Mercer Law Review

Volume 46
Number 4 *Annual Eleventh Circuit Survey*

Article 16

7-1995

Gottshall v. Consolidated Rail Corp.: Recognizing Negligently Inflicted Emotional Injuries Under The Federal Employers' Liability Act

J. Scott Hale

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Torts Commons

Recommended Citation
Hale, J. Scott (1995) "*Gottshall v. Consolidated Rail Corp.*: Recognizing Negligently Inflicted Emotional Injuries Under The Federal Employers' Liability Act," *Mercer Law Review*: Vol. 46 : No. 4 , Article 16.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol46/iss4/16

This Casenote is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Gottshall v. Consolidated Rail Corp.: Recognizing Negligently Inflicted Emotional Injuries Under The Federal Employers' Liability Act

The United States Supreme Court in *Consolidated Rail Corp. v. Gottshall*[1] granted certiorari for two cases from the United States Court of Appeals for the Third Circuit ("Third Circuit").[2] Both cases involved claims for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA").[3] In *Gottshall v. Consolidated Rail Corp.*,[4] the plaintiff alleged that he suffered from major depression and post-traumatic stress disorder because his employer, Conrail, negligently forced him to watch and actively participate in the events leading to a close friend's death.[5] Conrail dispatched plaintiff and several other employees, including plaintiff's close friend Richard Johns, to replace a defective stretch of track.[6] Johns suffered a heart attack and died at the work site. The crew's supervisor, Michael Norvick, was unable to summon rescue workers because Conrail had taken the radio base station off the air for repairs without notifying him.[7] Once paramedics arrived, they covered Johns' body and laid it by the tracks.[8] Norvick

---

1. 114 S. Ct. 2396 (1994).

2. Gottshall v. Consolidated Rail Corp., 988 F.2d 355 (3d Cir. 1993); Carlisle v. Consolidated Rail Corp., 990 F.2d 90 (3d Cir. 1993).

3. 45 U.S.C. §§ 51-60 (1988). The Act provides in pertinent part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . .

45 U.S.C. § 51 (1988).

4. 988 F.2d 355 (3d Cir. 1993).

5. *Id.* at 360.

6. *Id.* at 358. Most of the members of the crew that Conrail sent to repair the track were in their fifties and many were overweight. Conrail also knew that Johns suffered from high blood pressure and was taking medication for a heart problem. *Id.*

7. *Id.* at 358-59. The coroner's report indicated that Johns' chances of survival would have been greatly increased if he had received prompt medical attention. *Id.* at 359.

8. *Id.* at 359.

ordered the men back to work in plain view of the body.[9] After the incident, Gottshall was admitted to a psychiatric hospital where he suffered from insomnia, loss of appetite, nausea, physical weakness, and repetitive nightmares of Johns' death.[10] The United States District Court for the Eastern District of Pennsylvania granted summary judgment for Conrail.[11] The Third Circuit reversed, holding that FELA provides a cause of action for genuine and serious emotional injuries.[12] The case was subsequently remanded to the district court for determination of material issues of fact relating to breach of duty, causation, and injury.[13] In *Carlisle v. Consolidated Rail Corp.*,[14] the plaintiff alleged that the railroad negligently produced a stressful work environment that caused him to suffer a nervous breakdown.[15] In 1984 Conrail reduced its work force thus increasing Carlisle's responsibilities as a dispatcher. Conrail moved Carlisle to trainmaster in 1988, which required him to work long, erratic hours often in dangerous areas, while still performing his duties as a dispatcher on occasion.[16] Carlisle began experiencing insomnia, headaches, depression, and weight loss. After an extended period of working twelve to fifteen hour shifts for weeks at a time, Carlisle suffered a nervous breakdown.[17] A jury awarded Carlisle damages based on his FELA claim of negligent infliction of emotional distress.[18] In upholding the verdict, the Third Circuit stated that no common law standard for recovery had been adopted.[19] Instead, the court relied on the elements of common law negligence and added a genuineness test based on a review of the facts and common law standards.[20] Reviewing both decisions, the Supreme Court held that FELA does recognize a cause of action based on negligent infliction of emotional distress.[21] To recover under FELA, however, an employee must also meet the criteria of the common law zone of danger test.[22]

---

9. *Id.*
10. *Id.* at 359-60.
11. Gottshall v. Consolidated Rail Corp., 773 F. Supp. 778, 784 (E.D. Pa. 1991).
12. 988 F.2d at 371.
13. *Id.* at 383.
14. 990 F.2d 90 (3d Cir. 1993).
15. *Id.* at 91-92.
16. *Id.* at 92.
17. *Id.*
18. *Id.* at 97-98.
19. *Id.* at 98.
20. *Id.*
21. 114 S. Ct. at 2407.
22. *Id.* at 2411.

Congress enacted FELA in 1908 to impose liability on railroad companies for the large number of injuries suffered by railroad employees.[23] The Supreme Court has liberally construed FELA to accomplish the remedial goals that motivated its enactment.[24] On issues not expressly addressed by FELA, however, the Court has said that common law principles will guide the Court's analysis.[25] Congress did not define "injury" in FELA; consequently, the Court's determination of whether negligent infliction of emotional distress qualifies as an injury relies heavily on common law principles.[26] Today, only a few states do not allow recovery for mental or emotional harm caused by another's negligence.[27] In those states that do recognize a cause of action for negligently inflicted emotional injuries, policy concerns have prompted limitations on recovery.[28] The policy reasons most often cited include: (1) the potential for an infinite number of trivial suits; (2) unlimited and unpredictable liability; and (3) the fear of fraudulent claims based on injuries that are difficult to measure.[29] In an attempt to combat these fears, at least three primary tests have emerged from the common law.[30] First, the physical impact test requires a plaintiff seeking recovery for emotional injuries to sustain some type of physical injury from the negligent act that allegedly caused the emotional

---

23. Tiller v. Atlantic Coast Line R. R., 318 U.S. 54, 58 (1943); Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

24. Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 562 (1987) (citing Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957); Urie v. Thompson, 337 U.S. 163, 180 (1949)).

25. *Urie*, 337 U.S. at 174.

26. 114 S. Ct. at 2404.

27. *Id.* at 2405. *See* Allen v. Walker, 569 So. 2d 350, 352 (Ala. 1990) (noting Alabama does not recognize negligent infliction of emotional distress). *Compare* Mechanics Lumber Co. v. Smith, 752 S.W.2d 763 (Ark. 1988) with M.B.M. Co. v. Counce, 596 S.W.2d 681 (Ark. 1980) (noting that the state of the law is unclear in Arkansas).

28. Edmund C. Baird, III, Comment, *No Pain, No Gain: The Third Circuit's "Sufficient Indicia of Genuineness" Approach to Claims of Negligent Infliction of Emotional Distress Under the Federal Employers' Liability Act*, 71 WASH. U. L.Q. 1255, 1258 (1993) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54 at 360-61 (5th ed. 1984) (The four factors that Keeton recognizes are: (1) the inability to measure mental disturbances in monetary terms; (2) the remoteness of mental injuries as a consequence of negligent acts; (3) the lack of precedent; and (4) the possibility for a vast increase in litigation)). *Id.* at 360.

29. 114 S. Ct. at 2411.

30. For a survey of limitations to recovery for negligent infliction of emotional distress see Douglas Bryan Marlow, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781 (1988). *See also* Baird, *supra* note 28, at 1259 n.30.

injuries.[31] This test attempts to avoid fraudulent claims by establishing a clear relationship between the negligent act of the defendant and the injury suffered by the plaintiff.[32] However, the physical manifestation requirement has been criticized as overinclusive because it allows compensation for trivial mental injuries if accompanied by any physical injury. The requirement has also been attacked as underinclusive since serious mental injuries may go uncompensated if a plaintiff escapes physical injury.[33] The second test courts have applied is the zone of danger test.[34] This test expands recovery to plaintiffs that suffer a physical impact or apprehension of a physical impact from the defendant's negligent act.[35] The zone of danger test limits the scope of potential recovery for emotional injuries but recognizes that sometimes "a near miss may be as frightening as a direct hit."[36] Fourteen jurisdictions currently follow the zone of danger test.[37] The third test, the relative bystander test, was first recognized in *Dillon v. Legg.*[38] In *Dillon*, the California Supreme Court concluded that reasonable foreseeability should govern recovery for emotional injuries.[39] The court listed three factors that determine reasonable foreseeability: (1) the plaintiff's proximity to the scene of the accident; (2) actual observation of the accident by the plaintiff; and (3) a close relationship between the plaintiff and the victim.[40] Nearly half the states allow recovery under this standard or some similar variation.[41] The courts using this test believe that the factors established in *Dillon* limit recovery in a manner consistent with existing policy concerns.[42] In *Atchison, Topeka & Santa Fe Railway v. Buell*,[43] the Supreme Court recognized the lack of a uniform standard for negligent infliction of emotional distress under

31. 114 S. Ct. at 2406.
32. Marlow, *supra* note 30, at 784.
33. *Id.*
34. 114 S. Ct. at 2406.
35. Marlow, *supra* note 30, at 794.
36. 114 S. Ct. at 2406 (citing Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 488 (1982)).
37. *Id.* at 2406 n.9.
38. 441 P.2d 912 (Cal. 1968).
39. *Id.* at 920.
40. *Id.*
41. 114 S. Ct. at 2407 n.10.
42. *Id.* at 2407 n.11. One of the ways courts have limited recovery under the zone of danger and relative bystander test is by requiring a plaintiff to demonstrate a physical manifestation of the alleged emotional injury. *Id.*
43. 480 U.S. 557 (1987).

FELA.[44] The Court stated, however, that "broad pronouncements in [the area of emotional injuries under FELA] may have to bow to the precise application of developing legal principles."[45] Since *Buell*, no clear standard has emerged. The United States Courts of Appeals for the First, Second, and Sixth Circuits have avoided the issue by resolving FELA claims for emotional injuries on the general common law elements of negligence.[46] When they have gone beyond a pure negligence analysis, the United States Courts of Appeals for the Fourth and Fifth Circuits have required unconscionable or outrageous conduct to recover for emotional injuries under FELA.[47] The Fifth Circuit has expressly rejected the relative bystander theory as a basis for recovery.[48] Other jurisdictions have been more willing to accept the common law tests as limiting recovery for emotional injuries. In *Holliday v. Consolidated Rail Corp.*,[49] the Third Circuit applied the physical impact test to deny recovery under FELA for a purely emotional injury.[50] However, the Third Circuit has also shown a willingness to consider other common law tests as a basis for recovery. In *Outten v. National Railroad Passenger*

44. *Id.* at 570.

45. *Id.*

46. *See* Moody v. Maine Cent. R.R., 823 F.2d 693, 696 (1st Cir. 1987) (holding plaintiff failed to prove his employer's conduct caused his emotional injuries); Robert v. Consolidated Rail Corp., 832 F.2d 3, 7 (1st Cir. 1987) (holding plaintiffs are required to prove the traditional common law elements of negligence); Puthe v. Exxon Shipping Co., 2 F.3d 480, 483 (2d Cir. 1993) (holding plaintiff, a seaman, failed to establish foreseeability by alleging that many years of exposure to the hardships of the sea caused him to suffer emotional injuries); Stoklosa v. Consolidated Rail Corp., 864 F.2d 425, 426 (6th Cir. 1988) (holding plaintiff failed to demonstrate his injury was reasonably foreseeable); Adams v. CSX Transp., Inc., 899 F.2d 536, 539 (6th Cir. 1990) (holding plaintiff failed to prove breach of duty and causation).

47. The basis for requiring unconscionable or outrageous conduct on the part of the defendant appears to come from the courts' interpretation of Buell, 480 U.S. at 567 n.13. Buell refers to Farmer v. Carpenters, 430 U.S. 290, 305 (1977), which held that state law required outrageous conduct to recover on claims for emotional injuries. *See* Elliott v. Norfolk & W. Ry., 910 F.2d 1224, 1229 (4th Cir. 1990) (holding plaintiff's FELA claim must fail because plaintiff did not make a sufficient showing that the defendant's conduct was unconscionable or outrageous); Netto v. Amtrak, 863 F.2d 1210, 1214 (5th Cir. 1989) (holding plaintiff cannot recover under FELA because no evidence was presented to establish the defendant's conduct was unconscionable or outrageous).

48. *See* Gaston v. Flowers Transp., 866 F.2d 816, 821 (5th Cir. 1989) (holding recovery for purely emotional injuries is improper under FELA when the defendant's alleged tortious act was not directed at the plaintiff, but at a third person).

49. 914 F.2d 421 (3d Cir. 1990).

50. *Id.* at 427. The plaintiff claimed he suffered stress and accompanying physical symptoms as a result of being placed in a job he was unqualified to perform. The court held that plaintiff failed to allege an injury covered by FELA, and it granted summary judgment for defendant. *Id.* at 422.

Corp.,[51] the Third Circuit applied several common law theories of recovery, but it rejected the plaintiff's FELA claim because he could not prove that he suffered a physical impact, was in the zone of danger, was located physically close to the alleged negligent act, or that he had any personal responsibility for the incident.[52] Failing to find guidance in the federal common law, the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") relied on state law to establish a standard for recovery in *Gillman v. Burlington Northern Railroad.*[53] Holding that the zone of danger test is the appropriate test under Illinois law,[54] the Seventh Circuit has refused to reverse *Gillman.*[55] Thus, since the Supreme Court left the issue of emotional injuries under FELA open to developing legal theories, little has developed except confusion.

Gottshall has done much to clarify the scope of claims recognized under FELA.[56] Writing for the Court, Justice Thomas expressly stated that the term injury, as used in FELA, encompasses claims for negligent infliction of emotional injuries.[57] The Court based this determination on the common law's recognition of recovery for negligently inflicted emotional injuries at the time FELA was enacted, the broad interpretation the Court has accorded the term injury in the past, and the severe debilitating effect emotional injuries can have.[58] The Court's analysis of FELA claims for emotional injuries, however, goes beyond defining the term injury.[59] The Court also adopted the common law zone of danger test as limiting the scope of emotional injuries for which an

---

51. 928 F.2d 74 (3d Cir. 1991).

52. *Id.* at 79. Finding no support in the common law and the significant possibility of fraud, limitless claims, and increased litigation, the court expressly refused to create a new rule allowing recovery based on purely emotional injuries. *Id.*

53. 878 F.2d 1020, 1024 (7th Cir. 1989).

54. *Id.* The Illinois Supreme Court adopted the physical danger rule in Rickey v. Chicago Transit Auth., 457 N.E.2d 1 (Ill. 1983). Thus, Illinois law requires: (1) the plaintiff must be in the zone of danger; (2) the plaintiff must fear for his safety; and (3) the plaintiff must demonstrate some physical manifestation of his alleged emotional injury. *Id.* at 5.

55. *See* Ray v. Consolidated Rail Corp., 938 F.2d 704 (7th Cir. 1991) (holding an injury under FELA requires a plaintiff to be in the zone of danger to recover for emotional injury); Bernas v. Soo Line R.R., 996 F.2d 1219 (7th Cir. 1993) (unpublished disposition, stating that to recover for emotional injuries under FELA in the Seventh Circuit a plaintiff must prove physical contact or the threat of physical contact).

56. 114 S. Ct. 2396.

57. *Id.* at 2407.

58. *Id.* at 2407-08.

59. *Id.* at 2408.

individual can recover under FELA.[60] In support of the zone of danger standard, the Court pointed to three separate grounds for adopting this particular common law approach.[61] First, the common law recognized a right to recover for negligently inflicted emotional injuries at the time of FELA's enactment.[62] Although the zone of danger test was not the standard in a majority of American jurisdictions in 1908, the Court believed the test's progressive nature at that time was consistent with FELA's broad remedial goals.[63] Second, fourteen American jurisdictions currently use the zone of danger test.[64] Thus, current usage confirms that this standard remains a well recognized common law concept of negligence.[65] Lastly, the Court believed the zone of danger test was consistent with FELA's focus on physical perils.[66] According to the Court, the zone of danger test best accomplishes FELA's goals of compensating injured workers and improving safety measures in the future.[67] The Court also noted that the zone of danger test best achieves the general policy goals of preventing a large number of trivial suits, the possibility of fraudulent claims, and unlimited and unpredictable liability.[68] The physical impact test was dismissed as lacking support in the current state of the common law, and its requirement that a worker suffer a physical impact was criticized as unnecessarily rigid.[69] The Court further concluded that the relative bystander test lacks the historical support of the zone of danger test, and it unnecessarily extends recovery beyond FELA's emphasis on protecting against physical harm.[70] In his concurrence, Justice Souter expressed his belief that the Court's duty in interpreting FELA is to create a federal common law.[71] He also asserted that the majority correctly adopted the zone of danger test as the appropriate standard under federal common law.[72] The dissent, led by Justice Ginsburg, criticized the majority on several grounds.[73] First, Justice Ginsburg noted that the majority failed to

60. *Id.* at 2410.
61. *Id.* at 2410-11.
62. *Id.* at 2410.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 2411.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 2412 (Souter, J., concurring).
72. *Id.*
73. *Id.* at 2412-19 (Ginsburg, J., dissenting).

decide what point in time—present or historical—should be determinative of the relative support of each common law standard.[74] Next, she disagreed with the majority's position that potential liability for emotional injury claims under FELA is infinite.[75] Lastly, she concluded that the zone of danger test fails to accomplish FELA's broad remedial goals of protecting railroad employees from on-the-job injuries.[76] In her opinion, the Court should have adopted the Third Circuit's genuineness standard.[77]

Despite the division within the Court, the *Gottshall* decision resolved two unsettled issues.[78] First, the Court answered the question left unresolved by *Buell* by expressly holding that negligent infliction of emotional distress is an injury within the meaning of FELA.[79] Second, the Court determined that recovery for negligently inflicted emotional injuries should be limited to employees within the zone of danger.[80] Thus, *Gottshall* establishes a consistent standard for negligent infliction of emotional injury claims made under FELA—nonexistent until now.[81] Existing FELA jurisprudence provides guidance on whether the Court chose the right standard. In *Urie v. Thompson*,[82] the Court summed up its interpretation of FELA throughout the years as a "constant and established course of liberal construction . . . ."[83] Holding the term injury to encompass negligently inflicted emotional injuries has expressly expanded FELA's scope thus further liberalizing FELA's coverage. Also, in enacting FELA "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing

---

74. *Id.* at 2417.

75. *Id.* at 2418. According to Justice Ginsburg, the scope of possible plaintiffs under FELA is sufficiently limited because FELA only applies to railroad workers. She also suggests that requiring objective medical proof of an actual injury would solve the problem of authenticating claims for emotional injuries. *Id.*

76. *Id.*

77. *Id.* at 2419. For discussions of the need to eliminate FELA altogether in favor of the worker's compensation system, see Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act*, 29 HARV. J. ON LEGIS. 79 (1992); Arnold I. Havens, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310 (1987). For an article in support of maintaining FELA, *see* Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49 (1988).

78. *See supra* notes 41-44 and accompanying text.

79. 114 S. Ct. at 2407.

80. *Id.* at 2411.

81. *See supra* notes 41-44 and accompanying text.

82. 337 U.S. 163 (1949).

83. *Id.* at 181-82.

conditions and changing concepts of industry's duty toward its workers."[84] Allowing recovery for purely emotional injuries can clearly be viewed as enlarging the railroad's duty to its workers.[85] Lastly, the zone of danger test advances at least two common law policy considerations. First, the test limits the class of possible plaintiffs thus avoiding an infinite number of trivial claims. Second, the test should reduce the unpredictability of liability that has existed since *Buell*.[86] This last policy concern may prove *Gottshall's* greatest contribution to FELA jurisprudence. Under the zone of danger test, the railroad should be able to more accurately predict the type of conduct that will constitute negligence for purposes of FELA. Thus, the railroad should improve safety conditions to prevent recovery for emotional injuries suffered by employees within the zone of danger. Moreover, a universal standard should promote stability within the law by producing more consistent judgments under FELA. Therefore, the Court's holding in *Gottshall* will expand the scope of recovery for employees while establishing a standard on which employers can rely to prevent future liability under FELA.

J. SCOTT HALE

84. Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958).

85. *See Buell*, 480 U.S. at 570 (stating that "whether one can recover for emotional injury may not be susceptible to an all-inclusive 'yes' or 'no' answer.")

86. 114 S. Ct. at 2411.