Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act

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Modern United States Supreme Court railroad decisions interpreting the Federal Employers' Liability Act which was originally adopted in 1906 but was re-enacted on April 22, 1908, hereinafter called the Act, definitely outmode the harsh and partial judicially created doctrine heretofore pursued in a long list of old cases beginning in 1892 with *Aerkfetz v. Humphreys* that expanding industry, including railroads, should receive maximum freedom and be protected, shielded, and insulated against the consequences of its own neglect — at the expense of the employee — and from the human overhead by invoking “assumption of risk” and “non-negligence” defenses.


"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, 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."

2 The plaintiff in *Aerkfetz v. Humphreys* (1892) 145 U. S. 418, 12 S. Ct. 835, 36 L. ed. 758, was a repairer of tracks employed in a railroad yard which was used for the making up of trains and who was familiar with the manner in which the work was done, and who, knowing that the switch engine was busy moving cars and making up trains, placed himself with his face away from the direction from which cars were to be expected and continued to work without ever looking back, although there was no obstruction to his vision and by ordinary attention he could have observed the approaching cars, and while so employed was struck by the switch engine moving slowly and injured, was guilty of contributing negligence which prevented his recovery from the railroad company for his injury.
In 1908 the Act was given substantially its present form. At this time by virtue of Section 3, contributory negligence was abolished as a bar to recovery, the damages recoverable being diminished in proportion to the amount of negligence attributable to the employee, if any, except that it was provided no employee should be held guilty of contributory negligence in any case where the violation of any safety appliance act contributed to the injury.

Section 4 of this Act abolished assumption of risk as a defense where the violation of any safety appliance act contributed to injury. In 1939 Congress added to Section 4 of the Act a provision abolishing assumption of risk where such injury resulted from the negligence of the railroad, and by so doing, it also abolished the defense of non-negligence.

This prefatory history of the Act portrays the liberalizing tendency of the times leading to the present era of social reform which is the natural product of the age of industrial pioneering. Today, when the facts relative to carrier's negligence are in dispute, or fair-minded men will honestly draw different conclusions from undisputed facts, the case should go to the jury. The jury and not the Court is the fact-finding body, and the jury should be instructed that the duty of the railroad to maintain a high standard of care and to furnish a safe place to work is an absolute and continuing one. In conformity with the 1939 humanitarian amendment to the Federal Employers' Liability Act the enlightened policy of the United States Supreme Court in several recent decisions has been to resolve all inferences in close and doubtful cases in favor of the injured railroad employee. The Court has in these cases cast aside any denial of recovery on grounds of non-negligence or that the evidence is conjectural or too remote.

Prior to the August 11, 1939 amendment to the Act, it was well established that in an action brought thereunder the common law defense of assumption of risk was open to the defendant except where

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4 The 1939 Amendment of the Federal Employers' Liability Act, adopted by Congress in 1939, 53 Stat. 1404, 45 U. S. C. A. Par. 54, provides as follows:
   An "employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier;"
it was shown that the company had violated a Federal statute passed for the protection of the employee.\(^6\)

Under the common law rule a servant assumed the risk 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, and the danger therefrom was appreciated by him. The employer could conduct his business according to his own ideas, although another method would be less dangerous, and if his employee knew the hazards incident to the business in the manner in which it was carried on, and continued in the employment, he "assumed the risk" of the more dangerous method.\(^7\)

An exceptional harsh feature of the rule lies in the fact that if an employee knows of an unsafe condition, and complains about it, he is held to have the choice of continuing to work and assuming the risk, or quitting his employment and seeking a livelihood elsewhere.

State legislatures have long recognized the unfairness of the common law doctrine of assumption of risk and have abolished it by statute. The Congress of the United States, realizing that the application of the doctrine to cases arising under the Act, in the light of modern conditions, causes grave injustices to railroad employees, amended the Act in August, 1939, in an effort to eliminate such injustice.

As was noted before, the previous judicial standard of negligence was established in a line of cases generally referred to as railroad yard cases, commencing in 1892.\(^8\) The rule laid down in those cases placing upon railroad yard employees the full burden of looking out for themselves and relieving the carrier of responsibility for the safety of such employees was adopted by this Court fifty years ago. This judicial standard of negligence and the degree of care required of the carrier has been completely outmoded. In the light of present social and economic conditions, and recognizing the trend of modern legislation, Congress has directed a change by the 1939 Amendment to the Act.

Today railroads must take precautions, some of which may seem to be physically impossible, in order to measure up to the high standard of care recently laid down by the United States Supreme Court. While the opinions in these modern cases are not specific as to the care required of a railroad in the circumstances enumerated, it is clear

\(^6\) Toledo, St. L. & W. R. Co. v. Allen (1928) 276 U. S. 165; 48 S. Ct. 215; 72 L. Ed. 513.


that the Supreme Court is determined to permit recovery for the injured or deceased railroad employee and to place the responsibility for railroad accidents where it rightfully belongs. It is evident that these late cases are in direct conflict with the earlier decisions of the United States Supreme Court. In the earlier cases, recovery was not permitted because the Court held that the record left the matter of negligence in the realm of speculation and conjecture.

The statutory liability under the Boiler Inspection Act is not based on the railroad's negligence, but the Act requires a locomotive and all parts and appurtenances to be in proper condition and safe to operate and the duty imposed by that Act is not excused by any showing of care. Thereby it may be reasonably argued, this interpretation of the Act in a broad sense substantially makes the railroad an insurer. In other words, be it ever so careful, the carrier is liable if it permits an unsafe engine to be used on its line.

The recent decisions construing the Boiler Inspection Act, since the Amendment of 1939, demonstrate a definite change to a liberal and humanitarian attitude towards the injured railroad employee, as the Act is liberally construed to effectuate its prime purpose of protecting railroad employees and others by requiring the use of safe equipment. The Act imposes upon the railroad an absolute and continuing duty to maintain the locomotive and all parts and appurtenances thereof in proper condition and safe to operate without unnecessary peril to life or limb, and this duty is not limited to mechanical defects only but includes foreign elements as well.

The Federal Employers' Liability Act imposes liability on a railroad engaged in interstate commerce for injuries to its employees resulting in whole or in part from the negligence of any of the offi-

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9 Section 23 of the Boiler Inspection Act, Par. 1, et seq.; 45 U. S. C. A., Par. 22, et seq.; June 7, 1924, Chapter 355, Section 1, 43 Stat. 659, reads as follows: "Use of unsafe locomotives and appurtenances unlawful; inspection and tests.

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations herein-after provided for."


12 Italics ours.
cers, agents, or employees of such railroad, or by reason of any
defect or insufficiency, due to its negligence in its cars, engines, road-
bed, works, boats, wharves or other equipment.\textsuperscript{13}

The liability statute, while clearly conditioning liability of the
employer upon the existence of a causal relation between his negli-
gence and the injury to, or death of, the employee, not only expressly
negates the idea that such negligence must have been the sole cause
of the injury or death, but also inferentially contemplates a finding
of liability even in cases wherein the negligence of the employer was
not the cause logically nearest to the injury. Under this conception
of the Act, although causes for which the carirer is not liable con-
tribute directly to produce the injury, yet if a cause for which the
carrier is liable, that is a negligent act of any other employee, or a
defect or injury due to negligence in equipment or works, contributes
also as a cause, without which the injury would not have occurred, the
carrier is still liable. When there is any evidence tending to raise
an issue of fact as to causal relation between the injury sued upon,
and the want of care on the part of either party, the question is for
the jury.

Negligence and the causal relation may be inferred from probative
evidence or from evidence from which the jury could draw inferences.
The very essence of the function of the jury is to select from among
conflicting inferences and conclusions that which it considers most
reasonable. To deprive railroad workers of the benefit of a jury
trial in close or doubtful cases is to take away a goodly portion of
the relief that Congress specifically afforded them pursuant to the
terms of the Act. The negligence of the railroad may be determined
by viewing its conduct as a whole, and especially is this true where
the several elements from which negligence might be inferred are
so closely interwoven as to form a composite picture or a single
pattern. A negligent employer may no longer escape liability for
damages by judicial determination of non-negligence.

“Congress”, according to Justice Frankfurter in \textit{Tiller v. Atlantic
Coast Line R. R. Co.},\textsuperscript{14} hereinafter referred to, “has to some extent
alleviated the doctrines of the law of negligence as applied to railroad
employees.” Still, an employer is not liable if he is not negligent
despite the fact that the employee is conducting his employer’s busi-
ness at the time of the injury. In other words, the carrier is not
charged with those injuries which result from the usual dangerous
risks incident to employment on railroads — risks which cannot be
eliminated through the carrier’s exercise of reasonable care.

\textsuperscript{13} See particularly Secs. 22-34 and 51-60 of 45 U. S. C. A.
\textsuperscript{14} 318 U. S. 54 at p. 71, 87 L. Ed. 610, 63 S. Ct. 444 (1943).
Congress in the future may choose to pass a Federal Workmen's Compensation Act which will fill the gap, but in the meantime both Congress and the Supreme Court of the United States obviously intend that the Act shall be liberally construed and wherever uncertainty as to the existence of negligence arises from the evidence, or where fair-minded men will honestly draw different conclusions as to the negligence from undisputed facts, the question is not one of law but one of fact to be settled by the jury.

In Lilly v. Grand Trunk Western R. R. Co.¹⁵ suit was brought under the Federal Employers' Liability Act and the Boiler Inspection Act. Plaintiff, a brakeman, fell from the top of a locomotive tender while he was pulling a water spout which was at the side of the track, over the tender's manhole by means of a rod and hook preparatory to filling the tank of the tender with water. The top of the tender between the water manhole and the fuel space, an area of about six square feet, was covered with ice. Plaintiff contended that there was a small leak at the collar of the manhole from which water flowed onto the tender's surface and that the rod used for pulling the water spout over the tender was frozen in ice. He had to kick it free, and while standing on the ice and bracing himself, he reached out with the rod and as he pulled, the rod's hook slipped on the spout and his feet simultaneously slipped on the ice causing him to fall to the ground. The complaint charged negligence generally with respect to the presence of ice on the tender, and alleged separately a violation of the Boiler Inspection Act. The jury rendered its general verdict for plaintiff, but found there was no leak in or near the manhole collar on the tender at the time of the accident.

The Superior Court of Cook County, Illinois, gave judgment for plaintiff and the Appelate Court of the State of Illinois reversed.

The Supreme Court held plaintiff was entitled to maintain an action under the Boiler Inspection Act for the injuries received where ice had been allowed to accumulate on the top of the tender. In this connection the Court said (Mr. Justice Murphy writing the opinion):

"Negligence is not the basis for liability under the Act. Instead, it 'imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate without unnecessary peril to life or limb.' Southern Ry. Co. v. Lunsford, 297 U. S. 398, 401, 80 L. Ed. 740, 742, 56 S. Ct. 504; Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 69 L. Ed. 419, 45 S. Ct. 169; cf. Brady v. Terminal R. Assn., 303 U. S. 10, 82 L. Ed. 614, 58 S. Ct. 426. Any employee engaged in inter-state commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act,

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"The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve 'unnecessary peril to life or limb' — enough so as to permit a jury to find that the Boiler Inspection Act has been violated."**

A railroad is absolutely liable for injuries to employees proximately resulting in whole or in part by failure to comply with the Boiler Inspection Act, and employees' contributory negligence is no defense. The boiler Inspection Act was designed to fasten on a railroad the positive duty, regardless of negligence, to provide safe and adequate appliances and equipment. As a matter of fact, under the Boiler Inspection Act, the injured railroad employee has in the main most of the benefits of a federal workmen's compensation act plus the attractive advantage of having a jury determine the amount of recovery. The positive duty of a railroad declared by the Boiler Inspection Act pertains to mechanical defects, inadequacies, or insufficiencies in safety equipment and devices, faults in design, in type or manner of construction or defects allowed to occur through wear, tear, damage or neglect, and to substances added by nature or man which make equipment potentially unsafe. The railroad has the positive duty under the Boiler Inspection Act not to use or permit to

16 317 U. S. 481, 485, 486.
be used on its line locomotives which are not in proper condition or safe to operate, and this duty does not depend on whether the railroad has been negligent.

The Lilly v. Grand Trunk W. Ry. Co. case\(^{17}\) breaks through the line of cases which held that in order to establish liability under the Boiler Inspection Act the engine must be proved mechanically defective, as that case specifically holds that "the use of a tender upon whose top an employee must go in the course of his duties, which is covered with ice, ‘Involves, ‘unnecessary peril to life or limb’ — enough so as to permit a jury to find that the Boiler Inspection Act has been violated***”.

In the Lilly case the basis of the carrier's liability was the breach of duty. Its failure to keep the tender deck free from ice was a breach of duty which made the engine itself unsafe for use, and when injury occurred as a proximate result of such breach of duty the carrier was absolutely liable.

The first case arising after the adoption of the 1939 Amendment was that of Tiller v. Atlantic Coast Line R. Co.\(^{18}\). In that case, plaintiff's husband was employed as a policeman by the defendant railroad and among his duties was that of inspecting seals on cars in defendant's railroad yards to determine whether or not they had been tampered with. Tiller was aware that other employees, in moving trains and cars, would not look out for him and that he must watch out for such movements. He was also aware that no lights were used on the moving cars. The accident happened at night. There was no evidence as to what he was doing at the time he was run over. The Circuit Court of Appeals\(^{19}\) thought it could be inferred that he was standing between two tracks when trains were moving slowly on both sides. It was Tiller's habit to inspect the seals with a flashlight as a train slowly passed him. The train which apparently killed Tiller carried no light on the rear except that a brakeman with a lantern was riding on the rear end on the side opposite to where Tiller was found. The bell on the engine was ringing at the time. The District Court directed a verdict for defendant railroad on the grounds:

1. That the evidence disclosed no actionable negligence and
2. the cause of death was speculative and conjectural. The Circuit Court of Appeals affirmed and the U. S. Supreme Court granted certiorari because the lower court's decision was based on a holding that deceased had assumed the risk of his position and that therefore there was no duty owing to him by the railroad.

\(^{17}\) 317 U. S. 481, 486, 87 L. Ed. 411, 63 S. Ct. 347 (1943).

\(^{18}\) 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444 (1943).

\(^{19}\) 128 Fed. (2nd) 420 (1942).
Mr. Justice Black, writing the majority opinion, appears to recognize that cases previous to the 1939 amendment had treated assumption of risk sometimes as a defense to negligence and sometimes as the equivalent of non-negligence, and then states:

"We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that Statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'".20

It is manifest that Mr. Justice Black held that since "assumption of risk" had been often used to mean non-negligence and that since every vestige of assumption of risk was abolished, the defense of non-negligence was also abolished.

He pointed out further that:

"Perhaps the nature of the present problem can best be seen against the background of one hundred years of master-servant tort doctrine. Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost — to someone — of doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry. The assumption of risk doctrine for example was attributed by this Court to 'a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business,' but would also encourage carelessness on the part of the employee".21

The Tiller v. Atlantic Coast Line R. R. Co.22 case came before the United States Supreme Court a second time. After the case was remanded the complaint was amended in the District Court over objection by charging that in addition to the negligence previously alleged, Tiller's death was caused by the railroad's violation of the Federal Boiler Inspection Act23 and rules and regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of that Act. The jury returned a verdict in favor of the plaintiff and the District Court refused to set it aside. However, the Circuit Court of Appeals24 reversed, and certiorari was granted because of the

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20 318 U. S. 54, 58.
21 318 U. S. 54, 58, 59.
22 323 U. S. 574, 89 L. Ed. 403, 65 S. Ct. 421 (1945).
23 45 U. S. C. A. Secs. 22-34.
24 142 Fed. (2nd) 718 (1944).
importance of considerations involved relating to the administration and enforcement of the Federal Employers' Liability Act and the Boiler Inspection Act. The Circuit Court of Appeals had held that the evidence of negligence charged in the original complaint was insufficient to justify submission of the case to the jury, that there was no evidence that the alleged violation of the Boiler Inspection Act was "the proximate cause of the accident in whole or in part", and that the District Court should therefore have directed that this issue be found in favor of the railroad. The verdict of the jury for the plaintiff was general and did not specify the ground on which it rested.

The United States Supreme Court held that the plaintiff was entitled to recovery and that it was for the jury to determine whether or not the failure to provide the required light on the rear of the locomotive proximately contributed to the deceased's death. The Supreme Court held that the backward movement of cars on a dark night in an unlit yard is potentially perilous to those compelled to work in the yard, and that the railroad may be found by the jury to have been negligent in backing cars in making up a train at night in an unlit railroad yard without giving adequate warning of the movement to employees where there is substantial evidence that the movement was an unusual one although there was also evidence that the same movement had been performed on other occasions and that the employee struck by the backing cars was familiar with local conditions.

Mr. Justice Black delivered the opinion of the Court and he stated, in part:25

"It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death. The ruling of the court below that it was not a proximate cause was based on this reasoning: The general railroad practice in yard movements is to push cars attached to the rear of an engine; no express regulation of the Commission prohibits this; in the instant case the cars attached to the engine necessarily would have obscured any light on the rear of that engine; the light so obscured would not have enabled the engineer to see 300 feet backwards so as to avoid injuring the deceased nor would the light have been visible to the deceased standing at or near the track ahead of the backward movement. Therefore, the court concluded, the failure to furnish the light was not proximately related to the death of Tiller.

"Assuming, without deciding, that the railroad could consistently with Rule 131 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light did not contribute to Tiller's death. The de-

ceased met his death on a dark night, and the diffused rays of a strong headlight even though directly obscured from the front, might easily have spread themselves so that one standing within three car-lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. Tennant v. Peoria & P. U. R. Co. 321 U. S. 29, 33, 88 L. Ed. 520, 524, 64 S. Ct. 409. And 'The standard of care must be commensurate to the dangers of the business.' Tiller v. Atlantic Coast Line R. Co. supra (318 U. S. 67, 87 L. Ed. 617, 63 S. Ct. 444, 143 ALR 967.)"

In the case of Tennant v. Peoria & P. U. R. Co.26 the plaintiff Tennant at the time of the injury and death was working as a member of a switching crew in defendant railroad's yards. The plaintiff's case was predicated on the theory that Tennant's death was caused by defendant's negligence in failing to ring the bell at the time the movement of the train started. The jury returned a verdict in favor of plaintiff and the District Court entered judgment accordingly. The United States Court of Appeals reversed saying that by the great preponderance of proof, the rule did not require the bell to be rung under existing circumstances and concluded that even though there was failure to ring the bell, there was no evidence that such negligence was the proximate cause of the injury and death. Here, too, there was no evidence as to what the employee was doing. The cars had all been coupled and were standing for several minutes and there was nothing further for him to do here. The next movement was to be backward as the members of the crew well knew. Tennant had no further duty to perform on or about the train but was required next to be over on another track and if he had followed that routine, as he had done night after night, he would have been over on another track.

The United States Supreme Court held that a right to recover under the Federal Employers' Liability Act is established if from the facts proved negligence and its causal relation to the accident may reasonably be inferred. The Supreme Court held further that courts may not re-weigh the evidence and set aside a jury verdict merely because the jury would have "drawn different inferences and conclusions or because judges feel that other causes would have been more reasonable."

The Tennant case was a circumstantial evidence case, no eye witnesses being present. In reversing the Seventh Circuit Court (Chicago), which had reversed the judgment of the District Court based upon a jury's verdict, the majority opinion, written by Mr.

26 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409 (1944).
Justice Murphy, shows impatience with strict rules enunciated in early decisions of that court; and, in stating that the evidence required the submission of the case to the jury, said in part:

"In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury.***

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witness, receives expert instruction, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.*** That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."**7

Here Mr. Justice Murphy stated that the court below erred in holding that there was not sufficient proof to support the charge that the railroad company's negligence in failing to ring the bell was the proximate cause of Tennant's death. To this evidence must be added the presumption that the decedent was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death.

In Bailey v. Central Vermont R. R. Co.,**8 one Bailey, a section man, was killed in a fall from a bridge while he was engaged in unloading a hopper car of cinders which was being dumped through the ties in the bridge floor onto the roadway below. He was using a type of wrench which had been in use for years without an accident

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**7 321 U. S. 29, 34, 35.
**8 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943).
to turn a nut to permit the hopper to open. There was no defective equipment. The work was being done in the customary manner. He had been warned that the wrench would whirl if he did not disengage it from the nut or let it go before the hopper started to open. The wrench did whirl, causing Bailey to lose his balance and fall, thereby sustaining the injuries complained of. Suit was brought under the Federal Employers’ Liability Act.

The United States Supreme Court, in a majority opinion by Mr. Justice Douglas, upheld plaintiff’s theory that the railroad had failed to furnish a safe place to work. The Court said, in part:

“The hopper car could have been opened before it was moved onto the bridge and any cinders which spilled on the roadbed shoveled onto the roadway beneath the bridge. Or after the cinders had been dumped upon the roadbed a railroad tie could have been utilized as a drag to push cinders from the roadbed to the ground below the bridge.

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“The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground — all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of the issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw such a question from the jury is to usurp its function.

“The right to trial by jury is ‘a basic and fundamental feature of our system of federal jurisprudence.’ It is part and parcel of the remedy afforded railroad workers under the Employers’ Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.”

Mr. Justice Douglas pointed out further that the duty of the carrier is a continuing one “from which the carrier is not relieved by the fact that employee’s work at the place in question is fleeting or infrequent”.

The United States Supreme Court in the Bailey v. Central Vermont R. R. Co. case presents sound economic reasoning as a basis for

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this seemingly "harsh" rule from the carrier's standpoint, as modern workmen's compensation systems do not apply to railroad employees:

"That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."21

In Blair v. Baltimore & Ohio R. Co.,32 one Blair was employed by the railroad to load and unload in-bound and out-bound freight. In unloading a car standing at the platform adjacent to the railroad's warehouse, Blair came to three ten-inch seamless steel tubes, approximately thirty feet long and weighing slightly more than one thousand pounds each. The pipes were greased and slick. Petitioner informed his superior that the pipes were too heavy for him to move and suggested it was not customary for the railroad to unload pipes of this kind in its warehouse but to send the car directly to the consignee's place of business where it had proper equipment for unloading heavy equipment. Petitioner was told to get Mr. Miller, aged sixty-eight, the car inspector, and Mr. Fanno, aged sixty, the section man, to help him unload. Blair insisted that three men could not unload the heavy pipes but he was told to do the work "or they would get somebody who would." He then undertook to unload the pipes and carry them through the warehouse to place in the consignee's truck. In attempting to move the heavy tube, it slipped, causing the truck on which it was to be loaded to kick back, resulting in Blair's injury. The jury returned a verdict for Blair for personal injuries under the Federal Employers' Liability Act. The court below held that plaintiff could not recover because he had assumed the risk. The United States Supreme Court held that there was sufficient evidence to submit the case to the jury and reversed the judgment of the lower court.

In the majority opinion, the Court pointed out that:

"Despite conflicting evidence, there was sufficient evidence to justify the jury in finding that the injury was inflicted under these circumstances.

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"We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer 'become "more imperative" as the risk increases.' Bailey v. Central Vermont R. Co., 319 U. S. 350,
RECENT TRENDS IN RAILROAD CASES

352, 353, 87 L. Ed. 1444, 1446, 1447, 63 S. Ct. 1062. See also Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 87 L. Ed. 610, 617, 63 S. Ct. 444, 143 ALR 967. The negligence of the employer may be determined by viewing its conduct as a whole. Union P. R. Co. v. Hadley, 246 U. S. 330, 332, 333, 62 L. Ed. 751, 754, 755, 38 S. Ct. 318. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

"The nature of the duty which the petitioner was commanded to undertake, the dangers of moving a greased, 1000 pound steel tube, 30 feet in length on a 5 foot truck, the area over which that truck was compelled to be moved, the suitability of the tools used in an extraordinary manner to accomplish a novel purpose, the number of men assigned to assist him, their experience in such work and their ability to perform the duties and the manner in which they performed those duties — all of these raised questions appropriate for a jury to appraise in considering whether or not the injury was the result of negligence as alleged in the complaint. We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury 'in whole or in part'. Consequently we think the jury, and not the court should finally determine these issues."

In the Tiller v. Atlantic Coast Line R. R. Co. case, in Tiller v. Atlantic Coast Line R. R. Co., and in Tennant v. Peoria & P. U. Ry. Co., there was no direct evidence as to the cause of the accident which resulted in the injury and death of the employee. Yet, in the Tiller and Tennant cases the Court had no difficulty in finding that there was substantial proof that the death of the injured employee was caused by railroad's negligence in failing to provide a light in one case and in failing to ring a bell in the other case. The sole question under the Federal Employers' Liability Act is whether the defendant railroad was guilty of negligence. The rule is well established that where uncertainty as to existence of negligence arises from a conflict in the testimony, or, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but one of fact to be settled by the jury.

When one reads these leading cases decided by the Supreme Court of the United States in this field, it becomes apparent that the court is entirely out of sympathy with the earlier cases where verdicts

33 323 U. S. 600, 602, 604, 605.
34 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444 (1943).
36 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409 (1944).
were set aside by the Courts on technical or other grounds, or on the Court's conception of the "reasonable minds agree" rule. Since 1939, every case coming to our attention wherein a trial court or an upper court has reversed a jury's verdict, has in turn been reversed by the Supreme Court of the United States (the Tiller case twice, and the Bailey, Tennant and Blair cases), with the exception of Brady v. Southern Ry. Co.\textsuperscript{38} That opinion was five to four with a strong dissenting opinion written by Mr. Justice Black\textsuperscript{39} which definitely indicates the change in the attitude of the Court where the question of negligence is in doubt. Anyone who compares the two opinions in that case may draw his own conclusion as to what the Court would hold today in view of its later holding in the Tennant, Blair and second Tiller cases. In the Brady case, in connection with whether or not a defective rail was the proximate cause of injury, the conclusion of the majority members of the Court was that there was failure to show in the record any negligence of the carrier in the three instances of alleged negligence. Mr. Justice Black with gentle sarcasm begins his dissent as follows:

"Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad's employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable. Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results.

"Although I do not agree that the 'uniform federal rule' on directed verdicts announced by the Court correctly states the law, I place my dissent on the ground that, whatever rule be applied, petitioner sufficiently alleged and proved at least two separate acts of negligence attributable to the respondent railroad but for which the decedent Brady would probably have escaped death. The first was the act of one of respondent's trainmen in negligently closing the derailler; the second, the act of respondent's maintenance crew in negligently keeping a defective rail opposite that derailler. Proof of either was sufficient in itself to support a jury verdict against respondent under the terms of the Federal Employers' Liability Act."

* * *

"It is difficult to imagine how, except by sheer guessing, or by drawing upon some undisclosed superior fund of wisdom, the Court reaches the conclusion that respondent need not have forseen that trains would be backed over the wrong end of closed deraillers. The evidence of railroad men who had worked

\textsuperscript{38} 320 U. S. 476, 88 L. Ed. 239, 64 S. Ct. 232 (1943).
\textsuperscript{39} 320 U. S. 476, 484-489.
on railroads showed it was foreseeable. Doubtless judges know more about formal logic and legal principles than do brakemen, engineers, and divisional superintendents. I am not so certain that they know more about the danger of keeping a defective rail immediately opposite a derailer.***

"Nor is it easy to comprehend why the defective rail was not the 'proximate cause' of the injury. It was the last 'link in an unbroken chain of reasonably foreseeable events' which cost the employee his life. Surely this rail was the 'proximate cause' if those words be used to mean an event which contributes to produce a result, which is the meaning Congress intended when it made railroads liable for the injury or death of an employee 'due to' or 'resulting in whole or in part from' the railroad's negligence. The records show that two expert witnesses with many years of railroad experience testified that the accident was caused by the defective rail. That one of these witnesses on cross examination stated the derailment would not have occurred 'nine times out of ten' if there had been a sound rail hardly justifies a directed verdict against petitioner. The fact of causation is no different from any other fact and does not have to be proved with absolute certainty; ninety per cent certainty should suffice to make it an issue for the jury. That a sound rail would have given the deceased nine chances out of ten to escape death should be enough to give his family and the community the protection which the Act contemplates."40

"Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge concur in this opinion."

The problem of fixing liability for railroad injuries when there is no direct evidence relative to how the accident occurred in cases bottomed on the Federal Employers' Liability Act, and the far-reaching significant influence of the words of the Act, "in part", is strikingly set forth in Chief Justice Evans' decision handed down on October 25, 1945 in the case of Mary Eglser, Administratrix of the Estate of Daniel R. Mackin v. Henry A. Scandrett, Walter J. Cummings, and George J. Haight, Trustees of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.41 In this opinion it is to be noted that negligence may not be the sole cause of the injuries in order to fix liability on the carrier. This is an appeal from a judgment entered in an action brought pursuant to and under the Federal Employers' Liability Act for the death of plaintiff's decedent, a railroad engineer, following injuries sustained while he was out on an engine for the purpose of repairing a defective automatic bell ringer. The jury's verdict was special. It found the automatic bell ringer on the engine was in a defective condition. It also found, in answer to another question, that the failure of the railroad to provide an automatic bell

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40 Ibid.
41 U. S. Cir. Ct. of Appeals opinion dated October 25, 1945, 151 Fed. (2nd) 562.
ringer in good condition was the proximate cause of the injuries to, and the death of, said engineer.

Briefly stated, the evidence disclosed that while the train was stopped at Freeport, Illinois, in the course of its run from Kansas City to Milwaukee, Engineer Mackin decided to get out of his cab to fix the automatic bell ringer which had ceased to work automatically and which had to be operated manually. He told his fireman he was going to repair it. The fireman offered to do it. Mackin, however, went ahead, climbing out of the cab and onto the “cat walk”, on the right side of the engine. The fireman continued stoking the engine for the few minutes the train was at rest. This caused the escape of steam to such an extent that the fireman could not see forward from his cab window. When the fireman received the signal from the brakeman to proceed, he called to Mackin, who did not answer. The fireman then got out of the cab to look for Mackin, and found him on the ground on the left side of the cab.

The special verdict contained six questions, four of which with answers are here set forth.*

"1. Did the defendants fail to provide a locomotive boiler or a stoker engine in proper condition and safe to operate in the service to which the same were put? Answer: No.

"2. If you answer Question 1 'yes' then answer this question. Was such failure on the part of the defendants a proximate cause of the injuries and death of Daniel R. Mackin? Answer . . .

"3. Did the defendants fail to provide an automatic bell ringer in proper condition and safe to operate in the service to which it was put? Answer: Yes.

"4. If you answer Question 3 'yes' then answer this question. Was such failure on the part of the defendants a proximate cause of the injuries and death of Daniel R. Mackin? Answer: Yes.”

Upon the rendition of the verdict defendants moved to change the answer to question four because unsupported by any evidence in the case. In other words, defendants contended that there was no direct evidence and no evidence from which legitimate inference could arise tending to show the defective bell ringer was the proximate cause of decedent’s injuries. Plaintiff, on the other hand, contended that there was evidence from which the jury could draw inferences which in turn supported the finding that the defective bell ringer was the proximate cause of decedent’s fatal injuries.

*The other two questions and answers relate to the amount of damages, not here material.
The correctness of the court's action in changing the answer to the fourth question of the special verdict was the sole and determinative issue on appeal.

In its opinion on the motion after verdict the District court gave its reasons for its action.*

More specifically describing the situation which tends to connect Mackin's fall with the bell ringer, it may be said there was evidence which tended to show the engine was dirty, much coal dust lying around, etc. Considerable evidence was offered in respect to a loose rope lying along the hand rail brackets of the engine adjacent to the bell ringer. Plaintiff's contention was that this rope, a part of the automatic bell ringer equipment, was grasped by Mackin in place of the hand rail thereby plunging him to the ground. Evidence out of which theories were spun, tended to show (a) the morning was misty; (b) the cat walk was slippery; (c) the engine was dirty; (d) there was possibility that Mackin may have climbed over the engine instead of walking around it; (e) also the developing steam interfered with decedent's vision.

Judge Evans in his opinion in part stated as follows:42

"The decisions construing this statute43 are legion. And decisions elucidating the principle of "proximate cause", or attempting to do so, are without bound. Even a cursory study of them would convince the student of the law of the truth of the statement of Roberts, in the text, Federal Liabilities of Carriers, Sec. 869.

'No phase of negligence law offers greater resistance to logical treatment than the much discussed question of proximate cause***.

***It is not strange that attempts to frame an accurate and comprehensive definition of the term 'proximate cause' have not been successful. It has been spoken of as an 'efficient' cause, as a cause 'without which the injury would not have occurred,' as a 'direct' or 'dominant' cause.

*"Admittedly on the morning of March 13, 1944, the automatic bell ringer was not operating properly. This would justify the jury's answer to Question 3. Likewise that Engineer Mackin crawled out upon the side of the engine with the purpose of attempting a repair or adjustment of the bell ringer was not disputed. But the defective bell ringer was merely the occasion for Mr. Mackin to climb out on the engine. No proof was offered and I am sure none could be that the bell ringer caused his fall. It was operated by air. If it had been operated by electricity and he had received a shock which caused him to lose his balance and fall, the jury might have had some justification for affirmatively answering Question 4. However, no proof was introduced that Engineer Mackin ever touched any part of the bell ringer mechanism or that he fell while attempting its repair or adjustment. The burden of proof was on the plaintiff to establish an affirmative answer to Question 4. This the plaintiff has failed to do."

43 45 U. S. C. A. Sec. 51, supra note 1.
"***In construing the above quoted statute, Roberts says:

***it seems clear, in the light of the provisions above abstracted, that the liability statute definitely recognizes the complex causal basis of most injuries, and, in effect, states that if, among the several factors which have combined to produce an injury within the purview of the statute, there shall be found any negligent act or omission on the part of the carrier to which such injury was even in part due, then liability for such injury shall fall upon the carrier.

The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus determined the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term is understood in the act, liability of the employer shall follow, irrespective of the other factors causally related in whole or in part from negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.'

"Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of "proximate cause" as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence "in part" results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has "causal relation," — if the injury or death resulted "in part" from defendants' negligence, there is liability.

"The words "in part" have enlarged the field or scope of proximate causes — in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the
first acting cause which sets in motion the second cause which was
the immediate, the direct cause of the accident.***

"Under the evidence in this case, there was a possibility
(and the jury could have placed a much higher estimate than
a possibility) that the deceased grabbed the unattached bell
ringer rope which was lying on the handrails, when reaching
for the bell ringer, and, having no support therefrom, fell to
the ground. Also, there was direct causal relation between the
incurrence of injuries and the existence of the defective bell,
although whether the defectiveness of the bell itself directly
cased the death other than through the disconnected rope,
we doubtless cannot say with greater certainty than a prob-
ability.

"We cannot say, although the facts make us pause, that the
jury's answer to question four allowed speculation to do duty
for probative facts. We are somewhat influenced in reaching
this conclusion by the holding in the Tennant v. Peoria & P. U.
Ry. Co.44, which the Supreme Court held was one properly
submitted to a jury on the issue of proximate cause.

"In reaching this conclusion the following facts are signal
marks: Mackin fell; was injured; and from his injuries, died.
He was on the ground beneath the bell ringer which he had gone
out to repair. The bell ringer was defective, and defendants'
negligence in respect thereto was clearly established. Plaintiff
had the burden of showing the defective bell ringer was the
proximate cause of decedent's injuries. Defendants' negli-
genence need not be the sole cause. The loose rope was part of
the bell ringer equipment. It should not have been lying where
it was. In selecting one of the explanations of how the deceased
fell, the jury was not speculating when it accepted the rope
as the one most probable. In the light of the holding in the
Tennant case, we cannot agree with the District Court and
say there was no evidence that Mackin's death did not result
"in part" from the defective bell ringer.

The judgment is reversed and the cause remanded, with
directions to enter judgment in conformity with the jury's
verdict."

This actually is the first time "proximate cause" has been judicially
interpreted in the light of the 1939 amendment to the Federal Em-
ployers' Liability Act and the above decisions of the Supreme Court
of the United States. It will be noted that in these recent United
States Supreme Court decisions all inferences in close and doubtful
cases have been resolved in favor of the injured employee in con-
formity with the humanitarian amendment of the Federal Employers'
Liability Act adopted by Congress in 1939. The Supreme Court
has in these recent cases cast aside any denial of recovery on the
grounds that the evidence is speculative or conjectural where the

44 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409 (1944).
causal connection between the injury sustained and the negligence of
the carrier appears even inferentially.

New deal Supreme Court justices unquestionable have bestowed
upon railroad workers a new deal to the solution of their claims
in line with modern and progressive social thinking. Railroads are
slow and reluctant to accept the recent interpretation of proximate
cause as defined and outlined by the United States Court since the
1939 Amendment to the Federal Employers' Liability Act; however,
a disinterested student who reads the late decisions in point will
readily appreciate that today, whenever the facts are in dispute or
fair-minded men will honestly draw different conclusions from un-
disputed facts, the case should go to the jury as the jury and not
the Court is the fact-finding body. The jury is the tribunal under our
federal system of jurisprudence which determines whether the evi-
dence in railroad cases produces probative facts from which negligence
and the causal relation may reasonably be inferred.