9. Federal Employee Liability Act and Similar Statutes

9.01 Plaintiff's FELA Case
9.02 Definition of Causation
9.03 Elements - Defendant's FELA Case
9.04 Damages
9.05 Mitigation of Damages
9.06 Damages (Death Case)
9.07 Locomotive/Boiler Inspection Act; Federal Safety Appliance Act
9.08 Sample Special Verdict Form

9.01 - Plaintiff's FELA Case

Plaintiff brings this action under the Federal Employers Liability Act or FELA. FELA requires Defendant to exercise reasonable care to provide a reasonably safe workplace.

To succeed in his FELA claim, Plaintiff must prove two things by a preponderance of the evidence:

1. Defendant was negligent;

2. Defendant's negligence caused or contributed to Plaintiff's injuries.

Negligence is the failure to use the care that a reasonably prudent person would use in the same circumstances. The law does not say how a reasonably prudent person should act. That is for you to decide.

Comments

a. Generally. FELA operates to provide a broad federal tort remedy for railroad workers injured on the job. *Williams v. National R.R. Passenger Corp.*, 161 F.3d 1059, 1061-62 (7thCir.1998). Courts have interpreted the Act's language liberally in light of its humanitarian purposes. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). FELA abolished a number of traditional defenses to liability, including the fellow-servant rule, contributory negligence, and assumption of risk. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994).

b. Negligence Standard. FELA is founded on common law negligence principles. *See Robinson v. Burlington Northern R.R. Co.*, 131 F.3d 648, 652 (7th Cir. 1997) ("[FELA] is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms") (quoting *Urie v. Thompson*, 337 U.S. 163, 181 (1949)). FELA does not define negligence; what constitutes negligence for the statute's purposes is a federal question, taking account of the differing conceptions of negligence applicable under state and local laws for other purposes. *Gillman v. Burlington Northern R.R. Co.*, 878 F.2d 1020, 1021 (7th Cir. 1989) (quoting *Urie v. Thompson*, 337 U.S. 163, 181 (1949)); *see Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 132 (7th Cir. 1990) ("The jury is the tribunal to which is delegated the duty to apply the elusive concepts of reasonable care and cause and effect to the manifold facts and circumstances of each individual case").

c. Industry Customs and Safety Rules. If either side presents evidence of industry customs and/or specific safety rules as evidence of the presence or absence of negligence, the subcommittee recommends that the following language be added to the instruction: "In deciding

whether Defendant was negligent, you may consider industry custom or safety rules, but what is reasonable is up to you." *See Green v. Denver & Rio Grande Western R.R. Co.*, 59 F.3d 1029, 1034 (10th Cir. 1995) (jury should consider only "specific, objective safety rules").

d. Res ipsa loquitur The doctrine of res ipsa loquitur applies in FELA cases and, in appropriate circumstances, permits an inference of negligence on the part of the railroad for railroad-related injuries. For circumstances which warrant an instruction on the doctrine of res ipsa loquitur, see *Robinson v. Burlington Northern R.R. Co.*, 131 F.3d 648, 652-655 (7th Cir. 1997) (citing *Jesionowski v. Boston & Maine R.R.*, 329 U.S. 452, 456- 458 (1947)).

e. Negligence Per Se: When a plaintiff alleges that an employer's violation of a statute or regulation caused or contributed to his injuries, the court should modify the last sentence of this instruction to indicate that a violation automatically constitutes negligence. *Schmitz v. Canadian Pacific Railway Co.*, 454 F.3d 678, 683 (2006) (In FELA actions, "the violation of a statute or regulation ... automatically constitutes a breach of the employer's duty and negligence *per se* and will result in liability if the violation contributed in fact to the plaintiff's injury.") (quoting *Walden v. Ill. Cent. Gulf R.R.*, 975 F.2d 361, 364 (1992)). Unlike typical tort cases, this is true even where the statute or regulation was not designed to protect against the particular type of harm that the plaintiff suffered. *Schmitz*, 454 F.3d at 682-83 (citing *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958)).

f. Safety Appliance or Locomotive Inspection Act Claim. Instruction No. 9.01 is drafted for a case in which the plaintiff sues only under the FELA. If the plaintiff's suit is under both the FELA and the Safety Appliance Act or the Locomotive Inspection Act, Instruction 9.07 should be included in the instructions, and the first sentence of Instruction 9.01 should be modified accordingly. If the only claim is that the defendant violated the Safety Appliance Act or the Locomotive Inspection Act or other federal safety statute or regulation, only Instruction 9.07 should be given.

g. Employee. This instruction presupposes that the parties have stipulated that the defendant is a common carrier covered by FELA and that the plaintiff was injured in the scope and course of employment with the defendant. If this is in dispute, the instruction should be modified by adding a new first element:

> 1. That Defendant employed Plaintiff, and that Plaintiff was working for Defendant when he got hurt;

and by adding at the end of the instruction:

> [For purposes of this case, Plaintiff was "working for" Defendant if he was doing something that Defendant assigned or authorized. [This includes crossing Defendant's property on the way to or from work.]] *Wilson v. Chicago, Milwaukee, St. Paul, and Pacific R.R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988).

h. Curative Instructions. In most cases, supplemental instructions will be unnecessary; Instruction 9.01 provides a statement of the law comprehensive and comprehensible enough to permit counsel to argue most cases to an informed jury. Still, there may be cases in which argument, evidence, or a particular issue will provide reason to instruct on a certain aspect of FELA. For such instances, the Committee suggests the following additions:

(1) Non-Delegability. If the risk arises that the jury may believe that a third party's control over equipment or part of the workplace ameliorates the defendant's duty of reasonable care, the court may wish to add at the end of the first paragraph:

> This responsibility may not be delegated to a third party. [Thus, Defendant must provide a reasonably safe workplace even when Plaintiff's duties require him to enter property or use equipment that someone else owns and controls.]

See Shenker v. Baltimore & O. R.R. Co., 374 U.S. 1, 7-8 (1963); *Regan v. Parker-Washington Co.*, 205 F. 692, 705 (7th Cir. 1913) (under the common law doctrine of master/servant, a master's duty to provide reasonably suitable place and machinery cannot be delegated); *Rannals v. Diamond Jo Casino*, 265 F.3d 442,448 (6th Cir. 2001).

(2) Duty to Inspect. If a risk is shown to exist that the jury may believe that the employer's duty of reasonable care excludes inspection or reasonable steps to make the workplace safe, the court may wish to add at the end of the first paragraph:

> This responsibility includes inspecting the premises where Defendant's employees will be working and their equipment, and taking reasonable precautions to protect employees from possible danger. [It does not matter who owns the workplace.]

See Shenker v. Baltimore & O. R.R. Co. 374 U.S. 1. 8 (1963); *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998); *Lockard v. Missouri Pacific R.R. Co.*, 894 F.2d 299, 303 (8th Cir. 1990); *Fulton v. St. Louis-San Francisco Ry. Co.*, 675 F.2d 1130, 1133 (10th Cir. 1982).

(3) Continuing Duty. If a risk is shown to exist that the jury may believe that the plaintiff's time at the workplace affects the employer's duty of reasonable care, the court may wish to add at the end of the first paragraph:

> It does not matter whether Plaintiff's work at the place is brief or infrequent.

See Bailey v. Central Vermont Ry., 319 U.S. 350, 353 (U.S. 1943); *Brown v. Cedar Rapids and Iowa City Ry. Co.*, 650 F.2d 159, 161 (8th Cir. 1981).

(4) Assignment of Employees. If a risk is shown to exist that the jury may believe that the

employer's duty of reasonable care does not extend to the assignment of jobs or tasks, the court may wish to add at the end of the first paragraph:

> This responsibility to exercise reasonable care includes assignments of employees to particular tasks.

See Sea-Land Service, Inc. v. Sellan, 231 F.3d 848, 851 (11th Cir. 2000); *Fletcher v. Union Pac. R.R. Co.*, 621 F.2d 902, 909 (8th Cir. 1980).

(5) Procedures and Methods. If a risk is shown to exist that the jury may believe that the employer's duty of reasonable care does not extend to the selection of methods or procedures or assignment of sufficient workers, the court may wish to add at the end of the first paragraph:

> This responsibility includes decisions about the number of people assigned to a task and to methods or procedures Defendant might require employees to use.

See Lindauer v. New York Cent. R.R. Co., 408 F.2d 638, 640 (2nd Cir. 1969); *Stasior v. National R.R. Passenger Corp.*, 19 F. Supp.2d 835, 844 (N.D. Ill.1998); *Dukes v. Illinois Central R.R. Co.*, 934 F. Supp. 939, 945 (N.D. Ill.1996).

9.02 - Definition of Causation

Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part – no matter how small – in bringing about the injury. [There can be more than one cause contributing to an injury.] The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

Comments

a. Authority. A relaxed standard of causation applies under FELA. The common law standard of proximate cause does not apply under FELA. *Crane v. Cedar Rapids & Iowa R.R. Co.*, 395 U.S. 164, 166 (1969); *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957).

b. Multiple Causes. The bracketed sentence is in accord with *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165-166 (2003). The bracketed sentence should be used only in cases in which more than one cause is alleged.

9.03 Elements - Defendant's FELA Case

If you find that Defendant's negligence played a part in bringing about Plaintiff's injuries, you must consider Defendant's argument that Plaintiff should share responsibility for his own injuries. Defendant must prove two things by a preponderance of the evidence:

First: That Plaintiff was negligent; and

Second: That Plaintiff's negligence caused or contributed to his own injuries.

If Defendant proves these things, you must then decide what percentage of the injuries was due to Plaintiff's own negligence.

Comments

a. Generally. A plaintiff's negligence is not a defense to liability, but can be available to reduce damages. 45 U.S.C. § 53; *Caillouette v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 705 F.2d 243, 246 (7th Cir. 1983). An employer is entitled to an instruction on the plaintiff's negligence if the employer produces evidence of the employee's lack of due care. *Gish v. CSX Transp., Inc.*, 890 F.2d 989, 992 (7th Cir. 1989); *see also Wise v. Union Pacific R.R. Co.*, 815 F.2d 55, 57 (8th Cir. 1987) (defendant railroad entitled to instruction by showing that the plaintiff, who was injured when he tripped over a disconnected switch, did not look where he was stepping, wasn't wearing proper footwear, and should have seen the switch as others could).

b. Usage. This instruction should be used only in cases where a defendant asserts that a plaintiff's negligence has caused or contributed to the plaintiff's own injuries.

c. Assumption of Risk. Although there is some overlap between assumption of risk and contributory negligence, the two are not interchangeable. *Gish v. CSX Transp., Inc.*, 890 F.2d at 991-992. An assumption of risk is an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties; contributory negligence is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist. *Id*. The committee recommends against the giving of an assumption of risk instruction unless it is necessary to correct a misimpression. *See, e.g., Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1280 (3rd Cir. 1995); *Heater v. Chesapeake & Ohio Ry. Co.*, 49 F.2d 1243, 1249 (7th Cir. 1974). If the court chooses to instruct on this topic in a case in which the issue has been injected, the Committee recommends the addition of the following sentence:

> It is not a defense that an employee may have assumed the risk of his employment.

See 45 U.S.C. § 54; *see also Fashauer,* 57 F.3d at 1274-1275 (3rd Cir. 1995); *Green v. Union Pacific R.R. Co.*, 647 N.E.2d 1092, 1099 (Ill. App. Ct. 1995) (instruction proper where assumption of risk is either expressly or implicitly before the jury).

d. Causation. A single standard of causation should be applied to the plaintiff's negligence claim and the railroad's claim of contributory negligence. *Norfolk Southern Ry. Co. v. Sorrell,* 127 S.Ct. 799, 808 (2007).

e. Sole Cause. Although it is not error to instruct that the plaintiff may not recover if his negligence was the sole cause of his injury, *Taylor v. Illinois Cent. R.R. Co.*, 8 F.3d 584, 586 (7th Cir.1993) ("If you find that the plaintiff was negligent and that such negligence was the sole cause of any injuries the plaintiff may have sustained, then you are to return a verdict for the defendant."), the Committee believes such an instruction is unnecessary. Instruction 9.01 conditions the plaintiff's recovery on a showing that the defendant's negligence caused or contributed to the plaintiff's injuries, so the Committee recommends against what amounts to a second instruction on this element of the plaintiff's case.

f. Apportionment of Negligence. This instruction is in accord with *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 144 n.6 (2003). The FELA does not authorize apportionment of damages between railroad and non-railroad causes. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. at 160 ("Nothing in the statutory text instructs that the amount of damages payable by a liable employer bears reduction when the negligence of a third party also contributed in part to the injury-in-suit.").

g. Apportionment of Negligence: Wisconsin Approach. Wisconsin state courts do not inform jurors of the effect of apportionment of fault. *See Foley v. City of West Allis*, 335 N.W.2d 824, 831-833 (Wis. 1983).

9.04 - Damages

[If you find in favor of Plaintiff, then] [Regardless of how you have answered the questions concerning negligence and causation] you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained [and is reasonably certain to sustain in the future].

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

[1. The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received [as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.]]

[2. The [wages, salary, fringe benefits, profits, earning capacity] that Plaintiff has lost [and the present value of the [wages, salary, fringe benefits, profits, earning capacity] that Plaintiff is reasonably certain to lose in the future] because of his [inability/diminished ability] to work.]

[3. The reasonable value of household services Plaintiff has been unable to perform for himself to date [and the present value of household services Plaintiff is reasonably certain to be unable to perform for himself in the future).]]

[When I say "present value," I mean 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 those monetary losses at the times in the future when they will be sustained.]

[4. The physical [and mental/emotional] pain and suffering [and disability/loss of a normal life] [including any aggravation of a pre-existing condition] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental/emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate the Plaintiff for the injury he has sustained.]

[If you find for the plaintiff, any damages you award will not be subject to income taxes, so you should consider after-tax income in fixing the amount of damages.]

[Do not make any reduction in the amount of damages that you award based on any percentage of negligence that you have determined. I will reduce the damages that you award by the percentage of negligence that you assign to Plaintiff.] [Reduce the total amount of Plaintiff's damages by the percentage of negligence attributed to Plaintiff.]

Comments

a. Usage. This instruction, a modification of Seventh Circuit Pattern Civil Instruction 7.23, should be used in cases in which the employee's injuries were not fatal. Instruction 9.06, *infra*, should be used when the employee's injuries were fatal. Regarding the first two bracketed sentences, it is within the trial judge's discretion to request a determination of damages regardless of the jury's finding on liability. *Schmitz v. Canadian Pacific Railway Co.*, 454 F.3d 678, 685 (7th Cir. 2006). If the jury is not instructed to apportion the negligence, the final paragraph should not be given.

b. Inability/Diminished Ability to Work. Damages for impaired future earning capacity are awarded in tort suits when a plaintiff's physical injuries diminish his earning power. *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1370 (7th Cir. 1992). To recover for lost earning capacity, a plaintiff must produce "competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him . ... [A] plaintiff must show that his injury has caused a diminution in his ability to earn a living." *McKnight v. General Motors*, 973 F.2d at 1370 (quoting *Gorniak v. National R.R. Passenger Corp.*, 889 F.2d 481, 484 (3rd Cir. 1989) (FELA suit by railroad employee).

c. Pre-existing Condition. As a general principle of tort law, a tortfeasor takes his victim as he finds him; aggravation of a preexisting condition is a separate element of damages. *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1228 (7th Cir. 1995); *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 822 (7th Cir. 1985); *Alexander v. Scheid*, 726 N.E.2d 272, 284 (Ind. 2000); *Voykin v. Estate of DeBoer*, 733 N.E.2d 1275, 1279 (Ill. 2000); *Anderson v. Milwaukee Ins.*, 468 N.W.2d 766, 769 (Wis. Ct. App. 1991). While FELA is founded on common-law concepts of negligence and injury, the court of appeals has not addressed the propriety of a pre-existing condition instruction in a FELA case. If the court chooses to instruct on this topic in a case in which the issue has been injected, the following instruction is found in 3A KEVIN F. O'MALLEY, JAY E. GRENIG, & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL § 155.65 (5th ed. 2001):

> If you find for plaintiff, you should compensate plaintiff for any aggravation of an existing disease or physical defect resulting from such injury.
>
> If you find that there was an aggravation you should determine, if you can, what portion of plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

d. Present Value. In FELA cases "an utter failure to instruct the jury that present value is the proper measure of a damage award is error." *St. Louis Southwestern Ry. Co. v.*

Dickerson, 470 U.S. 409, 411-412 (1985). For a definition of "present value"see ILLINOIS PATTERN INSTRUCTIONS (CIVIL) § 31.12 (2000).

e. Emotional Injury. An employer has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury. This does not include a duty to avoid creating a stressful work environment; only a worker in the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 550-557 (1994).

f. Tax Consequences. If such an instruction is requested, a jury must be instructed that the verdict will not be subject to income taxes. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 497-498 (1980).

g. Other Means of Recovery: The court should not instruct the jury that a plaintiff lacks means of recovery, such as workers' compensation, other than FELA. *See Schmitz v. Canadian Pacific Railway Co.*, 454 F.3d 678, 685 (7th Cir. 2006) (affirming district court's refusal to instruct jury that plaintiff was ineligible for workers' compensation because such an instruction "could have prejudiced [the defendant] if the jury was moved to find for [the plaintiff] out of concern that his injury might otherwise go uncompensated").

h. Wisconsin Approach. Judges sitting in Wisconsin may choose not to give the final paragraph. The general rule in Wisconsin is that a jury is not to be informed of the effect of its verdict, in particular how verdict will effect apportionment of damages. *Delvaux v. Vanden Langenberg*, 130 Wis. 2d 464,387 N.W.2d 751 (1996) "The jury is a finder of fact; its charge does not include its applying the relevant law to the facts of the case, which is the function of the court." *Id*. at 481. Wisconsin courts believe that a jury should not be concerned with what the final result of the lawsuit may be. *Olson v. Williams*, 270 Wis. 57, 71, 70 N.W.2d 10 (1955).

9.05 - Mitigation of Damages

See Seventh Circuit Pattern Civil Jury Instruction 3.12.

Comment

a. Generally. An injured FELA plaintiff has a duty to mitigate his or her damages. *Russell v. National R.R. Passenger Corp.*,189 F.3d 590, 596 (7th Cir. 1999). "The burden nevertheless falls on the wrongdoer to show that the damages were lessened or might have been lessened by the plaintiff." *DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 688 (7th Cir.1995) (quoting *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593 (6th Cir.1986)). The pattern instruction is predicated upon the existence of evidence that the plaintiff failed to mitigate certain damages the plaintiff seeks. *See Russell v. National R.R. Passenger Corp.*,189 F.3d at 596 ("the factual predicate existed because Russell requested damages for future earnings, and testified that she had intended to continue working for a number of years, and would have done so but for her injuries"). The instruction should be modified to specify the type of damages to which it applies.

9.06 - Damages (Death Case)

[If you find in favor of Plaintiff, then] [Regardless of how you have answered the questions concerning negligence and causation] you must determine the amount of money that will fairly compensate Plaintiff on behalf of Decedent's family.

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

1. The loss of support and other financial benefits [he] [they] would have received from Decedent;
2. Loss of services that Decedent would have provided to [him] [them];
3. In the case of Decedent's minor children, Plaintiff may recover for the loss of Decedent's care, attention, instruction, training, advice and guidance;
4. Any pain and suffering experienced by Decedent before he died; and
5. The reasonable expense of medical care and supplies reasonably needed by and actually provided to Decedent.

[Do not make any reduction in the amount of damages that you award based any percentage of negligence that you have determined. I will reduce the damages that you award by the percentage of negligence that you assign to Decedent.] [Reduce the total amount of Plaintiff's damages by the percentage of negligence attributed to Decedent].

Comments

a. Usage. This Instruction should be used in cases in which the employee's injuries were fatal. Instruction 9.05, *supra*, should be used in cases which the employee's injuries were not fatal.

b. Generally. A wrongful death action under FELA is brought by a personal representative for the benefit of specific beneficiaries. 45 U.S.C. § 51. Damages are those that "flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 701 F.2d 1189, 1193 n4. (7th Cir. 1983) (quoting *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 70 (1913)). Future pecuniary benefits in a wrongful death action should be awarded at present value. *Chesapeake & O. Ry. Co. v. Kelly*, 241 U.S. 485, 489-490 (1916).

c. Pecuniary Loss. Recovery in a wrongful death action under FELA is limited to pecuniary losses. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The items listed in paragraph 3 have been deemed pecuniary losses in the case of a child beneficiary, *Norfolk & W. R. Co. v. Holbrook*, 235 U.S. 625, 629 (1915); the recovery may differ, though, in the case of a spouse, parent, or an adult child. If a claim is brought on behalf of an adult child, dependency upon the decedent must be shown and the instructions may need to be modified accordingly. *See, e.g., Thompson v. Camp*, 163 F.2d 396, 403 (6th Cir.1947). Funeral expenses should not be included in damages awarded in a wrongful death action under FELA. *See, e.g., Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1033 (5th Cir. 1984).

d. Wisconsin Approach. Judges sitting in Wisconsin may choose not to give the final paragraph. The general rule in Wisconsin is that a jury is not to be informed of the effect of its verdict, in particular how verdict will effect apportionment of damages. *Delvaux v. Vanden Langenberg*, 130 Wis. 2d 464,387 N.W.2d 751 (1996) "The jury is a finder of fact; its charge does not include its applying the relevant law to the facts of the case, which is the function of the court." *Id*. at 481. Wisconsin courts believe that a jury should not be concerned with what the final result of the lawsuit may be. *Olson v. Williams*, 270 Wis. 57, 71, 70 N.W.2d 10 (1955).

9.07 - Locomotive/Boiler Inspection Act; Federal Safety Appliance Act

Plaintiff [also] claims that Defendant violated the _____ Act, which requires a railroad to obey certain regulations about railroad operations. Those regulations require a railroad to [*describe regulated conduct*].

[Some of the standards under the _____ Act are different than the standards I described under FELA. In your deliberations, you must address Plaintiff's FELA claim separately from its _____ Act claim.]

To succeed in his _____ Act claim, Plaintiff must prove two things by a preponderance of the evidence:

1. Defendant violated [this] [one of these] regulation[s];

2. Defendant's violation caused or contributed to Plaintiff's injuries.

If you find Plaintiff has proved these things by a preponderance of the evidence, then Plaintiff is entitled to recover damages from Defendant [without showing that the Defendant was negligent.] [Any negligence on Plaintiff's part is not a matter for your consideration under the _____Act.]

Comments

a. Generally. No separate right to sue exists under the Safety Appliance Act, 49 U.S.C §§ 20301-20304, 21302, 21304 (1994), or the Locomotive Inspection Act, 49 U.S.C. §§ 20102, 20701 (1994), *Coffey v. Northeast Illinois Regional Commuter R.R. Corp.*, 479 F.3d 472 (7th Cir. 2007). Nonetheless, for the sake of jury comprehension, this instruction approaches the topic as though the claims are brought under separate statutes since the elements differ. *McGinn v. Burlington Northern R.R. Co.*,102 F.3d 295, 298-300 (7th Cir. 1996) (unlike a claim of negligence under FELA, railroads whose employees are injured as a result of violations of the Safety Appliance Act or the Locomotive Inspection Act will incur strict liability). The Safety Appliance Act and the Locomotive Inspection Act impose upon rail carriers an absolute duty to maintain the parts and appurtenances of their locomotives in safe and proper condition. *Id.*

b. Usage. Instruction 9.02 (FELA — Definition of Causation) should be given in conjunction with this instruction. This instruction may be modified for use in cases in which the plaintiff alleges strict liability for violation of a safety provision of the Code of Federal Regulations or other applicable safety statute. The bracketed material is

included for use when a FELA claim also is being submitted. The bracketed material and its references to negligence should not be given the jury is only considering claims that do not require proof of negligence.

9.08 - Sample Special Verdict Form

1. Do you find that Defendant was negligent and that Defendant's negligence caused or contributed to Plaintiff's injuries?

ANSWER _____ (Yes or No)

If you answer "no" to Question 1, do not answer any more questions.

2. (Without taking into consideration any possible negligence by Plaintiff) what sum of money do you find to be the total amount of Plaintiff's damages?

$_____

3. Do you find that Plaintiff was negligent and that Plaintiff's negligence caused or contributed to his own injuries?

ANSWER _____ (Yes or No)

Answer Question 4 only if you answered "Yes" to Question 3.

4. What percentage of Plaintiff's damages do you find to have been caused by the negligence of the respective parties?

(Answer in terms of percentages totaling 100%):

Plaintiff _____%

Defendant _____%

[5. The total amount of the damages $_____(from #2) X the percentage of Defendant's fault _____% (from #4(b)) = Net Verdict _____]

Date:_____

_____

Presiding Juror

Comment

a. Question 2: Wisconsin. The general rule in Wisconsin is that a jury is not to be informed of the effect of its verdict, in particular how verdict will effect apportionment of damages. *Delvaux v. Vanden Langenberg*, 130 Wis. 2d 464,387 N.W.2d 751 (1996) "The jury is a finder of fact; its charge does not include its applying the relevant law to the facts of the case, which is the function of the court." *Id*. at 481, Wisconsin courts believe that a jury should not be concerned with what the final result of the lawsuit may be. *Olson v. Williams*, 270 Wis. 51, 71, 70 N.W.2d 10 (1955). The committee believes this verdict form satisfies that concern.

b. Optional determination of damages. Instructions 9.04 and 9.06 contain bracketed material to be used if the court wishes the jury to determine damages regardless of its finding on liability. If that bracketed material is used, the jury should not be told to stop if it answers the first question with a "No."