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NOTES AND COMMENTS

CONSOLIDATED RAIL CORP. v. GOTTSHALL: “CLOSING THE DOOR” ON FELA CLAIMS FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS BY LIMITING RECOVERY TO THE “ZONE OF DANGER”

I. INTRODUCTION

The Supreme Court’s decision in *Consolidated Rail Corp. v. Gottshall*¹ recognized negligent infliction of emotional distress claims under the Federal Employers’ Liability Act (FELA)² but limited recovery by applying the “zone of danger” test.³ This controversial holding was correct because it balances the liberal recovery policy of FELA with the legitimate common law concerns of fraudulent claims and infinite liability.⁴ This casenote will analyze the history behind emotional or mental injury claims under FELA and then scrutinize the Court’s reasoning for adopting the restrictive “zone of danger” test over the more progressive and liberal “bystander” and “genuineness” tests.⁵

Although the issues in *Consolidated Rail Corp.* are straight forward, some pertinent background information on FELA and the tort of negligent infliction of emotional distress would be helpful in facilitating a thorough and intelligent discussion. In 1908, Congress passed FELA in an attempt to shift some of the liability for physical injuries and deaths caused by the railroad industry away from the employee to

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

2. Codified as amended at 45 U.S.C. §§ 51-60 (1988).

3. *Consolidated Rail Corp.*, 114 S. Ct. at 2396.

4. *Id.*

5. *Id.*

the employer.⁶ In imposing a heavier burden upon railroad companies, Congress reasoned that since the companies were profiting from their employees' hardships, they should have a duty to provide safe working conditions.⁷ The statute eliminated several common law defenses available to the railroads, and in the process advanced its remedial goal of permitting a "liberal" forum in which employees could bring their negligence claims.⁸

The shipping industry was incorporated within the scope of FELA by the Jones Act of 1915.⁹ "The standard of liability is the same under both acts, and the case law of the FELA therefore sheds light on the Jones Act."¹⁰ This note analyzes the case law involving alleged emotional injuries to both railroad workers and seamen, and therefore is applicable to actions involving either industry.

Negligent infliction of emotional distress has been recognized in common law for as long as FELA has been enacted.¹¹ Since FELA's inception, courts have been concerned about the possibility of infinite liability for defendants and the difficulty in substantiating emotional injuries, both of which encourage fraudulent claims.¹² To limit these effects on emotional distress claims, courts imposed either the "physical impact" or the "zone of danger" test.¹³ The "physical impact" test, the majority approach in the early part of this century,¹⁴ allowed for

6. "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering . . . injury or death 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).

7. *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (citing H.R. REP. NO. 1386, 60th Cong., 1st Sess. 2 (1908)).

8. In all actions . . . brought against any such common carrier by railroad . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, . . . such employee shall not be held to have assumed the risks of his employment . . . [and] [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. § 53-55 (1988). *See also* S. REP. NO. 460, 60th Cong., 1st Sess. 1-3 (1908) (discussing the abolishment of contributory negligence, the fellow-servant doctrine, and no-fault contracts to help further FELA's goals).

9. "Any seaman who shall suffer personal injury in the course of his employment may . . . 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 . . ." 46 U.S.C. app. § 688(a) (1988).

10. *Gaston v. Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989) (citing *Ferguson v. Moore-McCormick Lines*, 352 U.S. 521, 523 (1957)).

11. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2405 (1994).

12. Edmund C. Baird, III, *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, 1258-59 (1993).

13. *Id.* at 1260.

14. *Consolidated Rail Corp.*, 114 S. Ct. at 2406.

the recovery of emotional injuries only if the plaintiff suffered a physical impact.¹⁵ The “zone of danger” test limits recovery to emotional distress caused either by physical injury or the imminent apprehension of physical contact.¹⁶ Both tests are very restrictive and guard against the underlying common law concerns.¹⁷

In 1968, the California Supreme Court introduced the “bystander” recovery test.¹⁸ The three factors used by the court to determine liability for the emotional distress of bystanders were: (1) the plaintiff’s physical proximity to an accident; (2) whether the emotional injury resulted from “a sensory and contemporaneous observance of the accident,” and (3) whether a close relationship existed between the victim and the plaintiff.¹⁹ The “bystander” test has since become the majority standard in the United States, applied in roughly half the states. However, several jurisdictions have placed more restrictive limitations on who may recover.²⁰ This note will analyze the integration of these two areas of the law by first discussing their historical unrest in the federal courts and then examining the Supreme Court’s holding in *Consolidated Rail Corp.*, which presents a clear and decisive picture of emotional distress recovery under FELA.

II. STATEMENT OF THE CASE

James E. Gottshall and Alan Carlisle, former employees of Consolidated Rail Corporation (“Conrail”), each filed FELA claims against their former employer for negligent infliction of emotional distress.²¹ The Third Circuit Court of Appeals reversed Conrail’s summary judgment against Gottshall and upheld the jury’s verdict in favor of Carlisle.²² Conrail’s subsequent appeals led to the consolidation of both suits for review by the Supreme Court.²³ The distinct factual situations of both cases are presented below.

15. Baird, *supra* note 12, at 1260.

16. *Id.*

17. *Id.*

18. *Id.* at 1261.

19. *Id.*

20. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2407 (1994).

21. *Gottshall v. Consolidated Rail Corp.*, 773 F. Supp. 778 (E.D. Pa. 1991); *Carlisle v. Consolidated Rail Corp.*, 790 F. Supp. 521 (E.D. Pa. 1991).

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

23. *Consolidated Rail Corp.*, 114 S. Ct. at 2396.

A. *Gottshall v. Consolidated Rail Corp.*

In the summer of 1988, James Gottshall and his friend Richard Johns were part of a nine member work crew sent by Conrail to the Watertown Secondary near Turbotville, Pennsylvania to replace some defective track.²⁴ The conditioning and age of the crew were not conducive for the strenuous work nor for the hot weather.²⁵ The supervisor, Michael Norvick, forced the crew to work hard and did not give them any breaks.²⁶ After two and a half hours, Johns collapsed.²⁷ The record indicated that Conrail knew of Johns' weight problem, high blood pressure, cardiovascular disease, and his medication needs.²⁸ Johns regained consciousness, only to collapse a second time five minutes later.²⁹ Gottshall came to Johns' aid and administered CPR, while Norvick went to get medical assistance.³⁰ Due to communications difficulties, medical help did not arrive until almost an hour later.³¹ Johns had died in the interim. His corpse was covered and laid beside the track, where Norvick ordered his crew back to work.³² Three hours later, after the coroner had determined the cause of death to be a heart attack, Gottshall carried Johns' body to the ambulance.³³

Gottshall and Johns had been close friends for fifteen years.³⁴ Fellow employees stated that Gottshall was emotionally upset throughout the entire incident and continued to cry after they had left the worksite.³⁵ The next day Gottshall was sent back to the same track as the day before, but only after being reprimanded by Conrail for attempting to administer CPR to Johns.³⁶ Several days later, Gottshall had become so preoccupied with the death of Johns, that he left work sick and never returned.³⁷ Gottshall was diagnosed as suffering from major depression and post-traumatic stress disorder.³⁸ Afraid that he

24. *Gottshall*, 988 F.2d at 358.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 359.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 360.

would die in the same condition as Johns, Gottshall suffered from insomnia, loss of appetite, nightmares, and suicidal preoccupations.³⁹

After two other doctors confirmed the diagnosis, Gottshall filed an action against Conrail for emotional and physical injuries caused by Conrail's alleged negligence in creating the circumstances surrounding Johns' death.⁴⁰ The district court granted Conrail's motion for summary judgment, reasoning that Gottshall had failed to satisfy any elements of a recognized action for recovery.⁴¹ The Third Circuit reversed and remanded for trial, holding that FELA's liberal recovery policy should guide the court in determining whether the victim's emotional injury was genuine, thus supporting a negligent infliction of emotional distress claim.⁴²

B. *Carlisle v. Conrail*

Alan Carlisle began working for Conrail when it was formed in 1976.⁴³ He started as a train dispatcher, but eventually became supervisor of all rail operations in the Philadelphia area.⁴⁴ Carlisle's responsibilities, as well as his stress, increased because of Conrail's sharp reduction in its workforce and the risks involved in working with the company's aging railstock and outdated switching equipment.⁴⁵ Carlisle became increasingly anxious with Conrail's failure to alleviate these safety concerns because of a potential slow-down in the railyard's schedules.⁴⁶

By 1988 Carlisle was a trainmaster, a position which required him to work long hours in hazardous conditions.⁴⁷ The cutbacks at Conrail meant that Carlisle continued to work double duty as a supervisor of dispatchers.⁴⁸ After a consecutive fifteen day stretch of working twelve to fifteen hour days, Carlisle had a nervous breakdown.⁴⁹ Carlisle testified that Conrail was non-responsive to his complaints regarding the excessive hours and stress of his job.⁵⁰

39. *Id.*

40. *Id.*

41. *Gottshall v. Consolidated Rail Corp.*, 773 F. Supp. 778 (E.D. Pa. 1991).

42. *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993).

43. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 92 (3d Cir. 1993).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 93.

Carlisle filed a lawsuit in district court under FELA for negligent infliction of emotional distress.⁵¹ He was successful in claiming that Conrail was negligent in failing to provide a safe workplace due to the unreasonably stressful and dangerous conditions.⁵² The Third Circuit affirmed the jury verdict in favor of Carlisle.⁵³ The opinion expanded the court's holding in *Gottshall v. Consolidated Rail Corp.* by imposing liability on employers solely for emotional injuries caused by foreseeable job-related stress of their employees.⁵⁴

C. *Consolidated Action*

The issues before the Supreme Court under the consolidated actions were (1) whether the tort of negligent infliction of emotional distress was cognizable under FELA, and (2) if so, what was the proper scope of the availability of recovery?⁵⁵

III. PRIOR FELA JURISPRUDENCE

Damages for emotional distress have traditionally been recoverable under FELA when accompanied by a physical injury.⁵⁶ An employee could recover for his fright at the time of the accident and for any "mental distress directly associated with his physical injuries."⁵⁷ Grief for the loss of friends in an accident was not recoverable.⁵⁸ This theory went generally unchallenged until the mid-1980s, when a flood of litigation over emotional distress in the workplace began to reach the federal courts.⁵⁹

51. *Carlisle v. Consolidated Rail Corp.*, 790 F. Supp. 521 (E.D. Pa. 1992).

52. *Id.*

53. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1993).

54. *Id.* at 97.

55. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2403 (1994).

56. *See Erie R.R. v. Collins*, 253 U.S. 77, 85 (1920) (holding that a railroad employee may recover damages for "shame and humiliation" caused by an injury resulting in personal disfigurement or mutilation); *Bullard v. Central Vt. Ry.*, 565 F.2d 193, 197 (1st Cir. 1977) (limiting the right to recover emotional damages by a railroad employee who was involved in an accident in which he witnessed his friend's death).

57. *Bullard*, 565 F.2d at 197 n.3.

58. *Id.*

59. *See Moody v. Maine Cent. R.R.*, 823 F.2d 693 (1st Cir. 1987); *Puthe v. Exxon Shipping Co.*, 2 F.3d 480 (2d Cir. 1993); *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990); *Elliott v. Norfolk & W. Ry.*, 910 F.2d 1224 (4th Cir. 1990); *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989); *Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340 (6th Cir. 1987); *Ray v. Consolidated Rail Corp.*, 938 F.2d 704 (7th Cir. 1991); *Buell v. Atchison, T. & S.F. Ry. Co.*, 771 F.2d 1320 (9th Cir. 1985); *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986).

Prior to *Consolidated Rail Corp.*, the Supreme Court's only opportunity to set a standard for the lower courts to follow was in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*.⁶⁰ The railway company was making an appeal from an adverse Ninth Circuit decision which held that wholly mental injuries were recoverable under FELA.⁶¹ The Court in *Atchison* interpreted FELA's concept of "injury" as encompassing all reasonably foreseeable injuries caused by the employer's failure to exercise due care.⁶² The Court reasoned that the term "injury" was not qualified by any words such as "physical" or "bodily," which, considering FELA's liberal recovery policy, should allow damages for wholly mental injuries.⁶³ The Supreme Court reserved the question of whether the Ninth Circuit's interpretation of FELA was correct because the record was insufficiently developed as to the exact nature of the tortious activity and the extent of damages suffered.⁶⁴ However, dicta by the Court suggested there may be recovery for some types of emotional injury.⁶⁵ The Court noted that this question "is not necessarily an abstract point of law . . . that might be answerable without exacting scrutiny of the facts of the case."⁶⁶ The developing common law, combined with the particular facts of the case, precluded any broad pronouncement of the law in this area.⁶⁷

There was no uniformity among the federal circuits in the application of *Atchison*. The First Circuit noted that the *Atchison* decision was "an attempt to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open."⁶⁸ The opinion in *Atchison*, which denies recovery for emotional distress absent a physical impact, remained the law until *Consolidated Rail Co.*⁶⁹

60. 480 U.S. 557 (1987).

61. *Buell*, 771 F.2d at 1324.

62. *Id.* at 1322.

63. *Id.* at 1323.

64. *Atchison*, 480 U.S. at 567 (1987).

65. *Id.* at 568-70.

66. *Id.* at 568.

67. *Id.* at 569-70.

68. *Moody v. Maine Cent. R.R.*, 823 F.2d 693, 694 (1st Cir. 1987) (refusing to make a railroad worker's emotional injuries, allegedly the result of harassment at work, the pioneer case after the *Buell* decision due to lack of causation). *See also* *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993) (declining to address the emotional distress issue because the underlying negligence claim was not fully developed).

69. *Bullard v. Central Vt. Ry.*, 565 F.2d 193 (1st Cir. 1977).

In *Puthe v. Exxon Shipping Co.*⁷⁰ the Second Circuit, in dicta, indicated that recovery for wholly emotional injuries may be allowable. The standards set forth by the district court, requiring a "severe" injury and "unconscionable abuse," were not essential elements for recovery.⁷¹ The court declined to set any standards because the plaintiff had not met the basic elements of negligence.⁷²

In *Elliott v. Norfolk & Western Railway Co.*,⁷³ the Fourth Circuit refused to extend *Atchison* by recognizing a claim for negligent infliction of emotional distress. The Court stated that if such a claim was cognizable under FELA, then "unconscionable abuse" or "outrageous conduct" was a vital element.⁷⁴

The Fifth Circuit initially implied that the "zone of danger" was the appropriate scope of recovery for emotional injuries.⁷⁵ A few years later the court changed its position and allowed recovery for emotional injuries without "physical injury."⁷⁶ A subsequent rehearing en banc overruled the opinion, claiming there were insufficient facts to determine the issue, and reemphasizing the "zone of danger" test as the possible limit on recovery.⁷⁷

The Sixth Circuit has refused to expand FELA liability to the area of purely emotional injuries.⁷⁸

70. 2 F.3d 480, 483 (2d Cir. 1993) (dismissing seaman's claim because emotional injuries, caused by years of working at sea, were part of the job and therefore not foreseeable).

71. *Id.* (interpreting *Atchison* as not mandating courts, which hold such a claim viable under FELA, to determine if there was a "severe" injury or "unconscionable abuse" before imposing liability). See *Atchison*, 480 U.S. at 566 n. 13 (discussing standards which must be met to prove an intentional infliction of emotional distress claim).

72. *Puthe*, 2 F.3d at 483.

73. 910 F.2d 1224 (4th Cir. 1990) (rejecting plaintiff's claim that despite the lack of physical contact she suffered anxiety, insecurity, and hurt feelings due to disputes with her supervisors).

74. *Id.* at 1229 (assuming there is a claim under FELA recognizing emotional injuries, "unconscionable abuse" or "outrageous conduct" is an essential element to be proven; plaintiff failed to show either).

75. *Gaston v. Flowers Transp.*, 866 F.2d 816, 820 (5th Cir. 1989) (refusing to extend recovery to a seaman who witnessed his half-brother crushed to death, but who was only a bystander and not in the "zone of danger." The Court mentioned the dicta could be supported by Louisiana's use of the "zone of danger" test in limited common law recovery.).

76. *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991) (holding that a claim for negligent infliction of emotional distress, without a physical injury, was cognizable under FELA, but denied recovery because the accident was not foreseeable).

77. *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992) (overturning its prior holding that a tugboat captain could recover for purely emotional injuries caused by witnessing a fire since there was insufficient evidence to support the conclusion).

78. See *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 540 (6th Cir. 1990) (stating in dicta that an employer has not breached his duty to provide an emotionally safe workplace unless he has acted with "unconscionable abuse"); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir. 1988) (dismissing claim because essential element of negligence was missing); *Cf. Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340 (6th Cir. 1987) (rejecting plaintiff's FELA claim for intentional infliction of emotional distress).

The Seventh Circuit addressed this issue and found that "FELA does not create a cause of action for tortious harms brought about by acts which lack any physical contact or threat of physical contact."⁷⁹ The court has firmly stood by its "zone of danger" theory, even after the *Atchison* decision.⁸⁰

Since the *Atchison* ruling, the Ninth Circuit has accepted the Supreme Court's "invitation" to extend FELA liability to purely emotional injuries.⁸¹ Until the Third Circuit's recent findings in *Gottshall* and *Carlisle*, the Ninth Circuit had been the only circuit to liberally interpret FELA.⁸²

IV. DECISION IN *CONSOLIDATED RAIL CORP. v. GOTTSBALL*

The Supreme Court settled the conflict among the circuits with its holding in *Consolidated Rail Corp.*⁸³ The Court declared that FELA did allow claims for negligent infliction of emotional distress. However, it limited recovery under FELA only to those persons within the "zone of danger."⁸⁴

The Court analyzed the underlying intent and goals of the statute to determine whether there was a right of action for emotional injuries.⁸⁵ The purpose of FELA was to shift "part of the 'human overhead' of doing business in the railroad industry from the employees to the employers."⁸⁶ The Court, noting its past liberal construction of the statute, interpreted "injury" to encompass emotional, as well as physical, injuries.⁸⁷ This remedial goal, considered with the notion that

79. *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 813 (7th Cir. 1985) (holding the railroad liable for emotional distress caused by the abusive conduct of several supervisors towards an employee; the conduct included incidents and threats of physical contact).

80. See *Ray v. Consolidated Rail Corp.*, 938 F.2d 704 (7th Cir. 1991) (reaffirming *Lancaster* in light of *Atchison* by denying recovery for an employee who allegedly suffered emotional injuries caused by verbal harassment from his supervisor); *Hammond v. Terminal R.R. Assoc.*, 848 F.2d 95 (7th Cir. 1988) (refusing to extend *Atchison*, thereby precluding recovery for emotional injuries caused by harassment, criticism, and a heavy workload).

81. *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986) (maintaining its position in *Atchison*; despite some reservations, the court allowed recovery for wholly emotional injuries caused by an employer's harassment).

82. *Id.*

83. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994).

84. *Id.* at 2411.

85. *Id.* at 2403-04.

86. *Id.* at 2404 (quoting *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 58 (1943)).

87. *Id.* (citing *Rogers v. Missouri P. R.R.*, 352 U.S. 500 (1957) (holding that a relaxed standard of causation exists under FELA)).

"FELA jurisprudence gleans guidance from common law developments," was the determining factor behind the Court's acceptance of the claim.⁸⁸

After the Court concluded that there was a right of recovery under FELA, it focused on the more difficult task of determining the proper scope of a negligent infliction of emotional distress claim.⁸⁹ It first acknowledged the difference between pain and suffering, which traditionally has been associated with physical injury, and emotional distress, which is not directly brought about by a physical injury.⁹⁰ The Court was guided by the common law tests developed to limit recovery for emotional injury.⁹¹ Conrail supported the adoption of the "zone of danger" test while arguing against the Third Circuit's "genuineness" test.⁹² After careful analysis of the common law concerns regarding negligent infliction of emotional distress claims and the underlying principles of FELA, the Supreme Court adopted the "zone of danger" test because it was the best way to reconcile the two interests.⁹³

V. ANALYSIS

The initial question addressed by the Supreme Court was whether negligent infliction of emotional distress was a recognized cause of action under FELA.⁹⁴ In the early 1900s railroads were a major source of transportation for goods and people in the United States. Congress, aware that railroading resulted in death and injuries to thousands of workers each year, enacted FELA for the purpose of forcing the railroad industry to assume "some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."⁹⁵ The statute abolished some of the traditional common law tort defenses, such as the fellow servant rule and contributory negligence, which had barred recovery for many injured workers.⁹⁶

88. *Id.* at 2403 (citing *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568 (1987)).

89. *Id.* at 2405.

90. *Id.*

91. *Id.*

92. *Id.* at 2408; *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993); *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1993).

93. *Consolidated Rail Corp.*, 114 S. Ct. 2396 (1994).

94. *Id.* at 2403.

95. *Id.* at 2404 (citing *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring)).

96. *Id.*

The legislative history of FELA sheds light on some of the goals intended by Congress in its adoption.⁹⁷ First, the statute was intended to hold employers liable for an employee's injury due to the negligence of a co-employee.⁹⁸ Second, FELA was designed to eradicate the notion that workers have notice of dangers in the workplace and therefore assume the risk.⁹⁹ Third, the law of contributory negligence was expressly modified with respect to the scope of the statute.¹⁰⁰ Finally, agreements contracting away liability of employers were severely curtailed.¹⁰¹ The overall stated purpose of FELA was to promote the welfare of the employees who were involved in very dangerous but essential occupations. This was accomplished by shifting liability to the corporations who profited from their work.¹⁰² In *Urie v. Thompson*, the Court recognized that FELA was a broad remedial statute which should be governed by a standard of liberal construction in order to achieve its stated purpose.¹⁰³ This interpretation has guided the courts in FELA litigation for over forty years.¹⁰⁴

The Court correctly decided that a negligent infliction of emotional distress claim is available under FELA.¹⁰⁵ Many jurisdictions at the time of FELA's enactment had already recognized some form of recovery for emotional injury claims.¹⁰⁶ This recognition has increased almost universally to the present date.¹⁰⁷ FELA was founded on principles of common law negligence and injury, subject to the modifications imposed by Congress in 1908.¹⁰⁸ Although negligence under

97. *Gaston v. Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989) (analyzing the 1908 Senate Report to determine purposes behind statute).

98. *Id.* (discussing S. REP. NO. 460, 60th Cong., 1st Sess. 1-3 (1908)) (abolishing the common law fellow servant defense with respect to FELA claims. The policy reasons behind precluding employer liability when a co-worker's negligence causes the injury have diminished due to the growing complexity and diversification of the railroad industry.).

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.* at 818.

103. 337 U.S. 163, 180 (1949) (interpreting silicosis as an "injury" under FELA in light of the statute's accepted liberal construction, its humanitarian purposes, the absence of negative legislative history, and the breadth of the statutory language).

104. *See Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568 (1987); *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 862 (2d Cir. 1991); *Moody v. Boston & Me. Corp.*, 921 F.2d 1, 3 (1st Cir. 1990); *Ackley v. Chicago & N.W. Transp.*, 820 F.2d 263, 266 (8th Cir. 1987); *Edsall v. Penn Cent. Transp.*, 479 F.2d 33, 35 (6th Cir. 1973).

105. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2407-08 (1994) (making only recovery "official" because some form of the physical impact or "zone of danger" test had been recognized through an opinion or by dicta in virtually every circuit).

106. *Id.* at 2407.

107. *Id.*

108. *Id.* at 2404; *Gaston v. Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989) (discussing S. REP. NO. 460, 60th Cong., 1st Sess. 1-3 (1908)).

FELA is a federal question, common law is an essential supplement and guide in helping the courts determine this issue.¹⁰⁹ An official declaration by the circuit courts, as well as the Supreme Court, recognizing a right of recovery for emotional injuries has been side-stepped for the last fifteen years.¹¹⁰

However, further research finds that *Erie Railroad v. Collins*¹¹¹ and *Bullard v. Central Virginia Railway*¹¹² did acknowledge this right of recovery years before the mid-1980s. So why is there still a controversy as to whether an employee may recover for emotional injuries under FELA? Realistically, there is no question as to the existence of a claim for emotional distress, thus enabling the Supreme Court to easily decide the issue.¹¹³ A careful look at the many opinions by the circuit courts dealing with this issue reveals that all of the employees attempting to recover damages did so solely on the basis of emotional injuries.¹¹⁴ Therefore, the underlying question addressed by the cases was not whether a negligent infliction of emotional distress claim was viable under FELA, but rather to what extent should that right of recovery be limited.¹¹⁵

The Supreme Court has held that mental injuries resulting from a physical impact or injury are recoverable under FELA.¹¹⁶ The First Circuit in *Bullard* determined that an employee could recover for any mental injuries caused by a physical injury or the fright suffered during

109. *Urie v. Thompson*, 337 U.S. 163, 174 (1949); *Consolidated Railway Corp.*, 114 S. Ct. at 2408.

110. *See Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987); *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993); *Puthe v. Exxon Shipping Co.*, 2 F.3d 480 (2d Cir. 1993); *Elliott v. Norfolk & W. Ry.*, 910 F.2d 1224 (4th Cir. 1990); *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989); *Adams v. CSX Transp.*, 899 F.2d 536 (6th Cir. 1990) (dismissing claims for various reasons before the issue of recovering for emotional distress was addressed).

111. 253 U.S. 77, 87 (1920).

112. 565 F.2d 193, 197 (1st Cir. 1977).

113. *Consolidated Railway Corp.*, 114 S. Ct. at 2407-08.

114. *See Atchison*, 480 U.S. at 557 (alleging harassment by fellow employees caused plaintiff to suffer an emotional breakdown); *Moody v. Maine Cent. R.R.*, 823 F.2d 693 (1st Cir. 1987) (claiming the railroad's continued harassment, in the form of unattractive assignments and denial of admission to a training program, caused employee to suffer fatigue and depression); *Ellenwood*, 984 F.2d at 1270 (alleging railroad's policy, which adversely affected the plaintiff, caused him emotional distress); *Puthe*, 2 F.3d at 480 (alleging psychological injuries caused by a series of negligent actions by railroad); *See also Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990); *Elliott*, 910 F.2d at 1224; *Gaston*, 866 F.2d at 816; *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991); *Adams*, 899 F.2d at 536; *Hammond v. Terminal R.R. Assoc. St.L.*, 848 F.2d 95 (7th Cir. 1988); *Ray v. Consolidated Rail Corp.*, 938 F.2d 704 (7th Cir. 1991); *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986).

115. *See Bullard*, 565 F.2d at 197.

116. *Erie R.R. v. Collins*, 253 U.S. 77, 85-86 (1920).

an accident, thereby essentially adopting the “zone of danger” test.¹¹⁷ Almost all other circuits have expressed, either through opinions or dicta, that emotional distress caused by a physical impact or threat of a physical impact would be recognized under FELA as a legitimate right of recovery.¹¹⁸ The implied issue in *Consolidated Rail Corp.* was whether the Court should adopt the rulings of *Erie*, *Bullard*, and *Ray v. Consolidated Rail Corp.*, utilizing the “zone of danger” analysis, or the Third Circuit’s “genuineness” test, which considers FELA’s liberal recovery policy.

The Court first analyzed the Third Circuit’s reasoning in support of the “genuineness” test. The Court particularly focused on whether the test would be effective and consistent in determining the validity of the emotional distress while having the ability to guard against the numerous problems inherent in these types of claims.¹¹⁹ The “genuineness” inquiry asks “whether the factual circumstances . . . provide a threshold assurance that there is a likelihood of genuine and serious emotional injury.”¹²⁰ The Third Circuit’s analysis then evaluated the claim by the traditional concepts of negligence: duty, breach, causation, and foreseeability.¹²¹ This standard might not have been struck down so quickly by the Court except for the fact that the Third Circuit in *Carlisle* refined the test and virtually did away with any common law negligence analysis.¹²² Whether the evidence showed the injury to be genuine and serious, and whether it was foreseeable, became the main issues in determining liability under FELA in the Third Circuit.¹²³ The Supreme Court dismissed this test as being “fatally flawed in a number of respects.”¹²⁴

The Third Circuit treated the various common law tests, such as the “physical impact,” “zone of danger,” and “bystander recovery”

117. *Bullard v. Central Vt. Ry.*, 565 F.2d 193, 197 (1st. Cir. 1977) (acknowledging that the “physical” impact requirement was not as essential to recovery when the plaintiff suffers only a very minor injury, but still recovers damages for emotional injury because he was exposed to a potentially life-threatening accident); *See also Ray*, 938 F.2d at 705 (adopting the “zone of danger” test as the standard for determining liability in the Seventh Circuit).

118. *See Moody*, 823 F.2d at 696; *Ellenwood*, 984 F.2d at 1282; *Puthe*, 2 F.3d at 482; *Holliday*, 914 F.2d at 426; *Elliott*, 910 F.2d at 1228; *Gaston*, 866 F.2d at 821; *Adams*, 899 F.2d at 539; *Hammond*, 848 F.2d at 96; *Ray*, 938 F.2d at 705; *Taylor*, 787 F.2d at 1313.

119. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2408 (1994).

120. *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 371 (3d Cir. 1993).

121. *Id.* at 374.

122. *Consolidated Rail Corp.*, 114 S. Ct. at 2401; *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1993).

123. *See Carlisle*, 990 F.2d at 98.

124. *Consolidated Rail Corp.*, 114 S. Ct. at 2408. ,

tests, as arbitrary and easily discarded if they stood in the way of recovery of a "meritorious" claim.¹²⁵ However, since FELA does not expressly address the tort of negligent infliction of emotional distress, the common law concepts of this cause of action should be applied when determining liability.¹²⁶ The underlying concerns of the courts have been to guard against unpredictable and infinite liability as well as fraudulent claims.¹²⁷ If the common law tests, which have been developed and refined since the first of the century, could not be used in the analysis of emotional distress claims, the courts would have to embark on a course that would eventually establish an unprecedented form of liability. Railroads and shipping companies will be subjected to a standard which goes far beyond any remedial goals or "humanitarian" purposes Congress intended for FELA.¹²⁸

The Supreme Court has been adamant in stressing that FELA is not a workers' compensation statute.¹²⁹ The employer is not his employees' insurer; his liability is based on negligence, not the fact that the injury occurred.¹³⁰ Abandoning the wisdom and insight of ninety years of jurisprudence would only lower the defenses of the courts against fraudulent claims, thus opening the door for any employee, whether or not injured on the job, to recover damages from his employer.

The dissent argued that the concern about infinite liability to an infinite number of people is sufficiently diminished since FELA is only available to a small number of employees who work in the railroad or shipping industry.¹³¹ They interpreted the fact that the statute is to be liberally construed as meaning Congress intended for FELA to provide a federal "statutory negligence action . . . significantly different from the ordinary common law negligence action."¹³² It is true that the legislative purpose of FELA was to shift the disproportionate costs of injuries from employees to the railroad companies who have benefitted from the labor.¹³³ The congressional intent, however, was not to impose a form of strict liability upon the railroad industry, but

125. *Id.*

126. *See Monessen S.W. Ry. Co. v. Morgan*, 486 U.S. 330, 336-39 (1988).

127. *Consolidated Rail Corp.*, 114 S. Ct. at 2405.

128. 45 U.S.C. § 51 (1988); S. REP. NO. 460, 60th Cong., 1st Sess. 1-3 (1908).

129. *Ellis v. Union P. R.R.*, 329 U.S. 649 (1947).

130. *Id.* at 653.

131. *Consolidated Railroad Corp.*, 114 S. Ct. at 2412 (Ginsburg, J., Blackmun, J., and Stevens, J., dissenting).

132. *Rogers v. Missouri P. R.R.*, 352 U.S. 500, 509-10 (1957).

133. *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

rather to provide the employees a federal forum and remedy in the pursuit of valid claims.¹³⁴

The dissent attempted to extend FELA's departures from some aspects of the common law, dealing with specific applications to the statute, to its overall function.¹³⁵ The fact that Congress and the Supreme Court have furthered the statute's purpose by abandoning the common law defenses traditionally available to the railroads in favor of liberal interpretations of its language does not mean that all common law concepts are to be ignored when deciding these cases.¹³⁶ Only a *liberal* interpretation would permit the Court to think Congress would have wanted to erase from FELA all contact with the common law, thus depriving the federal courts of ninety years of jurisprudence.

The Third circuit suggested that the "genuineness" test was a sufficient restriction on claims by providing some finite limit to the railroad's liability.¹³⁷ But the determination of whether an injury is "genuine" as the only threshold test precluding liability is too fact specific and inconsistent to guard acceptably against the underlying evils inherent in this type of claim.¹³⁸ Emotional injuries are not always supportable by objective medical proof, placing judges in the difficult position of having to make highly subjective decisions concerning the viability and authenticity of emotional claims.¹³⁹ There is no consistent standard by which employers can conform their behavior to avoid liability.¹⁴⁰ Employers, such as Conrail, would not only have to look out for the physical safety of their employees, which it has a duty to do, but they would also have to be aware of and protect the delicate psyches of numerous workers.¹⁴¹ What would prevent an employee from bringing his personal problems to work, totally unknown to his

134. See *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943).

135. *Consolidated Rail Corp.*, 114 S. Ct. at 2413 (Ginsburg, J., Blackmun, J., and Stevens, J., dissenting).

136. See 45 U.S.C. § 51 (1988); S. REP. 460, 60th Cong., 1st Sess. 1-3 (1908); *Rogers*, 352 U.S. at 506.

137. *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 379 (3d Cir. 1993).

138. *Consolidated Rail Corp.*, 114 S. Ct. at 2409.

139. *Id.*

140. *Id.*

141. *Id.*

employer, and letting them manifest into symptoms of emotional distress caused by some hardship at work?¹⁴² Such an arbitrary and inconsistent analysis, when dealing with intangible harms caused by negligence, is unacceptable.¹⁴³

Carlisle's claim is proof of this problem.¹⁴⁴ He claimed to have suffered insomnia, headaches, depression, and weight loss because he was subjected to stressful conditions resulting from working long hours with allegedly faulty equipment.¹⁴⁵ There is no way to be sufficiently certain that Carlisle's emotional distress was not caused by some outside influence.

Opponents to the Supreme Court's decision argue that Carlisle's claim might be "genuine," therefore causing him to go uncompensated for Conrail's negligence.¹⁴⁶ However, a line must be drawn even if it precludes recovery for some legitimate injuries. The rejection of the inconsistent and highly subjective "genuineness" test was the correct determination by the Supreme Court.¹⁴⁷

The reliance on foreseeability as a limitation for liability was another flaw in the Third Circuit's reasoning in support of the "genuineness" test.¹⁴⁸ Scrutinized closely, every consequence of a negligent act could be found to be foreseeable. It is possible that any employee could have suffered fear and anxiety upon hearing the circumstances surrounding Johns' death in *Gottshall*, and this emotional distress could possibly be found to have been foreseeable by Conrail.¹⁴⁹ "Every injury has ramifying consequences . . . without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."¹⁵⁰ Foreseeability is not only an insufficient safeguard against infinite liability, but would probably have the opposite and disastrous effect of allowing recovery to whomever could see the farthest.

An employer has a duty "to avoid subjecting its employees to negligently inflicted emotional injury."¹⁵¹ The Supreme Court, after

142. *Id.*

143. *Id.*

144. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1993).

145. *Id.* at 92.

146. *Consolidated Rail Corp. v. Gotshall*, 114 S. Ct. 2396, 2417 (1994) (Ginsburg, J., Blackmun, J., and Stevens, J., dissenting).

147. *Id.* at 2409.

148. *Id.*

149. *Id.*

150. *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969).

151. *Consolidated Rail Corp. v. Gotshall*, 114 S. Ct. 2396, 2408 (1994).

reviewing the Third Circuit's "genuineness" test, followed its own wisdom and analyzed the common law in determining the correct limitation on employer liability.¹⁵² It accepted the "zone of danger" test, which was supported by Conrail, as best reconciling the concerns of the common law with the principles underlying FELA.¹⁵³

The Court's reasoning in support of adopting the "zone of danger" test was sound, logical, and consistent. It combined the essential historical aspects of this right of recovery with FELA's broad remedial goals to reach a well-balanced median which is consistent and fair in determining the liabilities and rights of the parties.¹⁵⁴ When FELA was enacted in 1908, the right to recover for emotional distress was well established throughout most common law jurisdictions.¹⁵⁵ The two prevailing rules of liability were the "physical impact" and "zone of danger" tests.¹⁵⁶ Although the "physical impact" was the more favored rule throughout the United States,¹⁵⁷ the "zone of danger" test was adopted by many jurisdictions as a more progressive rule of law.¹⁵⁸

Analyzing the issue of emotional distress in its historical context, the Supreme Court determined that Congress intended to limit liability for negligent infliction of emotional distress through the "zone of danger" test.¹⁵⁹ As this test was the more liberal of the two it conformed to the statute's purposes and goals of broad recovery for employees.¹⁶⁰ Logical and consistent application of stare decisis supports this historical analysis.¹⁶¹ The Court used its line of reasoning in *Monessen Southwestern Railroad Co. v. Morgan*¹⁶² as a basis for approaching and analyzing the issue in *Consolidated Railroad Corp.* The Court found that the right to recover pre-judgment interest was found not to have existed in the common law in 1908, and therefore determined it was not allowed under FELA in 1988.¹⁶³ By using this uniform

152. *Id.* See also *Urie v. Thompson*, 337 U.S. 163, 174 (1949).

153. *Consolidated Rail Corp.*, 114 S. Ct. at 2411.

154. *Id.*

155. *Id.* at 2405.

156. *Id.* at 2406.

157. Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 264 (1921).

158. *Consolidated Rail Corp.*, 114 S. Ct. at 2410.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. 486 U.S. 330, (1988) *Id.* at 337-38 (determining whether pre-judgment interest was recoverable under FELA, the Court used hindsight to see if it was recoverable in 1908. Since

method of historical analysis, the Supreme Court established a consistent and fair way of alerting parties to the various rights of recovery and defenses not expressly stated in the statute.¹⁶⁴

The dissent attacked the credibility of the majority's historical reasoning by arguing that it was inconsistent and lacked a clear point of reference.¹⁶⁵ They argued that if relative support among the jurisdictions was the determining factor in choosing a rule of liability, then either the "physical impact" or the "bystander" test would be appropriate, depending on whether the focus was on the past or present, respectively.¹⁶⁶

The dissent's argument fails by looking too much at the surface of the majority's reasoning, entirely missing the foundation underlying its historical analysis. First, the exact jurisdictional numbers supporting each test were not the sole factor in determining which rule was best under FELA to limit liability. The Court cited the continued support for the "zone of danger" test from 1908 to the present as one distinguishing positive factor in adopting the test as the measuring stick for FELA emotional distress claims.¹⁶⁷ Support for the "physical impact" test has waned over the years, and "bystander" recovery was not recognized for over sixty years after the enactment of FELA.¹⁶⁸ The Court followed a point of reference, eighty-five years old, in determining that the "zone of danger" test has been the most established and consistently applied of the three major liability rules, thereby avoiding the inevitable problems inherent in an out-of-date or unproven test.¹⁶⁹

Another factor in the Court's analysis was the consistency of the "zone of danger" test with FELA's focus on physical perils.¹⁷⁰ FELA's language refers only to an "injury," which the Court correctly held as encompassing both physical and mental injuries.¹⁷¹ However, the statute's primary purpose is to compensate employees who are injured or

Congress expressly dealt with the well-established defense doctrines, such as contributory negligence, but did not even mention the established principle barring recovery of pre-judgment interest; the Court concluded that Congress intended to leave the unmentioned common law intact and expected the courts to use it in determining FELA claims).

164. *Consolidated Rail Corp.*, 114 S. Ct. at 2410.

165. *Id.* at 2417.

166. *Id.*

167. *Id.* at 2410.

168. *Id.* at 2411.

169. *Id.* at 2410.

170. *Id.* (citing *Urie v. Thompson*, 337 U.S. 163, 181 (1949) (recognizing the Congressional intention to primarily focus on deaths and injuries resulting from railroad accidents)).

171. *Consolidated Rail Corp.*, 114 S. Ct. at 2410.

killed by the hazardous conditions of the railroad and shipping industries.¹⁷² One purpose of FELA was to encourage employers to implement safety measures which would alleviate the physical dangers and lower the number of claims filed.¹⁷³ The “zone of danger” test is a logical and consistent rule which allows an employee to recover for emotional injuries caused by the threat of a physical impact.¹⁷⁴ This test best facilitates Congress’ goals of alleviating physical dangers and allowing recovery to all injuries caused by the imminent threat of these dangers.¹⁷⁵

The Court went further and expressly rejected both the “physical impact” test and the “bystander” recovery rule as inappropriate limitations under FELA jurisprudence.¹⁷⁶ In evaluating the tests, it is clearly evident that the “zone of danger” test encompasses all the characteristics of the “physical impact” test, with the exception of physical injury.¹⁷⁷ Therefore, it cannot seriously be argued that the “physical impact” test should have some viability under FELA. At the opposite end of the spectrum, the “bystander” test is insufficient in governing FELA claims because of its lack of historical support and the instability of its recovery limits.¹⁷⁸ This test is twenty-five years old and, even though it is followed in roughly half the states, the majority of these jurisdictions limit its application to bystanders who witness a relative suffer a severe injury or death.¹⁷⁹ This would be a completely impractical limitation on FELA recovery because employees rarely work side by side with their relatives.¹⁸⁰ The argument that some states have done away with this “relative” requirement does not justify basing an almost century-old statute on a new and speculative theory.¹⁸¹

VI. CONCLUSION

The decision in *Consolidated Rail Corp.* will have a settling effect on the confusion surrounding employers’ liability under FELA. The

172. *Id.* (citing *Lancaster v. Norfolk & W. R.R.*, 773 F.2d 807, 813 (1985)).

173. *Id.* Cf. *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (stating FELA’s purpose was to shift the burden of personal injuries on the job from the employees to the employers, and emphasizing that the exercise of proper care by employer’s would alleviate this burden).

174. *Id.* at 2411.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

adoption of the "zone of danger" test allows every railroad and shipping employer to know exactly the extent of its liability for negligent infliction of emotional distress claims, enabling them to take measures to avoid such claims. The test also helps employees gauge the validity of their claim, thus curtailing any unnecessary or unwarranted litigation that can accompany emotional injuries. Also, two competing, but equally important, considerations are harmoniously brought together by the "zone of danger" test. First, FELA's main purpose of protecting employees from injury by allowing them a liberal recovery forum is still present since the test allows for recovery without a physical injury. Second, the historical common law concerns of the uncertainty surrounding emotional claims are best alleviated by this test. Certainty is a highly important ingredient in our legal system, and the Supreme Court finally shut the door on the uncertainty it left open eight years ago in *Atchison*.

Alan C. Buckner