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How F.E.L.A. Became Liability Without Fault

Gaspare A. Corso*

In 1889 President Harrison said,

It is a reproach to our civilization that any class of American Workmen should, in pursuit of a necessary and useful vocation, be subject to a peril of life and limb as great as a soldier in time of war.¹

Those were indeed the days of social injustice and exploitation of the laboring class. And we were then, as now, a people given to the melodramatic, hearts-and-flowers approach.

In 1906 Congress enacted a Federal Employers' Liability Act, [34 Stat. 232 (1906)], covering all employees of common carriers by railroad when the carrier was engaged in interstate or foreign commerce. This act was held unconstitutional.² But a second act, passed in 1908 [45 U.S.C.A. Sec. 51-60], was limited to employees who were themselves in interstate or foreign commerce. This act is now in effect.³

The Federal Employers' Liability Act supersedes the common and statutory law of the states ("There is no federal common law"),⁴ and this is true regardless of where the action is brought.⁵ Under common law, the injured employee was faced with the burden of proof and obliged to overcome the defenses of contributory negligence, assumption of risk and the fellow-servant rule.⁶ But it is apparent that Congress was dissatisfied with the common law approach to the master-servant relation-

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¹ Hare, *Actions for Personal Injuries and Death of Railroad Workers*, 17 Ala. L. R. 201 (1965), citing 12 Messages and Papers of the Presidents 5486.

² *The Employers' Liability Cases*, 207 U. S. 463, 28 S. Ct. 141, 52 L. Ed. 297 (1908).

³ *Second Employers' Liability Cases*, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 (1912).

⁴ *Schopp v. Muller Dairies, Inc.*, 25 F. Supp. 50 (E. D. N. Y., 1938).

⁵ *Rowlands v. Chicago & N. W. Ry. Co.*, 149 Wis. 51, 135 N. W. 156 (1912).

⁶ *Prosser, Law of Torts*, 549 (3rd Edit., 1964).

ship.⁷ The practical effect (at the very least) of the F.E.L.A. is to abolish many of the defenses available at common law to an employer when faced by a suit by an employee for injuries received in the course and scope of his employment.⁸

Assumption of risk as a defense against employee suits, however, was for many years held valid under the acts except in cases where the employer had violated statutes specifically enacted for employee safety, despite long and often bitter criticism.⁹ However, at the first session of the 76th Congress in 1939, Congress specifically amended the act to eliminate the employer's defense of assumption of risk.¹⁰

While a person might sympathize with such statements as that of President Harrison in 1889, the following statement, by Francis H. Hare, printed in 1965, is enough to give one pause:

The results of the Act can be read in the statistics. In 1907 there were 4,534 railroad men killed and 87,644 injured in railroad work. In 1950, with more men and railroad work, there were 392 killed and 22,000 injured.¹¹

This is as good an example of statistical syllogistic absurdity as one is apt to find. Mr. Hare goes on to describe the "Decade of Progress" as a period beginning in 1957,¹² during which the Supreme Court has decided that sociology takes precedence over law.

The 1939 Amendment to the F.E.L.A. settled the question of assumption of risk under the act.¹³ As a result of this amendment, an employee will not be precluded from recovery by his departure from ordinary and customary practice in performing his duties. Nor will he be precluded from recovery even where he chooses, of his own volition, to perform his duties in an unnecessarily dangerous manner.¹⁴

Contributory negligence is abolished as a defense under the

⁷ *Rogers v. Missouri Pac. R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

⁸ *Elliott v. Payne*, 293 Mo. 581, 239 S. W. 851 (1922).

⁹ *Prosser*, *op. cit. supra* note 6, at 550-551.

¹⁰ 53 Stat. 1404 (1939).

¹¹ *Hare*, *op. cit. supra* note 1, at 204.

¹² *Id.* at 209.

¹³ 45 U. S. C. A. § 51 (1908).

¹⁴ *Thomson v. Boles*, 123 F. 2d 487 (8th Cir., 1941), cert. den. 315 U. S. 804, 62 S. Ct. 632, 86 L. Ed. 1204 (1942).

act,¹⁵ even where the employee's conduct would constitute a criminal offense in the state of the occurrence.¹⁶ The act does, however, by its terms, provide for the diminution of damages in proportion to the employee's negligence.¹⁷

Under F.E.L.A., as under common law, the employer has the duty of reasonable care in providing a safe place to work for his employees. In *Payne v. Baltimore & Ohio R.R. Co.*,¹⁸ where a brakeman was killed as a result of a derailment caused by a large accumulation of ashes on a private spur track, the court was emphatic in declaring the duty of the railroad to be non-delegable, regardless of ownership or control of the property. The court further stated that if the employer should attempt to delegate its duty to an agent, it could not avoid its liability. Of course the court used the word "agent" to color its compliance with the provisions of the act, but failed to observe that no agency existed in the instant case.¹⁹

Recently, a case involving alleged failure to furnish a reasonably safe place to work arose, where a shop machinist slipped and fell in the process of hopping off a locomotive platform onto a shop platform 35 inches away. The Court of Appeals ruled the evidence insufficient to submit the case to a jury. Petition for certiorari was denied.²⁰

Also abolished under F.E.L.A. is the defense of the fellow-servant doctrine.²¹ The effect of this abrogation of the common

¹⁵ *LaMere v. Railway Transfer Co.*, 125 Minn. 159, 145 N. W. 1068 (1914). *Fort Street Union Depot Co. v. Hillen*, 119 F. 2d 307 (6th Cir., 1941), cert. denied, 314 U. S. 642, 62 S. Ct. 82, 86 L. Ed. 515 (1941).

¹⁶ *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 36 S. Ct., 683, 60 L. Ed. 1125 (1916).

¹⁷ 45 U. S. C. A. § 53 (1908);

Kansas City Southern Ry. Co. v. Jones Administratrix, 241 U. S. 181, 36 S. Ct. 513, 60 L. Ed. 943 (1916).

Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 33 S. Ct. 654, 57 L. Ed. 1096 (1913).

Moore v. Chesapeake & Ohio Railway Co., 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 763 (1934).

St. Louis-San Francisco Ry. Co. v. Floyd, 146 Okla. 42, 293 P. 250, 77 A. L. R. 1431 (1930).

Cross v. Spokane P. & S. Ry. Co., 158 Wash. 428, 291 P. 336 (1930).

Ames v. Western Pac. R. Co., 48 Nev. 78, 227 P. 1009 (1924).

¹⁸ 309 F. 2d 546 (6th Cir., 1962), cert. den. 374 U. S. 827, 83 S. Ct. 936, 9 L. Ed. 2d 968 (1963).

¹⁹ *Ibid.*

²⁰ *Ambold v. Seaboard Air Line R. R. Co.*, 34 U. S. L. Week 3063 (4th Cir. 1965), cert. denied 34 U. S. L. Week 3119 (Oct. 11, 1965).

²¹ *Taylor v. Atchison, T. & S. F. Ry. Co.*, 292 Ill. App. 457, 11 N. E. 2d 610 (1937).

(Continued on next page)

law is to make the negligence of a fellow employee that of the employer.²² While the employer will not generally be found negligent where the fellow employee is acting outside the scope of his employment,²³ he will be held liable if the employee commits an assault in the scope of his employment while acting in his employer's interest.²⁴ Where employee A complained of work going too slowly and employee B placed his hands on A's shoulders in an attempt to placate him and A struck B violently, merely to gratify his own temper, the railroad was found not liable as A was wholly outside the scope of his employment.²⁵ In the case at hand, the fellow employee was known to have a volatile temper and the parties orally stipulated the action be tried to the court without a jury.

However, a railroad can be liable for negligence in the employment or retention of an employee whose dangerous propensities are known. In so finding, the court in *Najera v. Southern Pacific Company*,²⁶ reviewed *Davis v. Green*,²⁷ which it construed as holding only that while a railroad was not liable for the intentional torts of its employees, it may still be liable for its own negligence. In a recent case, the appellate court upheld a judgment N.O.V. on the ground that the plaintiff failed to prove the railroad negligent in employing and retaining the employee who assaulted him. The United States Supreme Court reversed the decision of the state court, however, finding sufficient evidence was available.²⁸

(Continued from preceding page)

Eley v. Chicago Great Western R. Co., 186 Iowa 312, 166 N. W. 739 (1918).

Merrick v. Missouri-Kansas-Texas R. Co., 141 Kan. 591, 42 P. 2d 950 (1935).

Minneapolis &c. R. Co. v. Rock, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766 (1929).

²² *Tash v. St. Louis-San Francisco Ry. Co.*, 335 Mo. 1148, 76 S. W. 2d 690 (1934).

²³ *Davis & Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. E. 299 (1922); *In Re Southern Pac. Co.*, 30 F. 2d 723, 1928 A. M. C. 901 (S. D. N. Y. 1928).

²⁴ *Ochsrider v. Reading Company*, 172 F. Supp. 830 (E. D. Pa. 1959).

²⁵ *Ibid.*

²⁶ 191 Cal. App. 2d 634, 13 Cal. Rptr. 146 (1961).

²⁷ *Davis*, *supra* note 23.

²⁸ *Harrison v. Missouri Pacific Railroad Company*, 35 Ill. App. 2d 66, 181 N. E. 2d 737 (1962), reversed 372 U. S. 248, 83 S. Ct. 690, 9 L. Ed. 2d 711 (1963).

While earlier cases dealt extensively with proximate causation from a common law standpoint,²⁹ later cases evidenced a departure from the historic tests of proximate causation. In *Rogers v. Missouri Pacific R. Co.*, where an employee fell from a culvert while attempting to avoid flames from burning weeds which were fanned by a passing train, the lower court held that the plaintiff's injury was due to an "emergency brought about by himself." In reversing the lower court, the Supreme Court said,

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought. (Emphasis added)³⁰

Any uncertainty as to the future of proximate cause under the act was put to rest by the court in *Page v. St. Louis Southwestern Railway Co.* where the plaintiff employee was knocked from a ladder when an overhead door he was repairing kicked backwards, knocking him from the ladder; the court found proximate-cause instructions, requiring that the jury find that the accident was the "natural and probable consequence" of defendant's acts, were prejudicially erroneous.³¹

Res Ipsa Loquitur

Res ipsa loquitur is, simply stated, circumstantial evidence,³² and creates an "inference of negligence,"³³ evidence to be weighed by a jury.³⁴

The progression and expansion of res ipsa loquitur in its application under the F.E.L.A. can be clearly followed: *e.g.*, Where an individual was found dead of skull fracture alongside tracks and a locomotive had just passed and lumps of coal were found

²⁹ *Spokane & Inland Empire Railroad Company v. Campbell*, *supra* note 16; *New York Central Railroad Co. v. Ambrose*, *Administratrix*, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562 (1930); *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (1933).

³⁰ *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

³¹ 312 F. 2d 84 (5th Cir., 1963).

³² Prosser, *Law of Torts*, 217 (3rd Ed., 1964).

³³ *Ibid.*; *Jesionowski v. Boston & Maine R. Co.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416 (1947).

³⁴ *Ibid.*, *Jesionowski*.

lying near his head;³⁵ where a railroad employee was electrocuted in a cab from an undetermined cause;³⁶ where an employee was crushed when a crane he was operating fell over on its side;³⁷ where an injury stemmed from a bolt breaking, as a result of which a heavy object fell against the plaintiff-employee, with no evidence that the bolt was defective or that the defendant should have known of the defect;³⁸ and where a defective jack slipped, injuring its operator.³⁹ In the Supreme Court's first specific declaration making the doctrine of *res ipsa loquitur* applicable to F.E.L.A. cases the court said,

A conceptualistic interpretation of *Res Ipsa Loquitur* has never been used by this court to reduce the jury's power to draw inferences from the facts. Such an interpretation unduly narrows the doctrine as this court has applied it.⁴⁰

The "shining hour" of *res ipsa loquitur* came in 1963. A passenger train conductor was injured when in the pursuit of his duties he tried to close a coach door which stuck because of a defective mechanism. No evidence was offered as to how the defect came into being. The trial judge set aside the jury's verdict because the evidence failed to establish even the inference of knowledge on the part of the defendant. The Circuit Court of Appeals upheld the verdict on the basis of *res ipsa loquitur*, notwithstanding the absence of any affirmative pleading thereto on the part of plaintiff.⁴¹

Negligence

The words,

. . . resulting in whole or in part from the negligence of . . . or by reason of any defect or insufficiency, due to its negligence, . . .⁴²

would seem to preclude any misunderstanding as to the requirement intended by Congress that liability under F.E.L.A. be based

³⁵ *Lukon v. Pennsylvania R. Co.*, 131 F. 2d 327 (3rd Cir. 1942).

³⁶ *Sweeting v. Pennsylvania R. Co.*, 142 F. 2d 611 (3rd Cir. 1944).

³⁷ *Taylor v. Reading Co.*, 83 F. Supp. 804 (E. D. Penn. 1949).

³⁸ *O'Neill v. Baltimore & Ohio Railroad Co.*, 348 U. S. 956, 75 S. Ct. 447, 99 L. Ed. 747 (1955).

³⁹ *Wiles v. New York, Chicago and St. Louis Railroad Company*, 283 F. 2d 328 (3rd Cir. 1960).

⁴⁰ *Jesionowski v. Boston & Maine R. Co.*, *supra* note 33.

⁴¹ *Fassbinder v. Pennsylvania Railroad Company*, 322 F. 2d 859 (3rd Cir. 1963).

⁴² 45 U. S. C. A. § 51 (1908).

upon negligence,⁴³ and that the F.E.L.A. is not intended to be workmen's compensation.⁴⁴ However, where the act complained of involves a violation of the Safety Appliance Acts,⁴⁵ no evidence of negligence is required and any such violation of the S.A.A. will be considered negligence per se.⁴⁶ Thus, F.E.L.A. and S.A.A. are regarded as being *in pari materia*, the former providing the remedy, the latter the basis for the action.⁴⁷

It appears from the foregoing and has indeed been protested that, of itself, F.E.L.A. does not create liability without fault.⁴⁸ Nor may a railroad be considered an insurer of its employee's safety.⁴⁹ Negligence must rest upon failure of an employer to observe some duty or standard of care owing to the employee.⁵⁰ And what Congress intended by the use of the word negligence in the F.E.L.A. would seem something other than that contemplated by the Supreme Court today. Not found in court discussions involving railroad litigation are the historic tests of the ordinary, reasonable, prudent man. Rather we find a very "liberal" construction.⁵¹ For, after all, the nature of F.E.L.A. is remedial, though in derogation of common law.⁵² It creates liability where there was none at common law.⁵³ Thus, in cases involving F.E.L.A., the degree of care is discussed from the standpoint of that demanded by the particular situation,⁵⁴ commensurate with

⁴³ *Inman v. Baltimore & Ohio R. Co.*, 361 U. S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959).

⁴⁴ *Simpson v. Texas & New Orleans Railroad Company*, 297 F. 2d 660 (5th Cir., 1962).

⁴⁵ *Page v. St. Louis Southwestern Railway Co.*, *supra* note 31.

⁴⁶ 45 U. S. C. A. § 1-10 (1893-1906).

⁴⁷ *McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 324 Mo. 1005, 25 S. W. 2d 791 (1930).

⁴⁸ *Lewis, F. E. L. A.*, 14 S. C. L. Q. 447 (1962).

⁴⁹ *Seaboard Airline R. Co. v. Stoddard*, 82 Ga. App. 743, 62 S. E. 2d, 620 (1950).

⁵⁰ *Southern Ry. Co. v. Bradshaw*, 73 Ga. App. 438, 37 S. E. 2d 150 (1946).

⁵¹ *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149 (1901).

⁵² 35 Am. Jur., *Master and Servant*, § 398 (1941).

⁵³ *Jamison v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930).

⁵⁴ 35 Am. Jur., *Master and Servant*, § 398 (1941).

⁵⁵ *Elliott v. Payne*, 293 Mo. 581, 239 S. W. 851, 23 A. L. R. 706 (1922).

⁵⁶ *N. Y. C. R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627 (1873).

the danger at hand,⁵⁵ and the danger inherent in the employer's particular business.⁵⁶

. . . . ordinary care under some circumstances may, paradoxically as it may seem, be extraordinary care.⁵⁷

Having hurdled most of the obstacles presented by the common law defenses to negligence, and having stretched the interpretation of the word negligence to a point where mere existence as a corporate entity could itself be construed as a first cousin of negligence, there remained only the final obstacle of in some way connecting the scienter of negligence with the injury sustained. Should this be accomplished, the F.E.L.A. would in effect become a quasi-workmen's compensation act.

In 1957, the court, in *Rogers v. Missouri etc.*⁵⁸ examining section 51 of the F.E.L.A., placed new emphasis on the words "due in whole or in part to its negligence" in basing the test of a jury case on the bare inquiry as to whether the reasonable inference *might* be drawn that employer negligence played any part in the injury complained of. The reasoning process of this declaration followed through in the same year in *Webb v. Illinois Central R.R. Co.*,⁵⁹ and *Ferguson v. Moore-McCormack Lines*,⁶⁰ and was followed by *Moore v. Terminal R.R. Assn.*,⁶¹ *Inman v. Baltimore & Ohio R.R. Co.*,⁶² *Harris v. Pennsylvania R. Co.*,⁶³ and then in *DeLima v. Trinidad Corporation* in 1962 was emphatically reaffirmed.⁶⁴

By 1963 the seasoning process was complete and the Supreme Court was ready to pronounce in *Gallick v. Baltimore & Ohio*

⁵⁵ *Leach v. St. Louis-San Francisco Ry. Co.*, 48 F. 2d 722 (6th Cir., 1931).
⁵⁶ *O'Brien v. New York Rys. Co.*, 185 App. Div. 867, 174 N. Y. S. 116 (1919).

⁵⁷ *Payne v. Baltimore & Ohio Railroad Company*, 21 Ohio Op. 2d 228, 309 F. 2d 546 (6th Cir., 1962); cert. den. 374 U. S. 827, 83 S. Ct. 936, 9 L. Ed. 2d 968 (1963).

⁵⁸ *Jacobs*, Law of Accidents, 17 & 18 (1937) citing: *Stonebreaker v. Bamberger*, a Utah case.

⁵⁹ *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

⁶⁰ 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957).

⁶¹ 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1957).

⁶² 358 U. S. 31, 79 S. Ct. 2, 3 L. Ed. 2d 24 (1958).

⁶³ *Supra* note 43.

⁶⁴ 361 U. S. 15, 80 S. Ct. 22, 4 L. Ed. 2d 1 (1959).

⁶⁵ 302 F. 2d 585 (2d Cir., 1962).

R.R. Co.,⁶⁵ that, in effect, practically no negligence need be proven in F.E.L.A. cases. After gallantly pledging their allegiance to the historic requirement of reasonable foreseeability, the court not only appears to have ignored it but actually chastises the Appellate Court for asking for definite evidence. The court found the requirement of foreseeability satisfied when in answer to specifically propounded interrogatories the jury found that: the plaintiff had been bitten by a bug, the bug bite caused his condition, the defendant's stagnant pool had attracted the bug, and defendant knew of the stagnant condition. However, when specifically asked if they found any reason for the defendant to anticipate mishap or injury, the jury clearly and unambiguously responded negatively. When asked if they found the related events within the "realm of reasonability or foreseeability", again the jury answered in the negative. Notwithstanding technical objections to the interrogatories as to form, the jury seems to have been quite emphatic in its finding. The action of the Supreme Court in applying "consistent interpretation" hardly seems justified by the facts.

In a recent case involving conflicting testimony as to whether an injured employee had backed a forklift truck into an elevator shaft or had been injured when the unattended truck rolled forward, knocking him into the shaft and then falling on top of him, the jury found for the plaintiff. However, the Maryland Appellate Court reversed on the ground that the jury's verdict was based on conjecture. On certiorari the Supreme Court reversed, and in a decision that was by this date a foregone conclusion, held that the Maryland Appellate Court had improperly invaded the function of the jury in an F.E.L.A. case.⁶⁶

In 1934 F.E.L.A. was criticised as having become self-defeating in its purpose.⁶⁷ Again, in 1941 it was said to have become of little benefit to the railway employee.⁶⁸ That such criticism was valid at the time is questionable; it would hardly be valid today. The employer today stands stripped of the last vestige

⁶⁵ 372 U. S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963).

⁶⁶ *Davis v. Baltimore & Ohio Railroad Co.*, 379 U. S. 671, 85 S. Ct. 636, 13 L. Ed. 2d 594 (1965).

⁶⁷ *Schoene & Watson, Workmen's Compensation on Interstate Railways*, 47 Harv. L. Rev., 389-424 (1934).

⁶⁸ *Prosser, Law of Torts*, 561 (3rd Ed. 1964) citing: *Dodd, Administration of Workmen's Compensation*, 773-780 (1936).

of common law defenses.⁶⁹ The court today inquires only into the question of some *color* of negligence on the part of the employer which may have been involved in the most infinitesimal degree in the employee's injury. Such a conclusion might, at first blush, appear reckless and prejudiced, that is, if one has not reviewed such cases as *McMillan v. Western Pacific R.R. Co.*⁷⁰ This was an action by a train dispatcher, charging the railroad with negligence in requiring him to assume unusual responsibility, which resulted in his nervous collapse. Though the Supreme Court sustained the defendant's demurrer, the Supreme Court ruled the complaint sufficient to state a cause of action under F.E.L.A.

It is no defense for the railroad to show that the injury was brought about by the independent acts of another through no fault of the railroad.⁷¹ Recovery may be predicated upon "hindsight" by showing that the employer could have found a safer way for the employee to do the job in question.⁷² Foreseeability is dead under the Act. Its funeral was conducted by the Supreme Court when it stated,

It is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts; assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable.⁷³

Once having taken such latitude in the application of "threshold tort", it is an open track henceforth. Even false arrest has become "negligence" within the meaning of F.E.L.A.⁷⁴

Even granting that the "practical problem" of presenting a negligence case does remain,⁷⁵ the railroad employee today is better off than his contemporaries in other industries. The rem-

⁶⁹ *Rogers v. Missouri Pacific Railroad Co.*, *supra* note 58.

⁷⁰ 54 Cal. 2d 841, 9 Cal. Rptr. 361, 357 P. 2d 449 (1960).

⁷¹ *Payne v. Baltimore & Ohio Railroad Company*, *supra* note 56.

⁷² *Lewis*, Federal Employers Liability Act, 14 S. C. L. Q. 447 (1962) citing L. P. D. No. 1-35 (1-63) Sec. 4502.

⁷³ *Gallick v. Baltimore & Ohio R. Co.*, *supra* note 65.

⁷⁴ *Slaughter v. Atlantic Coast Line Railroad Company*, 112 U. S. App. D. C. 327, 302 F. 2d 912 (1962), cert. denied 371 U. S. 827, 83 S. Ct. 48, 9 L. Ed. 2d 65 (1962).

⁷⁵ *Hare*, Actions for Personal Injury and Death of Railroad Workers, 17 Ala. L. R. 213 (1965).

edy under workmen's compensation is in effect a compromise by which a limited compensation is accepted in exchange for the assurance that a claim will be paid.⁷⁶ The railroad employee, however, has almost the same assurance, but along with it is the opportunity to "go for broke" in the courts.

Not even the "unavoidable accident" has escaped emasculation by the courts under F.E.L.A. Recall the statement of plaintiff in *Page v. St. Louis*, 17 days after the accident ". . . it was just an accident, [sic.] just one of those things . . ." ⁷⁷ Note the dissent of Judge O'Sullivan in *Payne v. Baltimore*, "the instruction . . . has the effect of holding the defendant liable without fault." ⁷⁸

As long as there is evidence which, if believed by the jury, would support a finding of negligence, the jury will be allowed to make its own justice unfettered by such considerations as weight of evidence or findings consistent with fact. The trial court is not privileged to invade the province of the jury.⁷⁹

Conclusion

Granting that law is "fashioned to the demands of society," ⁸⁰ to whom are we to look for such design? Some say that the basis of the court's authority rests upon the public's faith in its "objectivity and detachment." ⁸¹ Some men, as eminent as Holmes, base the authority on public expediency:

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean of course, considerations of what is expedient for the community concerned.⁸²

Whether or not one agrees with Justice Harlan that, regarding F.E.L.A.:

⁷⁶ Prosser, *Law of Torts*, 543 (1st Edit. 1941).

⁷⁷ *Page v. St. Louis Southwestern Railway Co.*, 312 F. 2d 84 (5th Cir., 1963).

⁷⁸ *Payne v. Baltimore & Ohio Railroad Company*, *supra* note 56.

⁷⁹ But see *Gallick v. Baltimore & Ohio R. R. Co.*, *supra* note 65; *Davis v. Baltimore & Ohio Railroad Co.*, *supra* note 66.

⁸⁰ *Mesberg v. City of Duluth*, 191 Minn. 425, 254 N. W. 597 (1934).

⁸¹ Kurland, *The Supreme Court and its Judicial Critics*, 6 Utah L. Rev. 457-466 (1959).

⁸² Holmes, *The Common Law*, 35 (1881).

. . . It affords a particularly dramatic example of the inadequacy of ordinary negligence law to meet the social obligations of modern industrial society,⁸³

nevertheless one must not omit his further observation that:

The cure for that, however, lies with the legislature and not with the courts.⁸⁴

⁸³ Gallick case, *supra* note 65.

⁸⁴ *Ibid.*