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Torts--FELA Wrongful Death Recovery Precludes Subsequent State Action Against Employer (Montemarano v. New York Central R.R., 205 Misc. 463 (Sup. Ct. 1954))

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In the instant case, the Court followed settled law and refused to reduce the lump sum payments. Limited to the dispute between the parties, the decision is just. The plaintiff was ready, willing and able to perform her part of the agreement.[19] The defendant prevented her performance by refusing to return the children. Therefore, he should not be heard to complain. However, the courts should not deny reductions in every case simply because the agreement does not specifically provide for the reductions. The rights of the wife must be protected, and in the absence of any evidence to the contrary, it should be presumed that no reduction was intended. Nevertheless, the courts should look to the entire agreement, and wherever possible, give effect to reductions which are not specifically spelled out but which were obviously intended by the parties.[20] One such instance would be an agreement which provides for a reduction when the children reach their majority. Such a provision logically leads to the conclusion that the parties intended that a reduction take place when the wife was no longer supporting the children. Consequently, a reduction could be granted if the wife failed to support the children, despite the fact that the children had not yet reached their majority. By giving the intended effect to this and like provisions, the courts will be accomplishing practical justice without interfering with the sanctity of contracts.

TORTS — FELA WRONGFUL DEATH RECOVERY PRECLUDES SUBSEQUENT STATE ACTION AGAINST EMPLOYER. — The plaintiff-administratrix recovered damages but no funeral expenses in a prior action under the Federal Employers' Liability Act [1] for injuries resulting in the death of her intestate, an employee of the defendant. In a subsequent wrongful death action [2] for damages and funeral ex-

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would be tantamount to reforming one provision of the agreement while leaving the rest of the agreement intact. See note 4 *supra*.

[19] There was no showing or claim of any unfitness on the part of the wife to care for the children. The decision and order in the habeas corpus proceeding were based upon a finding that the happiness, welfare and best interests of the children would be served if their custody, at least for the present, were awarded to the father. This finding in turn seemed to be based upon the children's refusal to live with the mother and their manifest preference for the father.

[20] This method was employed with notable success in Matter of Herzog, 301 N.Y. 127, 93 N.E.2d 336 (1950).

[1] 35 STAT. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952) (hereinafter referred to as FELA). This Act was declared constitutional in Second Employers' Liability Cases, 223 U.S. 1 (1912).

[2] N.Y. DEC. EST. LAW §§ 130-134.

penses against the same employer, the Court dismissed the complaint. *Held:* the administratrix was barred by her prior recovery under the FELA which was her exclusive remedy, even though recovery of funeral expenses was denied. *Montemarano v. New York Central R.R.*, 205 Misc. 463, 129 N.Y.S.2d 527 (Sup. Ct. 1954).

The liability of railroad employers engaged in interstate commerce to their employees for negligent injuries is regulated by the FELA. *Where it is applicable,* the FELA is a paramount and exclusive remedy [3] which supersedes state laws.[4] To fall within the purview of the Act, there must have existed an employer-employee relationship at the time the cause of action arose.[5] It is also essential that both the employer [6] and the employee [7] be engaged in interstate commerce when the injury occurs. The failure of the employee to establish either of these elements renders the FELA inapplicable,[8] but in such a case he is *not* barred from proceeding against the same defendant under appropriate state laws.[9] However, if the FELA is applicable, it is the injured employee's sole remedy and if he fails to prove negligence he is precluded from proceeding against the same defendant under less stringent state laws.[10]

While the FELA is the exclusive remedy as against an employer engaged in interstate commerce, it does not control the liability of

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[3] New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917); Second Employers' Liability Cases, *supra* note 1. "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them." M'Culloch v. Maryland, 4 Wheat. 316, 426 (U.S. 1819).

[4] Second Employers' Liability Cases, *supra* note 1.

[5] 35 STAT. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).

[6] Wabash Ry. v. Bridal, 94 F.2d 117 (8th Cir.), *cert. denied,* 305 U.S. 602 (1938). Continuity of movement of the commodity being transported is the concluding factor in determining whether the employer was engaged in interstate commerce. Nordgard v. Marysville & Northern Ry., 211 Fed. 721 (W.D. Wash.), *aff'd,* 218 Fed. 737 (9th Cir. 1914), *aff'd,* 243 U.S. 36 (1917). A carrier may operate wholly within one state and still be a part of interstate commerce if the carrier is a cog or step in the continuous transportation of a commodity from one state to another. See Sherman v. Southern Pac. Co., 34 Cal. App.2d 490, 93 P.2d 812 (1939), *cert. denied,* 309 U.S. 669 (1940).

[7] Shanks v. Delaware, L. & W.R.R., 239 U.S. 556 (1916); Delaware, L. & W.R.R. v. Yurkonis, 238 U.S. 439 (1915); *see* New York, N.H. & H.R.R. v. Bezue, 284 U.S. 415, 420 (1932); Kettner v. Industrial Comm'n, 258 Wis. 615, 46 N.W.2d 833, 834-835 (1951).

[8] Shanks v. Delaware, L. & W.R.R., *supra* note 7; Delaware, L. & W.R.R. v. Yurkonis, *supra* note 7.

[9] Jackson v. Industrial Board, 280 Ill. 526, 117 N.E. 705 (1917) (Though administratrix brought an action under FELA for the death of an employee which was dismissed on the ground that the employee was not engaged in interstate commerce, the bringing of such suit did not prevent her from filing a claim under the Workmen's Compensation Act.).

[10] New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917), *reversing* 216 N.Y. 284, 110 N.E. 614 (1915); Erie R.R. v. Winfield, 244 U.S. 170 (1917), *reversing* 88 N.J.L. 619, 96 Atl. 394 (1916).

other tortfeasors who may be instrumental in causing injury to the employee.[11] Therefore, where the employer and a third party are jointly responsible for an employee's injury, the employee must seek redress against the employer under the FELA, while his remedy against the third party must be pursued under state laws. Thus, the Act does not govern the liability of negligent fellow servants,[12] non-employer interstate carriers,[13] and other third-party joint tort-feasors [14] though they are jointly responsible with the employer in causing the injury. If the employee elects to sue his employer under the FELA, recovery in a second suit against other negligent parties cannot include damages that could have been recovered from the employer.[15]

The damages recoverable in a wrongful death action under the FELA are limited to the pecuniary loss sustained by the decedent's survivors.[16] The Act does not specifically provide for funeral expenses [17] and the courts have consequently held that such expenses are not proper items of damage to be recovered thereunder.[18] In the instant case, the Court was called upon to decide whether a prior FELA recovery would bar a second action under state law against the same employer although the damages sought were not recoverable under FELA. Though the question was a new one for the Court, it was decided according to the exclusive remedy doctrine. The *Hoffman* [19] case, upon which the plaintiff relied, is distinguishable. The plaintiff in that case recovered funeral expenses under a state statute after having previously recovered damages for pecuniary loss against the employer under FELA. In the second suit, however, the defendant was not the employer, as in the instant case, but a joint tortfeasor. Hence, the exclusive remedy doctrine had no application.

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[11] Cott v. Erie R.R., 231 N.Y. 67, 131 N.E. 737, *cert. denied*, 257 U.S. 636 (1921); Lee v. Central of Georgia Ry., 147 Ga. 428, 94 S.E. 558 (1917), *aff'd*, 252 U.S. 109 (1920).

[12] Lee v. Central of Georgia Ry., *supra* note 11.

[13] Cott v. Erie R.R., *supra* note 11; Southern Ry. v. Allen, 88 Ga. App. 435, 77 S.E.2d 277 (1953).

[14] *See* Schosboek v. Chicago, M. St. P. & P.R.R., 191 Wash. 425, 71 P.2d 548, 549 (1937).

[15] See, *e.g.*, Hoffman v. Reading Co., 12 F. Supp. 1010 (D.N.J. 1935). The plaintiff recovered a judgment against the employer under the FELA. An action was then brought under the Pennsylvania death act against a joint tort-feasor. The court allowed recovery of funeral expenses since they were not recoverable under the FELA but denied recovery of damages to infant daughter for anticipatory pecuniary loss since FELA allows such items of damage.

[16] Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913).

[17] 35 STAT. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).

[18] Delaware, L. & W.R.R. v. Hughes, 240 Fed. 941 (2d Cir. 1917); *see* Collins v. Pennsylvania R.R., 163 App. Div. 452, 459, 148 N.Y. Supp. 777, 781-782 (4th Dep't 1914).

[19] Hoffman v. Reading Co., *supra* note 15.

In 1917, the utter exclusiveness of the Act was emphasized with great force in the *Winfield*[20] case where the court held that the FELA irrespective of the issue of negligence, was the exclusive remedy of the employee; he could not take advantage of the state workmen's compensation laws which do not require proof of negligence. Thus, some workers unable to prove negligence were left without a remedy. Then in 1939, an amendment to the FELA[21] extended the exclusive remedy doctrine to include additional employees by relaxing the test to be applied in determining whether the employee is engaged in interstate commerce.[22]

It cannot be denied that the FELA, at the time of its enactment, was extremely beneficial to that class of workers within its scope.[23] However, forty-six significant years have passed since then, during which the concept of compensation without negligence for industrial accidents has taken hold in the form of state workmen's compensation acts.[24] Without being restricted to the FELA, employees of railroad carriers engaged in interstate commerce could qualify under these state acts. However, as a result of the *Winfield* decision, such employees *must* look to the FELA for relief, in some instances, hopelessly. It is submitted that the good intended to be accomplished by the Act is not being realized today. Modern concepts of compensation for industrial accidents indicate a need for a reconsideration of the FELA in light of the effect of the *Winfield* decision.

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[20] New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917), *reversing* 216 N.Y. 284, 110 N.E. 614 (1915).

[21] 53 STAT. 1404 (1939), 45 U.S.C. § 51 (1952).

[22] *See* Ermin v. Pennsylvania R.R., 36 F. Supp. 936, 940 (E.D.N.Y. 1941); Great Northern Ry. v. Industrial Comm'n, 245 Wis. 375, 14 N.W.2d 152, 154 (1944). The Act was extended to those employees, any of whose duties shall ". . . in any way directly or closely and substantially, affect such *commerce*. . . ." (emphasis added). Prior to this amendment, the test was whether ". . . the employé at the time of the injury [was] engaged in interstate *transportation* or in work so closely related to it as to be practically a part of it." (emphasis added). Shanks v. Delaware, L. & W.R.R., 239 U.S. 556, 558 (1916). For an excellent discussion of the effect of the 1939 amendment on workmen's compensation, see Miller, *An Interpretation Of The Act Of 1939 (FELA) To Save Some Remedies For Compensation Claimants*, 18 LAW & CONTEMP. PROB. 241 (1953).

[23] *See* New York Cent. R.R. v. Winfield, *supra* note 20 at 159-162 (dissenting opinion) (discussion of the need for the abrogation of certain common-law defenses prior to the FELA).

[24] At the time the FELA was enacted the states had not yet passed workmen's compensation acts. See Delisi, *Scope of the Federal Employers' Liability Act—Recent Developments*, 18 MISS. L.J. 206, 208 (1947).