SUPREME COURT OF MISSOURI
en banc

May 1, 2007

Effective January 1, 2008

IN RE: REVISIONS TO MAI-CIVIL

TABLE OF INSTRUCTIONS

(Committee Comment – Revision)

O R D E R

1. Additions and revisions of previously approved MAI-CIVIL Instructions, Notes on Use and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

2. The Instructions, Notes on Use and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after January 1, 2008, and may be used prior thereto; any such use shall not be presumed to be error.

3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

_____
MICHAEL A. WOLFF
Chief Justice

1.00 [2008 New] Prohibited Instructions - General Comment

(Approved May 1, 2007; Effective January 1, 2008)

Chapter 1 prohibits certain instructions. It is not intended to be an exhaustive list of prohibited instructions. There may be other types of instructions that are prohibited by case law or rule.

For example, "abstract statements of law" and "act of God" instructions have routinely been condemned by the courts. Rule 70 prohibits instructions that submit to the jury or require findings of "detailed evidentiary facts."

Because an instruction is prohibited on a subject does not necessarily mean that evidence and argument are also prohibited. The classic example is the prohibited "sole cause" instruction. See MAI 1.03. It is well established that "sole cause" evidence and argument are permissible, though an instruction on the subject is not.

2.01 [2008 Revision] Explanatory Instruction for All Cases

(Approved May 1, 2007; Effective January 1, 2008)

(1) GENERAL - JURY INSTRUCTIONS

This instruction and other instructions that I will read to you near the end of the trial are in writing. All of the written instructions will be handed to you for guidance in your deliberation when you retire to the jury room. They will direct you concerning the legal rights and duties of the parties and how the law applies to the facts that you will be called upon to decide.

(2) OPENING STATEMENTS

The trial may begin with opening statements by the lawyers as to what they expect the evidence to be. What is said in opening statements is not to be considered as proof of a fact. However, if a lawyer admits some fact on behalf of a client, the other party is relieved of the responsibility of proving that fact.

(3) EVIDENCE

After the opening statements, the plaintiff(s) will introduce evidence.[1] The defendant(s) may then introduce evidence. There may be rebuttal evidence after that. The evidence may include the testimony of witnesses who may appear personally in court, the testimony of witnesses who may not appear personally but whose testimony may be read or shown to you and exhibits, such as pictures, documents and other objects.

(4) OBJECTIONS

There may be some questions asked or evidence offered by the parties to which objections may be made. If I overrule an objection, you may consider that evidence when you deliberate on the case. If I sustain an objection, then that matter and any matter I order to be stricken is excluded as evidence and must not be considered by you in your deliberations.

(5) RULINGS OF LAW AND BENCH CONFERENCES

While the trial is in progress, I may be called upon to determine questions of law and to decide whether certain matters may be considered by you under the law. No ruling or remark that I make at any time during the trial will be intended or should be considered by you to indicate my opinion as to the facts. There may be times when the

lawyers come up to talk to me out of your hearing. This will be done in order to permit me to decide questions of law. These conversations will be out of your hearing to prevent issues of law, which I must decide, from becoming mixed with issues of fact, which you must decide. We will not be trying to keep secrets from you.

(6) OPEN MINDS AND NO PRELIMINARY DISCUSSIONS

Justice requires that you keep an open mind about the case until the parties have had the opportunity to present their cases to you. You must not make up your mind about the case until all evidence, and the closing arguments of the parties, have been presented to you. You must not comment on or discuss with anyone, not even among yourselves, what you hear or learn in trial until the case is concluded and then only when all of you are present in the jury room for deliberation of the case under the final instructions I give to you.

(7) OUTSIDE INFLUENCES

During the trial you should not remain in the presence of anyone who is discussing the case when the court is not in session. Otherwise, some outside influence or comment might influence a juror to make up his or her mind prematurely and be the cause of a possible injustice. For this reason, the lawyers and their clients are not permitted to talk with you until the trial is completed.

(8) JUROR RESEARCH PROHIBITED

Your decision must be based only on the evidence presented to you in the proceedings in this courtroom. You should not conduct your own research or investigation into any issues in this case. You should not visit the scene of any of the incidents described in this case. You should not conduct any independent research of any type by reference to textbooks, dictionaries, magazines, the use of the Internet or any other means.

(9) FINAL INSTRUCTIONS

After all of the evidence has been presented, you will receive my final instructions. They will guide your deliberations on the issues of fact you are to decide in arriving at your verdict.

(10) CLOSING ARGUMENTS

After you have received my final instructions, the lawyers may make closing arguments. In closing arguments, the lawyers have the opportunity to direct your attention to the significance of evidence and to suggest the conclusions that may be drawn from the evidence.

(11) DELIBERATIONS

You will then retire to the jury room for your deliberations. It will be your duty to select a foreperson, to decide the facts and to arrive at a verdict. When you enter into your deliberations, you will be considering the testimony of witnesses as well as other evidence. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully and the probability or improbability of the witness' statements. You may give any evidence or the testimony of any witness such weight and value as you believe that evidence or testimony is entitled to receive.

[(12) NOTETAKING

Each of you may take notes in this case, but you are not required to do so. I will give you notebooks. Any notes you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, do not allow your notetaking to interfere with your ability to observe the evidence and witnesses as they are presented.

Do not discuss or share your notes with anyone until you begin your deliberations. During the deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during trial are not evidence. You should not assume that your notes, or those of other jurors, are more accurate than your own recollection or the recollection of other jurors.

After you reach your verdict your notes will be collected and destroyed. No one will be allowed to read them.] [2]

[(13) JUROR QUESTIONS

After all parties have completed questioning each witness, any juror may anonymously submit written questions to me for my review. You may not ask questions orally or out loud. I may limit the number of questions or revise the form of any

question. You must not draw any adverse inference against any party if I decide not to allow one or more of your questions for legal reasons. If I decide to allow any of your questions, I will read them to the witness and allow the witness to answer. I may then allow follow-up questions of that witness by the attorneys.] [3]

Notes on Use (2008 Revision)

(Approved May 1, 2007; Effective January 1, 2008)

1. When the facts of the case indicate a reversal of the parties in the order of proof, the instruction reference to plaintiff(s) and defendant(s) must be changed to show the actual order to be followed; i.e., in a case of a claim and counterclaim wherein the claim has been dismissed and the trial proceeds on the counterclaim, the defendant proceeds with evidence ahead of the plaintiff; in condemnation cases, the defendant is first in the order of proof; the trial court has discretion in some cases to vary the order. In will contests where the validity of the entire will or codicil is contested under section 473.083, RSMo, substitute for the first sentence of the third paragraph the sentence, "After the opening statements, the defendant-proponent(s) of the disputed document will present evidence consisting of the formal proof of the document, first." In will contests challenging only a portion of a will or codicil under section 473.081, RSMo, no such change is necessary.

This instruction shall be read by the trial judge immediately after the jury is sworn and before opening statements of counsel. It is not to be reread by the judge at the conclusion of all the evidence, but it is to be given to the jury with the other written instructions. The attorney for either side may read all or portions of the instruction during closing arguments.

2. If the court allows notetaking by jurors, these bracketed paragraphs should be given.

3. If juror questions are allowed under Rule 69.04, this bracketed paragraph should be given.

Committee Comment (2008 Revision)

(Approved May 1, 2007; Effective January 1, 2008)

Directions or admonitions:

Directions or admonitions given by a trial judge to a jury during the course of trial are technically not instructions. Examples of such directions or admonitions include a direction not to visit the scene of an accident or an oral repetition of the admonition to refrain from discussing the case during a recess. Considerable discretion is afforded to the trial judge, subject to appropriate requests or objections of counsel, to determine the scope and frequency of such directions or admonitions. An appropriate admonition may be in the following form and may be given orally:

> Justice requires that you not make up your mind about the case until all of the evidence has been seen and heard. You must not discuss this case among yourselves or with anyone else or comment on anything you hear or learn in this trial until the case is concluded and you retire to the jury room for your deliberations. Also, you must not remain in the presence of anyone who is discussing the case when the court is not in session. You should not consult the Internet concerning the issues in this case or conduct any other research or investigation on your own.

Cell phones or other electronic devices:

The trial court has considerable discretion regarding the use of cell phones or other electronic devices in the courthouse and during trial. Judicial discretion may be exercised by oral admonition, the addition of a paragraph regarding such devices at the end of MAI 2.01, or using a separate instruction.

Other appropriate admonitions or directions to the jury may be formulated and given by the trial judge as determined in light of the particular facts or circumstances of a given case.

Juror note-taking:

Rule 69.03 provides:

Upon the court's own motion or upon the request of any party, the court shall permit jurors to take notes. If jurors are permitted to take notes, the court shall supply each juror with suitable materials.

Jurors shall not take their notes out of the courtroom except to use their notes during deliberations immediately before discharge of the jury.

The court should collect all juror notes.

After the jury is discharged, the court shall destroy the notes promptly without permitting their review by the court or any other person.

Juror notes shall not be used to impeach a verdict.

Juror questions:

Rule 69.04 provides:

(a) Upon the court's own motion or upon motion of any party, the court may permit jurors to submit questions to witnesses. The court shall resolve any such motion before the jury is impaneled.

(b) If the court permits jurors to submit questions:

(1) The court shall instruct the jurors:

(A) On the procedure to be followed for asking such questions; and

(B) That no adverse inference is to be drawn against any party if any juror question is not allowed;

(2) After all parties have completed examination of each witness, any juror may submit written, anonymous questions;

(3) All parties shall be given an opportunity outside the hearing of the jurors to object to the substance or the form of any question;

(4) The court may limit the number of questions;

(5) The court may revise any question's form and shall read the question to the witness or the parties may stipulate to the answer; and

(6) The court may allow any party to ask follow-up questions after consideration of the juror questions.

Distribution of instructions:

Rule 70.02(f) requires that the final instructions of the court be given to the jury in writing. While Rule 70.02 does not explicitly require that each juror be provided with a copy of the final instructions, such approach is implicitly permitted. In its report to the Supreme Court of October 2000, the Civil Jury Study Committee recommended "that each juror be given a copy of the instructions before instruction reading, final argument, and deliberation." (Emphasis supplied.) That committee also noted that juror "understanding increased significantly when each juror received his or her own copy of the instructions." The MAI Committee encourages compliance with this recommendation whenever feasible.

24.01(A) [2008 Revision] Verdict Directing—F.E.L.A. — Constructive Knowledge Not In Issue—Failure to Provide Safe Place to Work

(Approved May 1, 2007; Effective January 1, 2008)

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce,[1] and

Second, defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe appliances, or

reasonably safe methods of work, or

reasonably adequate help, and [2, 3]

Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent,[4, 5] and

Fourth, such negligence [4] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*]. [6]

***** [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2008 Revision)

(Approved May 1, 2007; Effective January 1, 2008)

1. Paragraph First will seldom be an issue. Omit this paragraph if this matter is not in issue. If the issue of whether defendant was in interstate commerce is in issue, the instruction must be modified to also submit this issue.

2. The specifications of negligence set forth in this instruction concern conditions of which the defendant had constructive knowledge. See MAI 24.01(B) for cases in which constructive knowledge is disputed.

3. In the event that negligence charged is based upon the acts of the defendant's employee, the following alternate paragraphs "Second" and "Third" must be used.

"Second, defendant's employee (*characterize the negligent conduct, i.e., failed to keep a careful lookout, etc.*), and"

"Third, defendant's employee was thereby negligent, and"

4. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

5. In the event that there is only a single submission of negligence under paragraph "Second", then paragraph "Third" must be modified to read as follows:

"Third, defendant was thereby negligent, and"

6. Select the appropriate phrase.

*Add if affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence in an F.E.L.A. case. See MAI 32.07(B).

Committee Comment (2008 Revision)

(Approved May 1, 2007; Effective January 1, 2008)

In an F.E.L.A. case, common law negligence rules are controlling *except* that these rules have been modified by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500 (1957).

In the traditional negligence case, it is mandatory for the plaintiff to include the word "direct" or "directly" in the verdict directing instruction because of the proximate (direct) cause requirements. This prevents the jury from awarding damages or finding for plaintiff because of some indirectly contributing causative factors. This is not so with

F.E.L.A. The F.E.L.A. "was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 507. The test of a jury case under F.E.L.A. is simply "whether the proofs justify within reason the conclusion that employer's negligence played *any part, even the slightest*, in producing injury or death for which damages are sought." (Emphasis added.) *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500, 506. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir.1974).

As the United States Supreme Court has stated in *Rogers v. Missouri Pac. Ry.*, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick v. Kansas City Southern Ry. Co.*, 305 S.W.2d 478 (Mo. 1957); *Adams v. Atchison, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

24.01(B) [2008 New] Verdict Directing—F.E.L.A.—Constructive Knowledge Disputed—Failure to Provide Safe Place to Work

(Approved May 1, 2007; Effective January 1, 2008)

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce,[1] and

Second[2], conditions for work were not reasonably safe and defendant knew or by using ordinary care[3] could have known of such conditions and that they were not reasonably safe, and

Third, with respect to such conditions for work, defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe appliances, or

reasonably safe methods of work, or

reasonably adequate help, and

Fourth, defendant in any one or more of the respects submitted in Paragraph Third was negligent,[3] and [4]

Fifth, such negligence [3] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*]. [5]

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2008 New)

(Approved May 1, 2007; Effective January 1, 2008)

1. Paragraph First will seldom be an issue. Omit this paragraph if this matter is not in issue. If the issue of whether defendant was in interstate commerce is in issue, the instruction must be modified to also submit this issue.

2. MAI 24.01(B) is to be used in cases in which constructive knowledge of the railroad is disputed. *Qualls v. St. Louis Southwestern Ry. Co.*, 799 S.W.2d 84 (Mo. banc 1990), *cert. denied* 499 U.S. 961 (1991).

3. The terms "negligent" and "negligence" must be defined. The term "ordinary care" must be defined. See definitions in Chapter 11.00.

4. In the event that there is only a single submission of negligence under paragraph "Third", then paragraph "Fourth" must be modified to read as follows:

"Fourth, defendant was thereby negligent, and"

5. Select the appropriate phrase.

***** Add if affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence in an F.E.L.A. case. See MAI 32.07(B).

Committee Comment (2008 New)

(Approved May 1, 2007; Effective January 1, 2008)

In an F.E.L.A. case, common law negligence rules are controlling *except* that these rules have been modified by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500 (1957).

In the traditional negligence case, it is mandatory for the plaintiff to include the word "direct" or "directly" in the verdict directing instruction because of the proximate (direct) cause requirements. This prevents the jury from awarding damages or finding for plaintiff because of some indirectly contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. "was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 507. The

test of a jury case under F.E.L.A. is simply "whether the proofs justify within reason the conclusion that employer's negligence played *any part, even the slightest,* in producing injury or death for which damages are sought." (Emphasis added.) *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500, 506. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir.1974).

As the United States Supreme Court has stated in *Rogers v. Missouri Pac. Ry.*, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick v. Kansas City Southern Ry. Co.*, 305 S.W.2d 478 (Mo. 1957); *Adams v. Atchison, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

32.07(B) [2008 Revision] Affirmative Defenses - Contributory Negligence - F.E.L.A.

(Approved May 1, 2007; Effective January 1, 2008)

You must find plaintiff contributorily negligent if you believe:

First, plaintiff (*characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"*), and

Second, plaintiff was thereby negligent,[1] and[2]

Third, such negligence[1] of plaintiff resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[3]

Notes on Use (2008 Revision)

(Approved May 1, 2007; Effective January 1, 2008)

1. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

2. If more that one specification of negligence is submitted, modify Paragraph First to submit such specifications in the disjunctive and modify Paragraph Second to read:

"Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and"

3. Select the appropriate phrase.

If contributory negligence is submitted, see MAI 8.01 and 8.02 for appropriate modification of the damage instruction in an F.E.L.A. case.

Committee Comment (2008 Revision)

(Approved May 1, 2007; Effective January 1, 2008)

This instruction is revised to comply with *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. _____ (2007).