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Even the Slightest: Causation in Fela and Jones Act Cases

Thomas C. Galligan Jr.

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“[E]VEN THE [S]LIGHTEST”¹: CAUSATION IN FELA AND JONES ACT CASES

*Thomas C. Galligan, Jr.*²

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I. INTRODUCTION

In *Jones v. United States*,³ an engineer on a vessel was making his rounds as duty officer when he fell in the emergency diesel generator room. He did not see what caused him to slip and fall. He did not notice any grease on his shoes or pants when

1. *Rogers v. Missouri Pac. R.R., Co.*, 352 U.S. 500, 506 (1957).

2. LSU Interim President, Dodson and Hooks Endowed Chair and Maritime Law and James Huntington and Patricia Kleinpeter Odom Professor of Law. This Article was presented as a lecture as part of the Davis Lecture Series of the Federal Bar Association—Lafayette and Acadiana Region. The lecture honors Judge W. Eugene Davis of the United States Court of Appeals for the Fifth Circuit. Judge Davis is a wonderful judge; to someone in my field, Admiralty, he is a paragon. He is one of the nation’s great maritime jurists and has justifiably joined the ranks of the great Fifth Circuit Admiralty judges: John Minor Wisdom, John Brown, Alvin Rubin, John Duhe, and more.

3. 936 F.3d 318, 320 (5th Cir. 2019).

he fell. Plaintiff later sued for negligence under the Jones Act and for unseaworthiness.⁴ He testified in his deposition that he thought he fell on grease.⁵ He claimed that the vessel had cables above the weather decks; the crew frequently greased the cables, and the grease would drip onto the decks.⁶ While there was an overhang above the entrance to the generator room, plaintiff claimed grease could be tracked or spread across the deck.⁷ The trial court granted the defendant's motion for summary judgment and the Fifth Circuit affirmed and said: "The Jones Act causation standard is lower than at common law. But it still requires some evidence."⁸ Grease in places on the ship's deck at various times was not sufficient circumstantial evidence to establish that grease on the deck caused the plaintiff's fall.⁹

So, what is the source of this lower causation standard in Jones Act cases to which the court referred? The Jones Act¹⁰ grants a seaman a negligence action against the employer. The Jones Act, by its terms, incorporates the substantive standards of the Federal Employers Liability Act (FELA),¹¹ which is applicable to interstate and international railroad workers. And the FELA provides that a railroad is liable to its employees for personal injury damages or wrongful death "resulting in whole or in part from the negligence" of the railroad.¹²

Thus, whenever an employer's negligence causes "in whole or in part" injury or death to a seaman, the FELA imposes liability.¹³ Since the Jones Act incorporates the substantive standards of the FELA, judicial interpretations of the meaning of FELA provisions apply in Jones Act cases.¹⁴ Thus, the "in whole

4. *Id.* (He also sought maintenance and a cure).

5. *Id.*

6. *Id.*

7. *Id.* at 320–21.

8. *Id.* at 320.

9. *Id.* at 322.

10. *Id.*; see also 46 U.S.C. § 30104 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.").

11. *Id.*; see also 45 U.S.C. § 51.

12. *Id.*

13. *Id.*

14. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 570 (1994).

or in part"¹⁵ FELA language applies in Jones Act cases. And, the United States Supreme Court has provided some intriguing gloss on the phrase "in whole or in part."¹⁶ That is the subject of this Article.

Over the years, the Supreme Court has interpreted the FELA phrase "in whole or in part" several times, most recently in *CSX Transportation Inc. v. McBride*.¹⁷ Its jurisprudence on the subject is confusing, unclear, and inconsistent with mainstream tort law. In *McBride*, the Court held that the trial court did not err in refusing to give a jury instruction that required the plaintiff to prove that the defendant proximately caused the plaintiff's injuries.¹⁸ A proper instruction, per the majority, would be to tell the jury it should find for the plaintiff on causation if the defendant's negligence played a part in causing the plaintiff's injuries.¹⁹ In so holding, the Court did not separate the cause inquiry into its two basic, constituent parts: cause-in-fact and scope of risk or liability—what the law used to and sometimes does still call "proximate or legal cause."²⁰ The former—cause-in-fact—is sometimes called factual cause.²¹ An act is a factual cause of an injury if the factfinder concludes that the injury would not have occurred "but for" the defendant's particular alleged negligent act.²² Scope of the risk or liability (what courts used to and often do still call proximate or legal cause) is a limitation on the supposed infinite liability that might result if factual cause were all that the law required.²³ The Restatement (Third) of Torts: Physical and Emotional Harm § 29 provides that: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct negligent."²⁴ The

15. 45 U.S.C. § 51.

16. *Gottshall*, 512 U.S. at 570.

17. *See generally* 564 U.S. 685 (2011).

18. *Id.* at 2634.

19. *Id.* at 2635.

20. *Id.* at 2336.

21. DAN DOBBS ET AL., *DOBBS' LAW OF TORTS* § 186 (2d ed. 2020).

22. *Id.*

23. *See, e.g.*, Mark F. Grady, *Proximate Cause Decoded*, 50 *UCLA L. REV.* 293, 294 (2002).

24. *RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM* § 29 (2010).

Restatement (Third) does not use the phrases proximate or legal cause.²⁵ While the Court did not expressly adopt a proximate cause or scope of risk requirement in *McBride*, it clearly contemplated some limit on liability for “far out ‘but for’ scenarios.”²⁶ The Court just did not explain itself very clearly.

The United States Supreme Court’s lumping together of cause-in-fact and scope of risk in one supposed causation inquiry blurs two important concepts and, in doing so, repeats an error that was common before the ground-breaking work of Leon Green and other legal realists.²⁷ Moreover, it has led to continued confusion and a concomitant lack of meaningful analysis on each part of the so-called causation requirement. Herein, I will endeavor to explain the source of the confusion, urge the Court to bifurcate the cause-in-fact issue from the scope of risk issue, and humbly suggest a broad reading of scope of risk in FELA and Jones Act cases given the statutory purposes and the jurisprudential history.

Happily, *McBride* does not use the phrases “proximate cause” or “legal cause.”²⁸ Jettisoning those terms from the analysis is progress, real progress. Proximate cause leant an air of mystery to the law of negligence; more aptly, in enshrouded it in a fog of confusion. The phrase disguised the common-sense notion that liability was not unlimited, the notion that some risks were beyond the scope of risks that made the actor negligent in the first place. It made the limitation decision look like a legal decision, rather than a fact specific decision based essentially on fairness and the experience of the community. The tests courts used were confusing—foreseeability, hindsight, direct, remote, natural and probable, intervening and superseding causes—confused; they did not clarify. The Court has wisely abandoned the charade, although, as noted, it has not clearly said what replaces them.

In Section II, I will analyze *Rogers v. Missouri Pacific*

25. *Id.*

26. *McBride*, 564 U.S. at 704.

27. See generally LEON GREEN, JUDGE AND JURY 186–95 (1930); LEON GREEN, RATIONALE OF PROXIMATE CAUSE 76–77 (1927).

28. See generally *McBride*, 564 U.S. at 685.

Railroad Co.,²⁹ one of the fountainheads of the current muddle. Section III will discuss subsequent twentieth century FELA causation jurisprudence. Section IV will set forth the questions that the early jurisprudence left unanswered; Section V, takes a very relevant aside to violation of statute negligence cases under FELA and the Jones Act. Section VI analyzes *Norfolk Southern Ry. Co. v. Sorrell*³⁰ and Section VII discusses *McBride*. Section VIII summarizes the critical, scholarly commentary after *McBride*, much of which I relied upon in forming my views. Section IX samples the post-*McBride* jurisprudence. Section X sets forth my own analysis and consideration of the issues. And Section XI provides a brief conclusion.

II. ROGERS

In *Rogers* an FELA case, a railroad worker was ordered to use a hand torch to burn weeds and vegetation off a slope adjacent to defendant's rail lines.³¹ The supervisor instructed the worker to move off the tracks when a train passed and to watch for any hotboxes on the passing train.³² The reason for the order to get away from the tracks when a train approached was that the sound of one passing train could mute the sound of another approaching train, thereby placing the worker at risk.³³ As a train approached, plaintiff got off the tracks and watched for hotboxes.³⁴ But as he did so, the passing train fanned the fire which was burning in the weeds.³⁵ The fire approached the plaintiff who, when he moved away, stumbled, and fell into a culvert, suffering injury.³⁶ The worker sued the employer.³⁷

The trial court instructed the jury to find for the defendant if the plaintiff employee was "the sole cause of his mishap."³⁸ The

29. 352 U.S. 500 (1957).

30. 549 U.S. 158 (2007).

31. *Rogers*, 352 U.S. at 501-03.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 501-03 (1957).

37. *Id.*

38. *Id.* at 504.

jury found for the plaintiff.³⁹ The Missouri Supreme Court reversed,⁴⁰ concluding, according to the U.S. Supreme Court, that the plaintiff was the sole cause of his injury.⁴¹ The United States Supreme Court, in an opinion by Justice Brennan, reversed the Missouri Supreme Court, and reinstated the jury verdict.⁴² In doing so, Justice Brennan said:

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, **even the slightest**, in producing the injury or death for which damages are sought.⁴³

The Court continued:

Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played **any part at all** in the injury or death.⁴⁴

In reinstating the jury verdict, the Court first noted that the jury had apparently decided that the plaintiff was not the sole cause of his injuries and that the defendant's negligence had played a part in causing the plaintiff's injuries and that there was evidence to support those conclusions.⁴⁵

Justice Brennan also noted that the Missouri Supreme Court opinion could be read to say that the plaintiff's alleged negligence was at least as probable a cause for his injury as the defendant's fault and, if that were the case, there was no issue for the jury.⁴⁶

39. *Id.* at 505.

40. *Id.* at 503–05; 352 U.S. at 524 (1957) (Frankfurter, J., dissenting) (Justice Frankfurter dissented in *Rogers* and three other cases, arguing that the Court should not decide FELA sufficiency of the evidence cases).

41. *Id.*; Michael D. Green, *The Federal Employers Liability Act: Sense and Nonsense About Causation*, 61 DEPAUL L. REV. 503, 504 (2012) (Professor Michael Green points out that actually the Missouri Supreme Court found that there was no negligence of the railroad and that the state court did not use the sole cause phrase).

42. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 511 (1957).

43. *Id.* at 506 (emphasis added).

44. *Rogers*, 352 U.S. at 506–07 (emphasis added).

45. *Id.*

46. *Id.* at 505.

But the Court noted that the FELA does not require the plaintiff to exclude a "conclusion favorable [for] the defendant."⁴⁷

Justice Brennan continued:

The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that 'the injury would not have occurred but for the negligence' of his employer, and that '[t]he test of whether there is a causal connection is that, absent the negligent act the injury would not have occurred.' That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.⁴⁸

Of course, torts aficionados will see that Justice Brennan merges or conflates two related, but different, concepts: cause-in-fact and proximate cause. "But for" is the test for cause-in-fact, not proximate cause. And the phrase "sole . . . cause" was often used in deciding the proximate cause issue. Thus, but for is cause-in-fact and sole cause is proximate cause and Justice Brennan essentially ran them together.⁴⁹ His mistake may perhaps be forgiven because, first, FELA does not expressly separate the two concepts and, second, in the early part of the twentieth century, courts often confused or mingled the two concepts.⁵⁰ I will have much more to say about this later because Justice Brennan's conflation of cause-in-fact and proximate cause, or what we might more appropriately call scope of liability, continues to haunt us today in FELA/Jones Act cases.

III. GALLICK

After *Rogers*, the Court decided *Gallick v. Baltimore & Ohio Railroad Co.*⁵¹ There, defendant railroad had allowed a fetid pool

47. *Id.* at 506.

48. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957).

49. *Id.* at 500.

50. See, e.g., Thomas C. Galligan, Jr., *Let the Jury Decide! A Plea for the Proper Allocation of Decision-Making Authority in Louisiana Negligence Cases*, 94 TUL. L. REV. 769, 778 (2020).

51. 372 U.S. 108 (1963).

of stagnant water to remain on its property.⁵² The pool contained the bodies and body parts of rats and pigeons; moreover, insects were present on and around the pool.⁵³ While working around the pool, a large bug bit plaintiff on the leg.⁵⁴ The Supreme Court, in an opinion by Justice White, described what ensued:

The wound subsequently became infected. The infection failed to respond to medical treatment, and worsened progressively until it spread throughout petitioner's body, creating pus-forming lesions and eventually necessitating the amputation of both his legs. None of the doctors who treated and studied petitioner's case could explain the etiology of his present condition, although some of them diagnosed or characterized it as 'pyoderma gangrenosum, secondary to insect bite.'⁵⁵

The plaintiff sued in Ohio state court; the jury answered a series of special interrogatories.⁵⁶ Based on the answers to those questions, the court found for the plaintiff.⁵⁷ The Ohio Court of Appeals reversed, finding that there was no "direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool,' or had become infected by the pool with the substance that caused petitioner's infection;" the bug could just as likely come from a nearby river or surrounding weeds.⁵⁸ The Court of Appeals thought that there was, at best, a "chain of causation" that was speculative and too tenuous to establish liability.⁵⁹ The Ohio Supreme Court declined to review the decision.⁶⁰

The United States Supreme Court reversed. Justice White said:

According to the Court of Appeals, the break in the causal chain that turned it into a mere 'series of guesses and speculations' was the want of evidence from which the jury

52. *Id.* at 109.

53. *Id.*

54. *Id.*

55. *Id.* at 109–10.

56. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 110 (1963).

57. *Id.* at 112.

58. *Id.*

59. *Id.* at 113.

60. *Id.*

could properly conclude that respondent's fetid pool had had something to do with the insect that bit petitioner. The only question was whether or not the insect was from or had been attracted by the pool. We hold that the record shows sufficient evidence to warrant the jury's conclusion that petitioner's injuries were caused by the acts or omissions of respondent.⁶¹

Direct evidence or more substantial circumstantial evidence was not required.⁶² The maintenance of the fetid pool had something to do with the insect that bit petitioner.⁶³

Additionally, in *Crane v. Cedar Rapids & I. C. Ry.*,⁶⁴ the Court, in dicta, said that under the FELA a plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act."⁶⁵

IV. UNANSWERED QUESTIONS

Rogers with its "even the slightest"⁶⁶ causation language, and

61. *Id.*

62. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 114 (1963).

63. *Id.*

64. 395 U.S. 164 (1969).

65. *Id.* at 166.

66. While not the subject of this lecture, the even the slightest language caused other problems. Courts began to export the concept from the causation element(s) to the standard of care element and to only require that the plaintiff establish the defendant's slight negligence. Then the slight negligence of the defendant moved across the "v." to the plaintiff's side and the plaintiff's duty of care to him or herself became a duty of slight care, rather than ordinary care. The Fifth Circuit cleared up this confusion in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997). There, in an opinion by Judge Duhe, the court made clear that the standard of care was ordinary care and that standard applied to both the defendant and the plaintiff. Interestingly, in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957), decided the same day as *Rogers*, plaintiff was a second baker on ship. He was ordered to prepare twelve servings of ice cream. The ice cream was very frozen so (very frozen?), at some point in the operation, he could not extricate the ice cream from the container. Absent the availability of an ice chipper, the second baker decided to use a sharp butcher knife to loosen the ice cream. Sadly, during the process, his hand slipped, resulting in the loss of two fingers on his right hand. He filed suit under the Jones Act and the U.S. Supreme Court said he had established sufficient evidence that the risk which occurred was foreseeable and that his employer was conceivably negligent because the event was foreseeable. In so holding, the Court cited and quoted *Rogers*. It is not altogether clear if it was

cases like *Gallick*, left some unanswered questions because there were various ways to interpret the decisions. For instance:

1. Was the relaxed causation standard limited to cases where the plaintiff was alleged to be at fault? That is, was it nothing more than a clear reminder that under the FELA,⁶⁷ the plaintiff's negligence would reduce, not bar, recovery.⁶⁸ *Gallick* would seem to belie this interpretation.

2. Was *Rogers* and its language simply a condemnation of the tendency of some courts to refer to the "sole" cause of an accident?

3. Did *Rogers* mean that the FELA relaxed the proof needed on causation? It would seem so but then on which part of "causation?" Cause-in-fact? Proximate cause? Or, both?

4. Or did *Rogers* not just relax the causation standard, did it eliminate the need to prove proximate cause at all in FEELA and Jones Act cases? That was the import of the *Crane* dictum.

Clear answers to these questions were not forthcoming. Several post-*Rogers* lower courts noted that the burden of proof on causation in an FELA case was lower than in a negligence case at common law.⁶⁹ Consistently, the U.S. Supreme Court in *Consolidated Rail Corp. v. Gottshall*,⁷⁰ referred, in dictum, to the relaxed standard of causation in FELA cases but said no more on that issue. But relaxed on cause-in-fact? Relaxed on proximate cause? And what was the standard or standards?

Arguably going further, in *Oglesby v. Southern Pacific Transp. Co.*,⁷¹ the court said that "common law 'proximate cause' is not required under the FELA." In *Summers v. Missouri Pacific R.R. System*,⁷² the court expressly noted that some courts had held that it would be error to include an instruction on proximate cause in an FELA case. As authority, the court cited a leading

citing it in reference to breach or causation.

67. 45 U.S.C. § 53.

68. *See generally* 45 U.S.C. § 54 (In addition, under the 1939 amendments to the FELA, assumption of the risk was not a defense).

69. *See* *Holbrook v. Norfolk S. Ry. Co.*, 414 F.3d 739 (7th Cir. 2005); *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432 (9th Cir. 1999).

70. *Corp. v. Gottshall*, 512 U.S. 532 (1994).

71. 6 F.3d 603, 607 (9th Cir. 1993).

72. 132 F.3d 599 (10th Cir. 1997).

Fifth Circuit decision, *Page v. St. Louis Sw. Ry.*,⁷³ wherein the court said that the definite departure from traditional common-law tests of proximate causation as applied to the [FELA] came in *Rogers*." In *Page*, the court held it was error to instruct the jury that it must find defendant was the proximate cause of the plaintiff's injury.⁷⁴ The court said:

Under the definition of proximate cause in this case, the jury was required to find, before the plaintiff could prevail, that the cause of his injury was one which in natural and continuous sequence [common law proximate cause] produced the event or happening in question and without which such event or happening would not have occurred [cause-in-fact]. A detailed consideration of those requirements would seem to indicate that they are not essential to the jury's conclusion in this case that employer negligence played a part in producing the plaintiff's injury. The same thing would appear to be true of the requirement that the accident be the natural and probable consequence [proximate cause] of defendant's act or omission and such a consequence as ought to have been foreseen [proximate cause or breach] by a person in the exercise of ordinary care in the light of attending circumstances. Those requirements may well have been injurious to the plaintiff. They are foreign to the simple test prescribed in *Rogers*, supra. Under that decision, and the long line of Supreme Court cases which have followed it, we must hold that the court's instructions on proximate causation were erroneous in operating to unduly restrict the jury in the exercise of its functions.⁷⁵

Thus, some courts simply stated that the burden of proof on causation under the FELA and the Jones Act was relaxed. Others arguably went further stating that it was error to instruct a jury in an FELA and Jones Act case that the defendant was the proximate cause of the plaintiff's injuries. Did that mean that there was no proximate cause or scope of liability requirement in FELA and Jones Act cases? What has the Supreme Court said more recently?

73. 312 F.2d 84, 89, 92 (5th Cir. 1963).

74. *Id.* at 92.

75. *Id.*

V. AN ASIDE ON VIOLATION OF STATUTE
NEGLIGENCE CASES

Before turning to the post-2000 FELA/Jones Act Supreme Court causation jurisprudence, an aside to a closely related legal issue is necessary. In a negligence case when a plaintiff alleges that the defendant's violation of a statute constitutes a violation of the appropriate standard of care (sometimes loosely referred to as negligence per se cases), the court must answer two questions in determining whether the plaintiff may rely upon the statute as the standard of care of a reasonable person or as evidence of the standard of care of a reasonable person.⁷⁶ Those two questions are: (1) whether the plaintiff is a member of a class of persons which the statute was enacted to protect and (2) whether the risk (or type of accident) which arose was a risk which the statute was enacted to guard or protect against.⁷⁷ The second question is essentially a scope of the risk or scope of liability question, i.e., it is an old school proximate cause question.⁷⁸ That point is critical because of the way in which the United States Supreme Court has analyzed violation of statute in FELA and Jones Act cases.

In a number of decisions, involving violations of the Federal Safety Appliance Act,⁷⁹ and the Boiler Inspection Act,⁸⁰ the Court has held that any defect which constitutes a violation of those acts is actionable under the FELA if the violation contributed to the injury "without regard to whether the injury flowing from the breach was the injury the statute sought to prevent."⁸¹

On the Jones Act side of the ledger, in *Kernan v. American Dredging Company*⁸² the plaintiff seaman was killed when the tug on which he worked caught fire while towing a scow. The

76. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 14 (2010).

77. *Id.*

78. Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1517–18 (1993).

79. 45 U.S.C.A. § 2 (2020).

80. 45 U.S.C.A. § 51 (2020).

81. See *Coray v. S. Pac. Co.*, 335 U.S. 520 (1949); *Urie v. Thompson*, 337 U.S. 163 (1949); *Minneapolis & St. Louis R.R. Co. v. Gotschall*, 244 U.S. 66 (1917); *Louisville & N.R. Co. v. Layton*, 243 U.S. 617 (1917).

82. 355 U.S. 426, 427–28 (1958).

seaman's survivors alleged that the fire was caused because an open-flame kerosene lamp on the scow's deck ignited very flammable vapors lying above petroleum products which had accumulated on the water's surface.⁸³ The lamp in question was less than three feet above the water.⁸⁴ A regulation required that lights must be at least eight feet above the water.⁸⁵ Plaintiffs alleged that the violation of the regulation rendered the defendant negligent.⁸⁶ Defendant countered that the purpose of the height requirement was to make the lamp visible to other vessels in order to avoid a collision.⁸⁷ That is, defendant contended that the regulation was not intended to protect against the risk that a low hanging lamp would cause a fire.⁸⁸ The district court held that the lamp was a cause-in-fact of the death but that the regulation was not intended to protect against the risk which occurred and thus there was no liability.⁸⁹ The Supreme Court, in a 5-4 decision, with Justice Brennan writing for the majority, reversed, relying on the FELA Federal Safety Appliance Act and Boiler Inspection Act cases referenced above and said:

The courts, in developing the FELA with a view to adjusting equitably between the worker and his corporate employer the risks inherent in the railroad industry, have plainly rejected many of the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved. Among the refinements developed by the common law for the purpose of limiting the risk of liability arising from wrongful conduct is the rule that violation of a statutory duty creates liability only when the statute was intended to protect those in the position of the plaintiff from the type of injury in fact incurred. This limiting approach has long been discarded from the FELA.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Kernan v. American Dredging Co.*, 355 U.S. 426, 427-28 (1958).

88. *Id.*

89. *Id.*

Instead, the theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this Act, and his fault, in whole or in part, causes injury, liability ensues. And this result follows whether the fault is a violation of a statutory duty or the more general duty of acting with care, for the employer owes the employee, as much as the duty of acting with care, the duty of complying with his statutory obligations.⁹⁰

Given that the scope of injury or risk issue is a proximate cause issue masquerading in statutory interpretation clothes and that the Supreme Court was willing to impose liability in violation of statute cases where the risk which occurred was not necessarily a risk the statute was enacted to guard against, then perhaps proximate cause really is not required in FELA and Jones Act cases. But now let us turn to what the U.S. Supreme Court itself said in recent years.

VI. *SORRELL*

The United States Supreme Court returned to the FELA/Jones Act causation issue in *Norfolk Southern Ry. Co. v. Sorrell*.⁹¹ In *Sorrell*, a railroad employee was driving a dump truck loaded with supplies for use in some repairs on a gravel road adjacent to the employer's railroad tracks.⁹² Plaintiff claimed that a fellow employee negligently forced him off the road into a ditch.⁹³ The other driver claimed that plaintiff simply drove off the road into the ditch.⁹⁴ Relying on the fellow employee's version of the events, the employer claimed that either it was not liable at all or, at the very least, the plaintiff was also negligent and, thus, any recovery should be reduced by that negligence.⁹⁵ The precise issue before the Court was whether the standard of proof on causation was the same for both the

90. *Id.* at 438–39.

91. 549 U.S. 158 (2007).

92. *Id.* at 160.

93. *Id.* at 160–61.

94. *Id.*

95. *Id.*

plaintiff and the defendant.⁹⁶ Precisely, Missouri’s pattern jury instructions required the plaintiff to prove that the defendant’s negligence contributed “in whole or in part” to the plaintiff’s injury.⁹⁷ Alternatively, the defendant, who alleged the plaintiff was negligent, had to establish that the plaintiff’s negligence “directly contributed to cause the injury.”⁹⁸ The directly contributed requirement is essentially a requirement that the plaintiff’s alleged negligent action was a proximate cause of the accident.⁹⁹

The jury returned a verdict for the plaintiff and the defendant appealed, arguing that the FELA required that the same burden of proof on causation applied to both the plaintiff and the defendant.¹⁰⁰ The Court of Appeals affirmed because, per the court, in Missouri where there is an approved instruction (as there was here), the trial court must give it.¹⁰¹ The Missouri Supreme Court refused discretionary review.¹⁰² Subsequently, the United States Supreme Court granted certiorari on the question of whether the same standard for causation applied to both the plaintiff and the defendant.¹⁰³ At the end of the day, the Court, in an opinion by Chief Justice Roberts, held that the same standard of proof for causation applied to both the plaintiff and the defendant.¹⁰⁴

Noting that the Court, in interpreting the FELA is guided by common-law principles, Chief Justice Roberts stated that at common law the same standard of causation applied to both the plaintiff and the defendant.¹⁰⁵ He continued that it would be a practical and a theoretical challenge to reduce the plaintiff’s damages “‘in proportion’ to the employee’s negligence if the relevance of each party’s negligence to the injury [was] . . .

96. *Id.*

97. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 160–61 (2007).

98. *Id.* at 161.

99. *Id.*

100. *Id.* at 162.

101. *Id.*

102. *Id.*

103. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 162 (2007).

104. *Id.*

105. *Id.* at 168.

measured by a different standard of causation.”¹⁰⁶ Using the same standard of causation would be comparing “apples to apples.”¹⁰⁷ In so holding, the Court followed the Fifth Circuit and cited *Page*.¹⁰⁸

But what was the standard of causation in FELA and Jones Act cases? That question engendered a good bit of discussion in *Sorrell*, more, perhaps, than the issue on which the Court had granted certiorari. The railroad argued that the Court should consider not just whether the causation standard should be the same for the plaintiff and defendant but also what the causation standard was.¹⁰⁹ The railroad argued that the plaintiff should have to prove that the defendant’s negligence was a “proximate” cause of the injury.¹¹⁰ It claimed that whatever *Rogers* did, it did not eliminate the requirement that the defendant be a proximate cause of the plaintiff’s injury.¹¹¹ *Sorrell* argued that the Supreme Court had departed from a “proximate” cause requirement in *Rogers* and, in any event, the Court should not decide the issue because it was not the question on which the Court had granted certiorari and the defendant’s arguments were inconsistent with the position it had taken below.¹¹² The Court agreed with *Sorrell* on the procedural points: the Court had not granted certiorari on the need to prove “proximate” cause and it would be unfair to allow the railroad to switch gears (or tracks) and argue that issue.¹¹³

But the proximate cause question prompted two concurrences: one by Justice Souter, in which Justices Scalia and Alito joined,¹¹⁴ and one by Justice Ginsburg.¹¹⁵ Justice Souter agreed with the majority that the same causation standard

106. *Id.* at 169–70.

107. *Id.* at 169.

108. *Id.* at 164.

109. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 162 (2007).

110. *Id.* at 164.

111. *Id.*

112. *Id.* at 163–64.

113. *Id.*

114. *Id.* at 172 (Souter, J., concurring).

115. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 177 (2007) (Ginsburg, J., concurring in the judgment).

should apply to the plaintiff and the defendant.¹¹⁶ And he agreed that the Missouri Supreme Court should decide, in the first instance, what that standard was.¹¹⁷ He wrote to indicate that he believed that *Rogers* did not eliminate the need for the plaintiff to establish that the defendant was the proximate cause of the plaintiff's injuries.¹¹⁸ Justice Souter pointed out that pre-*Rogers* Supreme Court jurisprudence had referred to proximate cause.¹¹⁹ According to Justice Souter, *Rogers* "merely instructed courts how to proceed when there are multiple cognizable causes of an injury."¹²⁰ This was especially the case where the multiple causes included the plaintiff's alleged fault.¹²¹ To require the plaintiff to establish that the defendant's negligence was the sole cause of the injury would "undermine" the FELA's implementation of a comparative fault regime.¹²² Justice Souter did admit that the "even the slightest" language did not well serve clarity.¹²³

Justice Ginsburg agreed that the same causation standard applied to both the plaintiff and the defendant, but she clearly disagreed with Justice Souter on the proximate cause requirement.¹²⁴ She noted that the FELA and Jones Act called for a relaxed standard of causation.¹²⁵ She approvingly cited and quoted *Rogers*' "even the slightest" language.¹²⁶

Continuing, Justice Ginsburg opined that, rather than eliminating the proximate cause requirement in FELA cases, "*Rogers* describes the test for proximate causation applicable in FELA suits.¹²⁷ That test is whether 'employer negligence played any part, even the slightest, in producing the injury or death[.]'"¹²⁸ Then, citing Justice Andrews dissent in *Palsgraf v.*

116. *Id.* at 172 (Souter, J., concurring).

117. *Id.*

118. *Id.* at 172 (Souter, J., concurring).

119. *Id.* at 174.

120. *Id.* at 173.

121. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 173 (2007).

122. *Id.* at 175.

123. *Id.*

124. *Id.* at 177-78.

125. *Id.* at 177 (Ginsburg, J., concurring in the judgment).

126. *Id.*

127. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 178 (2007).

128. *Id.*

Long Island R.R. Co.,¹²⁹ Justice Ginsburg said that proximate cause involves, in part, a policy judgment about “how far down the chain of consequences a defendant should be responsible for its wrongdoing.”¹³⁰ Justice Ginsburg turned to the FELA, as Congress’ expression of the relevant policy, and pointed out that the FELA was enacted to protect railroad workers and that the Supreme Court had liberally interpreted it to that end, including the plaintiff getting to the jury if she or he proved that the defendant’s negligence “was even the slightest cause of his injury.”¹³¹ Justice Ginsburg then said: “The ‘slightest’ cause sounds far less exacting than ‘proximate cause,’ which may account for the statements in judicial opinion that *Rogers* dispensed with proximate cause for FELA actions.”¹³²

Justice Ginsburg pointed out that scholars have long criticized the confusion that the phrase proximate cause engendered and that some had called for replacing “proximate cause” with “legal cause.”¹³³ Thus, to Justice Ginsburg: “[w]henver a railroad’s negligence is the slightest cause of the plaintiff’s injury, it is a legal cause, for which the railroad is properly held responsible.”¹³⁴ I will have more to say on scope of the risk later. Per Justice Ginsburg’s concurrence, the causation jury instruction would provide that a party was the proximate cause of an injury when the injury resulted in whole or in part from the other party’s negligence—i.e., such negligence payed any part, even the slightest, in causing the injury.¹³⁵

Thus, after *Sorrell*, we knew that the standard of causation was the same for the defendant and the plaintiff. Alas, we still did not know exactly what that standard of causation was. And was the real issue cause-in-fact or scope of the risk (proximate cause) or both?

129. 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting).

130. *Sorrell*, 549 U.S. at 178–79 (Ginsburg, J., concurring in the judgment).

131. *Id.* at 179.

132. *Id.*

133. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 179–80 (2007).

134. *Id.* at 180.

135. *Id.* at 179, 181.

VII. *MCBRIDE*

The Supreme Court next considered the FELA/Jones Act causation question in *CSX Transportation, Inc. v. McBride*,¹³⁶ McBride suffered serious injuries while switching (adding and removing) cars on a train.¹³⁷ McBride claimed that the employer was negligent because the equipment employed—wide bodied engines and an independent hand brake—was not safe for switching and that the employer failed to train him on how to properly use the equipment.¹³⁸ The trial court gave a Seventh Circuit pattern jury instruction on causation, which provided: “Defendant ‘caused or contributed to’ Plaintiff’s injury if Defendant’s negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.”¹³⁹

CSX, the employer, had requested an instruction requiring the plaintiff to establish that the defendant’s negligence was a “proximate cause” of his injury, which it defined as: “any cause which, in natural or probable sequence, produced the injury complained of, with the qualification that a proximate cause need not be the only cause, nor the last or nearest cause.”¹⁴⁰ The jury returned a verdict for the plaintiff, but the jury also allocated the plaintiff with one-third of the total fault¹⁴¹ CSX appealed contending that if the requested instruction had been given a jury might have concluded that “the chain of causation was too indirect.”¹⁴² The Seventh Circuit affirmed, and, thereafter, CSX successfully sought a writ of certiorari in the United States Supreme Court.¹⁴³

A divided United States Supreme Court affirmed.¹⁴⁴ Justice

136. 564 U.S. 685 (2011).

137. *Id.*

138. *Id.*

139. *Id.* at 690.

140. *Id.* at 689.

141. *Id.* at 690.

142. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 690 (2011).

143. *Id.* at 691.

144. *Id.* at 705.

Ginsburg essentially turned her concurrence in the judgment in *Sorrell* into the majority opinion—the so-called law of the land. In the first paragraph of her opinion, Justice Ginsburg wrote:

[W]e conclude that the Act [(the FELA)] does not incorporate “proximate cause” standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee’s injury if the railroad’s negligence played any part in bringing about the injury.¹⁴⁵

CSX had argued that *Rogers* and its “even the slightest” language was intended to clearly show that contributory negligence (plaintiff negligence) was not a bar to recovery in FELA cases and that it was also aimed at other multiple cause cases; i.e., to make clear that there can be multiple responsible causes of an accident. The railroad claimed that *Rogers* was not intended to eliminate a proximate cause requirement entirely.¹⁴⁶ Justice Ginsburg rejected such a narrow reading of *Rogers*. Reviewing the facts and language in *Rogers*, Justice Ginsburg said that *Rogers* was best read as “a comprehensive of the FELA causation standard,”¹⁴⁷ and “a general standard for causation in FELA cases, not one addressed exclusively to injuries involving multiple potentially cognizable causes.”¹⁴⁸ Per Justice Ginsburg, the result in *Rogers* was driven, in part, by prior judicial recalcitrance to broadly interpret the FELA to foster its goal of improving the plight of injured railroad workers.¹⁴⁹ Moreover, she noted that every circuit had rejected FELA jury instructions using proximate cause language.¹⁵⁰ Of course, that is not necessarily a rejection of any scope of risk or liability requirement.

In the third section of her opinion, Justice Ginsburg turned to CSX’s argument that proximate cause is a fundamental

145. *Id.* at 688.

146. *Id.* at 693.

147. *Id.* at 695.

148. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 696 (2011).

149. *Id.*

150. *Id.* at 698.

concept in negligence actions. Without it, CSX argued, juries would impose liability whenever the plaintiff established “but for” causation.¹⁵¹ This is in essence a floodgates argument—the Court’s failure to require proximate cause in FELA and Jones Act cases would open the floodgates of liability. Justice Ginsburg brushed that argument aside saying that no one had pointed to any absurd results in the history of FELA litigation.¹⁵² She then reiterated her *Sorrell* statement that, rather than eliminating proximate causation, *Rogers* described the FELA test for proximate cause.¹⁵³ Here she used the statutory language—“in whole or in part”—not the “even the slightest” language.¹⁵⁴

Continuing in the next subsection of the opinion, which is not the opinion of the Court because Justice Thomas did not join it, Justice Ginsburg noted the confusion that the phrase “proximate cause” and all its alternative variations has caused over the years. Justice Ginsburg pointed out that the Restatement (Third) of Torts: Liability for Physical and Emotional Harm §29 entirely eschewed the term proximate cause—a point to which I will return in a later section.¹⁵⁵

In the next subsection of the opinion, Justice Ginsburg pointed out that to be held liable the defendant FELA employer must be negligent. She said that reasonable foreseeability of harm was an ingredient of FELA negligence because foreseeability was directly relevant to whether or not the defendant had behaved as a reasonable person under the circumstances. That is, foreseeability was a relevant factor in determining breach.

Then, critically, returning to causation, Justice Ginsburg said judges and jurors can use their “common sense” when dealing with far out “but for scenarios.”¹⁵⁶ Immediately thereafter, she approvingly cited two cases: *Nicholson v. Erie R. Co.*¹⁵⁷ and

151. *Id.* at 699.

152. *Id.*

153. *Id.* at 700.

154. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 702 (2011).

155. *Id.*

156. *Id.* at 703–04.

157. 253 F.2d 939 (2d Cir. 1958).

*Moody v. Boston and Maine Co.*¹⁵⁸ In *Nicholson*, the plaintiff alleged that the employer failed to provide a lavatory; employee was injured by a suitcase while looking for a lavatory in a passenger car.¹⁵⁹ The court applied *Rogers* and affirmed the lower court's dismissal for lack of causation.¹⁶⁰ In *Moody*, an employee suffered a stress-related heart attack after his employer forced him to work more than twelve hours with inadequate breaks.¹⁶¹ The trial court granted summary judgment finding no causation and the First Circuit Court of Appeals, applying *Rogers*, affirmed.¹⁶² By citing two cases that limited liability based essentially on the fact that the injury was not within the scope of the risk¹⁶³ of the negligent act, Justice Ginsburg apparently viewed the *Rogers* standard as sufficient to deal with such bizarre cases to limit liability, i.e., she recognized the defendant was only liable for those injuries which were within the scope of the risk. I will analyze this aspect of the opinion further below. Concluding, Justice Ginsburg wrote:

Juries in . . . [FELA] cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part—no matter how small—in bringing about the injury." That, indeed, is the test Congress prescribed for proximate causation in FELA cases.¹⁶⁴

The reader will once again note the use of "no matter how small," rather than *Rogers* "even the slightest" language. Notably, there is absolutely no reference to "proximate case."

Chief Justice Roberts, joined by Justices Scalia, Kennedy, and Alito, dissented.¹⁶⁵ The Chief contended that the Court erred in not requiring a plaintiff in an FELA case to prove proximate

158. 921 F.2d 1 (1st Cir. 1990).

159. *Nicholson*, 253 F.2d at 939.

160. *Id.* at 941.

161. *Moody*, 921 F.2d at 1.

162. *Id.* at 4.

163. In days of old, a court would have said there was no liability because the plaintiff had not established that the defendant was the proximate cause of the plaintiff's injuries.

164. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 705 (2011).

165. *Id.* at 705 (Roberts, C.J., dissenting).

cause.¹⁶⁶ To him, the majority only required cause-in-fact (but for), but proximate cause was a requisite element in any negligence case at common law, which should guide the Court in its development of FELA (and Jones Act) jurisprudence. While the Chief admitted there were criticisms of the various formulations of the idea of proximate cause, he wrote “it is often easier to disparage the product of centuries of common law than to devise a plausible substitute.”¹⁶⁷ He said that the FELA expressly abrogated common law limitations on recovery in four ways—eliminating the bar of contributory negligence, abrogating the fellow servant doctrine, eliminating the defense of assumption of the risk, and rendering written waivers of liability unenforceable—but Congress did not expressly eliminate the need for a plaintiff to prove proximate cause.¹⁶⁸ The Chief read the “whole or in part” language as a cross reference to the FELA’s creation of a comparative fault regime, not as an elimination of the proximate cause requirement.¹⁶⁹

If there is no need to prove proximate cause in FELA cases, the Chief Justice Roberts opined that defendants would be held liable for injuries that were not probable or foreseeable.¹⁷⁰ Without a proximate cause requirement, all the majority was requiring was “but for” causation.¹⁷¹ Counsel for McBride had argued for “but for plus a relaxed form of legal cause.”¹⁷² The majority test, per Chief Justice Roberts, had no “plus.”¹⁷³ Chief Justice Roberts proceeded to review pre-*Rogers* FELA jurisprudence and scholarship requiring proximate cause, and then turned to *Rogers* itself which he read as rejecting sole cause analysis as well as emphasizing that the FELA created a comparative fault regime where a plaintiff, who was just as much to blame for an accident as a defendant, still recovered, albeit a

166. *Id.* at 706.

167. *Id.* at 707.

168. *Id.* at 708.

169. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 709–10 (2011).

170. *Id.*

171. *Id.*

172. *Id.* at 710.

173. *Id.*

reduced award.¹⁷⁴ He wrote: “we have never held—until today—that FELA entirely eliminates proximate cause as a limit on liability.”¹⁷⁵

Chief Justice Roberts did not see the majority’s statement that the jury could consider foreseeability of the risk at the breach stage as a cure for its elimination of proximate cause because that would not eliminate liability where the risk of injury was foreseeable, but the injury was not “directly” caused by the defendant’s negligence.¹⁷⁶ Chief Justice Roberts also took the majority to task for using different verbal formulations of its causation test:

The Court’s opinion fails to settle on a single test for answering these questions: Is it that the railroad’s negligence “pla[y] a part—no matter how small—in bringing about the [plaintiff’s] injury,” as the Court indicates . . . or that “negligence play any part, even the slightest, in producing the injury[.]” . . . The Court says there is no difference . . . but I suspect lawyers litigating FELA cases will prefer one instruction over the other, depending on whether they represent the employer or the employee.¹⁷⁷

The Chief reiterated his call for the incorporation of proximate cause as an element in an FELA case:

Proximate cause . . . is useful to ask whether the injury that resulted was within the scope of the risk created by the defendant’s negligent act; whether the injury was a natural or probable consequence of the negligence; whether there was a superseding or intervening cause; whether the negligence was anything more than an antecedent event without which the harm would not have occurred . . . law has its limits. But no longer when it comes to the causal connection between negligence and a resulting injury covered by FELA. A new maxim has replaced the old: *Caelum terminus est*—the sky’s the limit.¹⁷⁸

174. *Id.* at 711–13.

175. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 715 (2011).

176. *Id.* at 717.

177. *Id.* at 718–19.

178. *Id.* at 719–20.

To sum up, Chief Justice Roberts essentially called for a traditional proximate cause requirement and test.

VIII. THE COMMENTATORS REACTION

Commentators responded to *McBride*. In *The Federal Employers Liability Act: Sense and Nonsense About Causation*,¹⁷⁹ Professor Michael D. Green, reviewed the pre-*McBride* jurisprudence and the confusion which ensued.¹⁸⁰ He adopted a somewhat wistful tone in noting that *McBride* did not clear up the confusion. He lamented that the majority did not analytically separate factual cause (cause-in-fact, or but for causation) from the scope of risk or liability (i.e., the dated common law's proximate cause).¹⁸¹ He opined that the *Rogers* "in whole or in part" language may have some relevance where the evidence of factual causation was uncertain.¹⁸² Optimistically, he said that the Court had attempted to jettison the mumbo jumbo magic words of proximate cause.¹⁸³ He also pointed out that the Court did include a scope of liability limitation but that it was not artfully worded, i.e., juries and judge could use their common sense to deal with "far out" but for cases to limit liability (and also to allow a judge to take a case form a jury).¹⁸⁴

The late Professor David W. Robertson in *Causation Issues in FELA and Jones Act Cases in the Wake of McBride*¹⁸⁵ also found the decision and opinions in *McBride* less than satisfying. In vintage, clear Robertson style, he listed the theoretical possibilities for what the post-*McBride* standard of causation

179. See Green, *supra* note 41.

180. See *id.*

181. *Id.* at 538–40.

182. *Id.*

183. *Id.* at 538.

184. *Id.* at 541.

185. David W. Robertson, *Causation Issues in FELA and Jones Act Cases in the Wake of McBride*, 36 TUL. MAR. L.J. 397 (2012); see also David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law and the National Level and in the Fifth and Eleventh Circuits*, 36 TUL. MAR. L.J. 425, 432–33 (2012); Michael J. Daly et al., *Recent Developments in Admiralty and Maritime Law*, 46 TORT TRIAL & INS. PRAC. L.J. 135, 136–37 (2011).

actually might be and came up with six possibilities.¹⁸⁶ He concluded that the most likely reading of the holding was that the “FELA lacks a formal fourth [proximate/legal cause/ scope of liability] requirement, but courts can find a way within the *Rogers* language to rule as a matter of law for defendants in cases of extremely and inappropriately remote causation.”¹⁸⁷ He expanded later:

Not only must trial judges avoid telling juries anything suggestive of traditional common law proximate cause, they

186. The six possibilities were:

#1. FELA is a four-element tort, not the usual five. The traditional fourth requirement—proximate cause—has been entirely excised from the Act.

#2. FELA lacks a formal fourth requirement, but the *Rogers* jury instruction—that causation is satisfied if the railroad’s negligence played any part (even the slightest, no matter how small, etc.) in bringing about the accident or illness—will, when subjected to the common sense of jurors (who are, after all, generally instructed to apply common sense), lead juries to weed out cases of extremely and inappropriately remote causation.

#3. FELA lacks a formal fourth requirement, but courts can find a way within the *Rogers* language to rule as a matter of law for defendants in cases of extremely and inappropriately remote causation.

#4. Like common law Negligence, the FELA Negligence cause of action is a five-element tort. FELA’s fourth requirement is not traditional common law proximate cause. But, like traditional common law proximate cause, this requirement does permit courts to rule as a matter of law that the accident or illness of which the plaintiff complains bears a too-attenuated connection with the defendant’s tortious conduct. This doctrine, which needs a different name from proximate cause—perhaps “producing cause,” or “legal cause,” or “scope of liability”—might take its content from:

(a) The “risk within array” approach of the Restatement (Third) of Torts, or

(b) The “refocused breach” variant of the Restatement (Third)’s risk-within-array approach.

#5. FELA harbors the Souter/Sorrell version of proximate cause.

#6. FELA harbors a full-blown, old-fashioned common law proximate cause requirement.

Robertson, 36 TUL. MAR. L.J., *supra* note 185, at 411–12.

187. *Id.* at 411.

must themselves also eschew resorting to proximate cause concepts for making matter-of-law determinations in FELA cases. Nevertheless, the *McBride* Court indicated that trial judges are enabled to rule as a matter of law for FELA defendants whose negligence has brought about injuries to workers in ways that are too "absurd or untoward" for liability to be appropriate. In other words, it turns out that counsel for *McBride* was correct in substance when he told the Court at oral argument that "the correct standard for recovery under FELA is "but-for plus a relaxed form of legal cause."¹⁸⁸

Courts would be left to wrestle with the confusion and find no liability when, based on the language in *Rogers* and *McBride*, there is "but for" causation but, "there is no connection of any kind between the accident or illness and those features of the situation that made the defendant's conduct negligent."¹⁸⁹ That is, juries and judges could still find that some risks which a defendant factually caused were not within the scope of the risks which made the defendant's conduct negligent (a breach of the appropriate standard of care).

Another commentator, John E. Holloway, referred to Justice Ginsburg's appeal to common sense to limit liability in cases of far out but-for causation as judicial activism.¹⁹⁰ Two others lamented the Court's failure to impose a proximate cause or scope of liability requirement in FELA and Jones Act cases and proposed legislative responses.¹⁹¹ Both expressed concern that the *McBride* decision would or could lead to unlimited liability.

Another student commentator was also concerned about unlimited liability, was wary of the Court's "common sense" approach to causation, and proposed reliance on coincidental causation cases as a potential limiting principle.¹⁹² As the author

188. *Id.* at 417–18.

189. *Id.* at 420.

190. John E. Holloway, *Judicial Activism in Admiralty Cases*, 43 TUL. MAR. L.J. 21, 43–48 (2018).

191. Aaron Maples, Comment, *Muddy Waters: The End of Proximate Cause in FELA and Jones Act Cases*, 10 LOY. MAR. L. J. 399 (2012); Trent R. Byquist, Comment, *Derailing FELA's Causation Standard: The Supreme Court's Misinterpretation of FELA in McBride and Suggestions to Restrict the Potential for Unlimited Carrier Liability*, 61 U. KAN. L. REV. 559 (2012).

192. Brett R. Noble, Comment, *Are Railroads Liable When Lightning*

noted coincidental causation occurs in cases where the injury and the breach of the standard of care are coincidental.¹⁹³ An automobile driver may have been speeding and that is what put her at the place of the accident when it occurred (rather than at some point upstream—earlier on her route—from the accident) so the speeding was a “but for” cause of the accident.¹⁹⁴ They would not have been where they were when the accident occurred but for their speeding.¹⁹⁵ However, the negligence (speeding) did not increase the chance of the accident occurring.¹⁹⁶ That is, recurrence of the negligent behavior would not increase the risk of the injury. Another way to say this may be that the risk which occurred was not within the scope of liability associated with the negligent act. Be that as it may, courts have not expressly adopted the coincidental causation approach to the FELA/Jones Act causation definition.

IX. A SAMPLING OF POST-*MCBRIDE* JURISPRUDENCE

What have courts done since *McBride*? I have no intention of being encyclopedic in this section but rather to sample a few decisions. In *Huffman v. Union Pacific R.R.*¹⁹⁷ the court reversed a jury verdict for the plaintiff because it concluded that “there was no expert testimony to support a link between Huffman’s performance of his work duties in less than ergonomically optimal ways—a result of the railroad’s negligence—and the specific knee problem he suffer[ed], which is osteoarthritis.”¹⁹⁸ In *Huckaba v. CSX Transportation, Inc.*,¹⁹⁹ the court said that the burden of proof on causation in FELA cases is lighter, but it read *McBride* as requiring more proof of causation than “but for.”²⁰⁰ The court pointed to Justice Ginsburg’s citations of *Nicholson*

Strikes, 79 U. CHI. L. REV. 1513, 1538 (2012).

193. *Id.*

194. *Id.* at 1539.

195. *Id.*

196. *Id.* at 1540.

197. 675 F.3d 412, 418–19 (5th Cir. 2012).

198. *Id.*

199. No. 13-cv- 0586-MJR-PMF, 2014 WL 12139085, at *5 (S.D. Ill. Aug. 28, 2014).

200. *Id.*

and *Moody, infra*.²⁰¹ In *Huckaba*, the plaintiff alleged that he injured himself lifting a generator which was necessitated because his employer did not have enough batteries on hand, i.e., if there had been more charged batteries available the generator would not have been needed.²⁰² The court granted summary judgment and dismissed that claim.²⁰³

In *Gaston v. Norfolk S. Ry. Co.*,²⁰⁴ the court did not read *McBride* as totally eliminating a proximate cause requirement but as recognizing a relaxed causation standard.²⁰⁵ The court there cited to and quoted from Justice Ginsburg's opinion and said "[o]nly when 'common sense' dictates that a 'but-for' scenario is too attenuated or 'far out' should a district court not send a claim to the jury."²⁰⁶ Other courts have effectively concluded that there is no proximate cause limitation in FELA and Jones Act cases.²⁰⁷ In *Garza v. Norfolk S. Ry. Co.*, the court noted that "but for" causation was required (and lacking).²⁰⁸

X. AND SO?

Thus, courts continue to speak in a bit of an analytical haze, not unlike the post-*Rogers*/pre-*McBride* jurisprudence, even if

201. *Id.*

202. *Id.* at *4.

a. 203. *Id.* at *6 (The court did not dismiss various other claims and the plaintiffs ultimately prevailed.); see *Niederhofer v. Ill. Cent. R.R. Co.*, No. 5-10-0392, 2011 Ill. App. LEXIS 2644 (Ill. App. Ct. Nov. 1, 2011) (interpreting *McBride* as requiring more than "but for" causation).

204. No. 2:17-CV-1151, 2020 WL 5593262, at *1 (S.D. Ohio Sept. 18, 2020).

205. *Id.* at *11.

206. *Id.*; see also *Szekeres v. CSX Transp., Inc.*, No. 1:08-CV-1153, 2012 WL 13026806, at *3 (N.D. Ohio June 12, 2012).

207. *Wardwell v. Union Pac. R.R. Co.*, 88 N.E. 3d 772, 776 (Ill. 2017) (Interestingly, the decision allowed the defendant to argue that the plaintiff was the "sole" negligent party who caused his injury); see also *Mickey v. BNSF Ry. Co.*, 358 S.W. 3d 138, 144 (Mo. Ct. App. 2011) (Not an error to refuse to instruct that plaintiff must establish defendant was a proximate cause of his injuries).

208. *Garza v. Norfolk S. Ry. Co.*, 536 F. App'x. 717 (6th Cir. 2013). Courts have also discussed the precise language of an FELA instruction after *McBride*. For instance, in *Cooke v. CSX Transp., Inc.*, 408 S.W. 3d 752, 757 (Ky. 2012), the Kentucky Supreme Court held that a jury instruction need not include "no matter how slight" where it included the "in whole or in part language." It would be fair to say that some confusion continues.

they achieve sensible results. Uniformity of approach and analysis are clearly absent. That said, despite the analytical confusion, the sky has not fallen. There has not been unlimited, injury-crippling, commercial gears halting liability. And that is to be expected because the universe of claims—from interstate and international railroad workers and seamen—is not large. But even in the limited universe of the claims at issue, liability has not been staggering, and while my review has not been exhaustive, there are not many cases that even cause the reader concern about unlimited liability to be concerned. No courts have imposed liability when lightning strikes.

Perhaps there is a message there. Maybe proximate cause is just not worth the effort—anywhere at all. Maybe juries and judges simply deciding breach, cause, and damages get it right without worrying about the proximate cause mumbo jumbo of the common law and its litany of supposed tests: foreseeable, unforeseeable, foresight, hindsight, direct, remote, natural and probable, intervening, superseding, and on and on and on. Perhaps, going further, courts and jurors do not really need to worry about scope of risk or scope of liability at all. It will work out. I confess life would be simpler and there is an appeal to finally just punting. But doing so would be a radical departure from the common law, even the common law of today, and would increase the risk of outlier results in bizarre cases. In American law, the notion that there is a scope of risk limitation on liability is universal and the Court's failure to expressly state it in FELA and Jones Act cases stands in stark contrast to mainstream law. While I prefer not to call it "proximate cause," as Chief Justice Roberts did in *McBride*, he is right that that requiring more than "but for" causation—what we may call scope of risk—in negligent cases is a vital component of Twenty-first Century negligence law.²⁰⁹ Consequently, I venture a few additional observations and a modest proposal.

First, I offer a historical note on causation. The FELA, passed in 1908, provides that a railroad is liable when its negligence causes "in whole or in part," an employee's injury or

209. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 706–07 (2011) (Roberts, C.J., dissenting).

death.²¹⁰ The FELA, and hence the Jones Act, do not expressly separate cause-in-fact from proximate/legal cause or scope of the risk. But it is also true that common law courts themselves often spoke of causation without bisecting the inquiry.²¹¹ Indeed, Justice Andrews in his famous dissent in *Palsgraf v. Long Island R.R. Co.*, which Justice Ginsburg cited in *Sorrell* and *McBride*, includes cause-in-fact as a part of proximate cause.²¹²

Congress enacted the FELA during the time when the single causation analysis practice was not uncommon. One of the great contributions of the legal realists, people like Leon Green and Wex Malone, was to clearly separate the cause-in-fact question from the scope of liability question. Thus, simply because the FELA does not expressly call for a proximate cause or scope of liability analysis does not mean it should not be an element of a modern negligence action. The FELA and Jones Act are products of their times and the times have changed as has the common law. I will return to this point in a moment.

Second, another target of the realists was sole cause language and sole cause conclusions. *Rogers* rejection of sole causation language was consistent with modern terminology and remains so.²¹³ It is not helpful or accurate to speak of a sole cause. Everything in life, including accidents and injuries, has an infinite number of causes stretching back to Eden or the Big Bang—depending upon your beliefs. Moreover, sole cause language reared and continues to rear its head in cases, like *Rogers*, where the alleged sole cause of the injury is the plaintiff's negligence.²¹⁴ That means sole cause conclusions tend to undermine and even conflict with comparative fault. Happily, *McBride* keeps sole cause language appropriately buried.²¹⁵

210. 45 U.S.C. § 54 (2020).

211. Galligan, 94 TUL. L. REV., *supra* note 50, at 778.

212. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 354 (1928) (Andrews, J., dissenting) ("The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen.").

213. *Cf. Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996).

214. *See, e.g., id.* (General maritime law tort case, not a Jones Act case).

215. *But see Wardwell*, 88 N.E. 3d at 772. (Interestingly, the decision allowed the defendant to argue that the plaintiff was the "sole" negligent party who caused his injury).

Third, Justice Ginsburg's opinion in *McBride*,²¹⁶ like her concurrence in *Sorrell*,²¹⁷ urges courts to abandon the words "proximate cause." Doing so is a fabulous, if belated, tribute to Leon Green and it is a blessing for judges, lawyers, and law students. The phrase and its litany of ambiguous, befuddling, so-called tests befogged; they did not clarify. The Restatements used the term "legal cause" instead of proximate cause.²¹⁸ That substitution was not particularly helpful, even if slightly less mis-titled than proximate cause. The *Restatement (Third) of Torts: Physical and Emotional Harm* § 29 eschews those terms entirely and provides that: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."²¹⁹ The *Restatement (Third)* tells it like it is—the question is scope of the risk. Is the risk in this case one of the risks which made what the defendant did a breach of the appropriate standard of care? Happily, *McBride* does not take us back into the misleading morass of proximate cause language. Justice Ginsburg is right on this point. The dissenters are wrong.

But, while *McBride* is post-modern in taking tort law away from proximate or legal cause terminology, it is not so up-to-date when it continues the FELA and *Rogers* tendency to merge cause-in-fact and scope of risk or scope of liability. Justice Ginsburg wrote that the FELA in requiring causation in whole or in part expresses the FELA (and Jones Act) test for proximate cause.²²⁰ But she did not carefully state—and no U.S. Supreme Court decision since *Rogers* has—that the causation inquiry involves two distinct elements: cause-in-fact and some limitation on the scope of risk or liability. She clearly contemplated cause-in-fact when she talked about common sense limiting far out but for causes but did not expressly state that cause-in-fact and legal limitation or scope of liability were separate inquiries. That is the common law of the Twenty-first Century and the Court, in

216. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 705 (2011).

217. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 180 (2007).

218. *Restatement (First) of Torts* § 9; *Restatement (Second) of Torts* § 9 (Am. Law Inst. 1965).

219. *Restatement (Third) of Torts: Phys. & Emot. Harms* § 29 (Am. Law Inst. 2010).

220. *McBride*, 564 U.S. at 705.

interpreting the FELA and the Jones Act should be guided by the common law.²²¹ Instead of separating cause-in-fact and scope of the risk, Justice Ginsburg keeps them conflated, stating that "[p]roperly instructed on negligence and causation" and told to use their "common sense" jurors can deal with far out but for cases but that proper instruction on causation is the "in whole or in part" causation instruction with no separation of case-in-fact and scope of liability.²²²

Historically, and today, FELA and Jones Act cases that involve cause-in-fact and those that involve scope of liability analytically get mixed together. For instance, in *Jones*, which I described at the start of this talk, the issue really was cause-in-fact. The plaintiff could not establish that the defendant's having allowed grease to occasionally collect on deck had caused him to fall.²²³ It was impossible to say that but for the grease, the plaintiff would not have fallen because the plaintiff could not show any grease on his pants, on his shoes, or in the area where he fell. Likewise, *Huffman v. Union Pacific Railroad*²²⁴ was a cause-in-fact case. The plaintiff could not establish that his osteoarthritis was caused by cumulative trauma from the demands of his job.²²⁵ He could not show that but for the work trauma, he would not have had the condition.²²⁶ Moreover, *Gallick* was a cause-in-fact case.²²⁷ Did the bug that bit the plaintiff come from the defendant's fetid pool or from somewhere else?²²⁸ In none of these cases, do the courts specifically speak to and analyze cause-in-fact. They discuss causation generally. That confuses the law and is a throwback to when cause-in-fact and scope of liability were a unified concept or element in negligence cases.

Analyzing cause-in-fact as a separate element would encourage consideration of a very important question. Is the

221. See, e.g., *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

222. *McBride*, 564 U.S. at 705.

223. *Jones v. United States*, 936 F.3d 318, 324 (5th Cir. 2019).

224. 675 F.3d 412 (5th Cir. 2012).

225. *Id.* at 426.

226. *Id.*

227. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 113 (1963).

228. *Id.*

standard for cause-in-fact relaxed in an FELA/Jones Act case? Should it be? Should it be lower than at common law? Even though the FELA and the Jones Act are not workers' compensation statutes, should a relaxed burden of factual cause apply as it does in many workers' compensation regimes?²²⁹ The Court has not considered this question, in part, perhaps, because it has been mired in the single "causation" swamp. A relaxed standard on cause-in-fact might mean that the plaintiff need not establish cause-in-fact as a probability but perhaps only as a possibility. And under that standard *Huffman* may have been able to establish cause-in-fact. Indeed, *Gallick's* "something to do with" phrase seems like a relaxed cause-in-fact requirement.²³⁰

Moving on, while some may opine that *McBride* totally eliminated the proximate cause or scope of liability requirement entirely, it clearly did not do so.²³¹ Justice Ginsburg, as noted, stated that factfinders when "properly instructed" and told to use their "common sense" would not award damages in "far out" but for scenarios.²³² She continued: "Indeed, judges would have no warrant to submit such cases to the jury."²³³ As I said above, she approvingly cited two cases for her common sense proposition: *Nicholson v. Erie R. Co.*²³⁴ and *Moody v. Boston and Maine Co.*²³⁵

In *Nicholson*, a female railroad worker worked in the shops where there was no restroom for women.²³⁶ Thus, when the plaintiff had to go to the bathroom, she had to walk to one of the cars standing on adjacent tracks.²³⁷ During a trip to a restroom in a railroad car, plaintiff was injured by a passenger's suitcase.²³⁸ Even though there was cause-in-fact, the court did not hold the railroad liable.²³⁹ Cause and effect were according to the court (in

229. See, e.g., *Thompson v. Dillard's Dep't Store*, 759 So. 2d 1074 (La. Ct. 2d Cir. 2000).

230. *Gallick*, 372 U.S. at 113.

231. *McBride*, 564 U.S. at 704.

232. *Id.*

233. *Id.*

234. 253 F.2d 939 (2d Cir. 1958).

235. 921 F.2d 1 (1st Cir. 1990).

236. *Nicholson*, 253 F.2d at 940.

237. *Id.*

238. *Id.*

239. *Id.*

proximate cause parlance) too far removed to justify liability.²⁴⁰

In *Moody*, a railroad worker’s widow sued her late husband’s employer, claiming that his fatal heart attack was the result of the long hours he had worked and interruptions to his rest when off-duty because of schedule shifts.²⁴¹ The trial court granted summary judgment because it was not foreseeable (proximate cause, not breach, parlance) that the worker would suffer a heart attack from stress of which the railroad was never informed.²⁴²

Both courts employed proximate cause terminology and reasoning to limit liability and Justice Ginsburg cited them approvingly. In both, “but for” causation was arguably established but there was no liability.²⁴³ The two cited decisions stand for the proposition that even under the Justice Ginsburg analysis, there is some limitation on liability in FELA negligence cases. But the problem under Justice Ginsburg’s common-sense rule remains: what is the standard and what is the content of a proper jury instruction on scope of liability and what is the concomitant legal standard a court should use when deciding whether to send the case to the jury. It is not foreseeability²⁴⁴ or

240. *Id.*

241. *Moody*, 921 F.2d at 2.

242. *Id.* at 5.

243. For instance, in *Nicholson*, if there had been a woman’s restroom in the shops the plaintiff would not have had to look for one elsewhere. But for the failure to provide the restroom, plaintiff would not have suffered injury from a passenger’s luggage in a train car looking for a woman’s restroom. And in *Moody*, while cause-in-fact is not as clear it seems the court merely accepted the possibility that but for the extra work the heart attack would not have occurred but there was no liability because the heart attack was not foreseeable.

244. Chief Justice Roberts was correct in saying that merely because foreseeability is relevant to determining breach does not solve the problem of unlimited liability. For instance, in *McBride*, it was a breach of the duty to exercise reasonable care to provide safe equipment and instructions how to use that equipment. It is foreseeable that the failure to provide proper equipment and instruction while switching railroad cars might result in personal injury. But imagine that after injuring his wrist the plaintiff had gone off to his car to go to the hospital, but his car did not start because the starter failed. Then imagine a co-worker offered to give the plaintiff a ride in his car. The co-worker providing the ride had COVID-19 but was asymptomatic. The plaintiff caught COVID-19 and sued the employer for the COVID-19. A jury might properly find that the employer was negligent—i.e., breached the duty to exercise reasonable care—because the failure to provide proper equipment might foreseeably cause injury to a worker. But contracting COVID-19 from a co-worker is not one of the

remoteness, as she makes clear in her opinion, because those ideas hearken back to proximate cause.

As noted, John Holloway was critical of the far out cause test, but an instruction asking a juror to use their common sense in determining scope of liability is infinitely superior to a jury instruction that returns to the mumbo jumbo magic words of proximate cause.²⁴⁵ What more might the jury be told? As noted, the *Restatement (Third) of Torts: Physical and Emotional Harm* § 29 eschews those terms proximate and legal cause entirely and provides that: “An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”²⁴⁶ I have written elsewhere on the subject of scope of liability and jury instructions on that issue. I said:

The court should ask the jury, when deciding scope of liability, whether the general type of injury that the plaintiff suffered was one of the harms risked when the defendant acted, and acted negligently. That is, “Jurors, do you associate the type of injury which plaintiff suffered with the risks defendant’s conduct posed?” I would add, but not insist upon, “In so deciding you should rely upon your common sense, your experience, and your sense of fairness.” I believe the word fairness, while not free of opacity, is much clearer to the ordinary person than foreseeability, direct, remote, intervening, superseding, etc. It is, in essence, a command to the fact finder to do the right thing in the case before the court—and only that case.²⁴⁷

In FELA/Jones Act cases, in recognition of the so-called relaxed causation standard, I would suggest that the court might add: In determining whether the injury was within the risks defendant’s conduct posed you should keep in mind that Congress enacted this law [FELA/Jones Act] to provide protection

risks that made the failure to provide equipment negligent. Chief Justice Roberts, to quote his dissent, might say the COVID-19 damages were not the direct result of the breach. I would prefer to say that they were not within the scope of risks which made the employer’s act negligent.

245. John E. Holloway, *Judicial Activism in Admiralty Cases*, 43 TUL. MAR. L.J. 21, 43–48 (2018).

246. Restatement (Third) of Torts: Phys. & Emot. Harms § 29 (Am. Law Inst. 2010).

247. Galligan, 94 TUL. L. REV., *supra* note 50, at 830.

and relief to injured workers.

It bears pointing out that even though Justice Ginsburg's common-sense limitation on far out cases is not an expressly proximate cause or scope of liability requirement, she did contemplate that it is the jury that uses its common sense in deciding whether the case is too far out.²⁴⁸ Put in the terms I would prefer; it is the jury which decides scope of risk or liability. This is what the *Restatement (Third)* provides.²⁴⁹ Only if reasonable minds could not disagree may the jury grant a summary judgment on far-outness or scope of risk.

XII. CONCLUSION

Thus, at the end of the day, there is still confusion and there is also the somewhat unsettling decision in *Kernan* which imposed liability in a violation of statute case even though the risk which occurred was not one of the risks the statute was enacted to protect against. That seems a clear refutation of any proximate cause or limitation of liability prong in Jones Act violation of statute cases. Interestingly, *Kernan*, like *Rogers*, is an opinion on the appropriate limitation of liability²⁵⁰ by Justice Brennan. Neither matches up very well with the traditional or even modern structure of negligence. *Kernan* also seems analytically inconsistent with *McBride* and its common-sense limits on liability. Perhaps, *Kernan* can be read as standing for the proposition that in FELA and Jones Act violation of statute cases, courts should interpret the scope of targeted statutory risks very broadly because of the FELA and Jones Act policies of protecting and providing relief to injured railroad workers and seamen. That is consistent with my proposed jury instruction urging jurors in FELA and Jones Act cases to bear in mind the pro-worker policies behind those two statutes. But to be consistent, there must be some limit, albeit a rather distant limit.

Plaintiffs may lament that I opine that there is some liability

248. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 700 (2011).

249. *See, e.g.*, Galligan, 94 TUL. L. REV., *supra* note 50, at 829.

250. I use the phrase limitation of liability in a tort sense not an admiralty sense.

limiting device left in FELA/Jones Act cases, but they should not be too quick to wish for the elimination of a scope of the risk limitation on liability. Why? *Sorrell*. What is sauce²⁵¹ for the goose on cause would be sauce for the gander on cause. Since *Sorrell* held that the standard for proving causation for the plaintiff is the same as the standard of causation for the defendant alleging comparative fault, that would mean that if the plaintiff only has to establish but for causation to establish liability then the defendant only has to establish but for causation to establish comparative fault. That is a bad thing for injured workers.

Who will answer all the unanswered questions? Hopefully, the United States Supreme Court—sometime soon. And when it does, I would urge the Court to request an amicus brief from some torts teachers.

251. The adage seems particularly appropriate because sauce and cause have all the same letters and one of the two words turns into the other and back again with the transposition of the letters s and c.