

ADMIRALTY LAW

BY PAUL S. EDELMAN AND JAMES E. MERCANTE

Causation Reaches Supreme Court

In our last Admiralty Law column of 2006, "Decisions to Watch" (New York Law Journal, Oct. 30, 2006, at p. 3), we reported that the U.S. Supreme Court granted certiorari to address an important causation issue in personal injury cases involving railroad workers. Hot off the press is the Supreme Court's decision dated Jan. 10, 2007, authored by Chief Justice John Roberts in *Norfolk Southern Railway Company v. Sorrell*.¹

This decision is of significance to admiralty practitioners as well because a seaman's statutory remedy for personal injury due to negligence—the Jones Act—expressly incorporates the liability standards applicable to railroad accidents. Thus, the *Sorrell* holding should apply with equal force to Jones Act litigation involving seafarers. However, the United States Maritime Law Association (MLA) reportedly declined an invitation to file an amicus brief finding the issue too controversial.

Case Facts

Timothy Sorrell, an employee of Norfolk Southern, was driving a dump truck loaded with asphalt on a gravel road between railroad crossings. The truck veered off the road and flipped over, injuring Mr. Sorrell. He claimed that another Norfolk Southern truck driver forced him off the road. Mr. Sorrell filed suit against Norfolk Southern in Missouri state court under the Federal Employer's Liability Act, 45 USC §§51-60 (FELA or the act).² A railroad worker may take action in state court because FELA provides for concurrent jurisdiction of state and federal courts, but federal law governs substantively.³

A Missouri jury awarded Mr. Sorrell \$1.5 million in damages. Norfolk Southern made and preserved objections to the jury instructions arguing that the causation instruction reflected a more lenient standard applicable to proving a railroad's negligence than the standard to establish the employee's contributory negligence. The U.S. Supreme Court concluded that the causation standard under FELA (and implicitly the Jones Act) should be the same for both categories of negligence.

FELA Action and Defenses

Enacted by Congress in 1908, FELA is a federal law designed to provide a compensation scheme, similar to worker's compensation, for railroad employees injured in the workplace. It pre-empted state tort remedies. However, unlike typical worker's compensation laws that provide compensation without regard to fault, FELA affords a statutory cause of action in negligence. Thus, under FELA, every common carrier by railroad is liable in damages for an employee's injury or death "resulting in whole or in part" from the negligence of any of the officers, agents, or employees of such carrier. 45 USC §51. While the act explicitly eliminated a railroad's



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defense of assumption of the risk and contributory negligence as a complete bar to recovery, it does allow a reduction in damages awarded to an employee "in proportion to the amount [of negligence] attributable to" the employee. 46 USC §53.

Both parties agreed that the causation standards for negligence and contributory negligence are the same under common law. This is not surprising because even the commonly accepted tort treatises are unanimous on this issue:

The Second Restatement of Torts states that "The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others."⁴ Prosser & Keeton explain that "The same rules of proximate cause that apply on the issue of negligence also apply on the issue of contributory negligence."⁵ Nonetheless, it seems the actual standards of what it takes to prove causation for the plaintiff and the

defendant in a FELA action are anything but uniform. Indeed, the Supreme Court reviewed various model and pattern jury instructions in FELA actions and noted the disparity of approaches throughout the United States. For example, New York's pattern jury instructions provide that railroad causation is measured by whether the injury results "in whole or in part" from the railroad's negligence, and a plaintiff's contributory negligence diminishes recovery if it "contributed to cause[s]" the injury.⁶

After reviewing the pattern and model jury instructions, the Supreme Court found Missouri's instruction "unique" to Missouri. Missouri's instructions apply a notably different causation standard for a jury to determine railroad negligence versus the standard applicable to determine employee contributory negligence. The jury instruction under review read that an employee will be found contributorily negligent if his negligence "directly contributed to cause" the injury while the railroad's fault is measured by whether the carrier's negligence "contributed in whole or in part" to the injury. The Supreme Court rejected the possibility that everyone is out of step except Missouri.⁷

The causation disparity was deemed inconsistent with common law and this was problematic for the Supreme Court because the elements of a FELA claim are governed by reference to common law.⁸ The Court found it difficult to reduce damages "in proportion" to the employee's negligence if the relevance of each party's negligence to the injury is measured by a different standard of causation. Norfolk Southern argued, and the Court agreed, that it is far simpler for a jury to conduct the apportionment FELA mandates if the jury compares "like with like—apples to apples."⁹

Norfolk Caught Smuggling an Issue

To begin with, the Supreme Court dispensed with Norfolk Southern's attempt to expand the question presented

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to address what the FELA causation standard should be, rather than simply whether the standard should be equally applied to negligence and contributory negligence. In *Rogers v. Missouri Pacific R. Co.*, the Supreme Court stated that under FELA, the test of a jury case is whether the proofs justify with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury.¹⁰ However, *Norfolk Southern* pointed out the deep conflict of authority in several states on the test for causation. While there does still appear to be confusion as to the substantive content of the causation standard as evidenced by Chief Justice Roberts' decision and the two concurring opinions, the Court decided not to address the issue since it had not been fully presented by the parties. In this regard, Chief Justice Roberts jabbed that the Court is "typically reluctant to permit parties to smuggle additional questions into a case after the grant of certiorari."¹¹ Accordingly, this issue was not resolved.

Common Law Persuasive

The Court began its analysis of the causation issue with a look at the common law. The fact that the common law applies the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from it, was "strong evidence" against Missouri's "disparate standards."¹² Mr. Sorrell's argument was that FELA does contain an explicit statutory alteration of the common-law rule because

§51 addressing railroad negligence uses the language "in whole or in part" while §53 covering employee contributory negligence does not.¹³ This, according to Mr. Sorrell, evidences an intent to depart from the common-law causation standard with respect to railroad negligence, but not with respect to employee contributory negligence. In essence, Mr. Sorrell urged that a higher standard of causation for plaintiff contributory

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negligence is acceptable because of FELA's remedial purpose. The Court was unpersuaded that a remedial purpose requires every uncertainty in the act to be interpreted in the employee's favor.¹⁴ The Court concluded that FELA does not abrogate the common-law approach and the same standard of causation must apply across the board.

The Court commented that while subtleties involving causation standards may be lost on a jury, Missouri's idiosyncratic approach of applying different standards of causation unduly muddies what may, to a jury, already be murky waters.¹⁵

The decision below was vacated and remanded to the Missouri Court of Appeals for further proceedings and to determine whether a new trial is required. Another issue left for remand was to address Mr. Sorrell's argument that any disparity in the jury instructions was harmless error, so that even with a revised instruction, according to Mr. Sorrell, the result would not change.

Conclusion

This decision should certainly help develop uniformity in jury instructions involving FELA and Jones Act cases. Uniformity is always a goal of admiralty practitioners. Perhaps, with the right case, the "smuggled" secondary issue in *Norfolk Southern* of what the test for causation in rail and sea personal injury cases is, may take center stage.

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1. ___S.Ct., 2007 WL 57176 (U.S. Mo.).
2. 45 U.S.C. §§51-60.
3. *Chesapeake & Ohio R. Co. v. Stapleton*, 279 US 587, 590 49 S.Ct. 442, 73 L.Ed. 861 (1929).
4. Restatement, Second, of Torts, §465(2), p. 510 (1964).
5. Prosser & Keeton, Law of Torts §65 at 456.
6. 1 B N.Y. Pattern Jury Instructions, Civil, No. 2:180 (3rd ed. 2006).
7. *Norfolk Southern Railway Company v. Sorrell* at *6.
8. *Chesapeake & Ohio R. Co. v. Stapleton*, 279 US 587, 590 49 S.Ct. 442, 73 L.Ed. 861 (1929).
9. *Norfolk Southern Railway Company v. Sorrell* at *7.
10. 352 US 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957).
11. 2007 WL 57176 at *4.
12. *Norfolk Southern Railway Company v. Sorrell* at *6.
13. 45 USC §51, 53.
14. *Norfolk Southern Railway Company v. Sorrell* at *8.
15. *Norfolk Southern Railway Company v. Sorrell* at *7.