An *Erie* Tale

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Brian L. Frye, *The Ballad of Harry James Tompkins*, 52 **Akron L. Rev.** 531 (2019).

Although Westlaw contains thousands of cases with a party named "Erie," there is only one *Erie*. This abridged citation evokes expansive concepts. *Erie* is shorthand for normative and descriptive accounts about how the constitutional system operates, the origins of legal rules, and the nature of judicial reasoning. Invocations of *Erie* can shimmer with veneration, prickle with disdain, or tingle with dread. Either way, references to *Erie* pervade scholarship and case law.

Despite the myriad meanings that *Erie* has acquired, there was until now a consensus about the underlying facts. Late on a dark night in Pennsylvania, Harry Tompkins was walking home on a path parallel to railroad tracks. A protrusion from a passing train knocked him beneath the wheels, which severed his right arm. Trains are not supposed to have protrusions. The railroad therefore was liable for negligence if it owed Tompkins a duty of care. Pennsylvania law rejected a duty of care because it deemed Tompkins a trespasser even though he was on a well-worn path. Tompkins' lawyers wisely did not sue in Pennsylvania. Instead, they sued in a federal court in New York because they anticipated that the court would ignore Pennsylvania law in favor of "general law." This strategy led to a large but short-lived jury verdict. The Supreme Court held on appeal that the trial court should have applied Pennsylvania law. On remand, Tompkins received no compensation for his life-changing injury.

Critics and defenders of *Erie* generally agree that Tompkins caught a tough break under a harsh definition of trespassing. Scholars sometimes frame the case as an example of how even progressive judges—such as *Erie*'s author, Louis Brandeis—may sacrifice an individual plaintiff's welfare in pursuit of broad legal ideals. But what if Tompkins actually was trespassing far more directly than generations of lawyers have assumed? The *Erie* decision was never really about the facts, but perhaps the facts were not even real.

Brian Frye's fascinating new article presents an extensively researched argument suggesting that Tompkins misrepresented the accident's cause. Rather than walking home, Tompkins may have been attempting to hitch a ride on the passing train. He was unemployed and the train was destined for a city with more opportunities than the small town where he lived. Climbing onto moving trains was common during the Great Depression. Severed limbs—or worse—were a grim consequence for thousands of riders.

Frye acknowledges the impossibility of unearthing the truth eighty-five years after the accident. But his critical analysis of transcripts and exhibits suggests an alternative version of the canonical story. In a nutshell, Frye contends that Tompkins' account is implausible because: (1) Tompkins saw the train's headlights while it was approaching him head-on from hundreds of feet away; (2) the train's maximum possible speed was at least 70% slower than Tompkins alleged (about 8-10 mph, rather than 34-35 mph); (3) the only cars with potential protrusions were in the middle and back of the train, so Tompkins could have been hit only after at least 640 feet of the train had passed him; (4) if Tompkins was moving in the direction that he claimed, he would have left the vicinity of the tracks before encountering the engine, let alone the relevant cars; and (5) there was ample room beside the path for Tompkins to veer away from the train while continuing to walk toward his house.

These findings raise a puzzling question: why did Tompkins not step aside during the long time that a large and noisy train passed within several inches of him? Tompkins testified that he felt no need to avoid the train and that his preferred path was safer than adjacent land further from the tracks. But even the appellate opinion affirming the verdict called Tompkins' account "patently absurd." He nonetheless prevailed on appeal because the deferential standard of review did not provide a basis for reversal. The question thus remains: did the accident really happen the way Tompkins alleged, such that he spent a long time walking within inches of a rumbling freight train that he easily could have sidestepped?

Any challenge to Tompkins' testimony faces a daunting hurdle: the wheels of the train indisputably severed his arm. There are not many ways this accident could have happened other than the way that Tompkins alleged and that the jury apparently accepted. An alternative account therefore bears a heavy burden of persuasion.

Frye assumes this burden while acknowledging that he is relying on speculation and inferences that he cannot definitively prove. He marshals evidence suggesting that Tompkins was trying to hitch a ride and slipped. The jury could have surmised that Tompkins was trying to board the train and nevertheless awarded him compensation because of his serious injury. An especially peculiar fact is that two young men called an ambulance almost immediately after the accident, then vanished before the ambulance arrived. Local residents did not recognize these elusive witnesses. Their presence on an obscure path at 2:30 a.m. concurrently with both Tompkins and the train is a remarkable coincidence. Frye speculates that these men were fellow rail-riders.

One might wonder why this speculation matters. After all, *Erie* is not cited as a tort case in which the finer points of trespassing are relevant. *Erie* is instead invoked to support abstract principles that are only nominally connected to Mr. Tompkins' circumstances. Yet this nominal connection is what makes Frye's research salient.

Facts are the foundation from which law evolves. An accurate account of a record can inform our understanding of how judges engage in the complex process of turning a dispute into a precedent. Frye's article is therefore a welcome addition to a growing body of literature upending conventional accounts of historically important cases. Examples of this literature include the "Stories" line of textbook supplements from Foundation Press and Dale Carpenter's illuminating book *Flagrant Conduct: The Story of* Lawrence v. Texas.

A revised understanding of *Erie* would add additional dimensions to an already multifaceted case. For example, *Erie* is often taught in Civil Procedure courses. Yet presumably few instructors use the case as a vehicle for exploring how juries evaluate evidence in a broader social context. If Frye is correct, then the jury apparently accepted implausible testimony because the railroad's deep pockets were a substitute for a social safety net that Congress had only just begun to construct.

Moreover, if Tompkins' lawyers were complicit in crafting misleading testimony, or looked the other way, then *Erie* would become a vehicle for analyzing professional responsibility and Fed. R. Civ. P. 11. Modern scholarship about Tompkins' lawyers has focused on their ostensibly clever effort to obtain favorable law by forum shopping. Yet this account emerges in part from statements by the lawyers that were intended for posterity and may have exaggerated their foresight. Some evidence suggests that the lawyers filed in the Southern District of New York for their own convenience and only later discovered that this decision facilitated a favorable choice of law. Even if the lawyers accurately summarized their effort to obtain favorable law, Frye's analysis implies that they were less candid about efforts to obtain favorable facts.

Although Frye's analysis is diligent and engaging, the record is sufficiently ambiguous that some readers might not endorse his conclusions. Indeed, I would like to see additional evidence before definitively impugning Tompkins or his lawyers. But even if readers are not convinced, they likely will be intrigued. And thus *Erie* acquires yet another layer of mystery.

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