

**7.20 FEDERAL EMPLOYERS LIABILITY ACT — COMPARATIVE NEGLIGENCE** (Approved pre-1984)

If, in accordance with the principle of law heretofore given you, you find that the defendant was negligent and that the plaintiff was contributorily negligent, you will apply the following provision of the *Federal Employers Liability Act*, 45 U.S.C.A., Sec. 53:

In all actions against any common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

This provision which deals with the effect of the employee's contributory negligence upon the amount of his/her recovery states two principles of law:

- The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but
- if the employee is guilty of contributory negligence the effect of such contributory negligence is that the damages the employee is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

These provisions of law are applicable to the facts in this case in the following manner:

First, ascertain the amount of damages that the plaintiff would be entitled to without reference to his/her contributory negligence.

Second, ascertain the proportion or percentage of such amount of damages which is attributable to plaintiff's contributory negligence.

Third, diminish the amount ascertained in the first step by the proportion or percentage of contributory negligence ascertained in the second step.

The amount remaining is the amount the plaintiff is entitled to.

***Alternate Charge***

If, in accordance with the principles of law heretofore given you, you find that the defendant was negligent and that the plaintiff was contributorily negligent, you will apply the following provision of the *Federal Employers Liability Act*, 45 U.S.C.A., Sec. 53:

In all actions against any common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

This provision which deals with the effect of the employee's contributory negligence upon the amount of his/her recovery, states two principles of law:

- The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but
- if the employee is guilty of contributory negligence the effect of such contributory negligence is that the damages the employee is entitled to shall be diminished by you in proportion to the amount of such contributory negligence.

To explain how to apply the doctrine of comparative negligence to the facts of this case, I shall use an illustration.

You may determine that the amount of the plaintiff's damages for his/her personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his/her contributory negligence is 50%. You would compute what 50% of X dollars is, that is 50 cents times each of X dollars, and diminish the amount of X dollars by 50% or 50 cents out of each dollar, which would leave the amount of 50% of X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his/her personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his/her contributory negligence is 10%. You would compute what 10% of X dollars is, that is 10 cents

times each of X dollars, and diminish the amount of X dollars by 10% or 10 cents out of each dollar, which would leave the amount of 90% or X dollars to which the plaintiff would be entitled in your verdict.

You may determine that the amount of the plaintiff's damages for his/her personal injuries was X dollars and that the percentage or proportion of that amount of X dollars which is attributable to the plaintiff because of his/her contributory negligence is 90%. You would compute what 90% of X dollars is, that is, 90 cents times each of X dollars, and diminish the amount of X dollars by 90% or 90 cents out of each dollar, which would leave the amount 10% of X dollars to which the plaintiff would be entitled in your verdict.

**Cases:**

*Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 444 (1943); *Bashco v. Pennsylvania Railroad Co.*, 3 N.J. Super. 86, 90, 91 (App. Div. 1949); *Hardy v. D.L. & W.R.R. Co.*, 97 N.J.L. 358, 361 (Sup. Ct. 1922); *Koshorek v. Pennsylvania Railroad Co.*, 318 F.2d 364 (3d Cir. 1963).

As to concurrent jurisdiction see *Miles v. Illinois Central R. Co.*, 315 U.S. 698, 86 L.Ed. 1129, 62 S.Ct. 827 (1942). *Forum non conveniens* may be asserted by a State court in a F.E.L.A. case. *Vargas v. A.S. Bull Steamship Co.*, 44 N.J. Super. 536 (App. Div. 1957).

***NOTE TO JUDGE***

State and Federal courts have concurrent jurisdiction in *Federal Employers Liability Act* cases. See 45 U.S.C.A., Sec. 56.

45 U.S.C.A., Sec. 51 provides generally that every common carrier by railroad, if negligent, shall be liable to its employees for damages arising out of injuries or death.

45 U.S.C.A. Sec. 53 provides that "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 140, Sec. 3, 35 Stat. 66."

The proviso in the foregoing refers to Title 45, Chapter 1, Sec. 1 *et seq.* (Safety Appliance Act) which required railroads to incorporate certain safety appliances and equipment on railroad engines and cars for the protection of employees and travelers.