

1-1952

The Federal Employers' Liability Act

John M. Ennis

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

John M. Ennis, *The Federal Employers' Liability Act*, 4 HASTINGS L.J. 23 (1952).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol4/iss1/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

THE FEDERAL EMPLOYERS' LIABILITY ACT

By JOHN M. ENNIS

Member of the Bar, Los Angeles, California

"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 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."¹

This law is not a compensation law in the nature of workmen's compensation. It is a special federal negligence law which gives the right to employees of a railroad to bring a negligence action against their employer for personal injuries suffered while on the job. If there are no facts which indicate negligence on the part of the railroad, the employee has no right under the act. There are situations where a man is injured through no apparent fault of his own and there cannot be shown any negligence on the part of the carrier. Such an injured railroad employee is without remedy; he does not have recourse to state workmen's compensation law; there is no federal compensation law to cover him, and if he is killed his widow has no remedy. Counsel consulted by an injured railroad employee should remember that negligence under F.E.L.A. is the same in degree as in other types of personal injury actions based on negligence. The attorney in an F.E.L.A. case should, however, be aware of a number of differences. The writer will cover the major differences in the order in which they occur most naturally to him, for no text is known which sets forth the differences between the F.E.L.A. and the ordinary law of negligence.

First, section 51 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 important in many situations. For example, a switch engine may be moving over a crossing with a switchman on the front footboard, which is a common place for him to be. A truck may fail to yield the right of way to the switch engine and

¹45 U.S.C. 51. The first Federal Employers' Liability Act was passed by Congress in 1906 and reenacted in 1908. The law is set out as amended in 1939 at 45 U.S.C., §§ 51-60. The F.E.L.A. embraces the Safety Appliance Acts, 45 U.S.C., §§ 1-16, and the Boiler Inspection Act, 45 U.S.C., §§ 22-34.

strike the engine, through gross negligence, causing an injury to the switchman. On first blush there would be no vestige of liability upon the part of the railroad in such a picture. For example, if the switchman had given a slow-down signal or a stop signal and if the engineer failed to heed these hand signals, there would be a case of liability against the railroad although it is obvious that the truck is the principal offender. In an ordinary negligence case, the attorney would be justified in advising his client that the carelessness of the truck driver was *the sole proximate cause* of the accident. It would be difficult to convince a jury, if one was allowed to go to a jury, that the truck driver was not the real cause of injury, and therefore *the sole proximate cause*.

Under F.E.L.A., the courts, including the United States Supreme Court, have rendered a number of decisions on the principle of proximate cause which indicate that the situation above outlined would constitute a case for liability. In this discussion reference is made to the two words "in part" appearing in section 51 of the act. A leading case on this subject is that of *Eglsaer v. Scandrett*.² In this case the facts were these: The train was stopped. The engineer decided to leave the cab to fix the automatic bell ringer, which had failed to work automatically and thereafter had been operated by hand. The engineer told the fireman he was going to repair the apparatus. The fireman offered to do the job. The engineer, however, climbed out of the cab and on to the catwalk along the *right* side of the engine. The fireman continued with certain duties in the cab, which duties caused steam to escape so that the fireman could not see the engineer or observe what he was doing. The fireman received a proceed signal from the brakeman, he called to the engineer, and when the engineer failed to answer, the fireman went to look for him and found him lying on the ground on the *left* side of the cab.

There was no evidence available as to what caused the engineer to fall from the catwalk of the engine or to receive the injuries which caused his death. The jury decided that the somewhat remote negligence of the defective bell ringer proximately caused the engineer's death.

The trial judge granted the motion of the defendant railroad and set aside the verdict of the jury. This is what he 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 circuit court was written by Mr. Justice Evans and it is a clear statement of the law indicating that a remote act of negligence

²151 F.2d 562, 564-566 (1945).

may be *in part* the cause of injury or death and sufficient to make the carrier responsible under the F.E.L.A.

The Court of Appeals reversed the judgment of the trial court with direction to enter judgment conforming to the jury's verdict for the plaintiff. In doing so the Court said the facts showed that the engineer fell and was injured and from these injuries died; that he was on the ground beneath the bell apparatus which he had said he was going to repair; and that the bell ringer was defective and the defendant was negligent with respect to this defect.

The Court of Appeals stated that while there was no evidence showing that the defective bell apparatus was the cause of the plaintiff's death, the Court thought that the defendant's negligence need not be the sole cause of the accident. It appeared there was a loose rope attached to the bell ringer equipment. The Court of Appeals 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 of Appeals 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.³

This decision has not been reversed nor have courts receded from this doctrine that the railroad's negligence may be only a part of the proximate cause or may be one of indirect inference.

An attorney consulted by an injured railroad employee should examine the facts for any evidence of negligence on the part of the railroad and should not be disturbed if, 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 legal cause of the employee's injury.

The second major difference between ordinary negligence cases and F.E.L.A. negligence cases has to do with the legal phrase "contributory negligence." In F.E.L.A. cases contributory negligence has been abolished and comparative negligence is the rule.⁴ The law reads as follows:

"In all actions hereafter brought against 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

³Citing *Tennant v. Peoria Ry. Co.*, 321 U.S. 29, 88 L.Ed. 520 (1944).

⁴35 Stats. 66 (1908), 45 U.S.C. 53 (1939).

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."⁶

In *Terminal R. R. Association v. Fitzjohn*⁶ the court said:

"Plaintiff's contributory negligence 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."

In the case of *Ellis v. Union Pacific R. Co.*⁷ an engine foreman was injured when he was caught between the side of the railroad car on which he was riding and the side of a 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; that plaintiff's *contributory negligence, if any, is a question for the jury to determine.*⁸

Another major difference between ordinary negligence actions and F.E.L.A. cases is this: Under the F.E.L.A. there is no defense based upon the theory that an employee assumed the risks of his employment.^{8a} Many times an injured employee receives his injury while violating one or more of the company rules. It has been said by railroad men who have seniority whiskers reaching to their knees that it is impossible "to railroad right and to keep on time" (*sic*) without violating a rule 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, provided, however, 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. Co.*,⁹ 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 damages awarded.

⁶Numerous 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 the U.S.C.A., title 45. None of these contravene the intent and meaning of the language in § 53, particularly the words in italics. This has not been a controversial section of the act, but see *Ericksen v. So. Pac. Co.*, 105 A.C.A. 1018, 234 P.2d 279 (1951), where the court stated: "Whether plaintiff was contributorily negligent was first for the jury to determine, then for the judge on new trial motion; that the jury, having been fully instructed on the subject, it cannot be said as a matter of law that the plaintiff was negligent, and the verdict cannot be disturbed for lack of diminution of damages, if there was such lack."

⁷165 F.2d 473, 1 A.L.R.2d 290 (1948).

⁸329 U.S. 649, 67 S.Ct. 598, 92 L.Ed. 572 (1947). Reversed on other grounds.

^{8a}The 1950 Supplement to the California Approved Jury Instructions contains a fairly complete set of jury instructions on F.E.L.A. cases. This book may be obtained from the West Publishing Co. At the request of the Chief Editor, the Honorable William J. Palmer, Judge of the Superior Court in Los Angeles, California, the writer drafted a set of F.E.L.A. jury instructions. They were incorporated in the 1950 Supplement, Part 4, and have been generously and well annotated by the editors. Instructions numbers 301-j and 301-k are instructions on comparative negligence.

⁹45 U.S.C. 54, amended (1939).

⁹283 U.S. 821, 51 S.Ct. 345, 75 L.Ed. 1436 (1931).

The "Assumption of Risk" doctrine was abolished by a statutory amendment of the F.E.L.A. which became effective August 11, 1939. The first case to reach the United States Supreme Court after the 1939 amendment was that of *Tiller v. Atlantic Coast Line Railroad Co.*¹⁰ The plaintiff's husband, 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 killed. The train which killed Tiller was backing up. There was a brakeman with a lantern riding on the rear end on the side opposite to that where Tiller was found. The engine bell was ringing at the time of the accident. The district court directed a verdict for the defendant railroad on the grounds: (1) That 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 deceased had in effect assumed the risk of his position. The 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 has been held equivalent to non-negligence. The court then states:¹¹

"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'."

Under the F.E.L.A. the Employee Is Entitled to Be Furnished a Reasonably Safe Place to Work.

Nowhere in the Federal Employers' Liability Act is this doctrine mentioned. The decisions of the courts have supplied it.

This principle will be covered in detail for two reasons: First, it covers a substantial number of the legal actions which arise under the F.E.L.A.; 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.

A leading case which indicates the all-inclusive interpretation of the United States Supreme Court expressly intended to furnish the highest degree of legal redress for injured railroad workers is *Bailey v. Central Vermont R. R. Co.*¹² Bailey, a section hand, fell from a bridge and was killed while

¹⁰318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 444 (1943).

¹¹318 U.S. 54, 58.

¹²319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943).

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 if he did not let go of it before the hopper started to open. Bailey did not let go of the wrench; the wrench twisted around, causing Bailey to lose his balance and fall to his death.

The widow sued under the Federal Employers' Liability Act, alleging the railroad had failed to furnish a safe place to work. The United States Supreme Court, by Mr. Justice Douglas, sustained the plaintiff's claim 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 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 emphasized that under our legal system the jury is the tribunal 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, in the *Bailey* decision, pointed out 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 employees' work at the place in question is fleeting or infrequent."

Equipment Used by the Employee That Is Not Reasonably Safe May Constitute Failure to Furnish a Reasonably Safe Place to Work.

In the case of *Carpenter v. Atchison, Topeka & Santa Fe Railway Co.*,¹³ 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 concern 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 traveling 15-20 m.p.h., in violation of the 10 m.p.h. limit set by company rules for travel at crossings, which rules also require the operator to yield the right of way to traffic at crossings and to flag over crossings during dense traffic. In

¹³109 Cal.App.2d 18, 240 P.2d 5 (1952).

this action for wrongful death brought under the Federal Employers' Liability Act¹⁴ judgment was given for the defendant railroad. The appellate court's decision reversing the trial court is as follows:

"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 control. (2) The act is to be given liberal construction in order to accomplish its humanitarian purposes. Under it *defendant has the duty 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) The evidence being such that fair-minded men might honestly draw different conclusions as to negligence on defendant's part, the question is not one of law, but of fact for the jury. (4) The rules governing the determination of a motion for vacation and entry of another judgment 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 rail for injuries to or the death of an employee resulting in whole or in part from its negligence. (6) It cannot be said as a matter of law that defendant 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 decedent's injuries."

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 Nonsuit, Directed Verdict, or Similar Legal Device.

The *Tiller* case is an example of the conclusiveness of the United States Supreme Court's decision that the question of negligence in Federal Employers' Liability Act cases must go to the jury. The jury returned a verdict in favor of the plaintiff but the court of appeals reversed.¹⁵ Certiorari was granted because of the importance of this case as it related to the administration and enforcement of the Federal Employers' Liability Act.

The court of appeals had held the evidence of negligence being insufficient to justify submission of the case to the jury, the district court should have directed a verdict in favor of the railroad.

The United States Supreme Court, in an opinion by Mr. Justice Black, said:

"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. . . ."

"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*

¹⁴45 U.S.C. 51 (1939).

¹⁵142 F.2d 718 (1944).

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, 88 L.Ed. 520, 524, 64 S.Ct. 409. And "The standard of care must be commensurate to the dangers of the business." *Tiller v. Atlantic Coast Line R. Co.*, *supra* (318 U.S. 67, 87 L.Ed. 617, 63 S.Ct. 444, 143 A.L.R. 967.)"

In the *Tennant* case the court stated:¹⁶

"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 instruction, 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 more 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."

It is clearly established that the question of negligence in a Federal Employers' Liability Act action is one to be determined exclusively by the jury.

A Work-place Away From Railroad-owned or Controlled Property Does Not Relieve the Railroad of Liability for a Place Unsafe for Work.

In the case of *Ericksen v. Southern Pacific Co.*,¹⁷ 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 Co. 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 at a place where the ties were flush with the end of the dock that he had to lean over to inspect the ends. In so doing he fell and was badly injured. Damages were awarded to him in a Federal Employers' Liability Act suit. On appeal the verdict was affirmed, the court saying: (1) The act

¹⁶321 U.S. 29, 34-35.

¹⁷105 A.C.A. 1018, 234 P.2d 279 (1951), affirmed 39 A.C. 385 (1952).

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, which here was 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.

In the case of *Terminal Railroad Association v. Fitzjohn*,¹⁸ the plaintiff was injured when he was knocked off the side of a 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.

If the Employee Uses an Unsafe Place When a Safe Place Is Equally Available, the Doctrine and the Duty of the Railroad Still Applies.

In the case of *Wilkerson v. McCarthy*,¹⁹ plaintiff was injured while trying to cross an engine pit on a greasy plank. Plaintiff was walking to 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 chose. The engine pit was guarded by a chain designed to keep away 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, 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 carrier to submit the case to the jury.

Certiorari was granted and the United States 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 Supreme Court further 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 Supreme 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.

¹⁸165 F.2d 473, 1 A.L.R.2d 290 (1948).

¹⁹336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 479 (1949). This case was tried a second time and the jury found for the defendant; however, the principle of law established by the decision has not been repudiated.

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 by the Railroad.

In *Terminal Railroad Association v. Howell*,²⁰ an employee was attempting to close the door on a railroad car, working under instructions from his foreman, and while so doing was injured. Defense of the railroad was that the employee should have been able to see that this out-of-order 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 out-of-order 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.

That the Railroad Has Notice, Actual or Constructive, of an Unsafe Place to Work Is a Matter to Be Left Entirely to the Jury.

In the case of *Baltimore & O. R. v. Fleckner*,²¹ the plaintiff stepped on a barrel hoop near a track, fell under a car and lost his foot. While the yard was not fenced, the public did not usually enter the switch yard. 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 it held that therefore the railroad had failed to furnish the employee with a reasonably safe place to work.

In the case of *Lowden v. Hanson*,²² the plaintiff, while throwing a spring switch, was injured when the handle broke because of a structural defect. There was no showing that the company had either actual or constructive notice of this defect. There was 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. The court held that the failure of the railroad to inspect the switch constituted a lack of ordinary care and imposed liability upon the railroad under the act.

Where the Unsafe Place to Work Gives Rise to an Occupational Disease Rather Than a Traumatic Injury, the Railroad Is Liable.

In the case of *Urie v. Thompson*,²³ the plaintiff, a former fireman on one of defendant's steam locomotives, filed suit in a state court to recover under

²⁰165 F.2d 135 (1948).

²¹300 Fed. 318 (1924).

²²134 F.2d 348 (1943).

²³337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R.2d 252 (1949).

the Federal Employers' Liability Act for injuries, alleging that after 30 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 apparatuses.

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 Federal Employers' Liability Act, 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, held: That the plaintiff's original petition stated a cause of action for negligence under the Federal Employers' Liability Act and was properly reviewable by the Court; that the action, 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 Federal Employers' Liability Act, when it results from the employer's negligence.

The Employee Is Not Required to Anticipate Unsafe Conditions in the Place of Work and to Take Precautions to Discover Them.

In the case of *Harness v. Baltimore and O. R. R. Co.*,²⁴ the court held that where an employee is without knowledge of risks of employment due to 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.

If Extraordinary Precautions by the Railroad Could Have Anticipated and Prevented the Development of an Unsafe Place to Work the Railroad Is Liable. This Is True Though the Railroad Does Not Have Control of the Place Where the Employee Is Injured.

In *Butz v. Union Pacific Co.*,²⁵ 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 Co., which was not a part of the Union Pacific Railroad Co. 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 nonsuit after hearing the plaintiff's evidence.

²⁴86 W.Va. 284, 103 S.E. 866 (1920).

²⁵233 P.2d 332 (1951).

The problem in the case was the position taken by the defendant, who 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 defendant Union Pacific Railroad.

The Utah Supreme Court quoted from *Boston & M. R. R. v. Meech*²⁶ as follows:

"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." (Emphasis added.)

The Utah Supreme Court then points out that in the *Wilkerson* case Mr. Justice Douglas reviewed the 55 petitions for certiorari taken from 1943 to 1949, 20 of said writs being granted, establishing the principle of trial by jury.

The Utah Supreme Court in conclusion makes the following statement, 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 *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 *any* evidentiary basis upon which reasonable minds could believe that *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."²⁷

From the Above Decisions the Writer Concludes:

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

2. If there is *any* evidence from which a jury *could* infer negligence upon the part of the defendant, the court shall *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. That 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 jury determination of the issue; that this is a question of fact to be determined by the jury, and the presumption is that the employer

²⁶156 F.2d 109 (1946), certiorari denied, 329 U.S. 763.

²⁷*Tiller v. Atlantic Coast Line Ry. Co.*, *supra*, note 10; *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1945); *Jacob v. City of New York*, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942).

has notice since he controls places of work and/or the assignments which the employee must carry out.²⁸

The Doctrine of Res Ipsa Loquitur in F.E.L.A. Cases.

In *Jesionowski v. Boston & Main R. R. Co.*²⁹ a switchman was killed at night. This switchman had thrown a switch, and then apparently signaled the train to back up. The switchman's body was *not* found at a place where he should have been located. The lower court held that the doctrine of *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 the doctrine of *res ipsa loquitur*.

The United States 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 the doctrine of *res ipsa loquitur*. The Court said that the deceased was presumed to have used due care for his safety and that the backing of the train did kill him. It was proper, therefore, 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.³⁰

Rules of Thumb for the Analysis and Trial of F.E.L.A. Cases.

First, does the case come under the act? The act covers employees of common carriers *by rail* in interstate commerce. This rules out bus drivers even for companies owned by the railroads, employees of the Pullman Company, and of car companies such as the Pacific Fruit Express.

Second, is the injured employee in interstate commerce? A general rule of thumb is: If you took all of 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 interstate 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 practice.

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?

²⁸Butz v. Union Pacific Co., 233 P. 2d 332 (1951), and cases cited therein.

²⁹329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416 (1946), see annotation in 169 A.L.R. 947.

³⁰Leet v. Union Pacific RR. Co., 25 Cal.2d 605, 155 P.2d 42 (1944).

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 51. 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. Superior Court Judges are very reasonable in allowing questions on *voir dire* to insure that the prospective jurors understand this. If counsel 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.

Eighth, in trying a case counsel should remember that he is 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 counsel may read these rules into evidence and argue them to the jury, showing that the company or its agents violated the rules, which was part of the cause of the injury to your client.³¹

Counsel for the plaintiff should always keep in mind in an F.E.L.A. case that he is representing an employee who has been injured while on duty and that the employee has no other compensatory relief except to come to the forum to apply to the jurors for his compensation for his wage loss as a result of injuries and for loss of earning power as well as for his pain and suffering. It is of the greatest importance that counsel make the jury understand this basic proposition.

³¹That the company rules may be used in suits where a member of the public is plaintiff, see *So. Pacific Co. v. Haight*, 126 F.2d 900 (1942); *Nelson v. So. Pacific Co.*, 8 Cal.2d 648, 67 P.2d 682 (1937). That the Safety Appliance Acts have been held to benefit the public, see *U. S. v. State of California*, 296 U.S. 554, 80 L.Ed. 391 (1935). That the Boiler Inspection Act is for benefit of public, see *Urie v. Thompson*, *supra*, note 23.