DRAFT

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[Updated: 6/3/11]

PATTERN JURY INSTRUCTIONS FOR CASES OF RAILROAD EMPLOYEE PERSONAL INJURY

FOR THE DISTRICT COURTS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This is a draft of proposed Pattern Jury Instructions for Railroad Employee Personal Injury cases prepared by Judge Hornby's chambers. We invite feedback and suggestions on any aspect of these instructions. Although we believe that these pattern instructions will be helpful in crafting a jury charge, it bears emphasis that this version is simply a proposal. Neither the Court of Appeals nor any District Court within the circuit has in any way approved the use of these instructions.

PATTERN JURY INSTRUCTIONS
FOR CASES OF
RAILROAD EMPLOYEE PERSONAL INJURY

1.1 Federal Employers' Liability Act, 45 U.S.C. §§ 51-60

[Updated: 6/1/09]

In order to prevail on [his/her] claim, [plaintiff] must establish each of the following things by a preponderance of the evidence:

> First, that [he/she] was [defendant]'s employee and that [defendant] was a common carrier by railroad engaged in interstate or foreign commerce;
>
> Second, that a part of [his/her] duties furthered interstate or foreign commerce or directly or closely and substantially affected such commerce in any way;
>
> Third, that at the time of [his/her] injury [he/she] was acting in the course of [his/her] employment;
>
> Fourth, that [defendant] was negligent; and
>
> Fifth, that [defendant]'s negligence was a legal cause of the injury sustained by [plaintiff].

A railroad corporation like [defendant] acts through its officers, agents and employees, and is responsible for any negligence by them when they are acting within the scope of their employment.

"Negligence" is the failure to use reasonable care or the failure to take reasonable steps to furnish a reasonably safe place to work with reasonably safe tools and equipment. Reasonable care is that degree of care that a reasonably careful railroad would use under similar circumstances to prevent reasonably foreseeable harm. To find negligence, you must find that harm was reasonably foreseeable. Negligence may consist either in doing something that a reasonably careful railroad would not do under similar circumstances, or in failing to do something that a reasonably careful railroad would do under similar circumstances. The fact that an accident may have happened does not alone permit you to infer that it was caused by negligence; a railroad does not guarantee its employees' safety.

For purposes of this claim, negligence is a "legal" cause of injury if it plays any part, no matter how small, in bringing about or actually causing the injury. So, if you should find from the evidence that negligence of [defendant] contributed in any way toward any injury suffered by [plaintiff], then [plaintiff]'s injury was legally caused by [defendant]'s negligence. Negligence may be a legal cause of injury even though it operates in combination with the act of another, some natural cause, or some other cause.

If a preponderance of the evidence does not support [plaintiff]'s claim that [defendant]'s negligence legally caused [his/her] injury, then your verdict will be for [defendant]. If, however, a preponderance of the evidence does support [plaintiff]'s claim, you will then consider the defense raised by [defendant].

[Defendant] contends that [plaintiff] was [himself/herself] negligent and that such negligence was a legal cause of [his/her] injury. This is a defensive claim and the burden of proving this claim is upon [defendant], who must establish by a preponderance of the evidence:

First, that [plaintiff] was also negligent; and

Second, that [plaintiff]'s negligence was a legal cause of [his/her] injury.

If you find in favor of [defendant] on this defense, that will not prevent recovery by [plaintiff]. It only reduces the amount of [plaintiff]'s recovery. In other words, if you find that the accident was due partly to the fault of [plaintiff]—that [his/her] own negligence was, for example, 10% responsible for [his/her] injury—then you will fill in that percentage as your finding on the special verdict form. I will then reduce [plaintiff]'s total damages by the percentage that you insert. Of course, by using the number 10% as an example, I do not mean to suggest to you any specific figure. If you find that [plaintiff] was negligent, you might find any amount from 1% to 99%.

DAMAGES

I am now going to instruct you on damages in the event you should reach that issue. The fact that I instruct you on damages does not indicate any view by me that you should or should not find for [plaintiff] on liability.

[Plaintiff] bears the burden of proof to show both the existence and the amount of [his/her] damages by a preponderance of the evidence. But this does not mean that [he/she] must prove the precise amount of [his/her] damages to a mathematical certainty. What it means is that [he/she] must satisfy you as to the amount of damages that is fair, just and reasonable under all the circumstances. Damages must not be enlarged so as to constitute either a gift or a windfall to [plaintiff] or a punishment or penalty to [defendant]. The only purpose of damages is to award reasonable compensation. You must not award speculative damages, that is, damages for future losses that, although they may be possible, are wholly remote or conjectural.

If you should award damages, they will not be subject to federal or state income taxes, and you should therefore not consider such taxes in determining the amount of damages.

It is the duty of one who is injured to exercise reasonable care to reduce or mitigate the damages resulting from the injury—in other words, to take such steps as are reasonable and prudent to alleviate the injury or to seek out or take advantage of a business or employment opportunity that was reasonably available to [him/her] under all the circumstances shown by the evidence. On this issue of mitigation the burden of proof is on [defendant] to show by a preponderance of the evidence that [plaintiff] has failed to mitigate damages. You shall not award any damages to [plaintiff] that you find [he/she] could reasonably have avoided.

[If you find that [plaintiff] had a pre-existing condition that made [him/her] more susceptible to injury than a person in good health, [defendant] is responsible for the injuries suffered by

[plaintiff] as a result of [defendant]'s negligence even if those injuries are greater than a person in good health would have suffered under the same circumstances.]

[[Defendant] is not liable for [plaintiff]'s pain or impairment caused by a pre-existing condition. But if you find that [defendant] negligently caused further injury or aggravation to a pre-existing condition, [plaintiff] is entitled to compensation for that further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by [defendant]'s negligence, then [defendant] is liable for all [plaintiff]'s injuries.]

The elements of damage may include:

1. Reasonable Medical Expenses. The parties have stipulated that reasonable medical expenses amount to $_____.

2. Lost Wages and Earning Power. You may award [plaintiff] a sum to compensate [him/her] for income that [he/she] has lost, plus a sum to compensate [him/her] for any loss of earning power that you find from the evidence [he/she] will probably suffer in the future, as a result of [defendant]'s negligence.

In determining the amount of future loss, you should compare what [plaintiff]'s health, physical ability and earning power were before the accident with what they are now; the nature and severity of [his/her] injuries; the expected duration of [his/her] injuries; and the extent to which [his/her] condition may improve or deteriorate in the future. The objective is to determine the injuries' effect, if any, on future earning capacity, and the present value of any loss of future earning power that you find [plaintiff] will probably suffer in the future. In that connection, you should consider [plaintiff]'s work life expectancy, taking into account [his/her] occupation, [his/her] habits, [his/her] past health record, [his/her] state of health at the time of the accident and [his/her] employment history. Work life expectancy is that period of time that you expect [plaintiff] would have continued to work, given [his/her] age, health, occupation and education.

If you should find that the evidence establishes a reasonable likelihood of a loss of future earnings, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

[You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.]

3. Pain and Suffering and Mental Anguish. You may award a sum to compensate [plaintiff] reasonably for any pain, suffering, mental anguish and loss of enjoyment of life that you find [defendant]'s negligence has caused [him/her] to suffer and will probably cause [him/her] to suffer in the future. Even though it is obviously difficult to establish a standard of

measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, attempting to come to a conclusion that will be fair and just to all of the parties.

Comment

(1) This instruction does not provide definitions for "employee," "course of employment," "common carrier" or "interstate commerce" because parties generally stipulate to these requirements.

For "employee" see 45 U.S.C. § 51 (2006); Kelley v. S. Pac. Co., 419 U.S. 318, 322-32 (1974); Baker v. Texas & Pac. Ry. Co., 359 U.S. 227 (1959) (per curiam) (citing Restatement (Second) of Agency §§ 220, 227 and holding that employment is a factual question for the jury); Reed v. Pennsylvania R.R. Co., 351 U.S. 502, 505-07 (1956); S. Pac. Co. v. Gileo, 351 U.S. 493, 496-501 (1956); Metro. Coal Co., Inc. v. Johnson, 265 F.2d 173, 177-78 (1st Cir. 1959).

For "course of employment" see Erie R.R. Co. v. Winfield, 244 U.S. 170, 172-73 (1917); Getty v. Boston and Maine Corp., 505 F.2d 1226, 1228 (1st Cir. 1974); Metro. Coal, 265 F.2d at 177-78.

For "common carrier" see 45 U.S.C. § 57 (2006); Edwards v. Pac. Fruit Express Co., 390 U.S. 538, 540 (1968).

For "interstate commerce" see 45 U.S.C. § 51; Philadelphia & Reading Ry. Co. v. Hancock, 253 U.S. 284, 286 (1920).

For a discussion of who is an "agent" of the employer, see Sinkler v. Missouri Pac. R.R. Co., 356 U.S. 326, 331-32 (1958).

(2) The fellow servant rule, contributory negligence, and assumption of risk have all been abolished in FELA cases. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542-43 (1994); see also 45 U.S.C. § 51 (fellow servant rule); 45 U.S.C. § 53 (1994) (contributory negligence); 45 U.S.C. § 54 (2006) (assumption of risk). An instruction on the non-existence of assumption of risk is unnecessary. Porter v. Bangor & Aroostook R.R. Co., 75 F.3d 70, 72 (1st Cir. 1996).

(3) In order to prove negligence, the cases sometimes say that the plaintiff must prove duty, breach, damages, causation and foreseeability. Stevens v. Bangor & Aroostook R.R. Co., 97 F.3d 594, 598 (1st Cir. 1996); Robert v. Consol. Rail Corp., 832 F.2d 3, 6 (1st Cir. 1987).

Duty is omitted from the instruction because duty is generally an issue for the court, and an employer is always required to exercise reasonable care for its employees' safety while in the course of their employment. Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1, 7 (1963); Bailey v. Cent. Vermont Ry., Inc., 319 U.S. 350, 352-53 (1943).

On causation, "'the test . . . 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.'" Gottshall, 512 U.S. at 543 (quoting Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506 (1957)), reaffirmed in CSX Transp., Inc. v. McBride, ___ U.S. ___, 131 S. Ct. 2630, 2637-41 (2011).

On foreseeability, the defendant is required to exercise reasonable care to prevent those harms that are foreseeable. Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 118 (1963).

According to Gallick, "reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." 372 U.S. at 117. A defendant's duty to exercise due care is limited to those conditions of which he/she/it is aware or should be aware. Shenker, 374 U.S. at 7-8. Accord CSX Transp., Inc. v. McBride, 131 S. Ct. at 2643:

> "[R]easonable foreseeability of harm," we clarified in Gallick, is indeed "an essential ingredient of [FELA] *negligence*." 372 U.S., at 117 (emphasis added). The jury, therefore, must be asked, initially: Did the carrier "fai[l] to observe the degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances[?]" Id., at 118. In that regard, the jury may be told that "[the railroad's] duties are measured by what is reasonably foreseeable under like circumstances. Ibid. (internal quotation marks omitted). Thus, "[i]f a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition." Id., at 118, n.7 (internal quotation marks omitted). If negligence is proved, however, and is shown to have "*played any part, even the slightest, in producing the injury,*" Rogers, 352 U.S., at 506 (emphasis added), then the carrier is answerable in damages even if "the extent of the [injury] or the manner in which it occurred" was not "[p]robable" or "foreseeable." Gallick, 372 U.S. at 120-21, and n.8 (internal quotations marks omitted); see 4 F. Harper, F. James & O. Gray, Law of Torts § 20.5(6), p. 203 (3d ed. 2007); 5 Sand 89-21.

Foreseeable danger may include intentional and criminal conduct. Harrison v. Missouri Pac. R.R. Co., 372 U.S. 248, 249 (1963) (per curiam) (quoting Lillie v. Thompson, 332 U.S. 459, 462 (1947)); Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562 n.8 (1987).

(4) There is no primary duty rule in FELA cases. Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 63-64 (1943).

(5) According to the First Circuit, FELA incorporates the "eggshell skull" rule. Stevens, 97 F.3d at 602 n.8. A defendant takes its victim as it finds him or her. See generally Figueroa-Torres v. Toledo-Davila, 232 F.3d 270, 274-76 (1st Cir. 2000). If the defendant aggravates a pre-existing injury, the defendant is liable only for the additional increment caused by its negligence and not for the pain and impairment that the plaintiff would have suffered absent defendant's negligent act. Stevens, 97 F.3d at 601. If the factfinder cannot separate injuries caused or exacerbated by the accident from those resulting from a pre-existing condition, the defendant is liable for all such injuries. Id. at 603. The bracketed instructions borrow heavily from those approved in Stevens. If post-accident health problems arise from another source, a defendant can use them to reduce the damages award. "In FELA cases plaintiff must prove pre-injury and post-injury earning potential." Id. at 599.

(6) In addition to accidental injury and death, occupational diseases are compensable under the statute. Urie v. Thompson, 337 U.S. 163, 186-87 (1949).

(7) Damages for negligent infliction of emotional distress are cognizable, but only if suffered within the zone of danger. Gottshall, 512 U.S. at 549-50, 554-57; Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997). That means that recovery is limited to "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." Gottshall, 512 U.S. at 547-48. Exposure without symptoms—"simple physical contact with a substance that might cause a disease at a substantially later time"—is not enough, Metro-North, 521 U.S. at 430, even for medical monitoring costs. Id. at 444. But workers who suffer from asbestosis disease resulting from exposure to asbestos on the job can recover emotional distress damages for their fear (as distinguished from their increased risk) of cancer, if it is "genuine and serious," even without proof of physical manifestations of the emotional distress. Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135,157 (2003). See also CSX Transp., Inc. v. Hensley, 129 S. Ct. 2139, 2141 (2009) (trial court was required to give jury instruction on "genuine and serious" standard for fear-of-cancer damages at request of defendant railroad).

(8) FELA bars claims for loss of parental and spousal support. New York Cent. & Hudson River R.R. Co. v. Tonsellito, 244 U.S. 360, 361-62 (1917) (cited in Horsley v. Mobil Oil Corp., 15 F.3d 200, 203 (1st Cir. 1994)).

(9) A wrongful death claim for pecuniary damages can be made under FELA. 45 U.S.C. § 51; Michigan Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 68-74 (1913). The covered employee's cause of action under FELA survives his or her death. 45 U.S.C. § 59 (2006); St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 657-58 (1915). Survival damages are limited to the deceased's loss and suffering while he or she lived. Craft, 237 U.S. at 657-58. The list of who may bring a wrongful death or survival suit is provided in the statute. 45 U.S.C. § 51 (wrongful death); 45 U.S.C. § 59 (survival); see also Poff v. Pennsylvania R.R. Co., 327 U.S. 399, 400 (1946) (assuming without deciding that only one class of plaintiffs may recover; "members of the second or third class . . . are not entitled to recover if there survives a member of the prior class"); Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 493-96 (1916) (state law determines who is "next of kin"); Poff, 327 U.S. at 401 (dependent next of kin constitute a single class to which non-dependent next of kin do not belong).

(10) Any award of future earnings should be reduced to present value, and the jury must be instructed accordingly. Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916). The discount rate is determined by the jury. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 341 (1988); see also St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 412 (1985) (per curiam) (noting that the discount rate "should take into account inflation and other sources of wage increases as well as the rate of interest"). Notwithstanding inflationary factors, "[t]he discount rate should be based on the rate of interest that would be earned on 'the best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Kelly, 241 U.S. at 491). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; see also Kelly, 241 U.S. at 490-91; Conde v. Starlight I, Inc.,

103 F.3d 210, 216 & n.8 (1st Cir. 1997) (suggesting six percent as an appropriate "market interest rate").

(11) Any award of past or future lost wages should be based upon after-tax earnings, and the jury should be allowed to consider evidence necessary for the calculation. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493-96 (1980). But FELA damage awards themselves are not taxable income. 26 U.S.C. § 104(a)(2) (2001); Liepelt, 444 U.S. at 496-98. Section 104(a)(2) excludes from taxation awards for both wage and non-wage income. Allred v. Maersk Line, Ltd., 35 F.3d 139, 142 (4th Cir. 1994). Therefore, an instruction that the damage award will not be taxed is required, see Liepelt, 444 U.S. at 498, at least if requested. Diefenbach v. Sheridan Transp., 229 F.3d 27, 32 (1st Cir. 2000) (failure to instruct not error if no objection).

(12) Prejudgment interest is unavailable under FELA. Morgan, 486 U.S. at 336-39.

(13) Punitive damages are not available in FELA cases. Horsley, 15 F.3d at 203.

(14) FELA does not authorize apportionment of damages between railroad and non-railroad cases. Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 143, 144 (2003).

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

[PLAINTIFF]	)	
	)	
v.	)	**CIVIL NO. _____**
	)	
[DEFENDANT]	)	

SPECIAL VERDICT FORM
[Federal Employers' Liability Act Claim]

1. Do you find that [defendant] was negligent and that its negligence was a legal cause of [plaintiff]'s injuries?

   Yes _____ No _____

   If your answer to Question #1 is "yes," proceed to Question #2. Otherwise, answer no further questions.

2. What are the total damages caused by the accident?

   $_____

   Proceed to Question #3.

3. Was the accident caused in part by [plaintiff]'s own negligence?

   Yes _____ No _____

   If your answer to Question #3 is "yes," answer Question #4. Otherwise, answer no further questions.

4. In what percentage did [plaintiff]'s negligence contribute to the accident?

   _____%

Dated: _____, 20__

_____
Jury Foreperson

2.1 Federal Safety Appliance Act, 49 U.S.C. §§ 20301-20306; Boiler Inspection Act, 49 U.S.C. §§ 20701-20703

[New: 6/14/02]

In order to prevail on [his/her] claim, [plaintiff] must establish each of the following things by a preponderance of the evidence:

> First, that [he/she] was [defendant]'s employee and that [defendant] was a common carrier by railroad engaged in interstate or foreign commerce;
>
> Second, that a part of [his/her] duties furthered interstate or foreign commerce or directly or closely and substantially affected such commerce in any way;
>
> Third, that at the time of [his/her] injury [he/she] was acting in the course of [his/her] employment;
>
> Fourth, that [defendant] violated the statutory requirement that [specify relevant requirement]; and
>
> Fifth, that [defendant]'s violation of the [specify relevant requirement] was a legal cause of the injury sustained by [plaintiff].

A railroad corporation like [defendant] acts through its officers, agents and employees, and is responsible for any violation of the [specify statute] by them when they are acting within the scope of their employment.

The [specify statute] requires that [specify relevant requirement].

For purposes of this claim, a violation of the [specify relevant requirement] is a "legal" cause of injury if it plays any part, no matter how small, in bringing about or actually causing the injury. So, if you should find from the evidence that a violation of the [specify relevant requirement] by [defendant] contributed in any way toward any injury suffered by [plaintiff], then [plaintiff]'s injury was legally caused by the violation. A [specify statute] violation may be a legal cause of injury even though it operates in combination with the act of another, some natural cause, or some other cause.

If a preponderance of the evidence does not support [plaintiff]'s claim that a violation of the [specify statute] by [defendant] legally caused [his/her] injury, then your verdict will be for [defendant]. If, however, a preponderance of the evidence does support [plaintiff]'s claim, you will proceed to consider damages.

DAMAGES

I am now going to instruct you on damages in the event you should reach that issue. The fact that I instruct you on damages does not indicate any view by me that you should or should not find for [plaintiff] on liability.

[Plaintiff] bears the burden of proof to show both the existence and the amount of [his/her] damages by a preponderance of the evidence. But this does not mean that [he/she] must prove the precise amount of [his/her] damages to a mathematical certainty. What it means is that [he/she] must satisfy you as to the amount of damages that is fair, just and reasonable under all the circumstances. Damages must not be enlarged so as to constitute either a gift or a windfall to [plaintiff] or a punishment or penalty to [defendant]. The only purpose of damages is to award reasonable compensation. You must not award speculative damages, that is, damages for future losses that, although they may be possible, are wholly remote or conjectural.

If you should award damages, they will not be subject to federal or state income taxes, and you should therefore not consider such taxes in determining the amount of damages.

It is the duty of one who is injured to exercise reasonable care to reduce or mitigate the damages resulting from the injury—in other words, to take such steps as are reasonable and prudent to alleviate the injury or to seek out or take advantage of a business or employment opportunity that was reasonably available to [him/her] under all the circumstances shown by the evidence. On this issue of mitigation the burden of proof is on [defendant] to show by a preponderance of the evidence that [plaintiff] has failed to mitigate damages. You shall not award any damages to [plaintiff] that you find [he/she] could reasonably have avoided.

[If you find that [plaintiff] had a pre-existing condition that made [him/her] more susceptible to injury than a person in good health, [defendant] is responsible for the injuries suffered by [plaintiff] as a result of the violation of the [specify] even if those injuries are greater than a person in good health would have suffered under the same circumstances.]

[[Defendant] is not liable for [plaintiff]'s pain or impairment caused by a pre-existing condition. But if you find that [defendant] legally caused further injury or aggravation to a pre-existing condition, [plaintiff] is entitled to compensation for that further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by the [specify statute] violation, then [defendant] is liable for all [plaintiff]'s injuries.]

The elements of damage may include:

1. Reasonable Medical Expenses. The parties have stipulated that reasonable medical expenses amount to $_____.

2. Lost Wages and Earning Power. You may award [plaintiff] a sum to compensate [him/her] for income that [he/she] has lost, plus a sum to compensate [him/her] for any loss of earning power that you find from the evidence [he/she] will probably suffer in the future, as a result of the violation of the [specify].

In determining the amount of future loss, you should compare what [plaintiff]'s health, physical ability and earning power were before the accident with what they are now; the nature and severity of [his/her] injuries; the expected duration of [his/her] injuries; and the extent to which [his/her] condition may improve or deteriorate in the future. The objective is to determine the injuries' effect, if any, on future earning capacity, and the present value of any loss of future

earning power that you find [plaintiff] will probably suffer in the future. In that connection, you should consider [plaintiff]'s work life expectancy, taking into account [his/her] occupation, [his/her] habits, [his/her] past health record, [his/her] state of health at the time of the accident and [his/her] employment history. Work life expectancy is that period of time that you expect [plaintiff] would have continued to work, given [his/her] age, health, occupation and education.

If you should find that the evidence establishes a reasonable likelihood of a loss of future earnings, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

[You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.]

3. Pain and Suffering and Mental Anguish. You may award a sum to compensate [plaintiff] reasonably for any pain, suffering, mental anguish and loss of enjoyment of life that you find the violation of the [specify statute] has caused [him/her] to suffer and will probably cause [him/her] to suffer in the future. Even though it is obviously difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, attempting to come to a conclusion that will be fair and just to all of the parties.

Comment

(1) The Federal Safety Appliance Act and the Boiler Inspection Act do not contain their own private cause of action. O'Loughlin v. Nat'l R.R. Passenger Corp., 928 F.2d 24, 26 n.3 (1st Cir. 1991) ("[N]either the Federal Safety Appliance Act nor the Boiler Inspection Act create independent causes of action . . . ."). But the First Circuit has allowed FELA actions based on violations of the Federal Safety Appliance Act, 49 U.S.C. §§ 20301-20306 (2001), the Boiler Inspection Act, 49 U.S.C. §§ 20701-20703 (2001), the Hours of Service Act, 49 U.S.C. §§ 21101-21108 (2001), and the Occupational Health and Safety Act, 29 U.S.C. §§ 651 et seq. (2001). Jacobson v. N.Y., New Haven & Hartford R.R. Co., 206 F.2d 153, 155 (1st Cir. 1953) (FSAA); McGrath v. Consol. Rail Corp., 136 F.3d 838, 842 (1st Cir. 1998) (BIA); Moody v. Boston and Me. Corp., 921 F.2d 1, 3 (1st Cir. 1990) (HSA); Pratico v. Portland Terminal Co., 783 F.2d 255, 262 (1st Cir. 1985) (OSHA). But see Elliott v. S.D. Warren Co., 134 F.3d 1, 4-5 (1st Cir. 1998) (questioning the validity of a FELA-based OSHA claim). The Supreme Court strongly recommends separate charging language for the statutory violation: "we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions [(general FELA negligence vs. strict liability for statutory violations)] be observed and impressed." O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 338 U.S. 384, 393 (1949).

(2) Instead of proving negligence, the plaintiff is required to prove only the statutory violation and causation. Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958); Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430, 434-35 (1949); Pratico, 783 F.2d at 262-67. The violation "is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence." O'Donnell, 338 U.S. at 390; see also Brady v. Terminal R.R. Assoc., 303 U.S. 10, 15 (1938) ("The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous."); Kernan, 355 U.S. at 432-33 (whether or not the injury flowing from the breach was the injury the particular statute sought to prevent is irrelevant). The employee is not required to prove the other elements of FELA negligence. See generally Stevens v. Bangor & Aroostook R.R. Co., 97 F.3d 594, 598 (1st Cir. 1996). On causation, "'the test . . . 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.'" Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994) (quoting Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506 (1957)). Otherwise, see generally the comments following the FELA instruction.

(3) Neither the Federal Safety Appliance Act nor the Boiler Inspection Act applies unless the railroad equipment was "in use" at the time of the accident. Brady, 303 U.S. at 13 (FSAA); McGrath, 136 F.3d at 842 (BIA). Whether or not railroad equipment is "in use" for purposes of the Acts is a question for the trial judge, not a factual question for the jury. Pinkham v. Me. Cent. R.R. Co., 874 F.2d 875, 881 (1st Cir. 1989). The determinative factors are "the location of the [railroad equipment] at the time of the injury and the activity of the injured party—not the genesis of any unsafe condition contributing to the injury." Id. at 882. Railroad equipment need not be in motion to be "in use." McGrath, 136 F.3d at 842 (citing Crockett v. Long Island R.R. Co., 65 F.3d 274, 277 (2d Cir. 1995)). The First Circuit has stated that the Boiler Inspection Act (and presumably the Safety Appliance Act) "excludes those injuries directly resulting from the inspection, repair and servicing of railroad equipment located at a maintenance facility." McGrath, 136 F.3d at 842 (quoting Angell v. Chesapeake and Ohio Ry. Co., 618 F.2d 260, 262 (4th Cir. 1980)).

(4) The Safety Appliance Act requires that couplers couple automatically by impact, uncouple without requiring workers to go between cars, and remain coupled until purposely set free. O'Donnell, 338 U.S. at 387-89; accord Norfolk & W. Ry. Co. v. Hiles, 516 U.S. 400 (1996); Porter v. Bangor & Aroostook R.R. Co., 75 F.3d 70 (1st Cir. 1996).

(5) "Certain requirements of the Safety Appliance Acts, as for example the use of the automatic coupler, are made mandatory by express statutory language. Others, like those of the Boiler Inspection Act, simply outline a general standard which may be more specifically articulated in rules [promulgated by the Secretary of Transportation]. Violations of the . . . rules are violations of the statute, giving rise not only to damage suits by those injured, but also to money penalties recoverable by the United States." Urie v. Thompson, 337 U.S. 163, 190-91 (1949) (citations omitted). The non-statutory regulations can be found in Title 49 of the Code of Federal Regulations.

(6) The defenses of contributory and comparative negligence are not available in FELA actions based on the violation of a safety statute. 45 U.S.C. § 53; Pratico, 783 F.2d at 267-68 (interpreting "safety statute" as used in section 53 to include at least the FSAA, BIA, HSA and OSHA).

(7) Only railroad employees can bring this type of lawsuit. "[I]t is abundantly clear that the federal courts have not . . . developed a private right of action for damages for personal injuries resulting from a breach of the Safety Appliance Acts [or other safety statute], in favor of persons not entitled to sue under the provisions of the Employers' Liability Acts." Jacobson, 206 F.2d at 157.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

[PLAINTIFF]	)	
	)	
V.	)	**CIVIL NO. _____**
	)	
[DEFENDANT]	)	

SPECIAL VERDICT FORM
[specify statute]

1. Do you find that [defendant] was negligent and that its negligence was a legal cause of [plaintiff]'s injuries?

   Yes _____ No _____

   If your answer to Question #1 is "yes," proceed to Question #2. Otherwise, answer no further questions.

2. What are the total damages caused by the accident?

   $_____

Dated: _____, 20__

_____
Jury Foreperson

3.1 Missing Witness

[New: 6/18/10]

Pattern Jury Instruction

If you find that [party] had a witness available to it whom it did not call, and that [party] did not have that witness available to it, you may infer that the witness's testimony would have been unfavorable to [party who failed to call the witness]. You may draw such an inference, but you are not required to.

Comment

(1) In Latin American Music Co. v. American Society of Composers, Authors and Publishers, 593 F.3d 95, 101 (1st Cir. 2010), the court said: "Although far more common in criminal cases, a missing witness instruction may be given in a civil case as well. . . . The instruction, however, should only be given where 'the witness is either actually unavailable to the party seeking the instruction or so obviously partial to the other side that the witness [though technically available] is deemed to be legally unavailable.'" Id. at 101-02 (citing United States v. Perez, 299 F.3d 1, 3 (1st Cir. 2002)). In an earlier civil case, the court said that the instruction is permissible "when a party fails to call a witness who is either (1) 'favorably disposed' to testify for that party, by virtue of status or relationship with the party or (2) 'peculiarly available' to that party, such as being with the party's 'exclusive control.'" Grajales-Romero v. American Airlines, Inc., 194 F.3d 288, 298 (1st Cir. 1999) (quoting United States v. DeLuca, 137 F.3d 24, 38 (1st Cir. 1998)). "When deciding whether to issue a missing witness instruction the 'court must consider the explanation (if any) for the witness's absence and whether the witness, if called, would be likely to provide relevant, non-cumulative testimony.'" Latin Am. Music Co., 593 F.3d at 102 (citing Perez, 299 F.3d at 3). Although all this language addresses the court's role in deciding whether to give the instruction, it seems appropriate, if the instruction is given, to allow the jury also to make the underlying determinations as to whether the conditions for the adverse inference are present. Whether to give the instruction is within the trial court's discretion. See Grajales-Romero, 194 F.3d at 298.

4.1 Spoliation

[New: 7/15/10]

Pattern Jury Instruction

If you find that a party destroyed or obliterated a document that it knew would be relevant to an issue being litigated in this case and knew at the time it did so that there was a potential for litigation, then you may infer (but you are not required to infer) that the contents obliterated were unfavorable to that party.

Comment

(1) Giving this instruction is discretionary with the trial judge. See Booker v. Mass. Dep't of Public Health, 612 F.3d 34, 46 (1st Cir. 2010), citing United States v. St. Michael's Credit Union, 880 F.2d 579, 597 (1st Cir. 1989).

(2) The First Circuit states:

> Before an adverse inference can arise, the sponsor of the inference must lay an evidentiary foundation, proffering evidence sufficient to show that the party who destroyed the document 'knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document's potential relevance to that claim. A spoliation instruction is not warranted absent this threshold showing, because the trier of fact would have no basis for inferring that the destruction of documents stemmed from the party's consciousness that the documents would damage his case.

Booker, 612 F.3d at 46 (citations omitted). The First Circuit also says:

> Whether the particular person who spoils evidence has notice of the relationship between that evidence and the underlying claim is relevant to the factfinder's inquiry, but it does not necessarily dictate the resolution of that inquiry. The critical part of the foundation that must be laid depends, rather, on institutional notice—the aggregate knowledge possessed by a party and its agents, servants, and employees.

Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 178 (1st Cir. 1998), Booker, 612 F.3d at 46.

(3) The inference is permissive, not mandatory. Testa,144 F.3d at 177.

(4) The First Circuit has declined to take a position on "whether a court can properly decide that there is sufficient evidence to permit the parties to argue for an adverse inference to the jury, while at the same time declining to give a spoliation instruction." Booker, 612 F.3d at 46 n.11.

5.1 Charge to a Hung Jury

[New: 6/1/09]

Members of the jury, I am going to ask you to continue your deliberations to try to agree upon a verdict and resolve this case. I have a few additional thoughts and comments I would like you to consider.

This case is important to the parties. The trial has been expensive in terms of time, effort, money and emotional strain to both the plaintiff and the defense. If you fail to agree on a verdict, the case is left open and may have to be tried again. A second trial would be costly to both sides, and there is no reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you.

Any future jury would be selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case could ever be submitted to a jury of people more conscientious, more impartial, or more competent to decide it or that more or clearer evidence could be produced on behalf of either side.

As I stated in my previous instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after considering the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced that it is wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard to the opinions of others and with a disposition to reexamine your own views. Each of you ought to consider whether your own position is a reasonable one if it makes so little impression upon the minds of other equally honest and conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict.

You may conduct your deliberations as you choose, but I suggest that you carefully reexamine and consider all the evidence in the case bearing upon the questions before you in light of my instructions on the law.

You may be as leisurely in your deliberations as the occasion may require and you may take all the time that you feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given to you as a whole. You should not single out any part of any instruction, including this one, and ignore others.

You may now go back to the jury room and continue your deliberations.

Comment

(1) This proposed instruction is derived largely from Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions §§ 106.09, 106.10 (5th ed. 2000).

The First Circuit approved the use of a civil Allen (Allen v. United States, 164 U.S. 492 (1896)) charge in an unpublished decision, Scarpa v. Saggese, 1994 U.S. App. LEXIS 2229, at *5 (finding proper "substantially the same charge" approved in a criminal case, United States v. Nichols, 820 F.2d 508, 511-12 (1st Cir. 1987)). The modified Allen charge approved in Nichols "was carefully phrased so that '(1) the onus of reexamination would not be on the minority alone . . ., (2) a jury would not feel compelled to reach agreement . . ., and (3) jurors would be reminded of the burden of proof.'" Nichols, 820 F.2d at 512 (quoting United States v. Angiulo, 485 F.2d 37, 39 (1st Cir. 1973)). Other circuits include civil Allen charges in their pattern instructions. See Third Circuit, General Instructions for Civil Cases § 3.4; Eighth Circuit, Model Civil Jury Instructions § 3.07; Ninth Circuit, Model Civil Jury Instructions § 3.5; Eleventh Circuit, Pattern Jury Instructions (Civil Cases) § 9. The former Fifth Circuit approved of the use of civil Allen charges in Brooks v. Bay State Abrasive Products, Inc., 516 F.2d 1003, 1004 (5th Cir. 1975), which was cited in United States v. Chigbo, 38 F.3d 543, 546 (11th Cir. 1994). In Brooks, the court stated that it approved the use of an Allen charge if it makes clear to members of the jury that (1) they are duty bound to adhere to honest opinions; and (2) they are doing nothing improper by maintaining a good faith opinion even though a mistrial may result. See also Railway Exp. Agency v. Mackay, 181 F.2d 257, 262-63 (8th Cir. 1950); Hill v. Wabash Ry. Co., 1 F.2d 626, 631-32 (8th Cir. 1924).