Employment Law - Federal Employers' Liability Act - Negligent Infliction of Emotional Distress

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Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol33/iss4/14
EMPLOYMENT LAW—FEDERAL EMPLOYERS' LIABILITY ACT—NEG-LIGENT INFILCTION OF EMOTIONAL DISTRESS—The United States Supreme Court held that negligent infliction of emotional distress is a cognizable injury under the Federal Employers' Liability Act provided that the employee satisfies the elements of the common law zone-of-danger test.


James Gottshall ("Gottshall") was a member of a Consolidated Rail ("Conrail") crew that was ordered to replace a stretch of defective track. Because the workcrew was under time pressure to finish the project, the crew was discouraged from taking scheduled breaks. Approximately two hours into the job, a worker, Richard Johns, collapsed. Gottshall and several others revived the worker, but the crew supervisor then ordered the men to stop assisting Johns and to immediately resume working.

About five minutes later, Gottshall again went to his coworker's aid after seeing Johns collapse a second time. While Gottshall administered cardiopulmonary resuscitation, the supervisor attempted unsuccessfully to reach assistance on his radio. The supervisor left the site in search of medical assistance. Before the supervisor returned with paramedics, Johns had died. Johns' body remained at the worksite covered with a sheet in plain view of the workers, as the workcrew was ordered to return to work. Gottshall was institutionalized shortly after

2. Consolidated Rail Corp., 114 S. Ct. at 2400.
3. Id.
4. Id. The workmen were able to revive Johns by administering a cold compress. Id. Johns had been sweating profusely and was pale. Id.
5. Id.
6. Id. Cardiopulmonary resuscitation (CPR) is "the reestablishing of heart and lung action as indicated for cardiac arrest or apparent sudden death resulting from electric shock, drowning, respiratory arrest, and other causes." THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 616 (1st ed. 1987).
7. Consolidated Rail Corp., 114 S. Ct. at 2400-01.
8. Id. at 2401.
9. Id. The coroner's report stated that Johns died from a heart attack caused
Johns' death because of various psychological disorders.\textsuperscript{10}

Gottshall then brought suit against Conrail under the Federal Employers' Liability Act ("FELA") for negligent infliction of emotional distress.\textsuperscript{11} The Third Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of Conrail and remanded the case for trial.\textsuperscript{12} In remanding the case, the Third Circuit utilized a liberal construction of FELA and adopted the genuineness of injury approach as the proper test for claims of negligent infliction of emotional distress brought under FELA.\textsuperscript{13} The Third Circuit's test included two parts. First, the test focused on whether the plaintiff suffered a serious and genuine injury based on a totality of factors.\textsuperscript{14} Second, the usual FELA elements of duty, breach of duty, injury, and causation had to be met in order to allege a prima facie case under FELA.\textsuperscript{15} Thus, the Third Circuit concluded that genuine issues of material fact existed regarding whether Gottshall suffered a cognizable injury from the events surrounding Johns' death.\textsuperscript{16}

In a separate case, respondent Carlisle brought suit under FELA for negligent infliction of emotional distress.\textsuperscript{17} Carlisle

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10. \textit{Id.} It was determined that Gottshall suffered from "major depression and post-traumatic stress disorder." \textit{Id.} Depression is defined as "a psychiatric syndrome consisting of dejected mood, psychomotor retardation, insomnia, and weight loss." \textsc{The Sloane-Dorland Annotated Medical-Legal Dictionary} 191 (1st ed. 1987). Post-traumatic stress disorder "is a term used to describe the patient who continues to reexperience a traumatic event, resulting in significant kinds of distress." \textit{Id.} at 221. Gottshall suffered from "nausea, insomnia, cold sweats, and repetitive nightmares" after Johns' death. \textit{Consolidated Rail Corp.}, 114 S. Ct. at 2401.

11. \textit{Consolidated Rail Corp.}, 114 S. Ct. at 2401. The Court contended that negligent infliction of emotional distress generally referred to emotional harm caused by the negligence of another and normally was not brought about by a physical injury. \textit{Id.} at 2405. The Federal Employer's Liability Act, enacted in 1908, provides in part:

\begin{quote}
Every common carrier by railroad while engaging in commerce between any of the several states... shall be liable in damages to any person suffering injury while he is employed by such carrier in commerce... resulting in whole or part from... such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
\end{quote}


13. \textit{Gottshall}, 988 F.2d at 371. The court of appeals contended that "the issue is whether the factual circumstances here provide a threshold assurance that there is a likelihood of genuine and serious emotional injury." \textit{Id.}

14. \textit{Id.} The factors included examining the claim in light of common law developments in the area of negligent infliction of emotional distress. \textit{Id.}

15. \textit{Id.} at 375.

16. \textit{Id.} at 379.

17. \textit{Consolidated Rail Corp.}, 114 S. Ct. at 2402.
claimed that Conrail breached its duty of care under FELA and caused him to suffer emotional injury by assigning him to stressful working conditions. On appeal before the Third Circuit, the court affirmed the district court's $386,500 damage award in favor of Carlisle. In affirming, the court restated its two-prong test set forth in Gottshall and held that an employer could be held liable when it was foreseeable that injuries would result from exposure to stressful working conditions. Thus, the Third Circuit concluded that Conrail had breached its duty of care by failing to provide Carlisle with a safe place of employment.

The Supreme Court granted Conrail's petition for certiorari to settle the split among the circuit courts over the proper threshold test to determine negligent infliction of emotional distress claims under FELA.

Justice Thomas, writing for the majority, asserted that the issue before the Court was whether FELA included recovery for negligent infliction of emotional distress, and if so, what recovery was available. The Court noted that FELA was designed to afford a remedy to workers who suffered injuries resulting from accidents on interstate railroads, and that the statute had been liberally construed to further these remedial goals. The Court also contended that to impose liability under the statute, the plaintiff had to establish negligence, not merely the existence of injuries. In addition, the Court emphasized that FELA was grounded in common law principles and because FELA was silent on the issue of negligent infliction of emotional distress, common law principles were determinative in FELA's application to the current case.

The majority asserted that the injury in a negligent infliction of emotional distress claim was mental or emotional harm caused by the negligence of another not directly brought about by a physical injury. The Court further noted that nearly all states have recognized a right to recover for negligent infliction

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18. Id. The alleged working conditions included extended shifts as well as overburdensome duties. Id.
19. Id.
20. Id. at 2402-03.
21. Id. at 2403.
23. Id. Justice Souter wrote a concurring opinion and Justice Ginsburg wrote a dissenting opinion in which she was joined by Justices Blackmun and Stevens. Id.
24. Id. at 2403-04.
25. Id. at 2404.
26. Id.
27. Consolidated Rail Corp., 114 S. Ct. at 2405.
of emotional distress.\textsuperscript{28} The majority also recognized the potential of unpredictable and infinite liability if an action for negligent infliction of emotional distress claims existed under FELA.\textsuperscript{29} Finally, the Court reviewed the three major common law threshold tests for limiting negligent infliction of emotional distress claims.\textsuperscript{30}

Deciding the issue of whether claims for negligent infliction of emotional distress were actionable under FELA, the Court agreed with the Third Circuit's holding that such claims were cognizable.\textsuperscript{31} The Court held that a railroad's duty under FELA included protecting its workers from negligently inflicted emotional harm and injury.\textsuperscript{32} The majority, however, rejected the Third Circuit's "genuineness" threshold test because the test failed to rely on common law principles.\textsuperscript{33} The Court concluded that determining injury based upon "genuineness" could lead to unpredictable liability for defendants.\textsuperscript{34} According to the Court, the common law had effectively eliminated the possibility of infinite liability from a single instance of negligent conduct.\textsuperscript{35}

In deciding the proper scope of recovery under FELA for negligent infliction of emotional distress, the Court selected the zone-of-danger test.\textsuperscript{36} The Court reasoned that the zone-of-danger
test was a well established common law concept of negligence that was suitable to determine what constituted negligence for purposes of FELA.\textsuperscript{37} Lastly, the Court concluded that the zone-of-danger test was harmonious with FELA's major concern of protecting workers from injuries resulting from physical perils.\textsuperscript{38}

The Court remanded \textit{Gottshall} for reconsideration under the zone-of-danger test.\textsuperscript{39} The Court also remanded \textit{Carlisle} with instructions to enter judgment for Conrail because, the Court asserted, that Carlisle's work-related-stress claim plainly did not fall within the common law's conception of the zone of danger.\textsuperscript{40} The majority therefore concluded that the Third Circuit applied an erroneous standard under both cases for evaluating claims for negligent infliction of emotional distress brought under FELA and reversed the judgments below.\textsuperscript{41}

Justice Souter wrote a concurring opinion in which he expanded on the Court's duty in interpreting FELA and concluded that the zone-of-danger test was the proper threshold test for determining liability under FELA for the negligent infliction of emotional distress.\textsuperscript{42}

Justice Ginsburg, with whom Justices Blackmun and Stevens joined, dissented.\textsuperscript{43} The dissent first addressed the limited scope of the railroad's liability because of the zone-of-danger test.\textsuperscript{44} The dissent determined that the majority's concern over the prospect of infinite liability should not control in the context of FELA because the class of potential plaintiffs under FELA was not the public at large.\textsuperscript{45} Instead, the dissent explained that the rationale used by the Third Circuit in \textit{Gottshall} and \textit{Carlisle} was proper.\textsuperscript{46} The dissent asserted that both Gottshall and Carlisle suffered severe injuries on the job as a result of

\textsuperscript{37} Consolidated Rail Corp., 114 S. Ct. at 2410.
\textsuperscript{38} \textit{Id.} The Court dismissed the physical impact test based on its lack of support in the common law as well as its overly limited application. \textit{Id.} at 2411. Justice Thomas also ruled out the bystander test because the test could only be used in the rare instances when a worker witnessed a railroad accident involving a relative. \textit{Id.}
\textsuperscript{39} \textit{Id.} The question of whether Gottshall met the elements of the zone-of-danger test was not adequately briefed or argued before the Court. \textit{Id.}
\textsuperscript{40} \textit{Id.} at 2411-12.
\textsuperscript{41} \textit{Id.} at 2411.
\textsuperscript{42} Consolidated Rail Corp., 114 S. Ct. at 2412 (Souter, J., concurring). Justice Souter explained that the Court's duty in examining claims under FELA was to generate a federal common law of what exactly constitutes negligence under the statute. \textit{Id.}
\textsuperscript{43} \textit{Id.} (Ginsburg, J., dissenting).
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 2417.
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Conrail's negligence. The dissent then addressed the majority's three justifications for its adoption of the zone-of-danger test. The dissent contended that the zone-of-danger test and its use in only fourteen states illustrated that the test was not even the test employed by the majority of the states. Moreover, because Congress intended FELA to be construed broadly, physical perils wrongfully limited the scope of the term "injury" in the statute and thus foreclosed the remedial intent of Congress in writing the statute. Finally, the dissent rejected the majority's primary concern of unlimited liability by concluding that the universe of potential FELA plaintiffs was hardly infinite, and that the appropriate FELA threshold should be the genuineness and gravity of the worker's injury. The dissent concluded that the Third Circuit's "genuineness of injury" approach was the appropriate standard to be taken under FELA and therefore concluded that the court of appeals' judgments should have been affirmed.

Tracing the development of the common law in the area of negligent infliction of emotional distress is necessary to understand the Court's holding in Consolidated Rail Corp. The tort of negligent infliction of emotional distress generally refers to a defendant who negligently causes a plaintiff to suffer mental or emotional harm that is not directly brought about by a physical injury. At early common law, however, recovery under the tort of negligent infliction of emotional distress was very limited. In Mitchell v. Rochester Railway Co., the Court of Appeals of New York adopted the rule that mental disturbance alone could

47. Consolidated Rail Corp., 114 S. Ct. at 2417 (Ginsburg, J., dissenting).
48. Id. The three justifications were: the firm roots of the test in the common law; the test's consistency with FELA's central focus on physical perils; and the test best controlled the majority's fear of infinite liability to an infinite number of persons.
49. Id. In addition, the dissent noted that the majority never decided the point from which to evaluate the support the different common law rules have enjoyed. Id.
50. Id. at 2418.
51. Id.
52. Consolidated Rail Corp., 114 S. Ct. at 2419 (Ginsburg, J., dissenting).
53. See Consolidated Rail Corp., 114 S. Ct. at 2405. While no specific definition of emotional distress was used throughout the common law, the tort of negligent infliction of emotional distress has generally been regarded as a tort involving a defendant breaching a duty owed to the plaintiff based on the plaintiff's right to be free from mental disturbance. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984).
not sustain a cause of action based on negligence. In *Mitchell*, the plaintiff brought suit after suffering a miscarriage. The Court considered whether a plaintiff could recover for mental distress when the plaintiff had not been physically injured. The court held that no recovery was available under a theory of negligent infliction of emotional distress for injuries sustained by fright, absent a contemporaneous physical injury. The court reasoned that to establish any other doctrine would be contrary to public policy, and would open a wide field of fictitious or speculative claims. In so holding, the Court of Appeals of New York had created the physical impact test.

In 1892, in *Purcell v. St. Paul Railway Co.*, the Supreme Court of Minnesota was presented with the issue of whether a cable car passenger could recover for purely emotional injuries caused by the fear of imminent peril. The passenger brought suit against the defendant cable car company for nervous convulsions and illness due to the defendant’s negligent operation of the cable car. The Supreme Court of Minnesota held that if the negligence of a carrier placed a passenger in a position of such apparent imminent peril as to cause fright, and the fright caused illness, the defendant’s negligence was the proximate cause of the injury, and the injury was actionable.

56. Id. The miscarriage had been caused when a horse car belonging to the defendant approached and almost ran the plaintiff over while she had been waiting to board one of the defendant’s trains. Id. As a result of her fright and excitement, the plaintiff became unconscious and suffered the miscarriage and consequent illness. Id.
57. Id.
58. Id. at 354-55. The *Mitchell* court relied on several policy concerns for disallowing purely emotional injury recovery including an expected flood of litigation; the risk of an overflow of fraudulent claims; and exposing defendants to potentially unlimited liability. Id. at 355. At the time FELA was enacted, most of the major industrial states had embraced the physical impact test. *Consolidated Rail Corp.*, 114 S. Ct. at 2406.
61. 50 N.W. 1034 (Minn. 1892).
62. *Purcell*, 50 N.W. at 1034. The passenger was riding on one of defendant’s cable cars when the cable car approached an intersection and nearly collided with another approaching cable car. Id.
63. Id. The passenger had appealed from an order overruling a general demurrer to the complaint. Id.
64. Id. The defendant contended that the plaintiff’s emotional injuries were caused by her pregnancy, and not by the defendant’s negligence. Id. at 1035. The court, however, noted that anyone in her position, pregnant or not, could have sustained the same injuries. Id. at 1035.
The court reasoned that because the plaintiff's fright was caused solely by the negligence of the defendant, the plaintiff met the test of being placed in a position of imminent peril. The test used by the court became known as the "zone-of-danger" test which allowed emotional injury recovery to plaintiffs who sustained a physical impact or who were placed in immediate risk of physical impact or harm.

In 1908 Congress enacted the Federal Employers' Liability Act ("FELA" or the "Act"). FELA was enacted to provide compensation for railway employees who suffered job-related injuries caused by the negligence of their employer. Eliminating traditional tort defenses as well as fostering recovery for meritorious cases were among the primary purposes of the Act.

Although the Supreme Court would not address the issue of negligent infliction of emotional distress under FELA for almost eighty years, in 1949, the Court noted the importance of the common law in interpreting and construing FELA in Urie v. Thompson. In Urie, the issue was whether FELA covered occupational diseases. The petitioner had been employed as a fireman on steam locomotives for thirty years, and in 1940, he had been forced to cease work because of a pulmonary disease. The Court determined that the railroad contributed to petitioner's injury by negligently creating the hazardous conditions. The Court further noted that common law principles as established and applied in federal courts would determine what was an actionable "injury" within FELA.

The third common law test for determining negligent infliction of emotional distress claims was enunciated by the Supreme

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65. Id. By restricting emotional injury recovery to those in apparent imminent danger of impact, the Supreme Court had established what later would be referred to in the common law as the "zone-of-danger" test.
67. 45 U.S.C. § 51 (1908). The original enactment was struck down on the ground that it applied to intrastate as well as interstate commerce. See Howard v. Illinois Cent. R.R., 207 U.S. 463, 504 (1908).
68. Carlisle, 990 F.2d at 93.
69. See Buell, 480 U.S. at 561.
70. 337 U.S. 163 (1949).
71. Urie, 337 U.S. at 165.
72. Id. Specifically, the petitioner was diagnosed with silicosis, a permanently disabling affliction caused by continuous inhalation of silica dust blown or sucked into the cabs of the locomotives on which he had worked. Id. at 165-66.
73. Id. at 175.
74. Id. at 174. The Court opined that FELA did not define negligence, leaving that question to be determined by common law standards. Id.
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Court of California in *Dillon v. Legg*. In *Dillon*, a negligent operator of an automobile struck and killed a young girl as the mother of the girl observed the accident from a safe distance. The trial court granted the defendant's motion for summary judgment and determined that the plaintiff had not sufficiently alleged a cause of action based upon emotional shock and physical injury.

Before the Supreme Court of California, the issue was whether an emotional injury sustained by a bystander outside the zone of danger was a foreseeable consequence of a defendant's negligent actions. The court asserted that there were three factors to be considered in determining the question of foreseeability of injury. First, the plaintiff had to be located near the scene of the accident. Second, the plaintiff's shock had to result from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident. Third, the plaintiff and victim had to be closely related in order for the injury to be deemed foreseeable and thus a recoverable injury. The court determined that an evaluation of these factors indicated the degree of the defendant's foreseeability. The court concluded that because all three factors were present, the plaintiff had alleged a prima facie case.

The Supreme Court did not address negligent infliction of emotional distress under FELA until 1987 in *Atchinson, Topeka & Sante Fe Railway Co. v. Buell*. In *Buell*, the respondent was a carman employed by the petitioner. The respondent filed a FELA complaint in federal district court, alleging that he had suffered severe personal injuries as a result of the petitioner's failure to provide him with a safe workplace. The petitioner

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75. 441 P.2d 912 (Cal. 1968).
76. *Dillon*, 441 P.2d at 914. The plaintiff sustained emotional disturbance and shock and injury to her nervous system which in turn caused her physical and mental pain and suffering. *Id*. The plaintiff's other daughter was in the zone of danger and was allowed to recover for her emotional injuries. *Id*. at 914-15.
77. *Id*. The plaintiff then appealed the trial court's judgment to the Supreme Court of California. *Id*.
78. *Id*. at 920.
79. *Id*.
80. *Id*.
81. *Dillon*, 441 P.2d at 920.
82. *Id*.
83. *Id*. at 920-21.
84. *Id*. at 921. Many states currently follow the bystander rule as announced in *Dillon*. See *Consolidated Rail Corp.*, 114 S. Ct. at 2407 n.10 (citations omitted).
86. *Buell*, 480 U.S. at 559.
87. *Id*. The respondent claimed that his workplace was not safe because fellow
contended that the respondent's sole remedy was through the Railway Labor Act. The issue before the Court was whether the intentional and negligent actions of an employer had caused the employee to suffer emotional injuries and therefore were actionable under FELA. The Supreme Court did not reach the issue of whether a purely emotional injury was cognizable under FELA, but stressed that FELA, not the Railway Labor Act, controlled the inquiry.

The Court asserted that whether an emotional injury was cognizable under FELA could only be answered on an ad hoc basis. The Court advised the federal courts that when dealing with the issue of emotional injury recovery under the Act, the common law development of negligent infliction of emotional distress had to be utilized. However, because the facts of the record were not adequately developed in Buell, the Court remanded the case.

Just months after the Buell decision, in Moody v. Maine Central Railroad, the Court of Appeals for the First Circuit also did not reach the issue of whether purely emotional injuries were cognizable under FELA. In Moody, the appellant brought an action against the appellee under FELA and claimed the railroad had negligently injured the appellant. The issue
was whether the employee had established a causal connection between his condition and the conduct of the railroad to enable the employee to recover under FELA. The court of appeals affirmed the trial court's granting of summary judgment in favor of the appellee. The circuit court concluded that although the Buell opinion did not completely reject recovery for wholly emotional injury, there was nothing in the record to indicate that the proximate cause of appellant's injuries was a genuine question of material fact.

In 1990, the Third Circuit elaborated on the type of injury included within a FELA action in Holliday v. Consolidated Rail Corp. In Holliday, the appellant was a railroad worker who was informed that he would be held out of service until he qualified as a conductor. The appellant filed suit under FELA alleging he was injured due to the appellee's negligence in placing the appellant in a position that he claimed was beyond his qualifications. The issue was whether the stress and resultant physical conditions that the appellant suffered was an injury within the meaning of FELA. The Third Circuit Court of Appeals held that the placement of the appellant in a position in which he was unqualified, combined with a lack of direct, physi-

alleged included depression and fatigue which resulted in attacks of angina. Id. Angina is defined as "spasmodic, choking, or suffocative pain." THE SLOANE-DORLAND ANNOTATED MEDICAL DICTIONARY 35 (1st ed. 1987). The trial court found an adequate basis for granting the appellee's motion for summary judgment on the grounds that appellant had failed to make a sufficient showing of causation between the alleged injuries and the actions of the appellee. Moody, 823 F.2d at 694.

97. Moody, 823 F.2d at 696.
98. Id. at 694-95.
99. Id. The court of appeals found that although there were references to eight doctors, there was no evidence that any of the doctors indicated that the purported harassment was the cause of any symptom exhibited by appellant. Id. at 695.
100. 914 F.2d 421 (3d Cir. 1990).
101. Holliday, 914 F.2d at 421. A conductor is in charge of trains and must be familiar with the physical characteristics of the lines on which he works. Id. at 421-22. In order to qualify as a conductor, the appellant worked various lines with a pilot, and began working without a pilot as a conductor in a short time. Id. at 422. A pilot is an engineer who helps another engineer operate a train over track that the engineer is unacquainted with. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1716 (3d ed. 1986). The appellant never became familiar with the lines or the switching thereon, nor did the appellant receive the proper notation that he was a qualified conductor as he continued to work as a conductor without a pilot. Holliday, 914 F.2d at 422. The stress of the job affected the appellant as he began to experience sleep disorder, anxiety, depression, involuntary rectal discharge and nightmares of train wrecks and injuries. Id. The court noted that evidence existed to establish that his physical problems and psychological disorders were attributable to his fear of causing an accident and of being physically injured. Id.
102. Id. at 422. The district court granted summary judgment in favor of the appellee without an opinion and the appellant appealed. Id.
103. Id.
cal impact on his person could not support recovery for negligent infliction of emotional distress under FELA. The court of appeals concluded that although no recovery was afforded in this case, emotional injury recovery under FELA could be available depending on the circumstances.

After several of the circuit courts declined to decide whether a wholly emotional injury was cognizable under FELA, the Fifth Circuit Court of Appeals was the next circuit court to examine the issue in the context of emotional injury recovery under the Jones Act. In 1991, the Fifth Circuit was given the opportunity to decide a purely emotional injury claim brought under the FELA-based Jones Act in Plaisance v. Texaco, Inc. In Plaisance, the appellant brought suit under the Jones Act for emotional injuries he alleged occurred in an explosion. The Fifth Circuit held that a claim for an emotional injury caused by negligently inflicted emotional distress, even without an accompanying physical impact, was cognizable under both FELA and

104. Id. at 427. The court concluded that the appellant was actually in an unqualified position for a few days. Id.

105. Id. at 426-27. The court opined that the issue of whether purely emotional injuries were recoverable under FELA was not reached from the facts given in the case. Id. at 427.

106. The Jones Act provides in relevant part:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law . . . and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.


108. Plaisance, 937 F.2d at 1005. The appellant had been a tugboat captain for thirty years. Id. The second tug, tied to the barge, struck an underwater gas pipeline, and the pipeline ruptured and an explosion and fire ensued. Id. After the explosion, the appellant immediately backed up to the barge, and the workers on the barge and the crew of the second tug were quickly moved to the safety of the appellant's tugboat. Id. The court found that the fire was confined to the rear of the barge and the front of the trailing tug. Id. The fire was extinguished by the crews, and the entire operation took less than thirty minutes. Id. No one suffered injuries by the fire or the explosion. Id. A few hours later, the appellant asked to be relieved of his duty because he did not feel well. Id. Subsequently, the appellant went to a hospital for a few days and was later transferred to a psychiatric hospital where he spent forty-five days. Id. The appellant was diagnosed as suffering from post-traumatic stress disorder and depression resulting from his perception that he and the others could have been killed or injured in the explosion. Id. at 1006-07. The appellant's emotional injury claims under the Jones Act were dismissed by the trial court and the appellant appealed. Id. at 1006.
the Jones Act. The court adopted the full recovery rule, which allowed a general negligence cause of action for the infliction of emotional distress. The court reasoned that the possibility of false claims and other policy considerations should not prevent recovery in all situations in which a person had suffered a consequential emotional injury. The court concluded that the district court properly dismissed the appellant's complaint on the basis that one could not reasonably expect an ordinary seaman to have the emotional reaction alleged by the appellant.

Since the late nineteenth century plaintiffs have been able to recover for emotional injuries provided they have suffered a physical impact or have been within the zone-of-danger. In 1908, FELA was adopted for railroad workers to recover for injuries sustained from the negligence of their employer. As the common law continued to evolve in the area of negligent infliction of emotional distress by recognizing bystander recovery as early as the late 1960's, no claims for distress had been brought. It was not until 1987, in Buell, that the Supreme Court of the United States first addressed the issue of negligent infliction of emotional distress recovery under FELA. Thus, as the common law developed rules and guidelines for recovery for purely emotional injuries, FELA lagged behind the common law in addressing claims and developing a federal common law pertaining to purely emotional injury recovery.

109. Id. at 1009.
110. Id. at 1010. The court of appeals explained that the claimed emotional injury had to occur from a situation in which a reasonable person, normally constituted, would not be able to adequately cope with the mental distress resulting from the circumstances. Id.
111. Id.
112. Id. at 1011. The final ruling on the appellant's claim, however, did not occur until the Fifth Circuit Court of Appeals, on the court's own motion, determined to rehear the case en banc. See Plaisance v. Texaco, Inc., 954 F.2d 266 (5th Cir. 1992). The term "en banc" generally "refers to a session where the entire membership of the court will participate in the decision rather than the regular panel of judges." BLACK'S LAW DICTIONARY 526 (6th ed. 1990). The court asserted that it took the case en banc to consider whether the facts were appropriate for establishing a rule for the recovery of purely emotional injuries under the Jones Act. Plaisance v. Texaco, Inc., 966 F.2d 166, 168 (5th Cir. 1992) (en banc). Sitting en banc, the Fifth Circuit affirmed the judgment of the district court dismissing the appellant's case. Plaisance, 966 F.2d at 169. However, the Fifth Circuit Court of Appeals held that the facts of the case did not permit the court to decide whether or under what circumstances it might permit recovery of damages for purely emotional injuries. Id. In dicta, the court of appeals thus rejected the use of the full recovery rule in the FELA/Jones Act context. Id.
To analyze the Supreme Court's holding in *Consolidated Rail Corp.*, it is important to understand the type of relief that the respondents requested and the limited scope of the Court's holding. The respondents, Carlisle and Gottshall, claimed Conrail was at fault for the negligent infliction of emotional distress on their person. The Court held that negligent infliction of emotional distress was a cognizable injury under FELA. The Court adopted, without finding a prima facie case, the common law zone-of-danger threshold test for determining whether a claim was meritorious.

In adopting the zone-of-danger test, the Court reviewed not only the policy reasons behind limiting recovery for emotional distress claims in general, but also the three major common law threshold tests. The court concluded that the zone-of-danger test remained a well-established common law concept of negligence based on its current use in fourteen jurisdictions. In addition, the Court viewed the test as consistent with both FELA's focus on physical perils, and its remedial and broad approach to recovery. However, by using the zone-of-danger test to restrict claims, the Court did not further FELA's broad and remedial purpose.

The Court noted that in the past it had accorded broad scope to the term "injury" in light of FELA's remedial purpose. The Court acknowledged that the zone-of-danger test was arbitrary yet contended it was in best accord with the concerns that had motivated FELA jurisprudence. However, this arbitrary and restrictive test is not in best accord with the liberal and remedial policies behind FELA jurisprudence.

The Court accepted the zone-of-danger test perhaps because the common law normally only recognized claims for negligently inflicted emotional injury brought by a plaintiff who met either the physical impact, zone-of-danger, or bystander tests. Because the physical impact test is the most restrictive and the bystander rule is virtually inapplicable to situations under

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115. *Consolidated Rail Corp.*, 114 S. Ct. at 2401-02.
116. *Id.* at 2408-09.
117. *Id.* at 2410. Because of the limited reach of the zone-of-danger test, the Court remanded Carlisle's case to have judgment entered for Conrail and remanded Gottshall's case to be reheard under the Court's instructions. *Id.* at 2411-12.
118. *Id.* at 2406-07.
119. *Id.* at 2410.
120. *Consolidated Rail Corp.*, 114 S. Ct. at 2407.
121. *Id.* at 2411.
122. The fourth and most liberal threshold test not mentioned by the Court is the full recovery rule. See *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991), *aff'd*, 966 F.2d 166 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 604 (1992).
The dissenting opinion provides the Court with an alternative to choosing one of the three major common law tests by concluding that fraudulent claims could be properly restricted by the Third Circuit's genuineness of injury approach. The dissent maintained that the threshold test under FELA should focus on the genuineness as well as the gravity of the alleged injury. Justice Ginsburg explained that the Third Circuit's approach provides a threshold assurance of genuine emotional injury. The dissent concentrated on the principle that FELA imposed upon carriers a higher standard of conduct and had eliminated many of the common law bars to recovery. As the dissent pointed out, the zone-of-danger test was inappropriate for a federal statute designed to govern the discrete category of on-the-job injuries sustained by railroad workers. There is not a strong correlation between a broad, remedial statute like FELA and the Court's deference to the very restrictive zone-of-danger test.

The Third Circuit's "genuineness" of injury test would provide plaintiffs with a test that is consistent with the broad and remedial policies behind FELA. The goal of every threshold test is to limit recovery to meritorious claims. This goal is better served by using an objective test, like the Third Circuit's genuineness of injury test or the short lived Fifth Circuit's full recovery rule. By selecting an arbitrary and limiting test, meritorious claims will be precluded.

123. At the same time, it is possible the Court was somewhat pressured into making an affirmative decision on the issue due to the split of authority throughout the various circuits concerning negligent infliction of emotional distress recovery under FELA. However, the full recovery rule, never mentioned by the Court, could possibly be the best solution of all: a liberal, yet uniform, threshold for recovery.

124. Consolidated Rail Corp., 114 S. Ct. at 2419 (Ginsburg, J., dissenting).

125. Id. at 2419. The dissent concluded that the Third Circuit had developed the appropriate FELA common-law approach. Id.

126. Id. at 2414. Section 5 of FELA provides in part, "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." 45 U.S.C. § 55 (1988). FELA also eliminated the defense of assumption of the risk. 45 U.S.C. § 54.

127. Consolidated Rail Corp., 114 S. Ct. at 2418.

Without question, there is considerable justification for adopting the zone-of-danger test. The zone-of-danger test provides uniformity and stability throughout the various circuits. However, the significant discretion given to lower federal courts in finding negligence under FELA has been taken away by the Supreme Court. Future federal courts will be forced to throw out many meritorious cases that do not fit the highly selective elements of the zone-of-danger test. In the wake of Consolidated Rail Corp., the future of emotional distress claims under FELA will be unnecessarily restricted. This restrictive future for FELA claims clearly contradicts the liberal and remedial policies of FELA.

In conclusion, the selection of the zone-of-danger test will provide uniformity for recovery under FELA at a major cost to workers protected under FELA. Also, it is easy to predict that most future complaints brought under FELA for negligent infliction of emotional distress will fail to survive a motion for summary judgment. With this predictable future in mind, the Supreme Court missed a rare opportunity to emulate the spirit of liberal recovery under FELA. By settling on the zone-of-danger test, the Court put to rest the more creative and practical Third Circuit “genuineness” test and the even more sensible full recovery rule.

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