



The Monthly Maritime Newsletter of SeaBright Insurance Company

FELA and the Jones Act

To help railroad workers recover medical and wage benefits from work-related injuries, Congress passed the Federal Employer's Liability Act in 1908. This law was designed to level the playing field between railroads and their workers. Prior to the FELA, an injured railroad worker's only means of recovery was a suit in tort against the employer. These workers typically did not have the financial means to pursue such legal action, and the few that did could not live without an income during the months and years spent awaiting trial. Further, the railroads often asserted their right to require that suits be filed where the injuries happened, normally in places far from an injured rail worker's home, imposing an even greater hardship on the worker. These inequities in the legal system spawned the FELA, and the courts quickly interpreted that law in favor of workers.

The FELA allows injured workers to pick their forum – state or federal – with liberal venue provisions, and it contains a specific provision prohibiting railroads from removing suits filed in state court to federal court. Workers recover for injuries caused by negligence of their employer, and while the workers' own negligence might reduce a recovery, it does not bar recovery entirely. This law took effect before workers' compensation statutes were fully operational in every state, and it was considered very progressive.

Among the stated purposes of the FELA was to require railroads to provide a safe place to work and to inspect workplaces. Time has shown that the FELA has been a cash cow for plaintiff's attorneys, because it not only allows recovery of medical and wage expenses but also permits non-pecuniary damages such as for pain and suffering. Punitive damages are *not* permitted.

The FELA was such a success that in 1920 Congress extended its terms to seamen. Now codified at 46 U.S.C. § 30104, the Jones Act personal injury section simply provides:

"A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."

From this single paragraph a storied stream of cases has emerged. Note that Jones Act benefits are in addition to the traditional maritime remedies of maintenance and cure; however, the

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responsibility for those benefits is the ship owner, while liability rests with the employer. Given the variety of vessel management arrangements, different companies often are liable for the two types of recovery.

Major FELA decisions have impacted maritime cases by:

- Limiting loss of earnings to *after-tax*, i.e., net income;
- Allowing employers to reduce liability for negligence of the seaman;
- Applying the same negligence standard to seamen's negligence as to the employer's; and
- Easing the degree of causation required to establish employer liability.

Every interpretation of the FELA applies immediately to Jones Act cases. Importantly the Jones Act incorporates the FELA's employer responsibility to:

- Provide a reasonably safe workplace to avoid accidents;
- Inspect the workplace regularly to eliminate safety hazards;
- Provide improved training and supervision to avoid accidents;
- Provide regular supervision and awareness of intentionally harmful interaction between employees that might cause accidents;
- Warn employees of known work hazards; and
- Strengthen enforcement of safety standards.

The judicial circuits are split on the type of negligence required to trigger Jones Act and FELA recovery. The majority of circuits hold that "negligence however slight" suffices; a minority requires "ordinary negligence," and to date the Supreme Court has not resolved this conflict.

However, in a very recent decision, the Court held that the "featherweight" causation standard applies in FELA, and thus, also in Jones Act cases. In the railroad industry, FELA lawsuits were strengthened with the principal of "featherweight" burden of proof to make it easier for victims of railroad worker accidents to file claims. This means that if a seaman's attorney can prove that the maritime employer has some degree of negligence leading to an accident, the seaman will recover tort damages, including not only pecuniary damage but also non-economic damages like pain & suffering. The Supreme Court, in a five-to-four decision, recently affirmed the Seventh Circuit's 2010 decision in *CSX Transp., Inc. v. McBride*, holding it is sufficient for a plaintiff in a FELA (or Jones Act) case to prove that the negligence of the employer was the contributing "legal cause" of the injury: it is not necessary to prove that the employer's negligence was the proximate cause. This decision continues 90 years of jurisprudence holding that proof of slightest negligence of the employer played a part – no matter how small – in bringing about the injury is sufficient for liability in FELA and Jones Act claims. This has been described as a "featherweight" causation test in which legal cause under the FELA is established when an employer's negligence plays "any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957).

In the recent opinion, the majority opinion of Justice Ginsburg was joined by Justices Thomas, Breyer, Sotomayor and Kagan. The Court held that the FELA provision that renders railway employers liable for employees' injuries or deaths "resulting *in whole or in part* from [employer] negligence", 45 U.S.C. § 51, is sufficiently clear in requiring only slightest causation. Justice Ginsburg's opinion states that the *Rogers* "slightest causation" standard does not eliminate the requirement that the concept of proximate cause is to be applied in FELA cases, as it "describes the test for proximate causation applicable in FELA suits." (Quoting from her concurring opinion in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007)). In a strong dissent, Chief Justice Roberts describes the majority's position as a "but for" test of liability that results what he describes as "*Caelum terminus est* – the sky's the limit." Be that as it may, the rules are now clear, and liability for both railroads and maritime employers looms as large as ever.

With such a low standard for maritime employer negligence, it is of utmost importance that your maritime clients get expert help in minimizing on-board hazards. SeaBright's loss control staff possesses the specialized skills needed to not only assist in accident prevention efforts, but to help eliminate sources of potential negligence so that tort suits can be resolved favorably.

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