160.00

FEDERAL EMPLOYERS' LIABILITY ACT

INTRODUCTION

Railroad employees who are injured in the course of their employment have a cause of action against their employer under a Federal statute known as The Federal Employers' Liability Act (FELA), 46 U.S.C.A. §§ 51-59, rather than under the common law. Under certain circumstances, FELA actions may also involve either the Safety Appliance Act, 45 U.S.C.A. §§ 1-16, the Boiler Inspection Act, 45 U.S.C.A. §§ 22-23, or both. In addition to railroad employees, the protection of the Federal Employers' Liability Act is also extended to seamen by the Jones Act, 46 U.S.C.A. § 688. The instructions in this section can be readily adapted for use in Jones Act cases.

Section 51 of FELA provides for an action for damages against any common carrier by railroad in interstate or foreign commerce arising out of the injury or death of an employee while employed in such commerce, "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."

The second paragraph of that section declares that any employee, "any part of whose duties ... shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce," is within the scope of the Act.

Section 53 removes contributory negligence as a complete defense to the action and provides instead for proportionate diminution of damages to the extent of the employee's contributory negligence. This is the "pure" form of comparative negligence as adapted in Illinois for negligence in *Alvis v. Ribar,* 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), not the statutory comparative fault subsequently mandated by the Illinois General Assembly for causes of action accruing on and after November 25, 1986 (735 ILCS 5/2-1116 (1994)). Moreover, under FELA, where a carrier's violation of a statute enacted for the safety of employees (such as the Safety Appliance Act or Boiler Inspection Act) contributes to the injury or death, the employee cannot be deemed guilty of any contributory negligence.

Section 54, by its language, removes assumption of risk as a defense in cases where the injury or death resulted, in whole or in part, from the negligence of an officer, agent or employee of the carrier, or where the violation of a statute enacted for the safety of employees contributed to the injury or death.

Section 59 provides for the survival of actions under the Act to the personal representative for the benefit of the surviving spouse and children, and if none, for the benefit of the parents, and if none, for the benefit of the next of kin dependent on the decedent. As opposed to the Illinois Wrongful Death Act, which is for the benefit of the "surviving spouse and next of

kin" (740 ILCS 180/2 (1994)), the next of kin under FELA have no right of recovery if there is a spouse, child or parent surviving.

A final general area of difference includes the extent to which federal, rather than state, law is applicable, even where the action is tried in a state court. *Bowman v. Illinois Central R. Co.,* 11 Ill.2d 186, 142 N.E.2d 104 (1957), *cert. denied*, 355 U.S. 837, 78 S.Ct. 63, 2 L.Ed.2d 49 (1957) (reviewing court in FELA case may not determine whether jury verdict and judgment are against the manifest weight of the evidence; limited to determining whether there is an evidentiary basis for the verdict); *Mitchell v. Toledo, P. & W. R. Co.,* 4 Ill.App.3d 1, 279 N.E.2d 782 (3d Dist.1972) (scope of appellate review is governed by federal law and is limited to determining whether there is an evidentiary basis for the verdict; only when there is a complete absence of probative facts to support the verdict can there be a reversal).

160.01 Statutory Provisions

At the time of the occurrence, there was in force a federal statute known as the Federal Employers' Liability Act. That Act provided that whenever an employee of a railroad is [injured] [or] [killed] while engaged in the course of his employment, the railroad shall be liable in damages [to the injured employee] [and/or] [for the death of the employee], where the [injury] [and/or] [death] results in whole or in part [from the negligence of any of the officers, agents, or other employees of the railroad] [or] [by reason of any defect or insufficiency, due to the railroad's negligence, in its (cars) (engines) (appliances) (machinery) (track) (roadbed) (works) (boats) (wharves) (other equipment)].

[Contributory negligence on the part of the injured employee shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.]

Notes on Use

The bracketed material should be selected to fit the charges of negligence to be submitted to the jury. For example, in a case involving only allegations charging negligence of an employee, the bracketed phraseology concerning equipment should be omitted.

If contributory negligence is a factual issue, the second paragraph should be given.

If the Safety Appliance or Boiler Inspection Acts are at issue, then use the IPI 170 series of instructions.

The instruction as to the method by which damages should be adjusted for contributory negligence, IPI 160.13, should also be given when this issue is involved.

The instruction should be accompanied by IPI 10.01 defining negligence. If contributory negligence is an issue, IPI 160.04 defining contributory negligence in FELA cases should also be used with this instruction. *See Wilson v. Norfolk & W. Ry. Co.,* 109 Ill.App.3d 79, 440 N.E.2d 238, 64 Ill.Dec. 686 (5th Dist.1982).

Moreover, IPI 15.01 dealing with proximate cause should not be used in a FELA case.

160.01 is a combination of former instructions 160.01-160.04.

Comment

This instruction paraphrases the pertinent portions of the Act, 45 U.S.C.A. §§ 51 et seq. An instruction in the language of the statute has been sustained. *Fritz v. Pennsylvania R. Co.,* 185 F.2d 31 (7th Cir.1950), and authorities therein cited. The categories of equipment set out in the bracket meets the requirement that only the specific provisions of the Act actually involved should be mentioned. *Terminal R. Ass'n of St. Louis v. Fitzjohn,* 165 F.2d 473, 480 (8th Cir.1948).

Conforming to the committee's decision to follow the statutory language, the phrase "results in whole or in part from the negligence" has been employed in lieu of the proximate cause terminology more customary in common law negligence actions. Such an instruction is adequate, and the addition of the terminology "proximate" adds nothing and is not essential. *Gilmore v. Toledo P.W. R.R. Co.,* 36 Ill.2d 510, 515, 224 N.E.2d 228, 231 (1967). *See* the Comment to IPI 160.04 regarding the issue of proximate cause.

Although the statutory language does not specifically so provide, the decisions restrict the effect of contributory negligence to that which is direct, or proximate, in considering diminution of damages. *Broadley v. Union R. Co.,* 132 F.2d 419 (6th Cir.1942) (error to give instruction permitting jury to consider remote contributory negligence). In connection with this instruction *see also* the Comments to IPI 160.01 and 160.13.

If the negligence of an employee was the sole cause of his injury he may not recover. *Helton v. Thomson,* 311 Ill.App. 354, 36 N.E.2d 267 (1st Dist.1941), *cert. denied*, 316 U.S. 688, 62 S.Ct. 1280, 86 L.Ed. 1760 (1942).

In *Chicago, St. P., M. & O. R. Co. v. Arnold,* 160 F.2d 1002 (8th Cir.1947), the court held the jury had been correctly charged that if it found that the plaintiff's negligence was the sole proximate cause of his injury, he could not recover. The court, however, reversed a jury verdict for the plaintiff on the ground that the trial court refused to give an instruction tendered by the defendant railroad. The gist of the instruction was that if the jury found the plaintiff was given timely warning by a supervisor that there was insufficient clearance, the verdict should be for the defendant. In so holding, the Court of Appeals said (160 F.2d at 1008):

> In the absence of the requested instruction the jury could not be expected to understand that [plaintiff's] failure to obey the warning, if given, was the sole proximate cause of his injury within the meaning of the court's charge.

Contrary to the *Arnold* case is *Trowbridge v. Chicago & Ill. Midland Ry. Co.,* 131 Ill.App.2d 707, 263 N.E.2d 619 (3d Dist.1970). In that case the railroad requested an instruction using the language of former IPI 160.02 but modified by the addition of the following language: "If, however, you find from the evidence that the sole proximate cause of the injury was the negligence of the plaintiff, then the plaintiff shall not recover any damages from defendant railroad." The railroad also objected to the plaintiff's burden of proof instruction (IPI 21.02) because the instruction failed to refer to the plaintiff's contributory negligence as the sole proximate cause of his injury. After reviewing, among others, the *Helton* and *Arnold* cases cited above, the court said, in sustaining a verdict for the plaintiff (263 N.E.2d at 622, 623):

> We do not believe the general language of the foregoing cases can be extended to authorize or approve the giving of a sole proximate cause instruction. On the contrary Page v. St. Louis Southwestern Railway Co., 349 F.2d 820 (5th Cir.1965), concludes that the introduction of such an issue is likely to be confusing and is not a distinct issue apart from the standard imposed by the FELA.

* * *

As indicated earlier in this opinion *Helton v. Thomson and Chicago, St. P., M. & O. R. Co. supra* (cited in the IPI comment to 160.02) do not authorize or require the modification recommended.

See also the comment to IPI 160.10.

160.02 FELA--Issues Made by the Pleadings

[1] [The plaintiff claims that he was injured and sustained damages while he was engaged in the course of his employment by the railroad.]

[The plaintiff claims that damages were sustained by reason of the (injury) (death) of the decedent while the decedent was engaged in the course of his employment by the railroad.]

[2] The plaintiff further claims that the railroad violated the Federal Employers' Liability Act in that:

a. [an (officer) (agent) (or) (other employee) (of the) railroad was negligent in that]

[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

b. [there was a defect or insufficiency due to the railroad's negligence in its (cars) (engines) (appliances) (machinery) (track) (roadbed) (works) (boats) (wharves) (or) (other equipment).]

[3] The plaintiff further claims that the [injury] [death] resulted in whole or in part from one or more of the alleged violations of the Act.

[4] The railroad denies [that it violated the Federal Employers' Liability Act as claimed by the plaintiff] [or] [and] [that the (plaintiff) (decedent) was engaged in the course of his employment for the railroad at the time of the alleged occurrence].

[5] [The railroad further denies that (any of the alleged injuries) (the death) resulted, in whole or in part, from any violation of the Act.]

[6] [The railroad further denies that the plaintiff (was injured) (or) sustained damages (to the extent claimed).]

[7] [The railroad claims that the (plaintiff) (decedent) was contributorily negligent (in that) (in one or more of the following respects):]

[Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's or decedent's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[8] [The railroad further claims that one or more of the foregoing caused in whole or in part the (plaintiff's injuries) (decedent's death).]

[9] [The plaintiff (denies that (he did) (the decedent did) any of the things claimed by the railroad,) (denies that (he) (the decedent) was negligent (in doing any of the things claimed by

the railroad,) (to the extent claimed by the railroad),) (and denies that any claimed act or omission on (his) (the decedent's) part caused in whole or in part (his claimed injuries) (the decedent's death)).]

Notes on Use

The instruction assumes that there is no factual issue as to whether the defendant was a common carrier by railroad in interstate commerce and whether the plaintiff was employed in such commerce. Where such issues exist, the instruction should be modified by inserting the necessary additional statutory language in lieu of the terms "railroad" or "employee," as the case may be. In the event there is an issue as to whether interstate commerce is involved, the definition of "interstate commerce" contained in paragraph 2 of 45 U.S.C.A. § 51 should be given. Where there is an issue as to whether the employee was engaged in the course of his employment, IPI 160.05, defining this phrase, should be used with this instruction.

Also see Notes on Use to IPI 160.01.

This instruction can be used in cases involving injury or death. Section 59 of the Act provides for the survival of actions under the Act to the personal representative for the surviving spouse, child, parent or next of kin. As opposed to the Illinois Wrongful Death Act, which is for the benefit of the "surviving spouse and next of kin" (740 ILCS 180/2 (1994)), the next of kin under FELA have no right of recovery if there is a spouse, child or parent surviving. In a death case under FELA use IPI 160.26.

Comment

See Comment to IPI 160.01.

For the issue of proximate cause *see* Comment to IPI 160.04.

In *Bridgeman v. Terminal R.R. Ass'n,* 195 Ill.App.3d 966, 552 N.E.2d 1146, 142 Ill.Dec. 405 (5th Dist.1990), a railroad employee had notified co-workers, including a foreman, that he was not feeling well. He was subsequently found in a bathroom, slumped down against the wall. An ambulance was called and the employee was pronounced dead at the scene. The court held that the railroad had a duty to help the employee once it was aware of his need for help. Because there was conflicting testimony as to when help was sought, the court held that enough had been established to submit the question of the railroad's negligence to the jury.

In *Laird v. Illinois Central Gulf R. Co.,* 208 Ill.App.3d 51, 566 N.E.2d 944, 153 Ill.Dec. 94 (5th Dist.1991), a railroad employee who had a long history of back problems was injured after helping to move 200 pound kegs and 150 pound spike pullers. In its motion for a directed verdict, the railroad claimed that because the employee failed to obtain an off-duty or light-duty medical excuse, it was his own negligence that was the sole proximate cause of his injuries. The appellate court upheld the denial of this motion and held that "the railroad had a duty to assign employees to work for which they are reasonably suited and will breach that duty if it negligently assigns an employee to perform work beyond his capacity."

160.02.01 FELA--Issues Made by the Pleadings--Emotional Injury--Zone of Danger

[1] [The plaintiff claims that he suffered emotional injury that resulted in damages while he was in the zone of danger of physical harm and while he was engaged in the course of his employment by the railroad.]

[2] The plaintiff further claims that the railroad violated the Federal Employers' Liability Act in that:

a. [an (officer) (agent) (or) (other employee) (of the) railroad was negligent in that]

[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

b. [there was a defect or insufficiency due to the railroad's negligence in its (cars) (engines) (appliances) (machinery) (track) (roadbed) (works) (boats) (wharves) (or) (other equipment).]

[3] The plaintiff further claims that his injury and damages resulted in whole or in part from one or more of the alleged violations of the Act.

[4] The railroad [denies that it violated the Federal Employers' Liability Act as claimed by the plaintiff] [or] [and] [denies that the plaintiff was in the zone of danger of physical harm] [or] [and] [denies that the (plaintiff) (decedent) was engaged in the course of his employment for the railroad at the time of the alleged occurrence].

[5] [The railroad further denies that any of the alleged emotional injuries resulted, in whole or in part, from any violation of the Act.]

[6] [The railroad further denies that the plaintiff (was emotionally injured) (or) sustained damages (to the extent claimed).]

[7] [The railroad claims that the (plaintiff) (decedent) was contributorily negligent (in that) (in one or more of the following respects):]

[Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[8] [The railroad further claims that one or more of the foregoing caused in whole or in part the plaintiff's emotional injuries.]

[9] [The plaintiff (denies that he did any of the things claimed by the railroad,) (denies that he was negligent (in doing any of the things claimed by the railroad,) (to the extent claimed

by the railroad),) (and denies that any claimed act or omission on his part caused in whole or in part his claimed emotional injuries).]

Notes on Use

The instruction assumes that there is no factual issue as to whether the defendant was a common carrier by railroad in interstate commerce and whether the plaintiff was employed in such commerce. Where such issues exist, the instruction should be modified by inserting the necessary additional statutory language in lieu of the terms "railroad" or "employee," as the case may be. In the event there is an issue as to whether interstate commerce is involved, the definition of "interstate commerce" contained in paragraph 2 of 45 U.S.C.A. § 51 should be given. Where there is an issue as to whether the employee was engaged in the course of his employment, IPI 160.05, defining this phrase, should be used with this instruction.

Also see Notes on Use to IPI 160.01.

This instruction should be used in cases involving emotional injury only. Use of this instruction assumes that the plaintiff suffered no physical injury other than that resulting from his emotional injury.

Comment

See Comment to IPI 160.01.

For the issue of proximate cause *see* Comment to IPI 160.04.

In *Bridgeman v. Terminal R.R. Ass'n,* 195 Ill.App.3d 966, 552 N.E.2d 1146, 142 Ill.Dec. 405 (5th Dist.1990), a railroad employee had notified co-workers, including a foreman, that he was not feeling well. He was subsequently found in a bathroom, slumped down against the wall. An ambulance was called and the employee was pronounced dead at the scene. The court held that the railroad had a duty to help the employee once it was aware of his need for help. Because there was conflicting testimony as to when help was sought, the court held that enough had been established to submit the question of the railroad's negligence to the jury.

In *Laird v. Illinois Central Gulf R. Co.,* 208 Ill.App.3d 51, 566 N.E.2d 944, 153 Ill.Dec. 94 (5th Dist.1991), a railroad employee who had a long history of back problems was injured after helping to move 200 pound kegs and 150 pound spike pullers. In its motion for a directed verdict, the railroad claimed that because the employee failed to obtain an off-duty or light-duty medical excuse, it was his own negligence that was the sole proximate cause of his injuries. The appellate court upheld the denial of this motion and held that "the railroad had a duty to assign employees to work for which they are reasonably suited and will breach that duty if it negligently assigns an employee to perform work beyond his capacity."

In *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), the Court recognized a claim for negligent infliction of emotional distress under FELA

and further held that the zone of danger test applies to determine who may recover for the negligent infliction of emotional distress.

160.03 FELA--Burden of Proof

[Part A]

The plaintiff has the burden of proving each of the following propositions:

[First, that he was injured and sustained damages while he was engaged in the course of his employment by the railroad.]

[First, that the plaintiff sustained damages as a result of the decedent's death while the decedent was engaged in the course of his employment by the railroad.]

Second, that the railroad violated the Federal Employers' Liability Act in one of the ways claimed by the plaintiff as stated to you in these instructions.

Third, that the [injury] [death of the decedent] and damages to the plaintiff resulted, in whole or in part, from a violation of the Federal Employers' Liability Act.

[If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the railroad.]

[Part B]

[If you find in favor of the plaintiff and against the railroad, you must then consider the railroad's claim that the plaintiff was contributorily negligent.

As to that claim, the railroad has the burden of proving each of the following propositions:

First, that the (plaintiff) (decedent) acted or failed to act in one of the ways claimed by the railroad as stated to you in these instructions and that in so acting, or failing to act, the (plaintiff) (decedent) was negligent;

Second, that the (plaintiff's) (decedent's) negligence was a cause in whole or in part of his (injury) (and) (death).

If you find from your consideration of all the evidence that the railroad has proved each of these propositions, then you will reduce the plaintiff's damages in the manner stated to you in these instructions. On the other hand, if you find from your consideration of all the evidence that either of these propositions has not been proved, then you will not reduce the plaintiff's damages.]

Notes on Use

If there is evidence of the plaintiff's or decedent's contributory negligence, then Part B of this instruction should be given.

Also see Notes on Use to IPI 160.01.

Comment

See Comment to IPI 160.01.

An instruction that under the FELA the burden is on the defendant to prove contributory negligence by the preponderance of the evidence was approved in *Fisher v. Chicago, R. I. & P. R. Co.,* 290 Ill. 49, 124 N.E. 831 (1919). The reason for inclusion of such an instruction is that the burden of proof has been held a matter of substance to be determined by federal law rather than local law in actions under this statute. *Central Vermont R. Co. v. White,* 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915), and cases there cited. In that case, the Court said (238 U.S. at 512, 83 S.Ct. at 868):

> But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff . . . . Congress in passing the Federal Employers' Liability Act evidently intended that the federal statute should be construed in the light of these and other decisions of the federal court.

160.03.01 FELA--Burden of Proof--Emotional Injury--Zone of Danger

[Part A]

The plaintiff has the burden of proving each of the following propositions:

[First, that he suffered emotional injury that resulted in damages while he was in the zone of danger of physical harm and while he was engaged in the course of his employment by the railroad.]

Second, that the railroad violated the Federal Employers' Liability Act in one of the ways claimed by the plaintiff as stated to you in these instructions.

Third, that the emotional injury and damages to the plaintiff resulted, in whole or in part, from a violation of the Federal Employers' Liability Act.

[If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the railroad.]

[Part B]

[If you find in favor of the plaintiff and against the railroad, you must then consider the railroad's claim that the plaintiff was contributorily negligent.

As to that claim, the railroad has the burden of proving each of the following propositions:

First, that the plaintiff acted or failed to act in one of the ways claimed by the railroad as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

Second, that the plaintiff's negligence was a cause in whole or in part of his emotional injury.

If you find from your consideration of all the evidence that the railroad has proved each of these propositions, then you will reduce the plaintiff's damages in the manner stated to you in these instructions. On the other hand, if you find from your consideration of all the evidence that either of these propositions has not been proved, then you will not reduce the plaintiff's damages.]

Notes on Use

If there is evidence of the plaintiff's contributory negligence, then Part B of this instruction should be given.

Also see Notes on Use to IPI 160.01 and 160.02.01

Comment

See Comments to IPI 160.01 and 160.02.01.

An instruction that under the FELA the burden is on the defendant to prove contributory negligence by the preponderance of the evidence was approved in *Fisher v. Chicago, R. I. & P. R. Co.,* 290 Ill. 49, 124 N.E. 831 (1919). The reason for inclusion of such an instruction is that the burden of proof has been held a matter of substance to be determined by federal law rather than local law in actions under this statute. *Central Vermont R. Co. v. White,* 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915), and cases there cited. In that case, the Court said (238 U.S. at 512, 83 S.Ct. at 868):

> But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff . . . . Congress in passing the Federal Employers' Liability Act evidently intended that the federal statute should be construed in the light of these and other decisions of the federal court.

160.03.02 FELA--Definition of Zone of Danger of Physical Harm

When I use the expression "zone of danger of physical harm," I mean that location where the plaintiff [suffered physical impact] [or] [was placed in immediate risk of physical harm] from the claimed acts of the railroad.

Notes on Use

This instruction should be given whenever IPI 160.02.01 or IPI 160.03.01 is given.

Comment

See Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994).

160.04 Definition of Contributory Negligence for Use in FELA Cases Only

When I use the expression "contributory negligence" [in Count ____], I mean negligence on the part of the [plaintiff] [decedent] that contributed in whole or in part to the [alleged] [injury] [death].

Notes on Use

This instruction is to be used only when contributory negligence is an issue. If contributory negligence is not an issue, use IPI 160.11.

Contributory negligence may also be at issue in a count other than the count of the complaint based on FELA. If contributory negligence is at issue in a count other than the FELA count, then specify in the bracket in which count the FELA definition of contributory negligence is to be used.

Comment

The IPI 160 series instructions do not use the phrase "proximate cause," but instead uses the phrase "that contributed in whole or in part" in reference to negligence or contributory negligence. Early FELA cases refer to "proximate cause." *See*, e.g., *Tennant v. Peoria & P. U. Ry. Co.,* 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944); *Williams v. N.Y. Central R. Co.,* 402 Ill. 494, 84 N.E.2d 399 (1949); *Allendorf v. E., J. & E. Ry. Co.,* 8 Ill.2d 164, 133 N.E.2d 288 (1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956); *Ganotis v. New York Central R.R. Co.,* 342 F.2d 767 (6th Cir.1965); *Coray v. Southern Pacific Co.,* 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949).

The more recent FELA cases have, however, adopted the standard set forth in *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). In *Rogers,* the court reversed the Missouri Supreme Court and sustained a jury verdict in holding that (352 U.S. at 506, 77 S.Ct. at 448):

> 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.

In so holding, the court rejected the Missouri Supreme Court's decision as having adopted the "language of proximate causation."

In *Hamrock v. Consolidated Rail Corp.,* 151 Ill.App.3d 55, 501 N.E.2d 1274, 1278; 103 Ill.Dec. 736, 740 (1st Dist.1986), the court quoted from *Rogers* and added, "In order to recover under the FELA, a plaintiff must show both negligence on the part of the employer and causation; however, 'the quantum of evidence necessary to establish liability is much less in a FELA case than it would be in an ordinary negligence case [cite].' "

The Fifth Circuit discussed proximate cause, negligence and contributory negligence at great length in *Page v. St. Louis Southwestern Ry. Co.,* 349 F.2d 820 (5th Cir.1965), where the district court defined an injury "proximately caused" as one caused by an act or omission which "played any part, no matter how small, in actually bringing about or causing the injury." *Id.* at 822, fn. 3. In reversing a judgment for the defendant, the court remarked (349 F.2d at 824, 827):

> [O]n the Rogers thesis which we follow, there is really no place for "proximate cause" as such. True, there must be a causal relation either to impose damages against the Railroad or to require diminution for negligence of the injured worker. But it only adds to the problem to recast this simplified formula in the awkward but outmoded dialectic.
>
> * * *
>
> We ought to avoid those practices which "distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury." [Citation omitted]. All of the issues, affirmative and defensive ... can be simply inquired into in a simple way . . . . When done in this fashion, with suitable accompanying general instruction ..., there is no need any longer for putting this in the labored terms of "proximate cause" or "sole proximate cause" or "contributory negligence."

In *Weese v. Chesapeake & O. Ry. Co.,* 570 F.2d 611, 613 (6th Cir.1978), *Essary v. Louisiana Dock Co.,* 66 Ill.App.3d 182, 383 N.E.2d 731, 22 Ill.Dec. 923 (5th Dist.1978), and *Hollinghead v. Toledo P. & W. R.R. Co.,* 39 Ill.App.3d 538, 349 N.E.2d 98, 101 (3d Dist.1976), the courts adopted the *Rogers* standard, that the proofs need only justify the conclusion that the employer's negligence played any part, *even the slightest*, in producing the injury.

In *Gilmore v. Toledo, P. & W. R.R. Co.,* 36 Ill.2d 510, 224 N.E.2d 228 (1967), the court also considered the question. After discussing the old and new concepts of what constituted "proximate cause," the court concluded (36 Ill.2d at 515, 224 N.E.2d at 231):

> It is apparent from what we have already said that an instruction saying defendants' negligence must be in whole or in part "the cause" of the injury is an adequate one in a FELA case. The addition of the word proximate would add nothing and is not essential.

In *Ganotis v. New York Central R.R. Co.,* 342 F.2d 767 (6th Cir.1965), the court stated (342 F.2d at 768-769):

> One of the purposes of the Federal Employers' Liability Act, as amended, was to abolish the common law defenses of assumption of risk, fellow servant rule and contributory negligence. With respect to contributory negligence it established the rule of comparison of negligence instead of barring the employee from all recovery because of contributory negligence. [cite] We do not believe that the Act also intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and

proximate cause when considered in connection with the employee's contributory negligence. If it had so intended, express words to that effect could easily have been used.

Based on the above-cited cases, the committee believes the term “proximate cause” should not be used in the plaintiff's case or in the defendant's case. The committee believes that in place of the term “proximate cause,” the terms “in whole or in part” should be used to define the causation element because the terms “in whole or in part” are used in the statute.

160.05 FELA--When Employee Is Engaged in the Course of His Employment

A person is in the course of his employment when he is doing anything he was employed to do, or when he is doing anything which his employment authorizes him to do or which is reasonably incidental to the employment.

Notes on Use

This instruction should only be given where there is a factual issue whether the employee was engaged in the course of his employment at the time of the occurrence.

Comment

The phrase "course of his employment" has received a broad construction in FELA cases, due, in part, to the fact that the exigencies of railroading require a wide variety of activities, otherwise personal, to be done on the job. *Chicago, M., St. P. & P. R. Co. v. Kane,* 33 F.2d 866 (9th Cir.1929), *cert. denied*, 280 U.S. 588, 50 S.Ct. 37, 74 L.Ed. 637 (1929) (employee crossing track from bunk car to toilet before going to work); *Mostyn v. Delaware, L. & W. R. Co.,* 160 F.2d 15 (2d Cir.1947), *cert. denied*, 332 U.S. 770, 68 S.Ct. 82, 92 L.Ed. 355 (1947) (employee sleeping on ground along side track where he was injured was in the "employ" of the railroad); *Healy v. Pennsylvania R. Co.,* 184 F.2d 209 (3d Cir.1950), *cert. denied*, 340 U.S. 935, 71 S.Ct. 490, 95 L.Ed. 674 (1951) (employee crossing tracks to inquire of supervisor as to delivery of war bond; scope of employment held for jury).

Several decisions have indicated that § 229 of the Restatement (Second) of Agency (1957) sets forth appropriate guidelines for determining whether the employee's conduct is within the scope of his employment. *Wilson v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,* 841 F.2d 1347, 1355 (7th Cir.1988); *Rogers v. Chicago & N.W. Transp. Co.,* 947 F.2d 837, 839 (7th Cir.1991). These factors include (a) whether or not the acts are commonly done by such servants; (b) the time, place, and purpose of the act; (c) the previous relations between the master and the servant; (d) the extent to which the business of the master is apportioned between different servants; (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; (f) whether or not the master has reason to expect that such an act will be done; (g) the similarity in quality of the act done to the act authorized; (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent of departure from the normal method of accomplishing an authorized result; and (j) whether or not the act is seriously criminal. Restatement (Second) of Agency § 229(2) (1957).

Acts of employee were deemed within the scope of his employ where employee, while on his way to eat lunch, slipped on ice in parking lot of the motel at which he was staying during a rest period. Duffield v. Marra, Inc., 166 Ill.App.3d 754, 520 N.E.2d 938, 117 Ill.Dec. 587 (5th Dist.1988).

160.06 FELA--Course of Employment as Matter of Law

At the time of this occurrence the [plaintiff] [decedent] was in the course of his employment.

Notes on Use

This instruction may be given only where there is no question of fact as to whether the plaintiff was in the course of his employment. It is given because IPI 160.01-160.03 refers to the statutory requirement that a plaintiff or decedent, under the Act, must be injured "while employed." Therefore, it is desirable, where no such issue has been raised, to remove any question concerning it from the jury's consideration.

160.07 FELA--Duty to Provide Safe Tools, Appliances, and Machinery Where Tools, etc., Supplied

It was the duty of the railroad to use ordinary care to provide [the plaintiff] [its employees] with reasonably safe and suitable [tools] [machinery and appliances] with which to do [his] [their] work. [Tools] [Machinery and appliances], in order to be reasonably safe and suitable, need not necessarily be the latest or best which could have been provided to do the work.

Comment

A railroad's duty with respect to tools, machinery and appliances is to use ordinary or reasonable care to furnish those which are reasonably safe and suitable. *Jacob v. New York City,* 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942). What is reasonable depends upon the circumstances, and the greater the danger, the greater the obligation to use all appliances readily obtainable to prevent accidents. *Margevich v. Chicago & N.W. Ry. Co.,* 1 Ill.App.2d 162, 116 N.E.2d 914 (1st Dist.1953), *cert. denied*, 348 U.S. 861, 75 S.Ct. 84, 99 L.Ed. 678 (1954).

In *Lowe v. Norfolk & W. Ry. Co.,* 124 Ill.App.3d 80, 463 N.E.2d 792, 79 Ill.Dec. 238 (5th Dist.1984), employees had presented evidence of a lack of protective clothing and the trial court modified the instruction by replacing "[tools] [machinery and appliances]" with "protective equipment." The Appellate Court, in reversing the case for retrial, held that the use of the language was not error, but that instruction should be more carefully reworded on retrial.

160.08 FELA--Duty to Provide a Reasonably Safe Place to Work

It was the duty of the railroad to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work.

Comment

The duty of a railroad is to use ordinary care to furnish a reasonably safe place to work. The diligence which must be used to meet this duty increases as the danger increases. *Bailey v. Central Vermont Ry. Co.,* 319 U.S. 350, 352; 63 S.Ct. 1062, 1063; 87 L.Ed. 1444 (1943); *Inman v. Baltimore & Ohio R. Co.,* 361 U.S. 138, 80 S.Ct. 242, 4 L.Ed.2d 198 (1959) (reversal of trial court's judgment for plaintiff affirmed by 5 to 4 vote, where plaintiff, a crossing guard, was struck by drunken motorist while flagging traffic and action was predicated on violation of the duty to provide a safe place to work).

This duty exists even when railroad employees are required to go onto premises of a third party over which the railroad has no control. *Duffield v. Marra, Inc.,* 166 Ill.App.3d 754, 520 N.E.2d 938, 117 Ill.Dec. 587 (5th Dist.1988).

In *Laird v. Illinois Central Gulf R. Co.,* 208 Ill.App.3d 51, 566 N.E.2d 944, 153 Ill.Dec. 94 (5th Dist.1991), the court held that where IPI 160.02 and 160.07 were given, the trial court did not commit error by refusing to give a non-IPI instruction that the employer was not a guarantor of the safety of the work place.

In *Ellis v. St. Louis Southwestern Ry. Co.,* 193 Ill.App.3d 357, 549 N.E.2d 899, 140 Ill.Dec. 248 (5th Dist.1990), the jury was given this instruction, and the employee claimed that the railway furnished him defective equipment with which to work. The Appellate Court held that because the plaintiff had not presented any evidence that the employee's injury was due to an unsafe workplace, it was not error to refuse to give a separate safe workplace issues instruction.

Use of this instruction in unmodified form was upheld in *Greenfield v. Consolidated Rail Corp.,* 150 Ill.App.3d 331, 500 N.E.2d 1083, 103 Ill.Dec. 12 (5th Dist.1986), and *Howes v. Baker,* 16 Ill.App.3d 39, 305 N.E.2d 689 (1st Dist.1973).

160.09 FELA--No Assumption of Risk By Employee

At the time of the occurrence there was in force a federal statute which provided that in any action brought against a railroad to recover damages for [injury to] [death of] an employee, the employee shall not be held to have assumed the risks of his employment in any case where the [injury] [death] resulted in whole or in part from the negligence of any of the officers, agents or employees of the railroad, [or by reason of any defect, due to the railroad's negligence, in its (cars,) (engines,) (machinery,) (track,) (roadbed,) (works,) (boats,) (wharves,) (or) (other equipment)].

Comment

This instruction includes language from that portion of Section 4 of the Act, 45 U.S.C.A. § 54, applicable to FELA actions which do not involve either Safety Appliance or Boiler Inspection Act violations. It also includes language concerning equipment which is, due to the railroad's negligence, defective, since courts have held that the assumption of risk defense is also unavailable when such defective equipment causes an injury. *Birchem v. Burlington N. R. Co.,* 812 F.2d 1047 (8th Cir.1987).

In *Hamrock v. Consolidated Rail Corp.,* 151 Ill.App.3d 55, 501 N.E.2d 1274, 103 Ill.Dec. 736 (1st Dist.1986), refusal to give a similar instruction was held to be reversible error. Although the defense was not explicitly asserted, there was evidence from which a jury could have reasonably inferred that the employee had assumed the risk. The railroad had attempted to show that the employee's negligence was the sole cause of employee's injuries. *See also Dilley v. Chesapeake & O. R. Co.,* 327 F.2d 249 (6th Cir.1964) (stating that where the jury had heard nothing with respect to the doctrine of assumption of risk until the doctrine was defined and its application debated in final arguments, and merely mentioned in court instructions, it would have been better practice to have eliminated any reference to the doctrine), and *Howes v. Baker,* 16 Ill.App.3d 39, 305 N.E.2d 689 (1st Dist.1973) (in which the court held that it was not error to give the instruction under the facts of that case, although it was not necessary to include the instruction in every case).

160.10 FELA--Burden of Proof--Contributory Negligence

[Withdrawn]

Notes on Use

This instruction has been withdrawn, and is now part of IPI 160.03. It previously provided "The burden of proving contributory negligence on the part of the [plaintiff] [decedent] rests upon the railroad."

The instruction on issues is now IPI 160.02.

The instruction on contributory negligence is now IPI 160.04.

160.11 FELA--No Contributory Negligence as a Matter of Law

The evidence in this case fails to show contributory negligence on the part of [the plaintiff] [the deceased employee], and, therefore, you should not consider the question of contributory negligence raised by the defendant.

Notes on Use

This instruction is to be given only when the jury has been told during the trial that contributory negligence is in issue, and at the close of all the evidence, the proof is insufficient to submit the issue to the jury. Where no mention of contributory negligence has been made there is no need for this instruction.

160.12 Damages Instructions

Comment

Additional damage instructions are necessary in FELA actions because of differences in comparative negligence rules and the elements of damages recoverable in death actions under the FELA as opposed to a state wrongful death action. Therefore, in injury actions, the basic group of damage instructions is the 30.00 series supplemented with IPI 160.13 or 160.23, depending on whether there are single or multiple defendants. On the other hand, in death actions, IPI 160.14-160.20 entirely replace the 31.00 series on wrongful death. General damage instructions concerning mitigation of damages, IPI 33.01 and 33.02, discount of future damages and mortality tables, IPI 34.00, exemplary damages, IPI 35.00, and forms of verdict, IPI 45.00, can be used in either injury or death actions under the FELA.

160.13 FELA--Diminishing Damages Because of Contributory Negligence

If you find that the [plaintiff's injury] [decedent's death] was caused by a combination of negligence of [one or more of] the railroad defendant[s] and contributory negligence of the [plaintiff] [decedent], you must determine the amount of damages to be awarded by you on Verdict Form ____ as follows:

First: Determine the total amount of damages to which the [plaintiff] [decedent] would be entitled under the court's instructions if the plaintiff had not been contributorily negligent.

Second: Assume that 100% represents the total combined negligence of all persons whose negligence contributed in whole or in part to the [plaintiff's] [decedent's] [injury] [or] [death], including the plaintiff[,] [and] the defendant[s you found liable] [, and all other persons]. Determine the percentage of such negligence attributable solely to the plaintiff [the decedent].

Third: Reduce the total amount of the plaintiff's damages by the proportion or percentage of negligence attributable solely to the plaintiff.

The resulting amount, after making such reduction, will be the amount of your verdict.

Notes on Use

The bracketed words and phrases in this instruction represent the alternative forms necessary to adapt the instruction to either a death action or an action for personal injuries under the Act. *See* IPI 160.01.

Comment

The jury should be instructed on the pure form of comparative negligence, in accord with Section 53 of the Act. *See Louisville & N. R. Co. v. Wene,* 202 Fed. 887, 890 (7th Cir.1913); *Sprickerhoff v. Baltimore & O. R. Co.,* 323 Ill.App. 340, 55 N.E.2d 532 (4th Dist.1944); *Thatch v. Missouri Pac. R. Co.,* 47 Ill.App.3d 980, 362 N.E.2d 1064, 6 Ill.Dec. 242 (5th Dist.1977).

160.14 FELA--Measure of Damages--Death--No Contributory Negligence

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for any pecuniary loss they have suffered and for any pecuniary loss they are reasonably certain to suffer in the future by reason of the death of the decedent.

[In calculating the amount of any future pecuniary loss, you must not simply multiply the survivors' life expectancies by the annual losses. Instead, you must determine the present cash value of the future losses. "Present cash value" means the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of the pecuniary losses at the times in the future when they will be sustained.]

Notes on Use

If the mortality tables have been introduced into evidence, IPI 34.05 should be used. Failure to give that type of cautionary instruction concerning life expectancy, work expectancy, and present value, has been held error in a FELA case. *Fritz v. Pennsylvania R. Co.,* 185 F.2d 31 (7th Cir.1950). *But see* Illinois Supreme Court Rule 366(b) (2) (i) (1994): "No party may raise on appeal the failure to give an instruction unless he shall have tendered it" and Fed. R. Civ. P. 51: "No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict . . . ."

Because it duplicates certain portions of IPI 34.05, the bracketed material should be omitted when that instruction is given.

Comment

The damages available under FELA are less extensive than those recoverable under the Illinois Wrongful Death Act. For example, under FELA, no cause of action for loss of consortium is allowed. *Kelsaw v. Union Pacific R. Co.,* 686 F.2d 819 (9th Cir.1982), *cert. denied*, 459 U.S. 1207, 103 S.Ct. 1197, 75 L.Ed.2d 440 (1983); *Howes v. Baker,* 16 Ill.App.3d 39, 305 N.E.2d 689 (1st Dist.1973). By contrast, the Illinois Wrongful Death Act does allow for recovery based on loss of consortium. *See*, *e.g.*, *Bullard v. Barnes,* 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984); *Elliott v. Willis,* 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982).

The limited measure of damages available under FELA was discussed by the United States Supreme Court in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). In that case, the Court held that the federal statute providing for damages in an admiralty wrongful death action (known as the Jones Act) incorporates FELA standards and, like FELA, allows recovery only for pecuniary loss. The Court thus denied recovery for loss of society.

The United States Supreme Court has also held that, as a matter of federal law, damage awards in suits governed by federal law, including FELA cases, should be based on present

value. *St. Louis Southwestern R. Co. v. Dickerson,* 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985).

160.15 FELA--Death Action--How to Determine Pecuniary Loss

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate [name(s) of survivors entitled to claim] for the pecuniary loss proved by the evidence to have resulted to [name(s) of survivors entitled to claim] from the death of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. The decedent's personal expenses (and other deductions);]

[4. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give his child(ren) had he lived;]

[5. His age;]

[6. His sex;]

[7. His health;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities].

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of [decedent's name].

Comment

The FELA has consistently been interpreted as providing recovery only for pecuniary loss. In *Michigan Central R. Co. v. Vreeland,* 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913), the United States Supreme Court explained that the language of the FELA wrongful death provision is essentially identical to that of Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846), the first wrongful death statute. Although Lord Campbell's Act did not explicitly limit the "damages" to be recovered, that Act and many state statutes that followed it were consistently

interpreted as providing only for pecuniary loss. *Vreeland*, 227 U.S. at 69-71; 33 S.Ct. at 195-196. The Supreme Court accordingly so construed the death provision of FELA. *Id*.

The limited measure of damages available under the FELA was reaffirmed in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), where the Supreme Court construed the federal statute providing for damages in an admiralty wrongful death action (Jones Act). Recognizing that Congress incorporated the FELA unaltered into the Jones Act, the Court stated that "Congress must have intended to incorporate the pecuniary limitation on damages as well." 498 U.S. at _, 111 S.Ct. at 325. The Court thus held that there is no recovery for loss of society in a Jones Act wrongful death action. *Id.*

By contrast, damages recoverable under the Illinois Wrongful Death Act are not limited solely to tangible economic loss; they may also include recovery for loss of consortium or for loss of society. *See* IPI 160.14.

Damages recoverable by the deceased's children are restricted to the benefits they might have expected to receive during minority, unless proof is made of unusual facts showing that a child might reasonably expect support after reaching majority. *Hines v. Walker,* 225 S.W. 837 (Tex.Civ.App.1920), *error refused*.

Cases recognizing that the care, attention, instruction, training, advice and guidance which the evidence showed the decedent reasonably might have been expected to give his children during their minority have pecuniary value are: *Norfolk & W. R. Co. v. Holbrook,* 235 U.S. 625, 629; 35 S.Ct. 143, 144; 59 L.Ed. 392 (1915); *St. Louis & S.F.R. Co. v. Duke,* 192 Fed. 306, 309-310 (8th Cir.1911); *Duke v. St. Louis & S.F.R. Co.,* 172 Fed. 684, 688-89 (C.C.W.D.Ark.1909); *Cain v. Southern R. Co.,* 199 Fed. 211, 213 (C.C.E.D.Tenn.1911); *Giles v. Chicago Great Western R. Co.,* 72 F.Supp. 493 (D.Minn.1947); *Liepelt v. Norfolk & W. Ry. Co.,* 62 Ill.App.3d 653, 378 N.E.2d 1232, 19 Ill.Dec. 357 (1st Dist.1978), *rev'd on other grounds*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

In *St. Louis & S.F.R. Co. v. Duke,* 192 Fed. 306 (8th Cir.1911), the court approved an instruction that "neither sympathy nor bereavement, nor affection, nor love, nor devotion which might have existed between the husband and wife and children can be rightly considered as an element of damage in a case of this kind. The law permits compensation for the pecuniary loss sustained, but not for sorrow, loss of companionship, or society." *See also Michigan Cent. R. Co. v. Vreeland,* 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913); *Allendorf v. Elgin, J. & E. Ry. Co.,* 8 Ill.2d 164, 179-180; 133 N.E.2d 288, 295-296 (1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956). Evidence of the anticipated future income tax liability that the decedent would have incurred had he lived is admissible to assist the jury in determining the survivor's net loss. *Norfolk & W. Ry. Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

Loss of future earnings may be based on the decedent's full life expectancy and need not be limited to an arbitrary retirement age as a wage earner. *Allendorf v. Elgin, J. & E. R. Co.,* 8 Ill.2d 164, 181, 133 N.E.2d 288, 296 (1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956); *Avance v. Thompson,* 387 Ill. 77, 84, 55 N.E.2d 57, 60 (1944), *cert. denied*, 323 U.S. 753, 65 S.Ct. 82, 89 L.Ed. 603 (1944).

160.16 FELA--Death Case--Survival Action

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will provide reasonable and fair compensation for any of the following elements of damages proved by the evidence to have been suffered by the decedent during the period between the time of the decedent's injuries and the time of his death and resulting from defendant's violation of the FELA, taking into consideration the nature, extent, and duration of the injury:

[Here insert the elements of damages which have a basis in the evidence.]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Notes on Use

This instruction is based upon IPI 30.01 and combines former IPI 160.16, 160.17, 160.18 and 160.19. With respect to appropriate elements of damage, *see generally* IPI Chapter 30. If contributory negligence is an issue in the case, IPI 160.13 concerning the diminution of damages due to contributory negligence, and IPI 11.01 defining contributory negligence, should be used with this instruction.

Comment

Survival action recovery under the FELA was cited by the Illinois Supreme Court in Murphy v. Martin Oil Co., 56 Ill.2d 423, 308 N.E.2d 583 (1974), as persuasive authority for departing from prior precedent and construing the Illinois Survival Act (735 ILCS 5/27-6 (1994)) to permit recovery for loss of property, loss of wages and conscious pain and suffering.

160.17 FELA--Medical Expenses--Death Case--Contributory Negligence an Issue

This instruction has been merged with IPI 160.16.

160.18 FELA--Death Case--Pain and Suffering of Deceased--No Contributory Negligence

This instruction has been merged with IPI 160.16.

160.19 FELA--Death Case--Pain and Suffering of Decedent--Contributory Negligence an Issue

This instruction has been merged with IPI 160.16.

160.20 FELA--Concerning Allocation of Damages--Death Case

The committee recommends that no instruction requiring the jury to allocate damages in a death case be given.

Comment

To conform to the statutory provision and the decisions construing it, an instruction on this subject should state that the jury should award only one aggregate sum. This is predicated upon the fact that section nine of the Act, 45 U.S.C.A. § 59, provides for "only one recovery." This may be covered by the forms of verdict so that no instruction is necessary.

The problem arises as to whether the jury should then allocate the award among the various beneficiaries. The statute is silent upon this point, and the decisions are not clear.

In *Gulf, C. & S. F. R. Co. v. McGinnis,* 228 U.S. 173, 176; 33 S.Ct. 426, 427; 57 L.Ed. 785 (1913), the statement was made that it was the function of the jury to apportion damages among the beneficiaries. In the later case of *Central Vermont R. Co. v. White,* 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915), the court interpreted the *McGinnis* case to mean that the jury might apportion damages among the beneficiaries in a FELA case where the state practice so provided. However, the Court also said (238 U.S. at 515, 35 S.Ct. at 869):

> That omission [of a statutory requirement that the jury apportion damages] clearly indicates an intent on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the states in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased--a matter for probate courts, and not for jurors.

It has likewise been held that a court has the power to compel a proper distribution of the recovery so as to protect the defendant against the claims of persons other than the plaintiff. *Anderson v. Louisville & N. R. Co.,* 210 Fed. 689 (6th Cir.1914). And, in connection with a judicially approved settlement, the apportionment has been held to be collateral or ancillary to the main controversy and, hence, within the jurisdiction of the Federal court in which the action was pending. *Stark v. Chicago, N. S. & M. Ry. Co.,* 203 F.2d 786 (7th Cir.1953).

In view of the foregoing authorities, the practical difficulties of proofs and computation involved in an apportionment, and possible disputes between the various classes of beneficiaries, the preferable practice is to permit the jury to return a verdict for the total damages and to require the trial judge to apportion that verdict among the beneficiaries shown to be entitled to participate in the recovery, protecting the defendant against additional claims. This treatment of the matter turns the apportionment into an ancillary proceeding between or among the beneficiaries.

160.21 FELA--Differing Effect of Contributory Negligence--Railroad and Non-Railroad Defendants--Employing and Non-Employing Railroad Defendants

The liability of the defendants in this case will be different if you find that the [plaintiff] [decedent] was guilty of contributory negligence.

As to the defendant [name railroad which employed plaintiff or decedent], if you find that its negligence, in whole or in part, caused [injury to the plaintiff] [the death of the decedent], then the defendant [name railroad which employed plaintiff or decedent] is liable, even if the [plaintiff] [decedent] was guilty of contributory negligence, because so far as the defendant [name railroad which employed plaintiff or decedent] is concerned, contributory negligence of the [plaintiff] [decedent] would reduce the amount of the damages which may be recovered but would not entirely prevent the [decedent's] [plaintiff's] recovery [of damages against that defendant].

As to the defendant [non-FELA defendant or railroad defendant that did not employ plaintiff or decedent], however, negligence of the [plaintiff] [decedent] which is more than 50% of the cause of the [injury] [death] would be a complete bar to recovery of damages from the defendant [non-FELA defendant or railroad defendant that did not employ plaintiff or decedent].

Notes on Use

IPI 160.13 concerning the diminution of damages because of contributory negligence, and IPI 11.01 defining contributory negligence should be used with this instruction.

Comment

At the time of the publication of IPI, Second Edition, contributory negligence was a complete bar to a common law negligence action. As a result, IPI 160.21 in the Second Edition instructed the jury as to the difference between pure comparative negligence under the FELA (damage reduction) and contributory negligence under Illinois law (complete bar to recovery) for actions which joined FELA claims with common law negligence actions. In *Alvis v. Ribar,* 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), the Illinois Supreme Court adopted the pure form of comparative negligence for all cases in which the trial commences on or after June 8, 1981. This decision conformed the Illinois law of contributory negligence to that which has been historically applicable to FELA actions. Because the plaintiff's contributory negligence would then have the same effect on railroad defendants which employed the plaintiff or decedent, non-railroad defendants, or non-employer railroad defendants, pursuant to the *Alvis* decision, former IPI 160.21 would no longer be applicable to actions arising prior to November 25, 1986.

For causes of action accruing on or after November 25, 1986, Illinois has adopted by statute a modified form of comparative negligence. The court is required to instruct the jury in writing that a non-FELA defendant should be found not liable if the jury finds that the contributory fault of the plaintiff is more than 50% of the proximate cause of the injury. *See* 735 ILCS 5/2-1107.1 (1994). As a result, this instruction should be given instructing the jury on the

difference between pure comparative negligence under the FELA and a modified comparative negligence under Illinois law.

This instruction differentiates between a FELA action and an ordinary negligence action as to the effect of contributory negligence. It is intended for use where liability against one co-defendant is asserted under the Act and liability against the other co-defendant is asserted under common law and both actions are tried together. The joinder of a FELA action with a common law action has repeatedly been sustained. *Doyle v. St. Paul Union Depot Co.,* 134 Minn. 461, 159 N.W. 1081 (1916); Bankson v. Illinois Central R. Co., 196 Fed. 171 (N.D.Iowa 1912); *Robbins v. Illinois Power & Light Corp.,* 255 Ill.App. 106 (3d Dist.1929). Even in jurisdictions where contributory negligence is a complete bar to recovery under the common law, it has been held that a FELA action may be tried together with a common law action. *Waylander-Peterson Co. v. Great Northern Ry. Co.,* 201 F.2d 408 (8th Cir.1953). Each party is entitled to have the law applicable to his case stated correctly. Because of the identity of terms, the jury will be less confused if the principles applicable to contributory negligence for both the FELA and the common law action are stated in the same instruction and differentiated.

160.22 Employing and Non-Employing Railroad Defendants--Differing Effect of Contributory Negligence on Liability

This instruction has been merged with 160.21.

160.23 FELA--Effect of Contributory Negligence on Damages Where Plaintiff, Third Party, and Railroad Are Negligent

If you find the defendant [non-FELA defendant or railroad defendant that did not employ plaintiff or decedent] not liable by reason of contributory negligence on the part of the [plaintiff] [decedent], and if you further find that the defendant [railroad that employed plaintiff or decedent] is liable, then you should assess damages against defendant [railroad which employed plaintiff or decedent] in the same manner as stated to you in these instructions.

Notes on Use

IPI 160.13 concerning the diminution of damages due to contributory negligence, and IPI 160.21 concerning the differing effect of contributory negligence in FELA and common law actions, should also be given. It is recommended that this instruction be given immediately following those instructions.

160.24 FELA--Burden of Proof--Contributory Negligence When Railroad and Either Non-Employing Railroad or Non-Railroad Are Defendants

The committee has withdrawn this instruction. The instruction on burden of proof on the issue of contributory negligence is now part of IPI 160.03.

Comment

In *Casey v. Baseden,* 111 Ill.2d 341, 490 N.E.2d 4, 95 Ill.Dec. 531 (1986), the Illinois Supreme Court held that the defendant has the burden of proving the plaintiff's contributory negligence. Since the burden of proving contributory negligence is the same under Illinois law as under the FELA, former IPI 160.24 is no longer a correct statement of the law.

160.25 FELA--Any Award of Damages Is Not Subject to Taxation

If you find for the plaintiff, any damages you award will not be subject to income taxes and therefore you should not consider taxes in fixing the amount of the verdict.

Comment

This instruction reflects the decision of the United States Supreme Court in Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 498; 100 S.Ct. 755, 759; 62 L.Ed.2d 689 (1980), and must be given if requested. It is applicable to all claims based on federal law but not as to claims involving purely state law. *See* Klawonn v. Mitchell, 105 Ill.2d 450, 456; 475 N.E.2d 857, 861; 86 Ill.Dec. 478, 482 (1985).

160.26 Death Case Under FELA

The plaintiff [personal representative] brings this action in a representative capacity by reason of his being [administrator] [executor] of the estate of [deceased's name], deceased. He represents the [surviving spouse] [child(ren)] [parent(s)] [next of kin] of the deceased. He is the real party in interest in this lawsuit, and in that sense is the real plaintiff whose damages you are to determine if you decide for the [administrator] [executor] of the estate of [deceased's name].

Comment

Under Section 59 of FELA the right of action given to the injured employee survives to his personal representative for the benefit of the beneficiaries provided for in this section; namely, "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 . . . ." 45 U.S.C.A. § 59.

Although the deceased's administrator is the "personal representative" under Section 59, *Williams v. Louisville & N.R. Co.,* 371 F.2d 125 (6th Cir.1967), *cert. denied*, 388 U.S. 919, 87 S.Ct. 2138, 18 L.Ed.2d 1364 (1967), the cause of action which survives under this section does not survive for the benefit of the deceased's estate, but only for the benefit of the relatives stated in this section and in the order specified. If no such relatives survive, no right of recovery is given by this section. *Hogan v. New York Cent. & H. R.R. Co.,* 223 Fed. 890 (2d Cir.1915).

160.27 Measure of Damages, Federal Employers' Liability Act Aggravation of Pre-Existing Condition

If you find for [(plaintiff's name)], you should compensate [(plaintiff's name)] for any aggravation of an existing disease or physical defect resulting from such injury. If you find that the pre-existing condition made [him] [her] more susceptible to injury than a person in good health, [(defendant's name)] is responsible for all injuries suffered by [him] [her] as a result of [their] [its] [his] [her] negligence. This is true even if those injuries are greater than would have been suffered by a person in good health under the same circumstances.

If you find that there was an aggravation of a pre-existing condition you should determine what portion of [(plaintiff's name)] condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make the determination or if it cannot be said that the condition would have existed apart from the injury, then [(defendant's name)] is liable for all of the injuries.

Notes on Use

This instruction should be given whenever there is evidence of an aggravation of a preexisting condition in a FELA case.

Comment

In *Schultz v. Northeast Illinois Regional Commuter Railroad Corporation, d/b/a Metra,* 201 Ill.2d 260, 775 N.E.2d 964, 266 Ill.Dec. 892 (2002), the Supreme Court determined that in FELA cases, the proper content of jury instructions regarding damages for an injury resulting from an aggravation of a pre-existing condition is determined by federal law. The Court concluded that an instruction essentially similar to 160.27 correctly stated the law that when the defendant's negligence aggravates a plaintiff's pre-existing condition, the defendant is liable only for the additional injury caused by the negligence.

This instruction is a composite of the instruction that the Supreme Court approved in the *Schultz* case and instructions cited in *Sauer v. Burlington Northern R.R. Co.,* 106 F.3d 1490 (10th Cir.1997) and *Stevens v. Bangor & Aroostook R.R. Co.,* 97 F.3d 594 (1st Cir.1996). In *Sauer,* the Court cited the Federal Pattern Instruction § 155.65 from the Federal Jury Practice and Instructions, 5th Edition (2001).