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FELA, Negligence, and Jury Trials--Speculation upon a Scintilla

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have a place in suits by passengers against their drivers or third persons; that when the issue of contributory negligence is submitted to the jury, it should be given under more specific instructions; and that the alleged contributory negligence should be tested from the time the passenger starts his trip, not just after the emergency situation has been created.

If the doctrine of contributory negligence is to be abolished, however, then let the legislature so legislate, or let the courts so state. If, as seems to be the case today, the doctrine is dying, with the exceptions mentioned above, then let the courts say that. But the continuation of a doctrine with a fine general rule and many exceptions and restrictive applications which pluck it bare of substance, only confuses the legal community, makes many decisions incomprehensible, and fails to add to the orderly administration of justice in a world already beset with more than enough complexities.

JAMES A. YOUNG

FELA, Negligence, and Jury Trials —Speculation Upon A Scintilla

I. PERSPECTIVE

> It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.[1]

This denunciation of the lamentable plight of railroad workers was delivered by President Harrison in 1889. The perils of which he spoke were indeed great; a compilation of on-the-job casualties suffered by American railroaders for the single year ending June 30, 1888, showed 2,070 deaths and 20,148 injuries.[2] In 1888, the odds of a brakeman dying a natural death were 1 in 4.7;[3] the average life expectancy after one became a switchman was seven years.[4]

The social impact of this appalling "human overhead" of the railroad industry incited a demand for legislation to protect railroad employees — a demand which became very insistent in the decade from 1880 to 1890.[5] The immediate result of this demand was the enactment of the first Safety Appliance Act,[6] in 1893, which provided

1. S. REP. NO. 1049, 52d Cong., 1st Sess. 1 (1892), as quoted in Johnson v. Southern Pacific Co., 196 U.S. 1, 19 (1904).
2. THIRD ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION 294 (1889).
3. *Id.* at 85.
4. *Symposium — Railroad Liability*, 25 TENN. L. REV. 123, 144 (1958).
5. Kennerly, *Federal Employers' Liability Act*, 8 TENN. L. REV. 213 (1930).
6. 27 Stat. 531 (1893), 45 U.S.C. §§ 1-7 (1952).

that trains and other equipment engaged in interstate commerce must be equipped with certain safety devices.

The promulgation of this statute, however, slackened only temporarily the demand for legislation. The problems of railroaders were too broad to be alleviated by the mere establishment of minimum safety standards. Effective though such standards might be, some workers would still be injured, and practically insurmountable obstacles would still block all avenues to compensation. The development of rules of law as to an employee's right to recover from his employer for work-connected injuries had been tempered by the policy that the risk must outweigh the utility or social value of the act in order for liability to be imposed.[7] During the nineteenth century, the social value of railroads had been tremendous; the growth of the industry had been essential to the development of our country. Heavy governmental subsidization of railroads reflected their importance. It has been estimated that government aid to railroads was equivalent to 40 per cent of the costs of all railroads in existence in 1870.[8] Because of the social value of the railroad industry, the law evolved in such a way as to give the greatest possible benefit to railroads. Thus, tort law developed the fellow servant rule and the doctrines of contributory negligence and assumption of the risk, the consequence of which was to effectively extinguish most railroad workers' rights of recovery against their employer.

By the turn of the century, however, the picture was somewhat different. The railroads had become sufficiently established to enable them to share the financial burden of deaths and injuries to employees, and to absorb the cost as an expense of their business. Furthermore, there was a great public clamor to relieve the railroad employee of the harsh defenses which the law had developed to protect an expanding infant industry.[9] One of the leaders in this campaign was President Theodore Roosevelt, who, in 1907, made the following remarks:

> The practice of putting the entire burden of loss of life or limb upon the victim or the victim's family is a form of social injustice in which the United States stands in an unenviable position.[10]

As a result of this agitation, Congress enacted the second[11] Federal

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7. RESTATEMENT, TORTS §§ 291-93 (1934).

8. RIPLEY, RAILROADS: RATES AND REGULATIONS 39 (1911).

9. Kennerly, *Federal Employers' Liability Act*, 8 TENN. L. REV. 213, 214 (1930). For a general description of the early efforts toward passage of FELA, see Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROB. 160 (1953).

10. 42 CONG. REC. 73 (1907).

11. The first Federal Employers' Liability Act, 34 Stat. 232 (1906), was declared unconstitutional because of its application to intrastate commerce. The Employers' Liability Cases, 207 U.S. 463 (1908).

Employers' Liability Act[12] in 1908. This was a declaration of public policy ". . . based upon the failure of the common law rules as to liability for accidents to meet modern industrial conditions . . . ,"[13] designed to achieve the broad purpose of promoting ". . . the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden."[14]

The pertinent provisions of the first section of FELA are 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 the 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.[15]

Probably the most essential thing to note about this act is that it is a *negligence* statute, and *not* a workmen's compensation law. The revolutionary aspect of FELA was not what it created (a form of social insurance), but, rather, what it destroyed (the common-law fellow servant rule). Another section[16] of the act substituted a rule of comparative negligence for the absolute bar of contributory negligence. Under the new rule damages are reduced by the jury in proportion to the amount of negligence attributable to the employee. The first thirty years of FELA saw a great expansion in the use of the defense of assumption of risk,[17] so the act was amended in 1939 to abolish that last remaining vestige of the common law's triumvirate of defenses.[18]

On its face, then, FELA purports to retain negligence as the basis of liability, and it would seem to incorporate a pre-existing body of negligence law which has long been familiar to both bench and bar. It is the purpose of this article to examine the extent to which judicial administration of the act has proved this proposition to be true in regard to the traditional rules governing the functions of judge

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12. 35 Stat. 65 (1908), 45 U.S.C. §§ 51-59 (1952). Declared constitutional in Second Employers' Liability Cases, 223 U.S. 1 (1912).

13. SENATE JUDICIARY COMMITTEE REPORT, 61st Cong., 2d Sess. 2 (1910).

14. S. REP. NO. 460, 60th Cong., 1st Sess. 3 (1908), quoted in Sinkler v. Missouri Pacific R.R., 356 U.S. 326, 330 (1958).

15. 35 Stat. 65 (1908), 45 U.S.C. § 51 (1952).

16. 35 Stat. 66 (1908), 45 U.S.C. § 53 (1952).

17. Metzenbaum and Schwartz, *Defenses Under the F.E.L.A.*, 17 OHIO ST. L.J. 416, 421 (1956).

18. 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1952); Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).

and jury, with particular emphasis upon the standard of proof which the practitioner will be required to meet in order to get his FELA case to the jury.[19]

Allocation of Functions Between Judge and Jury

Standards of Proof in non-FELA Cases

It is, of course, fundamental to our jury system that questions of fact are for the jury, and questions of law must be decided by the court. This division of functions, however, is not nearly that simple. The decision of which issues shall even be submitted to a jury is often fraught with difficulty since the court has the duty to withhold from the jury questions upon which reasonable men could not differ.[20] Probably the most common method of control over the jury is the directed verdict, whereby the court peremptorily instructs the jury to return a verdict for one of the parties and enters judgment accordingly.[21] Of primary importance to the practitioner, then, is the test which the court will use in determining whether to direct a verdict. The law has at various times recognized three different tests.

The earliest test employed by the federal courts in determining whether to direct a verdict was the so-called "scintilla" rule.[22] When following this rule the court may not direct a verdict against a proponent if there is a "scintilla" of evidence supporting his case. A "scintilla" has been defined as the "least particle,"[23] or, in more prosaic language, as ". . . merely a tittle, a glimmer, a minute particle, or an atom of evidence. . . ."[24] In determining whether there is a scintilla, the court may consider only such evidence as is favorable to the party against whom the direction is sought, irrespective of the weight of the evidence adduced by the other party. The mass of evidence presented by both parties is not weighed by the court until a verdict is returned and a motion for a new trial is made on the ground that the verdict is contrary to the manifest weight of the evidence. The scintilla rule was abandoned by the English courts in

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19. This paper concentrates upon federal cases. FELA grants concurrent jurisdiction to state courts. 35 Stat. 66 (1908), 45 U.S.C. § 56 (1952). It has been held, however, that federal case law governs state court actions: ". . . what constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs." Erie v. Thompson, 337 U.S. 163, 174 (1949).

20. Prosser, Torts § 39 (2d ed. 1955).

21. For an informative and exhaustive treatise on directed verdicts, see Blume, *Origin and Development of the Directed Verdict,* 48 Mich. L. Rev. 555 (1950).

22. 9 Wigmore, Evidence § 2494 (3d ed. 1940).

23. Black, Law Dictionary 1513 (4th ed. 1951).

24. Cleveland-Akron Bag Co. v. Jaite, 112 Ohio St. 506, 511, 148 N.E. 82, 84 (1925).

1857,[25] and by the United States Supreme Court in 1872.[26] The rule has also been abandoned by most state courts.[27]

After the rejection of the scintilla rule, there arose what could be called a "reasonable inference" rule. Under this rule, if there is any evidence from which the jury might reasonably infer the ultimate facts necessary to establish the proponent's case, the court may not direct a verdict against him.[28] It must be noted that the difference between this test and the scintilla rule is merely one of degree, since both require the court to examine only the evidence adduced by the party against whom the directed verdict is sought. Both of these rules are open to the criticism that their operation could, at least in theory, lead to a succession of new trials, because of the fact that the judge's consideration of the aggregate of the evidence is postponed until the motion is made for a new trial after a verdict has been returned.

Largely as a result of this criticism, a third rule, which may be called the "new trial" test, developed in the federal courts. By this test, the court must direct a verdict if, upon review of *all* the evidence adduced by both parties, it would be bound to set aside a verdict for one party as being against the manifest weight of the evidence. This rule overcomes the objection found in the theoretical possibility of a succession of jury trials, and differs from the first two rules in that it gives the court maximum control over the jury.[29] The federal courts have adhered to this rule in non-FELA litigation up to the present time.[30]

Standards of Proof in FELA Cases

In the early cases under FELA the new trial test was apparently the one used to determine whether a verdict would be directed. Probably the leading case, and one which well illustrates the operation of the rule, is *Pennsylvania R. R. v. Chamberlain,*[31] decided in 1933. Plaintiff's decedent had been piloting a string of cars down a slope when he fell off and was run over by another string of cars. The plaintiff's case was founded upon the theory that the second string of cars had been negligently allowed to collide with the first. There were no eye-witnesses to the event except plaintiff's one witness, who

25. Toomey v. London Ry., 3 C.B. (n.s.) 146, 140 Eng. Rep. 694 (1857).

26. Improvement Co. v. Munson, 81 U.S. 442, 448 (1872).

27. 9 WIGMORE, EVIDENCE § 2494 (3d ed. 1940).

28. *Ibid.*

29. Smith, *The Power of the Judge to Direct a Verdict,* 24 COLUM. L. REV. 111 (1924).

30. Note, 47 MICH. L. REV. 974, 983 (1949); Commercial Standard Ins. Co. v. Feaster, 259 F.2d 210 (10th Cir. 1958); Murray v. Towers, 239 F.2d 914, 916 (D.C. Cir. 1956); Taran Distributing, Inc. v. Ami, Inc., 237 F.2d 488, 490 (7th Cir. 1956); United States v. J. E. Bohannon Co., 232 F.2d 756, 758 (6th Cir. 1956).

31. 288 U.S. 333 (1933).

was 900 feet away from the scene of the accident. He testified that he heard a crash and then looked up and saw the two strings of cars together. Three other witnesses, however, testified that they had been on the cars in question and that there had been no such collision. Under either the scintilla rule or even the reasonable inference rule, this case could probably have gone to the jury, since only the plaintiff's evidence could be considered upon defendant's motion for a directed verdict. The trial court, however, directed a verdict for the defendant, plainly applying the new trial test. The Supreme Court affirmed, holding that no verdict based upon a statement so unbelievable could be sustained as against the positive testimony to the contrary by defendant's unimpeached witnesses. The court used the following language:

> . . . before evidence may be left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed. . . . The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. . . . The scintilla rule has been definitely and repeatedly rejected as far as the federal courts are concerned.[32]

The rule of *Chamberlain* prevailed in FELA litigation until the 1942 term of the Supreme Court. This Court rendered the first of a series of decisions which cast great doubt on the status of the new trial test. In *Bailey v. Central Vermont Ry.*[33] and *Tiller v. Atlantic Coast Line R. R.*,[34] the Court reversed lower court holdings that no jury question had been presented, without making clear the test it applied. The general tenor of both opinions, however, indicates that only the plaintiff's evidence was considered in deciding that the case should have gone to the jury.

In 1944, the Court made a clearer statement of its position in *Tennant v. Peoria & Pekin Union Ry.*[35] The court of appeals[36] had held that the case was improperly submitted to the jury, there being insufficient evidence on the issue of causation. The Supreme Court reversed the appellate court, holding that a jury question had been presented. Using language indicating that it was not operating under the new trial test, the Court said: "Upon an examination of the record we cannot say that the inference drawn by this jury that re-

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32. *Id.* at 343.
33. 319 U.S. 350 (1943).
34. 318 U.S. 54 (1943).
35. 321 U.S. 29 (1944).
36. Tennant v. Peoria & Pekin Union Ry., 134 F.2d 860 (7th Cir. 1943).

spondent's negligence caused the fatal accident is without support in the evidence."[37]

In 1949, all suspicions that the Supreme Court was changing its test for directed verdicts in FELA cases were confirmed by the language of *Wilkerson v. McCarthy*.[38] In that case, evidence that the plaintiff slipped and fell into an open pit while attempting to cross over it on a greasy plank was held to have raised a jury question, despite evidence of a safe route being available. Mr. Justice Black, in announcing the opinion of the Court, said:

> It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need only look to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.[39]

As has been noted above, there is considerable doubt as to whether this rule could properly be termed "established"; indeed, one author has challenged the statement as being "incorrect."[40]

While Mr. Justice Black's statement may be inaccurate as to non-FELA cases, or as to FELA cases prior to 1943, it is certainly an accurate description of the state of the law in FELA litigation since that date, and it has been subsequently quoted with approval.[41] The *Chamberlain*[42] case has never been expressly overruled, but rather just ignored. In place of the new trial test, as applied in that case, there has been substituted a rule requiring that the judge look only to the plaintiff's evidence in determining whether to order a directed verdict. Thus, the court is applying either the scintilla rule, or the reasonable inference rule. As previously noted, the difference is merely one of degree, since both rules call for a viewing of only one side of the evidence. Certain language of the Court in *Rogers v. Missouri Pacific R. R.*[43] indicated that the reasonable inference rule was being adopted:

> Judicial appraisal of the proof to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.[44]

However, recent cases indicate that the degree of evidence which the Court is willing to say permits a reasonable inference, approaches the

37. Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944).

38. 336 U.S. 53 (1949).

39. *Id.* at 57.

40. Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 580 (1950).

41. See, *e.g.*, Webb v. Illinois Central R.R., 352 U.S. 512, 514 (1957).

42. Pennsylvania R.R. v. Chamberlain, 288 U.S. 333 (1933), discussed in text, *supra* note 32.

43. 352 U.S. 500 (1957).

44. *Id.* at 507.

scintilla category. As Mr. Justice Harlan observed, in his dissenting opinion in the *Rogers* case:

> . . . in judging these cases, the Court appears to me to have departed from these long established standards, for, as I read these opinions, the implication seems to be that the question, at least as to the element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is a scintilla of evidence at all to justify the jury verdicts.[45]

Leading Cases and Recent Developments

The question of just exactly how much evidence will be required of the FELA practitioner to get his case to the jury is highly important. An almost unbroken line of recent Supreme Court decisions has indicated that the trend is toward requiring less evidence, as compared to both non-FELA cases and to early cases under that act. In order that some conclusions may be reached as to the correct test to be employed in directing a verdict, and as to the quantum of evidence needed to meet this test, an examination of certain leading cases and recent developments is appropriate.

Nowhere is the trend of requiring less evidence to send a case to the jury more apparent than in a series of cases on the question of causation. The earlier view is illustrated by the *Coogan*[46] case, decided in 1926. In that case, there had been no eye-witnesses to the death of a brakeman who was run over by a train. Plaintiff's evidence showed that there was a bent air pipe close to the rails which could have caused the decedent to trip and fall beneath the train's wheels. While conceding that the existence of the bent pipe might have been some evidence of negligence on the part of the railroad, the Supreme Court set aside a jury verdict, holding that causation had not been established. The Court stated that permitting the case to go to the jury would be to allow mere speculation, since it was just as possible that the bent air pipe did not contribute to the death.

Contrast that case with the *Tennant*[47] case, decided in 1944. The latter case also involved an unwitnessed death; there was no evidence as to how decedent happened to be run over, nor of his exact location at the time. The case had been submitted to the jury on the allegation that the death had been caused by the railroad's negligence in failing to ring a bell before moving the engine. The court of appeals,[48] following the reasoning of the *Coogan* case, held that the case should not have gone to the jury, since the jury could only speculate on the issue of causation, there being no substantial proof that failure to ring the bell was the proximate cause of the death. In

45. *Id.* at 564 (dissenting opinion).
46. Chicago, Milwaukee & St. Paul Ry. v. Coogan, 271 U.S. 472 (1926).
47. Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29 (1944).
48. Tennant v. Peoria & Pekin Union Ry., 134 F.2d 860 (7th Cir. 1943).

this case, however, the Supreme Court reversed, holding that a jury issue existed.

A comparison of the two cases immediately preceding leads to the conclusion that the plaintiff is not now required to produce nearly so much evidence of causation in fact as was required under the earlier cases. If he can introduce some evidence that the railroad was negligent in some particular, which *could* have caused the injury, the case will be sent to the jury, despite the lack of positive evidence as to causation. That this is true is shown by the famous *Lavender*[49] case decided in 1946.

That case involved the standard situation of an unwitnessed injury: a switch-tender had been found dead beside the tracks just after a train had gone by at a speed of 8-10 miles per hour. His death was caused by a blow on the back of his head. The plaintiff's theory was that he had been struck by a mail-hook that had been negligently allowed to protrude from the passing train. There was no evidence that any hook actually had been so protruding, and the plaintiff's case was mathematically questionable, in that the decedent was 67½ inches tall and the mail-hooks were 73 inches above the top of the rails. The railroad's theory was that the man had been murdered by a tramp; this theory was buttressed by the fact that his wallet was missing, and by expert medical testimony that the cause of death could have been a blow from a pipe or club. The Supreme Court of Missouri[50] had held that the plaintiff had failed to make a prima facie case, it being mere speculation and conjecture to say that the decedent had been struck by a mail-hook. The Supreme Court again reversed, holding that the case had been properly submitted to the jury, and relying heavily upon some meager and conflicting evidence as to the existence of some mounds of dirt upon which the decedent could have been standing to build his height up to 73 inches. In regard to the matter of speculation emphasized by the lower court, the Supreme Court had this to say:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear.*[51] (Italics added.)

These cases demonstrate that the lack of positive evidence of causation will seldom keep a case from the jury today. If some evi-

49. Lavender v. Kurn, 327 U.S. 645 (1946).

50. Lavender v. Kurn, 354 Mo. 196, 189 S.W.2d 253 (1945).

51. Lavender v. Kurn, 327 U.S. 645, 653 (1946). This statement has been quoted with approval in later cases: Webb v. Illinois Central R.R., 352 U.S. 512, 513 (1957); Watn v. Pennsylvania R.R., 255 F.2d 854, 858 (3d Cir. 1958).

dence of a negligent act, affirmative or inferential, is available, the plaintiff will get to the jury.

Closely related to the problem of causation is the question of contributory negligence. As noted, contributory negligence is not an absolute bar under FELA, but rather will merely operate to reduce the amount of the verdict in proportion to the amount of negligence attributable to the plaintiff. The Supreme Court has been steadfast in its determination that the jury decide whether the plaintiff's own conduct was the sole cause of his injury. In *Rogers v. Missouri Pacific R. R.*,[52] the plaintiff had been burning weeds with a hand torch near a track. He had been instructed to observe passing trains for "hot-boxes," and while so doing he was forced to retreat from the flames fanned by the passing train. He retreated too far, however, and fell into a culvert. The Supreme Court held that a jury question had been presented, since:

> Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought.[53] (Italics added.)

A later case carried this idea to a virtually inexplicable extreme. A mail and baggage handler was pushing a cart along a platform between two moving trains. The end of the cart swung against one of the trains throwing the plaintiff against the train on the opposite track. The platform was not overcrowded, the only other carts being some distance ahead and moving in the same direction as the one pushed by the plaintiff. In a per curiam decision, the Supreme Court held that the case could properly be submitted to a jury.[54]

In addition to the relaxation of requirements in the area of causation, a similar relaxation has recently been manifested in regard to the type of conduct which will give rise to an inference of a violation of the railroad's duty to use due care. Again, this can best be shown by a comparison of cases. In 1928, the failure to remove water which the railroad knew collected at a certain spot on its platform over which its employees were required to walk, was held not to be a violation of any duty owed to an employee who had slipped and fallen on the frozen spot.[55]

By 1957, however, a landmark case in FELA litigation provided a nice contrast to illustrate the changing pattern in the administration of the law. In *Ringhiser v. Chesapeake & Ohio Ry.*,[56] the plaintiff, having partaken of a purgative potion prior to reporting for work, experienced an urgent call of nature while on the job. Finding

52. 352 U.S. 500 (1957).

53. *Id.* at 506.

54. Moore v. Terminal R.R. Ass'n of St. Louis, 358 U.S. 31 (1958).

55. Missouri Pac. R.R. v. Aeby, 275 U.S. 426 (1928).

56. 354 U.S. 901 (1957).

the normal route to the facilities appointed for such activities blocked by a passing train, and being unwilling or unable to wait, he climbed into a loaded gondola car to defecate. While so occupied, he was injured when the car was nudged in a switching operation, causing some of the freight to slip and crush his leg. The majority of the Supreme Court seized upon the fact that there was evidence that the defendant knew that its employees occasionally used *empty* gondola cars in lieu of toilets, and held that a jury question had been presented on the issue of breach of duty, notwithstanding the fact that this particular car had been loaded with freight and stood upon a track normally used for switching. This case indicates the importance of presenting some evidence that the railroad *knew* of a given condition or practice, because it appears that if this known factor is in some way connected with the injury, the case will go to the jury.

One concluding general observation is that if a plaintiff can suggest some action on the part of the railroad that might have prevented the injury, his case will probably get to the jury. This was briefly illustrated in two recent cases. In *Cahill v. New York, New Haven & Hartford R. R.*,[57] a brakeman, who had been temporarily ordered to direct traffic at a grade crossing, was injured when a truck which he had halted moved forward and threw him against the passing train. Suit was brought, not against the owner of the truck, but against the railroad. A verdict for the plaintiff was set aside by the court of appeals on the ground that neither negligence nor proximate cause had been established. The Supreme Court reversed, however, apparently upon the ground that the railroad's failure to instruct the plaintiff in proper methods of traffic direction could have prevented the injury. A similar result was reached in *Webb v. Illinois Central R. R.*,[58] which was a suit by a brakeman for injuries sustained when he slipped and fell on a partially covered cinder "about the size of his fist" embedded in the roadbed. In that case, the Supreme Court again held that a jury question was presented, largely on the ground that the railroad might have discovered the existence of the clinker if they had used proper inspection methods.

Summary of Points Which Aid a Plaintiff in Getting His Case to the Jury

The implication of these decisions is that the Supreme Court is manifestly unwilling to invade what it considers to be the jury's function in FELA litigation. This function is to consider all cases in which there has been introduced any element, even the most tenuous one, upon which liability can be based; the scintilla rule has reappeared in these cases with renewed vigor. If the plaintiff can show

57. 350 U.S. 898 (1955), *reversing* 224 F.2d 637 (2d Cir. 1955).
58. 352 U.S. 512 (1957).

any particular in which the railroad may have been negligent, he will not be denied a jury determination because of a lack of evidence on the question of causation, nor because of his own conduct. If he can show that the railroad knew of a given condition, or can suggest some action on the railroad's part which might have prevented the injury, he will likewise reach the jury.

No attempt has been made to discuss the application of res ipsa loquitur in these cases, but the doctrine must be at least mentioned. In the early stages of the administration of FELA, there was considerable confusion among the decisions as to whether the doctrine was applicable at all in FELA cases; this confusion was doubtless caused by the body of law that had grown up to the effect that res ipsa loquitur does not apply to master-servant cases.[59] This reasoning lost most of its force with the abolition of assumption of risk as a defense in FELA cases and it can no longer be seriously questioned that the doctrine is available under the act. The great majority of cases, particularly the more recent ones, have held that the doctrine is applicable.[60] The Supreme Court has pointed out that the doctrine is to be applied primarily to what it calls ". . . extraordinary, not usual happenings, . . ."[61] the most common of which seem to be derailments.[62] A detailed examination of the scope of res ipsa loquitur in FELA cases is beyond the purview of this article, but it must be at least noted that the doctrine may be applicable, and when that is the case it will be an additional favorable factor in getting a plaintiff's case to the jury.

Finally, mention must be made of the Safety Appliance Acts[63] and the Boiler Inspection Acts.[64] The former makes it unlawful to operate a locomotive not equipped with power brakes or a train not composed of sufficient cars having power brakes so that the train can be controlled without the use of hand brakes. The act also requires that automatic couplers be used, and that all cars be equipped with secure ladders, grab-irons, and running boards. The Boiler Inspection Act requires railroads to inspect their locomotives and equipment regularly to insure compliance with standards set up by the Interstate Commerce Commission. It should be noted that a violation of the specific provisions of these acts imposes absolute liability upon the

59. It was so held in Patton v. Texas & Pac. Ry., 179 U.S. 658, 663 (1901).

60. Jesionowski v. Boston & Me. R.R., 329 U.S. 452 (1947); Texas & Pac. Ry. v. Buckles, 232 F.2d 257 (5th Cir. 1956); see also cases collected in Annot., 35 A.L.R.2d 475, 491 (1954).

61. Jesionwski v. Boston & Me. R.R., 329 U.S. 452, 458 (1947).

62. See, *e.g.*, Jesionowski v. Boston & Me. R.R., 329 U.S. 452 (1947); Chicago & No. W. Ry. v. Green, 164 F.2d 55 (8th Cir. 1947); Eker v. Pettibone, 110 F.2d 451 (7th Cir. 1940); Lowery v. Hocking Valley R.R., 60 F.2d 78 (6th Cir. 1932).

63. 27 Stat. 531 (1893), 32 Stat. 943 (1903), 36 Stat. 298 (1910), 45 U.S.C. §§ 1-16 (1952).

64. 36 Stat. 913 (1911), 38 Stat. 1192 (1915), 40 Stat. 616 (1918), 43 Stat. 659 (1924), 54 Stat. 148 (1940), 45 U.S.C. §§ 22-34 (1952).

railroad.[65] The only question then to be passed upon is whether the violation resulted in the injury complained of — negligence no longer having a bearing on liability.[66] Thus, these acts may also be of importance to a plaintiff in attempting to get his case to the jury.

CONCLUSION

The deluge of FELA cases upon the courts has been tremendous — there were 1,332 cases commenced under that act in the federal courts during 1956.[67] Of these cases, a substantial number reached the Supreme Court through its exercise of the certiorari power.[68] In its disposition of those cases, the Supreme Court has repeatedly reversed lower courts which had taken cases from the jury.[69] By these decisions, the Court has set a standard for the guidance of the inferior tribunals which requires the submission of nearly all cases to the jury for their determination.

There is no question that these decisions have effected a change in the traditional role of judge and jury. A companion result, however, is of even greater import, this being the fact that the expanded role of the jury has changed the result of a number of cases: any rule of substantive law or procedure which enlarges the jury's sphere tends to extend liability.[70]

> We cannot shut our eyes to the fact that in certain controversies between the weak and the strong — between a humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly, and generally run to the assistance and support of the feeble and apparently oppressed. . . .[71]

This fact has caused the Supreme Court decisions in FELA cases to be characterized as the work of a "judicial Robin Hood."[72]

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65. Lilly v. Grand Trunk W. Ry., 317 U.S. 481 (1943).

66. For discussions of these acts see McCold, *The Federal Railroad Safety Acts and the F.E.L.A.: A Comparison*, 17 OHIO ST. L.J. 494 (1956), and Louisell & Anderson, *The Safety Appliance Act and the F.E.L.A.: A Plea for Clarification*, 18 LAW & CONTEMP. PROB. 281 (1953).

67. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 542 (1957) (dissenting opinion, per Frankfurter, J.).

68. See Note, 69 HARV. L. REV. 1441 (1956); see also cases collected in Rogers v. Missouri Pac. R.R., 352 U.S. 500, 548 (1957) (Appendix A to opinion of Frankfurter, J., dissenting).

69. The following Supreme Court decision was announced subsequent to the completion of this note. Harris v. Pennsylvania R.R., 28 U.S.L. Week 3119 (U.S. Oct. 19, 1959). Plaintiff, a wreck train laborer, sued under FELA alleging that a cross-tie was raised and covered with grease, thereby causing him to wrench his back. A verdict of $25,000 was returned, and subsequently set aside by the Ohio Supreme Court, 168 Ohio St. 582, 156 N.E.2d 822 (1959). The Supreme Court granted certiorari and at the same time reversed the decision with directions to reinstate the jury verdict. The case is a further example of the Court's willingness to let a case go to the jury on the most minute evidence. There is an informative appendix attached to Mr. Justice Douglas' concurring opinion and a frank dissent by Mr. Justice Harlan. [Ed.]

70. James, *Function of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 689 (1949).

71. Haring v. New York & Erie R.R., 13 Barb. 9, 15 (N.Y. Sup. Ct. 1853).

72. Wright, *The Employers' Liability Act: Does the Supreme Court Want it Repealed?*, 45 A.B.A.J. 151, 202 (1959).

It is true that the judicial interpretation of the act is open to criticism, both because of its imposition of an almost absolute liability without the commensurate safeguard of liability limits such as are found in workmen's compensation laws, and because of the danger that its altered version of the judge-jury function will creep into other branches of the law. Recent opinions by the Supreme Court have made it clear that FELA negligence is being interpreted as something apart from common-law negligence,[73] thus obviating much of the danger noted in the latter criticism above. As to the other criticism, it can only be observed that much of our system of jurisprudence is entirely dependent in its operation upon the jury system, and if juries are to be the object of some sort of inherent distrust, our troubles are much greater than merely those encountered in the administration of FELA.

The factors which led to the passage of FELA were set forth in the introduction in an attempt to impart some of the intangible aspects — the spirit — of this law. Without this act, railroad workers were seldom compensated for work-connected injuries; with the act, the result would have been the same had there been restrictive judicial interpretations. Since there are many situations in which a man is injured through no fault of his own and yet is able to show little or no negligence on the part of the railroad, the courts are merely carrying out the spirit of the statute when they hold that such a worker's right to recovery must be determined by a jury.

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73. See, *e.g.*, Singler v. Missouri Pac. R.R., 356 U.S. 326, 329 (1958).