North Dakota Law Review

Volume 44 | Number 1 Article 1

1967

The Ten Most Important Cases under the Federal Employees, Liability Act

William H. DeParcq

THE TEN MOST IMPORTANT CASES UNDER THE FEDERAL EMPLOYEES, LIABILITY ACT*

WILLIAM H. DEPARCQ**

In the 57 years the Federal Employers' Liability Act[1] has been on the books, the Supreme Court of the United States has written more than 200 opinions explaining what the Act means and how it is to be applied. Many of those opinions may now safely be left to gather dust on a library shelf, because Congress, in 1939, amended the statute to clear away some of the subtle distinctions the Court had drawn in order to limit coverage under the old Act, and because the Court itself in recent years has had a very different attitude toward FELA than it did in an earlier day. Nevertheless the Court has had more than 60 FELA cases since the 1939 amendments[2] took effect, and that Court's own attitude changed, and it is difficult — and dangerous — to choose among these and to say that any ten cases are the ten most important. But this is the task which I have undertaken and I present my list of ten with no confidence that these are the ten most important but with some hope that they do illustrate the more important aspects of the special body of law which has grown up about FELA.

My first case, *Herdman v. Pennsylvania R. Co.*,[3] is a case which the railroad won. It is the only case on the list in which that happened, and one of the very few cases in the Supreme Court in the last 25 years in which that was true. Herdman fell in a caboose when the engineer made an emergency stop in order to avoid hitting a car filled with school children which was on the track. The stop was not unusually severe, and Herdman him-

---

* Taken from remarks made at the annual convention of the American Trial Lawyers Association in 1966.

** L.L.B. 1930, St. Paul College of Law; De Parcq and Anderson, Minneapolis, Minnesota.

1. 45 U.S.C.A. §§ 51-60 (1954), 35 Stat. 65 (1908), formerly 34 Stat. 232 (1906) [hereinafter referred to as the FELA].
2. 45 U.S.C.A. §§ 51, 54, 56, & 60 (1954), 53 Stat. 1404 (1939).
3. 352 U.S. 518 (1957).

self testified that such stops were not unusual or extraordinary. On this showing, the Supreme Court affirmed a directed verdict for the defendant. The importance of the case is that it shows that the basis for recovery under FELA continues to be, as the Act states, negligence. It has been much said in recent years, by railroad lawyers and by dissenting justices, that a majority of the Court has imposed absolute liability on the railroads. *Herdman* demonstrates that this is not true, and that the railroad is entitled to judgment as a matter of law if there has been no showing that it was negligent. Two more recent Supreme Court cases demonstrate the same proposition and there is convincing evidence to the same effect from the trial courts. In federal courts defendants have won final judgments in about the same proportion of contested FELA cases as in other negligence actions heard there.

It is true, as the Supreme Court said in the *Rogers*[4] case, which I shall discuss in a moment, that there are "special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action."[5] It is because of these special features that the lawyer who is experienced in ordinary negligence litigation may find himself lost when he takes his first FELA case. But though the action is based on statute rathern than common law, it is, as *Herdman* proves, a negligence action.

For whose negligence is the railroad responsible? The statute speaks of the fault of "any of the officers, agents, or employees"[6] of the railraod. The meaning given this phrase is illustrated by my second case, *Sinkler v. Missouri Pacific R. Co.*[7] A Missouri Pacific employee was injured through negligence in switching the car in which he was riding. The car was being switched by the Houston Belt Railway, a separate terminal railroad which does all the switching in that area. Under common law principles there was a good argument that the Belt Railway was an independent contractor, rather than an agent, but the Court said that "we need not depend upon common-law principles of liability"[8] and that "an accomodating scope must be given to the word 'agents' "[9] to carry out the intent of Congress in the statute. Since the Belt Railway was "engaged in furthering the operational activities" of the Missouri Pacific, it, and its employees, were "agents" of the Missouri Pacific for purposes of the statute.

---

4. Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957) [hereinafter referred to as Rogers].
5. *Id.* at 509, 510.
6. 45 U.S.C.A. § 51 (1954).
7. 356 U.S. 326 (1958).
8. *Id.* at 329.
9. *Id.* at 330, 331.

The FELA is an exercise of the power of Congress over interstate commerce, and for years there was difficulty in knowing whether an injured employee's relation to such commerce was close enough to bring him within the protection of the Act. For 30 years the Court was very restrictive, and required that the employee be engaged in interstate commerce at the moment of injury. In 1939 Congress amended the Act to liberalize its coverage, but there remained uncertainty as to how far it had gone. That uncertainty was resolved in 1956 in *Reed v. Pennsylvania R. Co.*[10] The employee there was a file clerk at the railroad's home office, injured when a cracked window pane blew in on her. The Court found that under the 1939 amendment she was within FELA, since the test "is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation."[11] Since the railroad could not transport things without efficient files of the sort this clerk maintained, she met the test. The Court rejected the argument that FELA applies only to those exposed to the special hazards of the railroad industry. In a colorful phrase it said: "The benefits of the Act are not limited to those who have cinders in their hair, soot on their faces, or callouses on their hands."[12] One excellent lawyer for the Pennsylvania was going off to a panel discussion about FELA shortly after the *Reed* decision came down, and he asked a top officer of the raiload if it had any employees whose work did not further interstate commerce, within the meaning of the *Reed* case. "Yes," the answer came back, "our lawyers." That seems to be about right. In the light of *Reed,* every railroad employee, except perhaps its lawyers, should be held covered by the Act.

The next case, *Jesionowski v. Boston & Maine R. Co.,*[13] is important because it suggests the kind of proof of negligence which is sufficient to take a case to the jury. Jesionowski was injured when a train derailed, and submitted the case to the jury on the theory of *res ipsa loquitur.* The jury found for him, but an appellate court set the verdict aside. The derailment could have occurred either because the train or the track were defective, or because Jesionowski had himself thrown a switch improperly. Thus, the appellate court reasoned, the instrumentalities involved were not under the exclusive control of the railroad and *res ipsa* was inapplicable. The Supreme Court disagreed. It rejected any attempt to apply rigid judicial definitions of *res ipsa.* Instead, it

10. 351 U.S. 502 (1956).
11. *Id.* at 505.
12. *Id.* at 506.
13. 329 U.S. 452 (1947).

said, the question is simply whether the circumstances were such as to justify a finding that this derailment was the result of the defendant's negligence. "Derailments are extraordinary, not usual happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence."[14] The jury, by its verdict, had necessarily rejected the railroad's theory that Jesionowski had thrown the switch improperly. Accordingly the derailment must have been caused by some defect in the train or the track, and the jury was entitled to find, without further proof, that the railroad was negligent in permitting such a defect.

The lawyer who is aware of *Jesionowski* should never let the Latin words, *res ipsa loquitur*, escape his lips. Instead he should argue only that the circumstances are such that an inference of negligence is permissible. I learned this the hard way, when I sued for the death of a brakeman who was killed in a head-on collision of two trains on a single track. As the famous line, "this is a hell of a way to run a railroad," suggests, the mere occurrence of such a collision argues strongly that there was negligence. But when I made the mistake of submitting this as a *res ipsa* case, and the jury inexplicably returned a verdict for defendant, I had to overcome a great many cases which have said that a directed verdict is never proper in a *res ipsa* case before I was able to get the verdict set aside, and judgment ordered for plaintiff as to liability. If I had submitted the case on the theory that such a collision is circumstantial evidence which compels an inference of negligence, my task would have been much easier.

If one single decision, of the more than 200 the Supreme Court has handed down under FELA, can be called the most important, it would have to be my fifth case, *Rogers v. Missouri Pacific R. Co.*[15] Section One of the Act has always provided that the railroad is liable if injury or death is caused "in whole or in part"[16] by the negligence of its officers, agents, or employees. For years the courts, unwilling to believe that a mere statute could mar the symmetry of the common law, refused to take the statute seriously. Instead they smuggled back into the statute the common law notion of "proximate cause." They talked such nonsense as that the negligence of the employer may have been a cause in part in a philosophical sense but not in a legal sense. The Supreme Court, in more recent years, had sought to curb such tendencies, and had warned that "the introduction of dialectical subtleties can serve no useful purpose," but many courts still failed to learn

14. *Id.* at 458.
15. *Supra*, note 4.
16. *Supra*, note 6.

this lesson. Accordingly, when Rogers was injured in an accident which resulted both from the railroad's negligence in requiring him to work in a dangerous place and from his own inattentiveness, the Missouri Supreme Court set his verdict aside.[17] It said that in order to recover the plaintiff must show that his injury would not have occurred but for the negligence of his employer. This is, of course, the language of proximate causation, not of a statute which imposes liability for injuries resulting "in part" from employer negligence. The Supreme Court reversed, and put to rest, one hopes for good, the notion that proximate cause has any application in FELA. It said: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played *any party, even the slightest,* in producing the injury or death for which damages are sought."[18]

But while *Rogers* is important for settling the causation muddle, it is even more significant in defining the sufficiency of the evidence to go to the jury. For years lower courts had been setting verdicts aside if the evidence suggested more than one explanation of the accident, and only by speculation and conjecture could the jury decide whether the accident was the result of employer negligence or of some other cause. This, the Supreme Court said in *Rogers,* is not proper. The Court said:

> It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. . . . (T)he Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury.[19]

The infrequent cases do occur, in which there is no issue for the jury. My first case, the *Herdman* case, where the Supreme Court agreed that defendant was entitled to a verdict as a matter of law, was such a case. It was decided the same day as *Rogers.* But such cases are infrequent. In a series of some 20 cases in the four years after *Rogers,* the Supreme Court showed that it meant what it had said there by *per curiam* reversal of lower court decisions which had taken cases from the jury.

It was not only with regard to causation that the courts for a long period refused to believe that Congress meant what it said.

17. Rogers v. Thompson, 284 S.W.2d 467 (Mo. 1955).
18. Rogers, *supra* note 4, at 506 (emphasis supplied).
19. *Id.* at 506, 510.

The original Act abolished contributory negligence as a complete defense, and substituted instead a rule of comparative negligence. The courts were equal to this. They took the notion of assumption of risk out of the obscurity to which it had been rightfully consigned, and found that plaintiff had been guilty of assumption of risk, and thus could recover nothing, under circumstances which would otherwise suggest contributory negligence. This was one of the things which concerned Congress in 1939, and it then amended Section Four of the Act by abolishing the defense of assumption of risk.[20] But the decision in *Tiller v. Atlantic Coast Line R. Co.*[21] was needed to give meaning to the amendment. A railroad policeman was killed while working in a dark yard with narrow clearance and no warning from backing trains. The Court of Appeals said there could be no recovery for his death because the nature of his job required him to work in such places and thus he had assumed the risk. The 1939 amendment, according to the Court of Appeals,[22] had abolished assumption of risk as a defense against the consequence of the employer's negligence, but had not abolished it as negating any conclusion that negligence existed at all. The Supreme Court disagreed. It held that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment"[23] and said it "must not, contrary to the will of Congress, be allowed recrudesence under any other label in the common law lexicon."[24] Accordingly a railroad must now exercise due care to protect its employees even against accustomed dangers.

There are some cases in which proof of negligence is not required at all. The plaintiff in *Myers v. Reading Co.*[25] was injured because a brake wheel was stiff and kicked back, causing him to lose his hold and fall. He could not point to any defect in the brake, except that on this occasion it had failed to function properly. But a statute known as the Safety Appliance Act requires cars to be equipped with "efficient hand brakes." This is one of many requirements imposed by that statute, and by the Boiler Inspection Act.[27] Cars, for example, must have couplers which couple automatically. If cars fail to couple, the railroad is liable

20. *Supra*, note 2.
21. 318 U.S. 54 (1943). A second appeal was prosecuted and reported at 323 U.S. 574 (1945).
22. 128 F.2d 420 (4th Cir. 1942).
23. 318 U.S. at 58
24. *Id.* at 67.
25. Myers v. Reading Co., 331 U.S. 477 (1947).
26. 45 U.S.C.A. § 11 (1954), 36 Stat. 298 (1910).
27. 45 U.S.C.A. § 22-34 (1954).

no matter how careful it has been. Where there is a claim under one of these special statutes, "the statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous." Thus it is highly advantageous to the plaintiff if he can bring his case within one of these statutes. Not only is he then freed of the burden of proving negligence, but also contributory negligence is not even a partial defense where these acts apply.

The case of *Lilly v. Grand Trunk Western R. Co.*[28] was a suit under the Boiler Inspection Act. Plaintiff had slipped on ice on the tender, and alleged that there was a leak in the tender, which would have been a violation of that statute. In closing argument plaintiff's lawyer said, fervently if ungrammatically: "gentlemen, don't find there was no leak, or you put him out of court."[29] The jury returned a general verdict for plaintiff, but in answer to a special interrogatory specificallly found that there had been no lelak. I was called in to argue the case before the Supreme Court, in an effort to resuscitate the verdict for plaintiff. The theory successfully advanced there was that ice on the tender, even without a leak, is a violation of an Interstate Commerce Commission rule prohibiting any foreign matter on the top of a tender. ICC rules made under the Boiler Inspection Act have the same force as do the provisions of the Act itself, and there is absolute liability for violation of one of them. In this case the ICC rule had never been called to the attention of the trial court, or relied on in any way below, but this did not matter since the court should have taken judicial notice of it. And what to do about that unfortunate remark in the closing argument? Justice Murphy, speaking for the Court, was equal to the task. He said: "There is no reason to penalize petitioner for remarks of counsel uttered in an excess of zeal."[30] The case is important in defining the weight to be given ICC regulations, and in establishing that judicial notice must be taken of them, but it is most important, I submit, in showing that the Court will protect the FELA plaintiff even against the blunders of his own lawyer.

Section Six of the FELA gives plaintiffs a very wide choice of forums in which to sue. The choice has been cut down somewhat in recent years, by decisions holding that the federal transfer of venue statute and state doctrines of *forum non conveniens* may be applied to FELA cases, but it is still an advantage to the

28. 317 U.S. 481 (1943).
29. *Id.* at 489.
30. *Id.*

plaintiff, where he can, to bring suit in a community accustomed to large verdicts and sympathetic to working men. By the same token, the railroads have sought in every way possible to prevent such a choice by plaintiffs. One such device was involved in *Boyd v. Grand Trunk Western R. Co.*[31] There the railroad advanced funds to its injured employee, so that he might not be penniless while settlement of his claim was discussed. This was a generous and humanitarian act by the railroad. But in the receipts which the employee signed for such loans, there was a provision that if the negotiations failed, and he brought suit, he would sue only in the county or district where he resided or where the injuries were sustained, and not elsewhere. The ungrateful employee did not sue in Michigan, where he lived and and the accident had occurred, but filed suit instead in Illinois. The railroad then sued in Michigan to enjoin him from prosecuting his Illinois suit, on the ground that it violated the loan agreement. The Supreme Court held the railroad could not obstruct the Illinois suit. Section Five of the Act prohibits any contract or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the Act. The venue options of Section Six were, the Court said, "a right of sufficient substantiality"[32] to be protected by Section Five, and accordingly the attempt to limit the choice of venue by contract was void. Any other result, it was reasoned, would obstruct "the right of the Liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause."[33]

It is not only the railroads which seek to limit the rights given employees by FELA. Some state courts have been unsympathetic to the Act, particularly in view of the broad construction the Supreme Court has put upon it in recent years. If a state court takes a grudging or hostile attitude toward the Act, it can and probably will be reversed by the Supreme Court, as *Rogers* and the *per curiam* cases which have followed it show. A different kind of barrier toward enforcement of the employee's rights is sometimes found in state procedural rules. The accepted test is that a state court must follow federal decisions on matters of substance, but that it is free to apply to an FELA case the same procedures it applies to all other cases. "Substance" and "procedure" are inexact terms in many areas of the law, and this is no less true where FELA is concerned. The best illustration of this

31. 338 U.S. 263 (1949).
32. *Id.* at 265.
33. *Id.* at 266.

is *Brown v. Western Ry. of Alabama.*[34] The state courts in Georgia at the time of that decision followed old-fashioned procedural notions, among which was the doctrine that a pleading is to be construed most strictly against the pleader. Thus the Georgia court sustained a demurrer to a complaint which, strictly construed, alleged no more than that plaintiff was injured when he stepped on a large clinker lying alongside the track in the railroad yards. The court read the complaint as if it had said that plaintiff's vision was unobstructed and that he could have seen and avoided the clinker, and it thought also that there was no allegation that the railroad was negligent in allowing the clinker to be there. On a sympathetic reading of the complaint, it would have been clear that plaintiff was alleging negligence by the railroad, and that his vision was obstructed, but it was not then fashionable in Georgia to read complaints sympathetically. The Supreme Court reversed, holding that the right of trial given railroad employees by Congress "cannot be defeated by the forms of local practice,"[35] and that "strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."[36] The case appears to stand for the proposition that no state rule, whether it be called "substance" or "procedure," can be applied in an FELA case if it will make it more difficult for the plaintiff to recover.

Plaintiffs can and do lose FELA cases. The statute has not made an insurer out of the railroad. But as the ten decisions I have discussed show, the Supreme Court has made it as easy as possible for the employee with a meritorious claim to obtain the relief which Congress has said is due him

34. 338 U.S. 294 (1949).
35. *Id.* at 296.
36. *Id.* at 298.