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Torts - Liability Under Federal Employers' Liability Act

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However, the mere fact that this type of case does not fall under the "safe-place statute" does not relieve the owner from liability under doctrines of common law negligence, nor does it prevent the application of res ipsa loquitur. Although the owner of a building is not an insurer to those in and around his building, he is bound to use reasonable care in construction and maintenance in order to avoid injuries to the public which fall within the range of foreseeable harm as defined at common law.[10]

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Torts—Liability under Federal Employers' Liability Act—The plaintiff brought suit as administrator of the estate of Peter Anastis against the Erie Railroad Co., for wrongful death under the Federal Employers' Liability Act. The decedent had been employed by the defendant as a yard foreman since 1913, and for several years had been hard of hearing. On November 22, 1944, which was a clear day, the decedent with his gang was working in the Youngstown, Ohio, yards of the defendant. The tracks in this yard ran in a general east and west direction and a toolhouse was located just south of the tracks. At 12:10 the decedent and his men left their place of work to go to lunch, which they always ate in the toolhouse. About that time a regular freight train of the defendant came into the yard and stopped about where the men had been working. This was the only engine in the yard when the men stopped working. One of the decedent's men testified that just before the decedent reached the toolhouse he turned and walked across the tracks in a northerly direction, while the men entered the toolhouse where they ate their lunch and talked together. This witness further testified that the door of the toolhouse remained open, but he heard no movement of trains or bells or whistles sounding. After lunch the men went to look for their foreman and found his body lying across the tracks about seven hundred feet west of the point where he had last been seen. How he traveled that seven hundred feet, whether by foot or on a moving train, did not appear. No one saw the accident. There was no evidence as to how the decedent met his death except that he was run over by one of the defendant's trains, presumably by the one which was in the yard and departed during the thirty minutes which elapsed between the time the decedent was last seen and the time his body was found. The plaintiff contended that the evidence showed the defendant negligent in not maintaining a lookout and in not giving a signal of warning. The District Court directed the jury to return a verdict for the defendant. From this verdict the plaintiff appealed.

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[10] Harper on Torts, Chapter 7.

Held in an action under the Federal Employers' Liability Act, the plaintiff must establish by evidence that the defendant was negligent, and a jury may not speculate and formulate a plausible theory as to where and how the accident happened, and then speculate on what it was that the railroad company did that was negligent and caused the accident. *Trust Co. of Chicago v. Erie R. Co. (C.C.A.7, Feb. 6, 1948) 165 F. (2d) 806.*

The decision in the principal case appears to call a halt to the recent trend in railroad cases. The recent trend has been fully treated by Mr. Raymond J. Moore in a recent law review article.[1] In his article Mr. Moore traced the development of railroad liability for injury to employees at common law, and discussed the common law doctrine of assumption of risk by the employee of the employer's negligence when the fact of such negligence was known to him, or was so plainly observable that he was presumed to have known of it. His article further discussed the effect of the Federal Employers' Liability Act of 1906 which allowed recovery against a railroad for injuries resulting from its negligence but which set up contributory negligence as a bar to such recovery; and of the Federal Employers' Liability Act of 1908 which abolished contributory negligence as a bar to recovery and substituted the doctrine of comparative negligence, and further provided that no employee should be held guilty of contributory negligence in any case where the violation of any safety appliance act contributed to the injury. Finally the article in question discussed the proviso added by amendment in 1939 which abolished assumption of risk where the injury resulted from the negligence of the railroad. As a result of this latter amendment Congress in effect abolished the defense of non-negligence.

Mr. Moore cited numerous cases which interpret the various provisions of all the acts listed above. For the purpose of reviewing the instant case the cases which interpret the amendment of the Federal Employers' Liability Act adopted in 1939 are especially important. The effect of the decisions in these cases is to make a railroad practically an insurer of its employees. As judicially interpreted, proximate cause under the act as amended need not be the direct, the complete, the responsible and efficient cause of the injury, but it is sufficient if the negligence of the railroad has some causal relation to the injury and if the injury or death resulted in part from a defendant's negligence. The Supreme Court has, in these decisions, refused to deny recovery as a matter of law on the ground that the evidence is speculative or conjectural where causal connection between the injury sustained and the negligence of the carrier appears even inferentially. Thus, though there

[1] Moore, "Recent Trends in Railroad Cases," 29 Marq. L. Rev. 73 (1946).

was no direct evidence as to the cause of the accident which resulted in the death of the employee, the court had no difficulty in finding that there was substantial proof that the death of the injured employee was caused by the railroad's negligence in failing to ring a bell in one case,[2] and in failing to provide a light in another case.[3]

The sole question under the Federal Employers' Liability Act is whether the defendent was guilty of negligence. The rule is well established that where uncertainty as to the existence of negligence arises from a conflict in the testimony, or where the facts being undisputed, fairminded men would honestly draw different conclusions, the question is not of law but one of fact to be settled by the jury. As a result of this rule the court has looked unsympathetically upon directed verdicts in cases arising under the Federal Employers' Liability Act, possibly because it feels that, since there is no Federal Workmen's Compensation Act, to deprive these workers of benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress intended to afford them.

Decisions handed down since Mr. Moore's article was published all follow the trend described in that article.[4] The courts appear extremely reluctant to take a case from the jury under any circumstances. In this regard they reason that the focal point of judicial review is the reasonableness of a particular inference or conclusion drawn by a jury, and it is not the function of the court to search the record for conflicting circumstantial evidence in order to take the case from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. They feel that the jury, as the fact-finding body, has the function of selecting from among conflicting inferences and conclusions those which it considers most reasonable.[5]

In the principle case the court distinguishes the cases cited by Mr. Moore and the writer on the ground that in each of them there was some evidence of negligence shown or conflicts in evidence as to negligence which the jury might have to resolve, and in the resolution of which the jury might have to speculate. "But here," the court says,

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[2]Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 88 L. Ed. 520, 64 S. Ct. 409 (1944).

[3] Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 87 L. Ed. 610, 63 S. Ct. 444 (1943); Tiller v. Atlantic Coast Line Co., 323 U.S. 574, 89 L. Ed. 403, 65 S. Ct. 421 (1945).

[4] Boston & M.R. R. v. Meech, 329 U.S. 763, 91 L.Ed. 68, 67 S.Ct. 124 (1946); Pearce v. Lehigh Valley R. Co., (C.C.A. 3, 1946) 157 F. (2d) 252; Handy v. Reading Co., (D.C. Pennsylvania, 1946) 66 F. Supp. 246; Boston & M.R.R. v. Kyle, (C.C.A. 1, 1946) 156 F. (2d) 112; Bocook v. Louisville & N.R. Co. (D.C. Kentucky, 1946) 67 F. Supp. 154; Pitt v. Penn. R. Co. (D.C. Pennsylvania, 1946) 66 F. Supp. 443; Chicago St. P. & M. R. Co. v. Arnold (C.C.A. 8, 1947) 160 F. (2d) 1005; Ellis v. Union Pacific R. Co., 329 U.S. 649, 91 L.Ed. 572, 67 S.Ct. 598 (1947).

[5] O'Brien v. Chicago & N.W. R. Co., 329 Ill. App. 382, 68 N.E. (2d) 638 (1946).

"there is no conflict and a total failure of proof, the jury would have no probative evidence on which to base its verdict and would have to substitute speculation, which it may not do."

The Court recognizes the recent trend in cases of this type when it says in its opinion:

> "We realize that cases arising under the Federal Employers' Liability Act approach so closely the line which makes the railroad an insurer of its employees that we tread on thin ice in upholding a District Court that has directed a verdict under the Act especially when we also realize that a strong minority of the Supreme Court supports the thesis that any common law case in which a jury may be demanded should never be taken from the jury, since the jury must be deemed to be as capable of finding a correct answer as the court."

However, this court felt constrained to sustain the District Court in its direction of a verdict because here there was a total failure of proof of negligence. It did so upon the basis of general holdings of the Supreme Court to the effect that negligence must be shown and in the absence thereof a verdict must be directed.[6]

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[6] Galloway v. United States, 319 U.S. 372, 395, 87 L.Ed. 1458, 63 S.Ct. 1077, 1089 (1938).