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Negligence -- FELA -- Proximate Cause -- Function of Jury

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defendant,[26] the last Supreme Court consideration of this problem, *Patch v. Wabash R. R.*,[27] interjected uncertainty into the law. In holding the defendant multiple corporation to be a citizen of Illinois, the Court placed its decision on the dual factors that the cause of action arose in Illinois and that the suit was brought in that same state. In the situation where the multiple corporation is plaintiff, definitive Supreme Court authority is lacking, even though, as pointed out above, there is one case which apparently held the "allegation" rule proper in that situation.[28] Although several distinctions exist between the two rules which may differently affect the rights of the parties or the numbers of cases of this peculiar kind which will get into federal courts,[29] the preferability of one rule over the other does not seem to be the most pressing problem in this area of confused law. What is most needed is a clear set of rules from the Supreme Court so that party litigants may advisedly chart the course of the suit.

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Negligence—FELA—Proximate Cause—Function of Jury

When an airhose on defendant's train burst, locking the brakes and stopping the train, plaintiff brakeman attempted to make repairs. He tapped on the coupling of the airhose with a wrench, knocking loose particles of dust and rust, some of which lodged in his left eye, causing loss of vision. Suit was brought under the Federal Employers' Liability Act[1] and the Federal Safety Appliance Act.[2] The jury found

[26] See n. 13 *supra*.
[27] 207 U. S. 277 (1907).
[28] See n. 19 *supra*.
[29] The differences noted are the following:
(1) The inability of the defendant multiple corporation to remove from a state court under the "state of suit" rule, absent any waiver by the plaintiff, as contrasted with the possibility of removal under the "allegation" rule in the particular situation where the citizenship given the multiple corporation by allegation of the plaintiff is different from the state of suit. It should be noted that this limitation is in no way harsh, since, under the assumed fact situation, the suit will always be in one of the states of incorporation of the defendant multiple corporation, and any claim of local prejudice would be without merit.
(2) The ritual of the "state of suit" rule which requires the plaintiff (who is a citizen of one of the states of incorporation of defendant multiple corporation) in a suit against a multiple corporation to go into a foreign state in order to maintain the suit in federal court on the ground of diversity of citizenship. This limitation and the former one illustrate the fact that the "state of suit" rule is less liberal than the "allegation" rule in allowing access to the federal courts in suits of this kind.
(3) The limitation of the "state of suit" rule which prevents the transfer of a suit from a federal court in one state of incorporation of the multiple corporation where there is diversity of citizenship to another charter state of which the adverse party is a citizen. The transfer is improper since it would cause diversity to cease and hence oust the jurisdiction of the federal courts. See Lucas v. New York Central R. R., 88 F. Supp. 536 (S. D. N. Y. 1950).

[1] 35 STAT. 65 (1908), as amended; 45 U. S. C. § 51 *et seq.* (1946), which provides

that the plaintiff's injury was the proximate result of (1) defendant's negligence in allowing rust and dust to accumulate on the airhose and (2) defendant's violation of the Safety Appliance Act in having defective air brakes. The Supreme Court of Texas, in a four to three decision, affirmed jury findings.[3]

This case presents three interesting problems in a highly specialized field of tort law. These are: (1) What constitutes negligence in cases under FELA? (2) Assuming that there is negligence or a violation of the Safety Appliance Act, when is an injury proximately caused by such negligence or violation? (3) What part does the jury play in answering these questions?

The orthodox conception of negligence in employer-employee relationships is that an employer is negligent when he fails to use reasonable care and prudence in providing for the safety of employees.[4] Under recent Supreme Court rulings, almost any act or ommission by an agent of a railroad which precedes injury to an employee might be declared to be negligence,[5] or the mere occurrence of an accident might be the basis for liability.[6] For example, where plaintiff's intestate, unload-

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that "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 . . . 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, engine, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." See Richter and Forer, *Federal Employers' Liability Act,* 12 F. R. D. 13 (1951); Note, 22 So. CALIF. L. REV. 63 (1948).

[2] 27 STAT. 531 (1893), as amended, 45 U. S. C. §§ 1-16 (1946). The Act imposes a duty on railroads engaged in interstate commerce to provide certain safety appliances and creates absolute liability for injuries which are proximately caused by the absence of these appliances or any defect in them. Application of the Act is explained in *Note,* 16 A. L. R. 2d 654 and in 3 NACCA L. J. 200 (1949). The Safety Appliance Act and the Federal Employers' Liability Act, note 1 *supra,* are in *pari materia,* and the former is treated as an amendment to the latter. The Safety Appliance Act merely dispenses with the necessity of showing that a violation of the appliance statute is negligence and makes such violation negligence as a matter of law. Urie v. Thompson, 337 U. S. 163 (1949).

[3] Missouri-Kansas-Texas Ry. v. Evans, 250 S. W. 2d 385 (Tex. 1952) (case reversed and remanded to consider new evidence of discovery of cancer in plaintiff's eye).

[4] Patton v. Texas & Pacific Ry., 179 U. S. 658, 662 (1901), where the Court said, "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence." The Court went on to state that the employer must use reasonable care and prudence in providing for employees and that, beyond such reasonable provision, the employer owes no duty.

[5] Lillie v. Thompson, 332 U. S. 459 (1947) (assigning female plaintiff to night duty as telegraph operator, where she was criminally attacked); Ellis v. Union Pacific R. R., 329 U. S. 649 (1947) (not giving plaintiff oral warning of an impaired clearance already marked by a sign); Seago v. New York Central R. R., 315 U. S. 781 (1942) (engineer's moving train as usual without ascertaining a crewman's location); Owens v. Union Pacific R. R., 319 U. S. 715 (1942) (similar facts).

[6] Wilkerson v. McCarthy, 336 U. S. 53 (1949) (railroad had grease-pit surrounded by guard chains; plaintiff went around barriers and accidentally fell into

ing ashes from a hopper car on a bridge, lost his footing on the twelve-inch ledge, fell and was fatally injured, the Supreme Court approved a jury verdict based on negligence in failing to provide deceased with a safe place to work.[7] In another case, the Court held that a jury might properly "infer" negligence and find that the railroad had failed to furnish a brakeman with a "safe place to work" where he stepped on a coal clinker lying in the railway yard, fell and was injured.[8] The Texas court follows this trend of holding railroads to an economically impractical, if not impossible, standard of care, by imposing on the defendant railroad the duty to keep exposed parts of the train absolutely free of "particles foreign to a human eye."[9]

In determining when a violation of duty is the proximate cause of an injury,[10] the best test, appears to be the "substantial factor" test,[11] or the "appreciable factor" test[12] as it is sometimes stated, but in FELA cases the test now used seems to be the very liberal "but for" or *sine qua non* test.[13] It cannot be denied that the wording of the statute partially

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pit); Jesionowski v. Boston & Maine R. R., 329 U. S. 452 (1946) (cars jumped track which was apparently in proper order and switchman was killed); Lavender v. Kurn, 327 U. S. 645 (1946) (switchman found dead near tracks from blow on head). *But see* Prosser, Law of Torts § 49, p. 358 (1941) ("Railway . . . not liable for . . . accident unless its negligence has increased the danger . . ."). In industry generally, employee assumes risk of such incidents of the employment against which he can protect himself equally as well as the master. *Id.* § 67.

[7] Bailey v. Central Vermont Ry., 319 U. S. 350 (1943); *cf.* Tiller v. Atlantic C. L. R. R., 318 U. S. 54 (1943) (clearance of three feet and seven inches between tracks could be found by jury to be an unsafe place to work). The Court makes no suggestion as to what *is* a safe place to work. *Contra:* Toledo, St. L. & W. Ry. v. Allen, 276 U. S. 165 (1928) (Supreme Court held that two feet and nine inches clearance between trains was not an unsafe place to work).

[8] Brown v. Western Ry., 338 U. S. 294 (1949), *reversing* 77 Ga. App. 780, 49 S. E. 2d 833 (1948). The Georgia court found no negligence as a matter of law. See a later Georgia case: Atlantic C. L. R. R. v. Chapman, 84 Ga. App. 94, 65 S. E. 2d 629 (1951) (defendant railroad guilty of negligence in allowing clinkers to lie in yard). *Contra:* Gulf, M. & N. R. R. v. Wells, 275 U. S. 455 (1928), *reversing and remanding* 107 So. 27 (Miss. 1926) (where jury had found for a brakeman who alleged that an unusual jerk of a train which he was boarding and a coal clinker underfoot combined to cause him to fall and be injured); Frizell v. Wabash R. R., 199 F. 2d 153 (8th Cir. 1952) (railroad not negligent where plaintiff slipped on cinders alongside track).

[9] Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 393 (Tex. 1952) (three dissenting judges argued that there was no negligence as a matter of law, that to hold otherwise would be to burden railroads with an "unreasonable and impossible" standard of conduct). The standard suggested would require railroad companies to incessantly wash freight cars and then chip off the rust that the moisture caused.

[10] Atchison, T. & S. F. Ry. v. Toops, 281 U. S. 351 (1930) (plaintiff must establish a causal relation between carrier's violation of some duty owed and his injury to impose liability on employer); Lang v. New York Central R. R., 255 U. S. 455 (1921); St. Louis & S. F. Ry. v. Conarty, 238 U. S. 243 (1914).

[11] Mitchell v. Friedman, 11 N. J. Super. 344, 78 A. 2d 417 (1951). See Prosser, Law of Torts § 46 (1941); Restatement, Torts § 431 (1934) (Was actor's wrong a substantial cause in bringing about the injury? One must use care to distinguish the legal from the philosophic cause).

[12] Prosser, Law of Torts § 46 (1941).

[13] Heiting v. Chicago, R. I. & P. R. R., 352 Ill. 466, 96 N. E. 842 (1911);

justifies the use of such a test.[14] Thus, ". . . so long as the negligence of the carrier partly contributes to cause the injury or death of an employee, then the carrier is responsible for the full amount of that injury and death."[15] It seems clear from recent Supreme Court rulings that liability of a railroad for injuries or death to employees may be predicated on any obscure or remote connection between the defendant's carelessness and the plaintiff's injury.[16] For example, the Court held that a railroad might be found to be negligent in assigning female plaintiff to night duty as telegraph operator and that this proximately caused her injury when she unlocked the door and admitted a strange man, who criminally attacked her.[17] In another case, the Court said that the failure of couplers to connect automatically on the first attempt could be found to have been the proximate cause of injuries to a crewman who climbed aboard the car, stopped it from rolling, signalled the engineer to make a second attempt, and was thrown to the floor of the car and injured by the force of the impact when the coupling was effected on the second try.[18] Another opinion declared that where a signalman was riding on a motorcar several hundred feet behind a train, which stopped suddenly due to the defective brakes "setting," and he crashed into the rear of the train, the unsafe brakes could be found to be the proximate cause of his death even though the deceased would have had ample time to stop his car, had he been looking ahead.[19]

Camp v. Wilson, 258 Mich. 38, 241 N. W. 844 (1932); HARPER, LAW OF TORTS § 100 (1933) (if consequences would not have occurred but for defendant's conduct, his acts are causal in fact).

[14] 35 STAT. 65 (1908), as amended, 45 U. S. C., § 51 (1946) ("railroad . . . liable . . . for such injury . . . resulting in whole or in part from the negligence of . . . carrier"); Spokane & I. E. R. R. v. Campbell, 241 U. S. 497 (1916). The Supreme Court seems to interpret "in whole or in part" as allowing liability where the violation of duty is merely a contributing cause in a philosophic sense, but it is submitted that the phrase should be construed as requiring that such negligence be a substantial, contributory cause in a legal sense. See note 11, *supra*.

[15] Dooley, *The Meaning of FELA to the Railroad Worker,* OKLA. B. A. J. 67, 68 (1951).

[16] Tennant v. Peoria & P. U. Ry., 321 U. S. 29 (1944), *reversing* 134 F. 2d 860 (7th Cir. 1943) (failure of engineer to ring bell and unexplained death of switchman who was run over). This case was unwillingly followed and severely criticized in Griswold v. Gardner, 155 F. 2d 333 (7th Cir. 1946); Tiller v. Atlantic C. L. R. R., 318 U. S. 54 (1943), *reversing* 128 F. 2d 420 (4th Cir. 1942); *after retrial and on second appeal,* 323 U. S. 574 (1945), *reversing* 142 F. 2d 718 (4th Cir. 1944) (insufficient light on backing freight train and death of night policeman by being run over in unexplained accident). *Contra:* Pennsylvania R. R. v. Chamberlain, 288 U. S. 333 (1933), *reversing* 59 F. 2d 986 (2d Cir. 1932); Atchison, T. & S. F. Ry. v. Toops, 281 U. S. 351 (1930).

[17] Lillie v. Thompson, 332 U. S. 459 (1947), *reversing* 162 F. 2d 716 (1947).

[18] Carter v. Atlanta & St. A. B. Ry., 338 U. S. 430 (1949), *reversing* 170 F. 2d 719 (1948).

[19] Coray v. Southern Pacific Co., 335 U. S. 520 (1948), *reversing* 112 Utah 166, 185 P. 2d 963 (1947). State court argued that violation of Safety Appliance Act in having defective air brakes was not the legal cause of the death, but it merely created a *condition* after which intestate, by his own negligence, caused his own death. See PROSSER, LAW OF TORTS, § 45 (1941); Beale, *The Proximate Con-*

The majority of the Texas court followed the Supreme Court's attitude in holding that plaintiff's *eye injury* was proximately caused by defendant's violation of a statute requiring trains to have *effective power brakes*.[20] The three dissenting judges argued that "As a matter of law the bursting of the airhose was not the proximate cause of plaintiff's injuries."[21] They asserted that the "force" of the violation of the Safety Appliance Act came to rest when the train stopped, that the violation merely created a set of circumstances or conditions from which the injury to the plaintiff occurred,[22] and that it was a "remote" cause of plaintiff's injuries.[23]

Generally, a personal injury case will not go to the jury unless there is sufficient evidence of facts from which it might reasonably be found that the defendant was guilty of a breach of duty proximately causing the injury to the plaintiff.[24] In the past ten years, with only

sequences of an Act, 33 HARV. L. REV. 633, 651 (1920).

"Causal relationship between negligence or violation of a Safety Appliance regulation, and injury, has been markedly reduced as a hurdle and has been uniformly held to be a question of fact for the jury." Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203, 231 (1951).

[20] "Injuries received by railroad employees *in repairing the brake system* are within the protection of the Act." (italics added). Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 388 (Texas 1952); *cf.* Minneapolis, St. P., & S. S. M. Ry. v. Goneau, 269 U. S. 406 (1926). In this case, the principal decision relied on by the Texas court, a brakeman lost his balance, fell from a bridge, and was seriously injured while trying *to effect a coupling* between cars with a defective coupler. *Contra:* Bohm v. Chicago, M. & St. P. Ry., 161 Minn. 74, 200 N. W. 804 (1924), *cert. denied*, 267 U. S. 600 (1925) (brakeman going to inspect a defect in air brakes fell off bridge); Reetz v. Chicago & E. R. R., 46 F. 2d 50 (6th Cir. 1931) (similar facts); McCalmont v. Pennsylvania R. R., 283 Fed. 736 (6th Cir. 1922).

[21] Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 393 (Texas 1952); See Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 640 (1920). "The rule that requires exclusion of remote consequences is . . . a fundamental principle of law, based on the necessity of doing justice to all, and the question in any particular case, whether a given result is remote, is *purely a question of law.*" (italics added).

[22] The position of the dissent resembles that of the court in Coray v. Southern Pacific Co., 112 Utah 166, 185 P. 2d 963 (1947), *reversed in* 335 U. S. 520 (1948); *accord*, Lang v. New York C. R. R., 255 U. S. 455 (1921) (absence of an automatic coupler required by statute was not proximate cause of intestate's death but merely a condition which made it possible for intestate to be crushed between two cars without couplers, although he would not have been injured had the cars had couplers); St. Louis & S. F. Ry. v. Conarty, 238 U. S. 243 (1914) (similar facts and holding); Phillips v. Pennsylvania R. R., 283 Fed. 381 (1922).

[23] "We are of the opinion that an injury sustained while repairing a piece of machinery is not proximately caused by the defect in the machinery making necessary the repairs. Such a defect is in law a remote cause." Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 394 (Texas 1952); *accord*, Schoultz v. Eckardt Mfg. Co., 112 La. 658, 36 So. 593 (1904) (employee injured by his own negligence while repairing a machine belt was not injured by the breaking of the belt). See HARPER, LAW OF TORTS § 110 (1933) (where violation of duty is a cause in fact in a philosophical sense, it is not necessarily a legal or culpable cause); See also note 11 *supra*.

[24] Texas & N. O. R. R. v. Warden, 78 S. W. 2d 164 (Tex. 1935); Austin v. Southern Ry., 197 N. C. 319, 148 S. E. 446 (1929); Gulf, M. & N. R. R. v. Wells,

rare exceptions,[25] the Supreme Court has been adamant in its insistence that FELA cases should go to the jury, even where circuit and state supreme courts had held that the evidence was insufficient as a matter of law.[26] For instance, where a switch tender was found lying beside a track after a train had passed, fatally injured from a blow on the head, and plaintiff argued that the deceased had probably been struck by a mail hook which could have swung out twelve inches from the passing train and dealt the fatal blow, the Court held that a jury might be justified in so finding from the "probative facts" present, although the only conclusive evidence was that the deceased had been found dying from a blow on the head, on a dark night in an outlying railway yard.[27]

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275 U. S. 455 (1928), *reversing* 107 So. 27 (Miss. 1926); Bohm v. Chicago, M. & St. P. Ry., 161 Minn. 74, 200 N. W. 804 (1924), *cert. denied*, 267 U. S. 600 (1925). See also PROSSER, LAW OF TORTS § 50 (1941) (questions of fact regarding negligence and proximate cause are for jury, but standard of care and legal limits on proximate cause doctrine are questions of law to be settled by the court); WIGMORE, EVIDENCE § 2552 (3d ed. 1940) (judge declares, as a matter of law, the outside limits within which jury serves as finders of fact); James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L. JOUR. 667 (1949).

[25] Brady v. Southern Ry., 320 U. S. 476 (1943), *affirming* 222 N. C. 367, 23 S. E. 2d 334 (1942) (strong dissent by Justices Black, Murphy, Douglas, and Rutledge expressing view that the jury verdict should be sustained); Reynolds v. Atlantic C. L. R. R., 336 U. S. 207 (1949), *affirming* 251 Ala. 27, 36 So. 2d 102 (1948) (same four judges dissent and uphold jury providence of the case); Moore v. Chesapeake & O. Ry., 340 U. S. 573 (1951), *affirming* 184 F. 2d 176 (4th Cir. 1950). Justice Black, with Douglas concurring in the dissent, says that the majority of the court is upholding "a totally unwarranted substitution of a court's view of the evidence for that of a jury." *Id.* at 431. All of these exceptions and others are of little significance in view of the dissents and the great number of cases *contra*. See note 26, *infra*.

[26] Carter v. Atlanta & St. A. B. Ry., 338 U. S. 430 (1949), *reversing* 170 F. 2d 719 (5th Cir. 1948); O'Donnell v. Elgin, J. & E. Ry., 338 U. S. 384 (1949), *reversing* 171 F. 2d 973 (7th Cir. 1948); Brown v. Western Ry., 338 U. S. 294 (1949), *reversing* 77 Ga. App. 780, 49 S. E. 2d 833 (1948); Urie v. Thompson, 337 U. S. 163 (1949), *reversing* 357 Mo. 738, 210 S. W. 2d 98 (1948); Wilkerson v. McCarthy, 336 U. S. 53 (1949), *reversing* 112 Utah 300, 187 P. 2d 188 (1947); Coray v. Southern Pacific Co., 335 U. S. 520 (1948), *reversing* 112 Utah 166, 185 P. 2d 963 (1947); Anderson v. Atchison, T. & S. F. Ry., 333 U. S. 821 (1948); *reversing* 13 Cal. 2d 117, 187 P. 2d 729 (1947); Lillie v. Thompson, 332 U. S. 459 (1947), *reversing* 162 F. 2d 716 (6th Cir. 1947); Myers v. Reading Co., 331 U. S. 477 (1947), *reversing* 155 F. 2d 523 (3d. Cir. 1946); Ellis v. Union Pacific R. R., 329 U. S. 452 (1947), *reversing* 146 Neb. 397, 19 N. W. 2d 641 (1945); Jesionowski v. Boston & M. R. R., 329 U. S. 452 (1946), *reversing* 154 F. 2d 703 (1st Cir. 1946); Blair v. Baltimore & O. R. R., 323 U. S. 600 (1945), *reversing* 349 Pa. 436, 37 A. 2d 736 (1944); Tennant v. Peoria & P. U. Ry., 321 U. S. 29 (1944), *reversing* 134 F. 2d 860 (7th Cir. 1943); Owens v. Union Pacific R. R., 319 U. S. 715 (1943), *reversing* 129 F. 2d 1013 (9th Cir. 1942); Bailey v. Central Vermont Ry., 319 U. S. 350 (1943), *reversing* 113 Vt. 8, 28 A. 2d 639 (1942); Tiller v. Atlantic C. L. R. R., 318 U. S. 54 (1943), *reversing* 128 F. 2d 420 (4th Cir. 1942), and 323 U. S. 574 (1945), *reversing* 142 F. 2d 718 (4th Cir. 1944); Lilly v. Grand Trunk Ry., 317 U. S. 481 (1943), *reversing* 312 Ill. App. 73, 37 N. E. 2d 888 (1941); Seago v. New York C. R. R., 315 U. S. 781 (1942), *reversing* 155 S. W. 2d 126 (Mo. 1941).

[27] Lavender v. Kurn, 327 U. S. 645 (1946), *reversing* 354 Mo. 582, 189 S. W. 2d 253 (1945). Justice Murphy, writing the opinion of the court, said, "It is no answer to say that the jury's verdict involved speculation and conjecture . . ." *Id.* at 653.

The Court has repeatedly justified its attitude with the quotation: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these . . ."[28] As an consequence of this entrenched view, juries have, over the last decade, in effect written the law with regard to FELA actions.[29] An injured railroad employee may almost always be assured of having his case reach the jury[30] and may be fairly certain of a favorable verdict.[31] It was against this background that the Texas court approved a jury trial rather than deciding the case as a matter of law as the dissenting judges would have done.[32]

It appears that the Supreme Court will continue to lead lower courts[33] by its own reluctance to preclude any railroad employee from recovery.[34] In view of this and other apparent discontent with FELA as

[28] Jones v. East Tennessee, V. & G. R. R., 128 U. S. 443, 445 (1888) (case involved negligence and contributory negligence). This reasoning is adopted by the Texas court in Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 392 (Texas 1952).

[29] ". . . it is not judicial legislation which has amended the bases of the FELA action, but judicial alteration of its own procedure, wherein the judge-jury relation has been modified to conform to the philosophy of the majority of the Court. The net result of the procedural alteration has been a change in the substantive law." Note, 44 ILL. L. REV. 854 (1950).

[30] See note 23 *supra*. "The jury is the tribunal under our federal system of jurisprudence which determines whether the evidence in railroad cases produces probative facts from which negligence and the causal relation may reasonably be inferred." Moore, *Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act*, 29 MARQ. L. REV. 73, 94 (1946). See also Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203, 231 (1951); Note, 26 NOTRE DAME LAW. 694 (1951).

[31] James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L. REV. 667 (1949). The author takes cognizance of the fact that juries, in majority of accident cases, return verdicts for plaintiffs. James suggests that this fact has added significance when one remembers that most defendant's lawyers will try to settle unfavorable claims out of court and take only *doubtful* cases to court.

[32] Missouri-Kansas-Texas R. R., 250 S. W. 2d 385, 393 (Texas 1952). See Griswold v. Gardner, 155 F. 2d 333, 334 (7th Cir. 1946). The court affirmed a jury verdict for plaintiff, but said "That the Supreme Court treats the question of negligence and proximate cause as a jury question in this class of cases is clearly shown by a study of these cases. Moreover, not only are the issues to be decided by the jury but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this act where a trial court would be justified in directing a verdict."

". . . regardless of what we might think of the sufficiency of the evidence. . . . The fact is . . . that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees." *Id.* at 333.

[33] See note 8 *supra*. "Our Supreme Court will not hesitate to spank a trial judge or a court of appeals who has failed to heed its strong and oft-repeated admonitions concerning the functions of the court and that of the jury. As a result, trial judges and courts have become fearful of directing verdicts or of entering judgments, notwithstanding the verdicts of juries." Dooley, *The Meaning of FELA to the Railroad Worker*, 22 OKLA. B. A. J. 66, 67 (1951).

[34] Justice Frankfurter criticizes the need for showing negligence in industrial accident cases as being outmoded and suggests absolute liability should be imposed on railroads and other large industries in a concurring opinion in Tiller

it stands today,[35] perhaps Congress should replace the Act with a comprehensive plan which would not require railroad workers to show that their injury was proximately caused by negligence or violation of a safety statute by the carrier but which would allow reasonable compensation[36] to railroad workers for all accidental injuries arising out of their employment.[37] Such legislation would eliminate the necessity of mold-

v. Atlantic C. L. R. R., 318 U. S. 54, 73 (1943). Justices Black and Frankfurter express similar concurring opinions in Wilkerson v. McCarthy, 336 U. S. 53 (1949).

Justice Douglas, in Bailey v. Central Vermont Ry., 319 U. S. 350, 354 (1943), refers to the use of the doctrine of negligence and the jury trial as ". . . crude, archaic, and expensive as compared with the more modern systems of workmen's compensation." Dissenting, Justice Roberts, with whom Justice Frankfurter concurred, said, "I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress (FELA) when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence." *Id.* at 358.

[35] PROSSER, LAW OF TORTS § 70, p. 547 (1941). With pertinent quotations and citations, the author points to the increasing agitation for some sort of workmen's compensation act to supplant FELA. See 74 A. B. A. REP. 108 (1949). A resolution was adopted by the House of Delegates of the American Bar Association to offer and support an amendment to FELA to the effect that an injured employee be compelled to bring his cause of action under the Workmen's Compensation Act of the jurisdiction wherein the injury occurred, if such jurisdiction has such an act, and that the employee not have an election of remedies. It further provided that such action would be a bar to any proceeding on the claim under the act of any other jurisdiction. See also Pollack, *Workmen's Compensation For Railroad Work Injuries and Diseases,* 36 CORNELL L. Q. 236 (1951). The author urges enactment of a federal workmen's compensation act for railroad employees and notes that approximately thirty bills have been before congress for such a law. He also states the belief that a majority of railroad workers favor such action, but indicates that some of the strongest opposition comes from employees. *See e.g.,* Lush, *Importance of Legal Aid,* The Railroad Trainman, Jan. 1947, p. 8. The speaker, former manager of the legal aid department of the Brotherhood of Railroad Trainmen, expresses aversion for compensation acts because of the ceilings on recovery and upholds FELA as being the better plan to compensate workers for injuries.

[36] Affolder v. New York C. & St. L. R. R., 339 U. S. 96 (1950) (jury awarded $95,000 for loss of a leg; court reduced the sum to $80,000); Lavender v. Kurn, 327 U. S. 645 (1946) ($30,000 for death); Missouri, K. & T. R. R. v. Evans, 250 S. W. 2d 383 (Tex. 1952) (jury gave $40,000 for an eye; reduced by court to $20,000); Missouri, K. & T. R. R. v. Ridgeway, 191 F. 2d 363 (8th Cir. 1951) (jury awarded damages fifty-five times greater than plaintiff's annual earning capacity and nearly twice as much as plaintiff could earn in a normal lifetime if he had not been partially crippled). In all of the preceding cases, it is doubtful that the plaintiffs should have been sustained in their suits under FELA. Moreover, the damages awarded are illogical and incongruous.

Maximum recovery under the North Carolina Workmen's Compensation Act for the four cases above would have been: (1) $6,000 for loss of leg, (2) $8,000 compensation plus $200 burial expenses for death, (3) $3,600 for loss of eye, and (4) approximately $5,000 for partial loss of use of a hand and foot in the *Ridgeway* case. See N. C. GEN. STAT. §§ 97-29 through 31 (1943, recompiled 1950, Supp. 1951).

[37] FELA contemplates compensation only for injuries caused by the violation of some duty which employer, by statute, owes employee. See note 24 *supra.* Theoretically, the Act does not cover purely accidental injuries as would a workmen's compensation act. See, *e. g.,* N. C. GEN. STAT. § 97-2 (f) (1943, recompiled 1950) (covers "injury by accident arising out of and in the course of employment, and . . . disease . . . where it results unavoidably from accident").

ing time-honored legal concepts of negligence, proximate cause, and jury function to meet special needs in FELA cases.

LUCIUS W. PULLEN

Parties—Joinder—Partially Subrogated Insurance Companies

The ultimate question decided in the principal case[1] was, "Where the owner of an insured automobile brings an action for damages to his automobile and for injury to his person against the supposed tort-feasor whose negligence allegedly caused the damage and injury, may the court, on motion of the supposed tort-feasor, bring into the case as an additional party an insurance company which has indemnified the owner for *only a part*[2] of the damage to the automobile?"[3] It was answered in the affirmative.

The court had never faced that precise question squarely. This is, at least, partially understood when it is remembered that: "It can very rarely happen that making an additional party will be a serious prejudice, and hence such orders are usually discretionary and not reviewable.";[4] unless the exercises of discretion by the court is refused upon the ground that it has no power to grant the motion, in which case the refusal is reviewable.[5] Any understanding thus gained fades, however, with the realization that the party question may properly be included in

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Thus, the workmen's compensation acts cover *all* accidental injuries connnected with the employment, but with an unreasonably low ceiling on the amount recoverable, while FELA has no ceiling but does not cover all work-incurred injuries. See Baker v. Atlantic C. L. R. R., 232 N. C. 523, 61 S. E. 2d 621 (1950), *cert. denied,* 340 U. S. 939 (1951) (railroad not liable for death of repairman where the motor car on which he was riding hit a dog and was wrecked); Moore v. Chesapeake & O. Ry., 184 F. 2d 176 (4th Cir. 1950), *affirmed,* 340 U. S. 573 (1951) (railroad not liable where brakeman fell from engine and was killed in an unexplained accident); *A Survey of Statutory Changes in North Carolina in 1951,* 29 N. C. L. REV. 351, 428 (1951). The suggested federal workmen's compensation act should arise at the equitable point of convergence of the Federal Employer's Act and the state workmen's compensation acts.

[1] Burgess v. Trevathan, 236 N. C. 157, —S. E. 2d— (1952).

[2] Italics author's.

[3] Burgess v. Trevathan, 236 N. C. 157, 159, —S. E. 2d— (1952).

[4] Bernard v. Shemwell, 139 N. C. 446, 447, 52 S. E. 64 (1905). The inference is that the court did not consider premature and fragmentary an appeal from an order making a new party where such order was on its face prejudicial. See also: Raleigh v. Edwards, 234 N. C. 528, 67 S. E. 2d 349 (1951); Service Fire Ins. Co. v. Horton Motor Lines Inc., 225 N. C. 588, 35 S. E. 2d 879 (1945); Home Loan and Ins. Co. v. Locker, 214 N. C. 1, 197 S. E. 555 (1938); Morgan v. Turnage Co., Inc., 213 N. C. 425, 196 S. E. 307 (1938); Choate Rental Co. v. Justice, 212 N. C. 523, 193 S. E. 817 (1937); Wilmington v. Board of Education, 210 N. C. 197, 185 S. E. 767 (1936); Goins v. Sargent, 196 N. C. 478, 146 S. E. 131 (1929); N. C. GEN. STAT. §§ 1-163, 173 (1943).

[5] Gilchrist v. Kitchen, 86 N. C. 20 (1882). See also: Guy v. Baer, 234 N. C. 276, 67 S. E. 2d 47 (1951); Smith v. New York Life Insurance Co., 208 N. C. 99, 179 S. E. 457 (1935); Life Ins. Co of Va. v. Edgerton, 206 N. C. 402, 174 S. E. 96 (1934).