24.01(A) [2021 Revision] Verdict Directing — Constructive Knowledge Not In Issue — Failure to Provide Safe Place to Work

(Approved March 2, 2021; Effective July 1, 2021)

Your verdict must be for plaintiff [1] if you believe:

First, plaintiff was an employee of defendant,[2] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[3] and

Third,[4] defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe [appliances],[5] or

reasonably safe methods of work, or

reasonably adequate help, and[6]

Fourth, defendant in any one or more of the respects submitted in Paragraph Third was negligent,[7,8] and

Fifth, such negligence[7] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[9]

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

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. In a case where defendant is submitting plaintiff's contributory negligence, the initial phrase of plaintiff's verdict director should be modified as follows:

In your verdict, you must assess a percentage of fault to defendant [whether or not plaintiff was partly at fault],[1] if you believe:

[1] The bracketed phrase may be used at plaintiff's option.

2. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

3. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

4. 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.

5. The term "equipment" or any other statutory term used in 45 U.S.C. § 51 may be substituted for the word "appliances"

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

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

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

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

8. 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"

9. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed

phrase to submit contributory negligence or failure to mitigate damages in an F.E.L.A. case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision) [NO CHANGE]

A. In F.E.L.A. cases, 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, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

B. 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, 77 S.Ct. 443, 1 L.Ed.2d 493. 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. at 506, 77 S.Ct. 443, 1 L.Ed.2d 493. 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).

C. 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).

D. In *Cluck v. Union Pacific R.R. Co.*, 367 S.W.3d 25 (Mo. banc 2012), the Court considered the applicability of the doctrine of respondeat superior liability in F.E.L.A. actions. The Court rejected plaintiff's contention that respondeat superior liability does not apply in F.E.L.A. cases. In so doing, the Court rejected plaintiff's further argument that the test for liability was merely a temporal test of whether the employee causing the injury was generally acting within the course and scope of employment at the time of the incident.

E. If *respondeat superior* liability is an issue, refer to Chapter 13 generally and specifically the definition at MAI 13.05.

F. These instructions may also be considered for use in cases brought under the Jones Act, 46 U.S.C. Appx. § 688(a). *See, e.g., Futrell v. Luhr Bros., Inc.*, 916 S.W.2d 348 (Mo. App. 1996).

24.01(B) [2021 Revision] Verdict Directing — Constructive Knowledge Disputed — Failure to Provide Safe Place to Work

(Approved March 2, 2021; Effective July 1, 2021)

Your verdict must be for plaintiff [1] if you believe:

First, plaintiff was an employee of defendant,[2] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[3] and

Third,[4] conditions for work were not reasonably safe and defendant knew or by using ordinary care[5] could have known of such conditions and that they were not reasonably safe, and

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

reasonably safe conditions for work, or

reasonably safe [appliances],[6] or

reasonably safe methods of work, or

reasonably adequate help, and

Fifth, defendant in any one or more of the respects submitted in Paragraph Fourth was negligent,[5] and[7]

Sixth, such negligence[5] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[8]

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

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. In a case where defendant is submitting plaintiff's contributory negligence, the

initial phrase of plaintiff's verdict director should be modified as follows:

In your verdict, you must assess a percentage of fault to defendant [whether or not plaintiff was partly at fault],[1] if you believe:

[1] The bracketed phrase may be used at plaintiff's option.

2. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

3. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

4. MAI 24.01(B) is to be used in cases in which constructive knowledge of the railroad is disputed. *Qualls v. St. Louis SW Ry. Co.*, 799 S.W.2d 84 (Mo. banc 1990), cert. denied 499 U.S. 961, 111 S.Ct. 1585, 113 L.Ed.2d 650 (1991). This instruction should not be used "if the judge decides the plaintiff has shown defendant had actual knowledge of the negligently produced condition." *Qualls*, 799 S.W.2d at 87.

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

6. The term "equipment" or any other statutory term used in 45 U.S.C. § 51 may be substituted for the word "appliances."

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

"Fifth, defendant was thereby negligent, and"

8. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed

phrase to submit contributory negligence or failure to mitigate damages in an F.E.L.A. case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision) [NO CHANGE]

(Approved July 13, 2015; Effective January 1, 2016)

A. In F.E.L.A. cases, 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, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

B. 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, 77 S.Ct. 443, 1 L.Ed.2d 493. 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. at 506, 77 S.Ct. 443, 1 L.Ed.2d 493. 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).

C. 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).

D. In *Cluck v. Union Pacific R.R. Co.*, 367 S.W.3d 25 (Mo. banc 2012), the Court considered the applicability of the doctrine of respondeat superior liability in F.E.L.A. actions. The Court rejected plaintiff's contention that respondeat superior liability does not apply in F.E.L.A. cases. In so doing, the Court rejected plaintiff's further argument that the test for liability was merely a temporal test of whether the employee causing the injury was generally acting within the course and scope of employment at the time of the incident.

E. If *respondeat superior* liability is an issue, refer to Chapter 13 generally and specifically the definition at MAI 13.05.

F. These instructions may also be considered for use in cases brought under the Jones Act, 46 U.S.C. Appx. § 688(a). *See, e.g., Futrell v. Luhr Bros., Inc.*, 916 S.W.2d 348 (Mo. App. 1996).

24.04(B) [2021 Revision] Affirmative Defense — Contributory Negligence

(Approved March 2, 2021; Effective July 1, 2021)

In your verdict, you must assess a percentage of fault to plaintiff [whether or not defendant was partly at fault][1] 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,[2] and [3]

Third, such negligence[2] of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. The bracketed phrase may be used at defendant's option.

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

3. 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"

4. Select the appropriate phrase.

If contributory negligence is submitted, see MAI 24.06 and 24.07 for appropriate modification of the damage instruction in an F.E.L.A. case. Use Verdict Form 37.07.

Committee Comment (2016 Revision) [NO CHANGE]

(Approved July 13, 2015; Effective January 1, 2016)

A. This instruction is revised to comply with *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799 (2007).

B. Unlike "contributory negligence" as it was applied in non-F.E.L.A. cases prior to the adoption of comparative fault principles, contributory negligence under the F.E.L.A. did not bar plaintiff's recovery, but required a pro rata reduction. *See* 45 U.S.C. § 53, which provides: "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee …."

C. Section 53 goes on to state: "Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The Boiler Inspection Act (now the Locomotive Inspection Act) and the Federal Safety Appliance Acts have been held to be such enactments; thus, the defense is not available in cases arising thereunder.

24.06 [2021 Revision] Damages—Death of Employee

(Approved March 2, 2021; Effective July 1, 2021)

If you find in favor of the plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate *(here identify the beneficiaries)* for any damages you believe (he, she, they) [and decedent][1] sustained [and *(here identify the beneficiaries)* are reasonably certain to sustain in the future][2] as a direct result of the fatal injury to *(name of decedent)*. Any award of future pecuniary damages must be included at present

value. [Any award you may make is not subject to income tax.][3] [In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to decedent. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you attribute to decedent.][4]

You must not consider grief or bereavement suffered by reason of the death.

Notes On Use (1996 Revision) [NO CHANGE}

1. Use bracketed phrase where the evidence supports the submission of damages to decedent between the time of injury and the time of death, i.e. pain and suffering.

2. This may be added if supported by the evidence.

3. If requested this bracketed sentence must be given. See *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

4. If contributory negligence is submitted the damage instruction must be modified by adding this bracketed sentence. See MAI 24.04(B) for the appropriate contributory negligence instruction in an F.E.L.A. case.

If the law and facts permit a mitigation of damages submission in an F.E.L.A. death case, see MAI 24.07 and 24.04(A) for the appropriate method of submission of failure to mitigate damages.

Committee Comment (2021 Revision)
(Approved March 2, 2021; Effective July 1, 2021)

A. This instruction is used only in F.E.L.A. cases wherein the employee was fatally injured. The reference to present value is used in F.E.L.A. cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84

L.Ed.2d 303 (1985). *Dickerson* clearly requires inclusion of the sentence relating to present value if requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in an FELA case is now consistent with the method in Chapter 37.00 for use in cases based on Missouri law. FELA cases are governed by federal law. Under Chapter 37.00, the *jury* determines total damages and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing *total damages* to the amount recoverable by plaintiff. This is consistent with the submission of comparative fault in FELA cases in other jurisdictions.

C. 45 U.S.C.A. Section 53 states that "the jury" is to determine the damages "in proportion to the amount of negligence attributable to such employee ...." The statutory provision does not specify how the jury is to make that determination. The United States Supreme Court has held that the jury can make its determination by writing down percentages of fault for both parties and separately recording the amount of total damages. *Norfolk & Western Ry. Co., v. Ayers*, 538 U.S. 135 (2003) at 144 n. 6; 570-71 (where the Court sanctioned the use of verdict forms which required the jury to write down percentages of fault and the amount of total damages in an FELA asbestosis claim).

D. During the instruction conference, the parties and the court should discuss, on the record, what damages are supported by the evidence and can properly be argued to the jury. In F.E.L.A. wrongful death cases, recovery is limited to pecuniary losses. See *American Railroad Co. of Porto Rico v. Didricksen*, 227 U.S. 145 (1912); *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913); *Miles v. Apex Marine Corp.*, 498 U.S. 19

(1990). In this way, jury arguments can proceed without undue interruptions.

24.07 [2021 Revision] Damages — Injury to Employee
(Approved March 2, 2021; Effective July 1, 2021)

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] as a result of the occurrence[2] mentioned in the evidence. [In determining plaintiff's damages, you may include an amount to compensate plaintiff for the fear of cancer if you believe that such fear is genuine and serious.][3] Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.][4] [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number ____, in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure.][5] [In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.][6]

Notes on Use (2010 Revision) [NO CHANGE]

1. This bracketed phrase may be added if supported by the evidence.

2. When the term "occurrence" must be modified, substitute some descriptive term that specifically describes the compensable event or conduct. For example, if the plaintiff claims that he was injured in a fall which occurred at work but the defendant claims that

the injury did not result from the fall but rather resulted from a non-compensable automobile accident, the instruction may be modified to read "as a result of the fall on (the date of the compensable event)."

3. Add this bracketed sentence where the evidence supports submission of compensability of plaintiff's fear of the future risk of contracting cancer in accordance with *CSX Transp., Inc. v. Hensley*, 538 U.S. 135, 129 S. Ct. 2139, 173 L. Ed. 2d 1184 (2009).

4. If requested, this bracketed sentence must be given. See *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

5. If failure to mitigate damages is submitted, the damages instruction must be modified by adding this bracketed sentence. See MAI 24.04(A) for the appropriate method of submission of failure to mitigate damages in an F.E.L.A. case. *Kauzlarich v. Atchison, Topeka, and Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo.banc 1995).

6. If contributory negligence is submitted, the damages instruction must be modified by adding this bracketed sentence. See MAI 24.04(B) for the appropriate contributory negligence instruction in an F.E.L.A. case.

Committee Comment (2021 Revision)
(Approved March 2, 2021; Effective July 1, 2021)

A. The reference to present value is used in F.E.L.A. cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). *Dickerson* clearly requires inclusion of the sentence relating to present value if

requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in an FELA case is now consistent with the method in Chapter 37.00 for use in cases based on Missouri law. FELA cases are governed by federal law. Under Chapter 37.00, the *jury* determines total damages and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing *total damages* to the amount recoverable by plaintiff. This is consistent with the submission of comparative fault in FELA cases in other jurisdictions.

C. 45 U.S.C.A. Section 53 states that "the jury" is to determine the damages "in proportion to the amount of negligence attributable to such employee ...." The statutory provision does not specify how the jury is to make that determination. The United States Supreme Court has held that the jury can make its determination by writing down percentages of fault for both parties and separately recording the amount of total damages. *Norfolk & Western Ry. Co., v. Ayers*, 538 U.S. 135 (2003) at 144 n. 6; 570-71 (where the Court sanctioned the use of verdict forms which required the jury to write down percentages of fault and the amount of total damages in an FELA asbestosis claim).

D. This instruction is used only in F.E.L.A. cases where the employee sustained injury. Other than the references to taxation, present value, and mitigation of damages, it is essentially the same as MAI 4.01 with the exception that the word "direct" is deleted from the fifth line of MAI 4.01. This is required in an F.E.L.A. case so that the instruction complies with the substantive law set forth in *Wilmoth v. Chicago, Rock Island & P.R. Co.*, 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S.

164, 89 S.Ct. 1706, 23 L.Ed.2d 176 (1969); and *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).