Reconsidering Rogers: Re-Examining Causation Under the Federal Employers' Liability Act

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ABSTRACT

The Supreme Court will soon determine whether the Federal Employers’ Liability Act (FELA), which provides railroad employees with quasi-common law remedies for injuries suffered on the job, requires a plaintiff to show that her injury was proximately caused by railroad negligence. In 1957, in Rogers v. Missouri Pacific R. Co., the Supreme Court reversed almost 50 years of case law requiring proof of proximate causation. Now, more than 50 years after that, the question has returned to the Supreme Court. This article summarizes the history of railroad injuries and recovery under the FELA, reviews the pre- and post-Rogers case law, and proposes an alternative causation standard tailored to the railroad environment. The standard, dubbed “foreseeable control,” focuses the inquiry on the railroad’s ability to provide a safe environment, promoting worker safety and limiting liability to situations where a railroad’s careful attention could have prevented the injury.

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* I would like to thank Professor Paul Rothstein, of Georgetown University Law Center, for introducing me to my first legal mistress, the law of Torts.

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INTRODUCTION

In the next year, for the first time in more than half a century, the Supreme Court will decide whether the Federal Employers’ Act (FELA) incorporates a specialized statutory causation standard, or follows its roots in the common law principle of proximate causation. The FELA establishes a tort-like cause of action for employee injuries caused by railroad negligence. This statutory tort parallels its common law cousin, the tort of negligence, and permits recovery “for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.”¹ For almost 50 years after FELA’s enactment in 1908, this language was understood to borrow the principle of “proximate cause” from the common law, despite the absence of clear textual guidance. Then, in 1957, in a dramatic break with prior decisions, Justice Brennan’s majority opinion in Rogers v. Missouri Pac. R. Co. mandated a more lenient causation standard.²

More recently, however, the Supreme Court hinted that it might be willing to reconsider Rogers if the question were squarely presented.³ In a 2007 case, Justice Souter (joined by Justices Scalia and Alito) penned a concurrence proposing that common law “proximate cause” was the appropriate standard, while a separate opinion by Justice Ginsburg agreed with the label but approved the substantive standard in Rogers.⁴ Rising to the bait like hungry carp, courts and railroad lawyers openly questioned the “featherweight” causation standard. In November 2010, the Supreme Court granted certiorari on the question of whether FELA requires proof of proximate causation.⁵

This article proposes a fresh answer, adapting traditional common law principles to fit the statute’s allowance for causation “in whole or in part.” This standard, dubbed “foreseeable control,” would allow recovery if the defendant could have foreseeably exercised control over the particular injury, as measured at the time of the negligence. The imposition of a “control” requirement honors the statutory language permitting multiple causes while setting a limit based on the principal condition necessary for industrial safety. Section I of this article will outline the historical and legal factors preceding the enactment of FELA, with particular reference to the industrial conditions that drove the legislation. Section II will outline the early legislative and judicial wrangling over the statute, and its unanticipated transformation (under Justice Brennan’s guidance) into a broader compensation regime. Section III will explain the proposed “foreseeable control” causation standard and relate its application to some traditional doctrines of causation.

³ Sorrell, 127 S.Ct. at 805 (Roberts, J.).
⁴ Id. at 809-12 (Souter, J., concurring).
⁵ CSX Transportation v. McBride, 598 F.3d 388 (7th Cir. 2010), cert. granted, No. 10-23, 562 U.S. ____ (2010).
I. A BRIEF HISTORY OF LIABILITY FOR RAILROAD INJURIES

Railroads were not federally regulated until the late 1800s, and in the absence of federal intervention, states developed common law doctrines in suits against railroads. The common law of the time was often unforgiving. The fellow-servant rule, for example, was so harsh that it has been described as “a hard rule” and “a deliberate instrument of oppression.” Other doctrines, such as contributory negligence and assumption of the risk, gave railroads additional tools with which to bar suit. This section will explain the less-familiar fellow servant rule, as well as provide a brief overview of more familiar common law doctrines that featured prominently in early railroad employee litigation.

First articulated in 1837 in the English case of Priestly v. Fowler, the fellow-servant rule was most famously exposited in an 1842 Massachusetts case, Farwell v. Boston & Worcester R.R. Corp. The plaintiff engineer brought suit against his employer for injuries sustained when a switch caused the locomotive and its cars to derail. A “careful and trustworthy” switchman, also employed by the defendant railroad company, had negligently thrown the switch. The court’s first conclusion was an economic one. Because employees working for a railroad knew the “natural and ordinary risks and perils incident to the performance of such services,” the court said, employee compensation for such tasks was “adjusted accordingly.” In this view, the employee would stop working if the compensation were inadequate to compensate him for risks. According to this logic, employees would not accept employment with the railroad unless the offered wage reached some average that compensated workmen as a whole for their risks, ultimately shifting the risk premium for injuries back onto the railroad. In effect, the railroad employee assumed the risks regarding his employment in exchange for a wage higher than if there were no risk.

The court then concluded that the party liable for the plaintiff’s damages ought to be the person who could best promote the safety and security of other employees. Perhaps implying

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6 See Maurice G. Roberts, INJURIES TO INTERSTATE EMPLOYEES ON RAILROADS 2-3 (1915).
7 Roberts, supra note 6, at 330 et seq. (Report of House Judiciary Committee).
9 150 Eng. Rep. 1030 [1837]; see generally C.Y.C. Dawbarn, EMPLOYERS’ LIABILITY TO THEIR SERVANTS AT COMMON LAW AND UNDER THE EMPLOYERS’ LIABILITY ACT, 1880, AND THE WORKMEN’S COMPENSATION ACT, 1906 (1911); Roberts, supra note 6, at 329.
10 45 Mass. (4 Met.) 49 (1842).
11 Id. at 50.
12 Id.
13 Id. at 57.
14 Twentieth-century commentators have framed Farwell as an exercise in laissez-faire economics. Friedman & Landinsky, supra note 8, at 56-57. Though the court used some elementary economic tools to resolve the doctrinal issue, it also effectively assumed that the market was functioning efficiently, that the worker was conscious of the risks, and that no transactions costs applied to bargaining for compensation.
15 Id. at 58.
that employees were unfairly exempt from the financial risks of railroad work (which were primarily shouldered by the railroads), the court noted that common carriers were made strictly liable for safety because the carriers were best positioned to guard against loss.\(^\text{16}\) Similarly, the court reasoned, employees who were working in a common enterprise or undertaking were observers of each other’s misconduct and therefore could either report the misconduct or leave their employment.\(^\text{17}\) Compared to a simplistic application of respondeat superior, the court argued, employee safety would be “more effectually secured” by forcing an injured employee to bear the costs of his fellow employees’ negligence.\(^\text{18}\)  

The rule created a situation where a judgment-proof co-worker could be liable for negligently injuring the plaintiff, though as a practical matter, the injured plaintiff would recover from neither the tortfeasor nor his employer. In such a case, the employer retained the benefits of both employees’ work and shouldered none of its costs. Such simplistic economic analysis did not endear the fellow-servant rule to the public, and courts blushed at its uniform enforcement. The fellow-servant rule established firm economic incentives that depended on rigorous enforcement, and judges were unwilling to apply it with the ruthless consistency necessary to carry out its purpose.\(^\text{19}\)  

Many states created exceptions to the fellow-servant rule. The vice-principal exception, which distinguished a supervisor (who was representing the company as vice-principal) from his subordinate employees, had the legal result that he was not a fellow servant.\(^\text{20}\) Likewise, employees working in different departments that had little contact with one another might be found not to be fellow servants.\(^\text{21}\) Fourteen years after *Farwell*, in 1856, Georgia passed legislation exempting railroad employees from the fellow-servant rule, initiating a national trend that, by the time FELA was enacted in 1908, had thoroughly undermined the rule for railroad employees.\(^\text{22}\) By 1911, 25 of the 46 states had abolished or modified the fellow-servant rule as

\(\text{\textsuperscript{16} Id. at 58-59.}\)
\(\text{\textsuperscript{17} Id. at 59.}\)
\(\text{\textsuperscript{18}Id. The House Judiciary Committee considered the fellow-servant rule to be tied to particular industrial methods and systems as they existed at the time of its invention:}\)

It is possible that a century ago, under industrial methods and systems as they then existed, co-employees could have some influence over each other tending to their personal safety. Under present industrial methods and systems this cannot be true. Then they worked with simple tools and were closely associated with each other in their work. Now they work with powerful and complex machinery, with widely diversified duties, and are distributed over larger areas and often widely separated from each other. Under present methods, personal injuries have become a prodigious burden to the employees engaged in our industrial and commercial systems.

**HOUSE COMM. ON THE JUDICIARY, LIABILITY OF EMPLOYERS, H.R. DOC. NO. 60-1386, at 2 (1st Sess. 1908).**

\(\text{\textsuperscript{19} Friedman & Landinsky, supra note 8, at 59-62.}\)
\(\text{\textsuperscript{20} James W. Ely, Jr., RAILROADS AND AMERICAN LAW 214-15 (2001).}\)
\(\text{\textsuperscript{21} Ely, supra note 20, at 214.}\)
\(\text{\textsuperscript{22} HOUSE COMM. ON THE JUDICIARY, LIABILITY OF EMPLOYERS, H.R. DOC. NO. 59-2335, at 3 (1906); Friedman & Landinsky, supra note 8, at 63; Roberts, supra note 6, at 331; Ely, supra note 20, at 215-16; Roberts, supra note 6, at 331. Iowa followed six years later in 1862, Wyoming in 1869, and Kansas in 1874. Alabama barred application of the rule to railroads in 1885, Minnesota in 1887 barred it as to employees operating trains, and in 1893, Arkansas}\)
applied to railroads. Even England, the birthplace of the rule, had legislatively abolished it for all types of hazardous employment in 1888. Federal courts sitting in diversity applied the exceptions narrowly.

Beyond the fellow-servant rule, two other familiar common law defenses obstructed railroad employee recovery for work-related injuries. The defense of assumption of the risk barred recovery from workers who were found to have assumed ordinary risks incidental to their employment, or arising out of the condition of the workplace. Likewise, the harsh contributory negligence rule usually precluded employees from recovery if the employee had broken a work rule or engaged in other unsafe behavior.

Growing frustration with state law built support for federal efforts to make railways safer. Before 1906, injured railroad employees had to file suits relying on the state law governing the location of the injury. The variance in state law created a tangle of variegated common law, with unpredictable results. A railroad worker who found himself injured while carrying an interstate load might find his suit barred by contributory negligence in the jurisdiction of the accident, though the bar would not apply had he been injured only a few seconds later.

The need for a uniform national standard was clear. Less clear was the form of that standard. By the turn of the twentieth century, reformers had consistently failed to impose liability upon railroads for employee injuries, though they occasionally succeeded in passing railroad safety legislation. Meanwhile, between 1889 and 1906, railroad employee injury rates doubled. Reformers cast an envious eye at other countries’ worker injury compensation regimes, and began to push national legislation to keep pace. Though railroad resistance was

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24 Ely, supra note 20, at 216, 216 n.25.

25 Ely, supra note 20, at 216; Roberts, supra note 6, at 190.

26 Ely, supra note 20, at 216.

27 For an extensive discussion of the steady growth of industrial accident law and eventual rise of workmen’s compensation laws, see Friedman & Landinsky, supra note 8, at 51-72.

28 Roberts, supra note 6, at 2.

29 Railroads exerted substantial political and economic power at all levels of government. Many works have chronicled their legislative and court battles. See generally James W. Ely, Jr., RAILROADS AND AMERICAN LAW (2001); Robert S. Hunt, LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROAD ON WISCONSIN LAW IN THE NINETEENTH CENTURY (1958); William G. Thomas, LAWYERING FOR THE RAILROAD: BUSINESS, LAW AND POWER IN THE NEW SOUTH (1999).

30 Friedman & Landinsky, supra note 8, at 60.
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January 28, 2011

fierce, the reformers finally got their way.31

II. CREATION, CONSENSUS, AND CONFUSION

In the years of its infancy, FELA was the subject of vigorous challenges by the railroad industry. This Section will first provide a brief history of the Federal Employers’ Liability Act, starting with its enactment and the early years of its causation decisions. Next, it will review the case of Rogers v. Missouri Pac. R. Co., which severed FELA’s causation standard from its common law roots in the name of changing policy conditions. Finally, it will discuss the aftermath of Rogers.

A. The Employers’ Liability Acts Before Congress and the Courts

In 1908, Congress passed legislation establishing a nationwide regime for railroad employee compensation, creating a statutory cause of action modeled after the tort of common law negligence.32 FELA follows the common law tort in its basic structure,33 but departs in several important ways.34

- It precludes application of the fellow-servant rule for covered workers.35
- Comparative negligence, not contributory negligence, was the method of apportioning damages where the employee was at fault.36 Accordingly the statute preserves the negligent plaintiff’s right to recovery, so long as the railroad’s negligence caused the injury “in whole or in part.”37
- Assumption of the risk is no longer a defense.38


33 Unlike workers’ compensation systems, FELA requires plaintiffs to show that the railroad was at fault. It also created liability for negligent defects and insufficiencies in equipment associated with the railroad. Taken together, these two elements (acts and equipment defects) have been construed to cover the scope of negligent acts for which the carrier could have been guilty under the common law. Roberts, supra note 6, at 19.

34 One early treatise distinguished FELA from the common law, exhorting the courts to ensure that the statute was “liberally construed” to carry out Congress’s intention, to protect workers from becoming a “burden on the public.” Thornton, supra note 23, at 33.

35 Thornton, supra note 23, at 1; Daunis McBride, RICHEY’S FEDERAL EMPLOYERS’ LIABILITY, SAFETY APPLIANCE, AND HOURS OF SERVICE ACTS 144-49 (2d ed. 1916).

36 45 U.S.C. § 53; see generally Roberts, supra note 6, at 216-26?


38 In 1939, Congress eliminated the defense of assumption of the risk in all FELA cases. 45 U.S.C. § 54, as amended by Pub. L. No. 76-382, 53 Stat. 1404, 1404 (1939). Several early cases held that assumption of the risk was unavailable based on Section 1 of the Act. Roberts, supra note 6, at 190-93, 197-99. The Supreme Court expressed a contrary view, holding that because the legislature had barred assumption of the risk in cases involving a safety statute, the doctrine was available in other cases where dangers were open and obvious. See Gila Valley, Globe & N. Ry. Co. v. Hall, 232 U.S. 94, 101-02 (1914) (undermining assumption of the risk by imposing duty on railroad to create safe workplace); Seaboard Air Line R. Co. v. Horton, 233 U.S. 492, 507-08 (1914) (defendant entitled to a jury instruction on assumption of the risk because no safety statute had been violated); Schlemmer v.
The act was not immediately effective. A virtually identical 1906 statute had been declared unconstitutional in January 1908 as exceeding Congress’s authority under the Commerce Clause, so few plaintiffs stepped forward to test the statute. The 1908 statute fixed the Commerce Clause problems, and the Supreme Court affirmed the constitutionality of the new statute in 1912.

By 1915, three years after the Supreme Court had affirmed FELA’s constitutionality, at least 80 percent of railroad employees were covered by FELA. The floodgates were open, and the courts rapidly generated new case law. During that same time, the lower federal courts and state appellate courts decided between 500-600 FELA cases. Perhaps wary of what the lower courts would do to FELA case law, the Supreme Court regularly reviewed FELA cases, usually to consider whether the evidence was sufficient to support the jury’s finding of liability. Between January 1912 and March 1915, the Supreme Court issued 29 opinions construing FELA, averaging almost one per month.

Until the Supreme Court’s 1957 decision in Rogers v. Missouri Pac. R. Co., courts generally assumed that FELA retained common law standards of causation. The Supreme Court had repeatedly affirmed lower courts’ use of the term to describe FELA’s causation standard and saw no contradiction between “proximate cause” and findings of multiple

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39 See Pub. L. 59-219, 34 Stat. 232 (1906); Employers’ Liability Cases, 207 U.S. 463, 504 (1908) (refusing to narrow the statute by construction). The 1906 statute had granted recovery to all railroad employees, not just those working in interstate commerce. Roberts, supra note 6, at 4. The 1906 Act was approved, however, as applied to United States territories and the District of Columbia. Id. at 4. This decision supported the railroads’ expectation that courts would generally continue to be friendly to the railroads.

40 Roberts, supra note 6, at vi.

41 Second Employers’ Liability Cases, 223 U.S. 1 (1912); Roberts, supra note 6, at 7.

42 Roberts, supra note 6, at v.

43 Roberts, supra note 6, at vi.

44 Roberts, supra note 6, at vii.


46 Roberts, supra note 6, at vi. Around the same time, success rates for West Virginia plaintiffs’ attorneys increased moderately, but there is no clear link between this fact and the passage of FELA. Thomas, supra note 29, at 154 n.31.

47 The expectations of borrowing from the common law were so strong that the statute itself makes no explicit reference to the common law tort, though the courts immediately interpreted the it as such. The Supreme Court’s common law interpretations of FELA are entirely the product of the statute’s legislative history, not the precise terms of the text.

48 See Carter v. Atlanta & St. Andrews Bay R. Co., 338 U.S. 430, 434-35 (1949); Urie v. Thompson, 337 U.S. 163, 177 (1949) (“All the usual elements are comprehended including want of due or ordinary care, proximate causation
contributory proximate causes. 49

Despite the courts’ lip service to both “proximate cause” and concurrent causes, the proud declarations of congruence between the concepts and the statutory text masked a tension between the statutory language and traditional notions of proximate cause. 50 Legal realists and positivists had revealed that common law “proximate cause” involved little more than arbitrary line-drawing, 51 and under the tension, the Supreme Court would soon be tempted to draw its own arbitrary line.

B. Rogers v. Missouri Pacific Railroad Co.

In 1957, the Supreme Court inaugurated a new era in FELA litigation. The Court’s landmark ruling in Rogers v. Missouri Pacific R. Co. reconsidered the FELA causation standard in sweeping language, brushing aside its own prior decisions. On July 17, 1951, plaintiff James Rogers worked for Missouri Pacific Railroad Company as part of a team assigned to maintain a particular section of track near Garner, Arkansas. 52 The section of track at issue in the case had two tracks sitting atop a dirt mound, which had sloping sides and a path about three feet wide on

of the injury, and injury[.]”); Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 32 (1944) (“In order to recover under the Federal Employers’ Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident.”); Brady v. Southern R. Co., 320 U.S. 476, 483-84 (1943) (“But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.”), quoting Milwaukee & St. Paul Rwy. Co., 94 U.S. 469, 475-76 (1876); Tiller v. Atlantic Coast R. Co., 318 U.S. 54, 67 (1943) (“The Act of 1908 and the amendment of 1939 . . . leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.”); Davis v. Wolfe, 263 U.S. 239, 242-44 (1923); Spokane & Inland Empire R. Co. v. Campbell, 241 U.S. 497, 510 (1916) (“But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, it is plain that the Employers' Liability Act requires the former to be disregarded.”).

49 Coray v. Southern Pac. R. Co., 335 U.S. 520, 523 (1949) (Petitioner entitled to recover where defective equipment was “sole or a contributory proximate cause” of the injury); Carter v. Atlanta & St. Andrews Bay R. Co., 338 U.S. 430, 434-35 (1949); see also Daunis McBride, RICHEY’S FEDERAL EMPLOYERS’ LIABILITY, SAFETY APPLIANCE, AND HOURS OF SERVICE ACTS 138-41 (2d ed. 1916) and accompanying footnotes.

50 As the Seventh Circuit observed in the case currently on certiorari to the Supreme Court, the term “proximate cause” is hard to define. McBride v. CSX Transp. Co., No. 08-3557, slip op. at 10 n.3 (7th Cir. 2010), cert. granted (2010).

51 See, e.g., Palsgraf v. Long Island R. Co., 162 N.E. 99, (N.Y. 1928) (Andrews, J., dissenting) (“What we do mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source.”).

52 Rogers, 352 at 502; Rogers v. Thompson, 284 S.W.2d 467, 468 (Mo. 1955) [hereinafter “Thompson”].
each slope. Rogers’ primary task was to burn off weeds and vegetation growing on the shoulder using a hand torch.

During the burning, a train passed the crew’s location and Rogers stopped burning to watch for overheated wheel bearings, called “hotboxes.” To observe the train, Rogers stood on a path next to the track near an adjoining culvert. He was soon enveloped by fire and smoke after the passing train fanned Rogers’ weed burning into a significant conflagration. Rogers shielded himself from the flames and smoke, then retreated toward the culvert. He fell, suffering injury.

Rogers brought suit, alleging that the railroad failed to maintain the right-of-way, path, or shoulder, resulting in an inadequate footing for Rogers to move or work under the circumstances. Although culverts were stationed along the right-of-way at various points, they typically had a flat surface or walkway over the top. This one was covered in crushed rock from the track, which had been shaken down onto the walkway by vibration from passing trains. Rogers testified that the section crew was required to clean up any rocks that slid down from the ballast onto the path, keeping the ballast in a straight line. He also alleged that the foreman had negligently assigned him to work near railroad tracks where the train could cause fire from the burning weeds and smoke to approach Rogers. The foreman did not tell Rogers to ignore the fire, and Rogers knew that his primary duty was to keep an eye on it. Rogers moved far enough away from the fire, he thought, to remain clear of the flames until the train had passed. Unfortunately, he underestimated the speed of the fire, fled from the smoke and flames, and injured himself as he fled.

53 Rogers, 352 at 502; Thompson, 284 S.W.2d at 468.  
54 Rogers, 352 at 501-02; Thompson, 284 S.W.2d at 468-69.  
55 Rogers, 352 at 502; Thompson, 284 S.W.2d at 469. Monitoring hotboxes is an essential part of railroad safety practice, even today. Hotboxes can indicate or pose significant safety and fire hazards. A hotbox suggests that a wheel bearing has failed, increasing the internal friction within the wheel assembly and overheating the metal components. If the bearing is not fixed, the bearing or its axle can fail, perhaps causing a derailment. In older designs, the bearing was packed in materials that would catch fire or smoke when overheated, generating sparks and flames. Newer bearing designs reduce but do not eliminate these fire hazards, and hotboxes are detected using more sophisticated devices that can detect an overheated axle.  
56 Rogers, 352 at 502; Thompson, 284 S.W.2d at 469. The peculiar mix of factors in Rogers – a dirt mound, a passing breeze, and a blazing flame – demand a fresh reinterpretation of the FELA causation standard. See Earth, Wind & Fire, “Serpentine Fire” (1977) (“The cause and effect of you has brought new meaning in my life to me.”).  
57 Rogers, 352 at 502; Thompson, 284 S.W.2d at 469.  
58 Rogers, 352 at 502; Thompson, 284 S.W.2d at 468.  
59 Rogers, 352 at 503.  
60 Thompson, 284 S.W.2d at 469-70, 472.  
61 Thompson, 284 S.W.2d at 470.  
62 Rogers, 352 at 502-03; Thompson, 284 S.W.2d at 469-70.  
63 Thompson, 284 S.W.2d at 469.  
64 Thompson, 284 S.W.2d at 469.
At trial, the court overruled the railroad’s motion for a directed verdict, and the jury ultimately returned a verdict for the plaintiff. The railroad appealed, arguing that the injury could not have been a reasonably foreseen consequence of the culvert’s construction and maintenance, that the alleged injury was not proximately caused by the railroad’s method for burning weeds, and that the injury could not have been reasonably foreseen from that method.

1. Missouri Supreme Court: Proximate Parsimony

The railroad fared well before the Missouri Supreme Court. The court reversed the jury’s finding of negligence, based in part on its decision that the plaintiff had offered insufficient evidence regarding the condition of the culvert and the hazards on the path related to “ordinary use.” The court also stated the general causation standard at that time:

The test of whether there is causal connection is that, absent the negligent act the injury would not have occurred. Moreover, in order that negligence be actionable, there must not only be causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury. Foreseeability of injury is sometimes employed as a test of proximate cause; but if it reasonably could have been foreseen or anticipated that an act of commission or omission was likely to injure someone, then it makes no difference that the manner in which the act did injure someone might not have been foreseen or anticipated and the actor may be held liable for any injury which, after the occurrence, appears to have been a natural and probable consequence of his act.

The standard for proximate causation was objective, and turned partly on whether the injury was a natural and probable consequence of the alleged negligence. The court’s decision to use a standard of proximate causation in this case was unremarkable, as it was merely following the pattern set by the Supreme Court.

The opinion’s reasoning, however, set the stage for a vigorous reversal by the 1957 Supreme Court. First, the Missouri Supreme Court reversed the jury’s verdict on negligence, bucking Supreme Court precedent and its own decisions interpreting FELA, all of which expressed a general rule allowing juries to consider inferences of negligence. The lower court glossed over several potentially contrary opinions together standing for the proposition that

65 Thompson, 284 S.W.2d at 468, 470.
66 Thompson, 284 S.W.2d at 470.
67 Thompson, 284 S.W.2d at 470-72.
68 Thompson, 284 S.W.2d at 471.
69 The court observed, somewhat obviously, that “the standard of care must be commensurate to the dangers of the business. Less diligence is required where the danger is slight than where great.” Thompson, 284 S.W.2d at 472. Argued to lower the railroad’s duty of care, however, this principle seems out of place in a case involving an accelerated fire, heavy steel railcars with possibly overheating axles, and other hazards. In light of the eventual onrushing flames fanned by the train, it is hard to see how the danger to Rogers was “slight,” even hypothetically.
complex factual situations involving safe working conditions go to the jury.\textsuperscript{70} By taking the shine off the lower court’s gloss, the Supreme Court could firmly renew its commitment to jury trials where work duties were closely entangled with safety demands.

Second, the lower court held that Rogers had caused his own injuries, concluding that Rogers’ eventual headlong rush to avoid the flames was “an emergency brought about by himself” but stopped short of calling his actions negligent.\textsuperscript{71} According to the Missouri Supreme Court, the fire was “unattended and unwatched” as it swept toward Rogers, eventually obliging him to rush away.\textsuperscript{72} Yet the Missouri Supreme Court never explained the legal significance of Rogers’ duties to watch both the train and the fire. Instead, the court was content to insinuate – without holding – that Rogers was negligent in failing to watch the fire.\textsuperscript{73} Based on this reasoning, the implicit grounds for the court’s reversal were that Rogers failed to carry his burden of showing that the railroad negligently created a dangerous condition near the drainage culvert from which Rogers fell. On appeal, the Supreme Court would use this inchoate aspersion as the grounds to abandon the doctrine of proximate causation.

2. Simple-Partial Causation

The new standard, articulated in a 5-4 decision, imposed liability with only a finding that the railroad’s negligence had partially caused the plaintiff’s injury. Writing for the majority, Justice Brennan held that the evidence was sufficient to support the jury’s verdict for Rogers.\textsuperscript{74}

\textsuperscript{70} Bailey v. Central Vermont Ry., 319 U.S. 350, 353 (1943) (FELA) (negligence was jury question where workers injured while working with awkward tools on an elevated train track); Kelso v. Ross Construction Co., 85 S.W.2d 527, 537 (Mo. 1935) (negligence was jury question where truck backed into worker in confined space with high noise levels); Tatum v. Gulf, Mobile & Ohio R. Co., 223 S.W.2d 418, 423 (Mo. 1949) (FELA) (negligence was jury question where plaintiff was required to work on trestle without guardrails and car containing plaintiff stopped on trestle at night).

\textsuperscript{71} Thompson, 284 S.W.2d at 472.

\textsuperscript{72} Thompson, 284 S.W.2d at 472; cf. Scott v. Shepherd, 2 Wm. Bl. 892; Clark v. Chambers, 3 Q.B.D. 327, 330, 338 (see 92 in Holmes’s Common Law). These flames were held unrelated to the culvert, thus eliminating the culvert as a possible cause of the accident and rendering irrelevant any negligence associated with its maintenance. Thompson, 284 S.W.2d at 472.

\textsuperscript{73} Concluding that Rogers was negligent would have resolved several inferences against the plaintiff. The train tracks in question ran roughly from north to south, and Rogers had been burning weeds to the south of the culvert where he was injured. To observe hotboxes on the passing train safely, therefore, Rogers had to move some distance from the fire, but remain close enough to see the signs of impending axle failure. From this position, Rogers would have had to turn his head 90 degrees to keep an eye on the flame. Rogers would observe each axle while simultaneously watching the fire, two tasks which he probably could not safely perform together. Based on this evidence, the jury’s inference of negligence was entirely reasonable.

\textsuperscript{74} Rogers, 352 U.S. at 503. In dissent, Justice Frankfurter explained his refusal to rule on cases concerning the sufficiency of evidence under FELA, for which he considered certiorari (as a general rule) improvidently granted. 352 U.S. at 524-26 (Frankfurter, J., dissenting). As Justice Harlan pointed out in his parallel dissent, the Supreme Court substituted its own views on the evidence for those of the Missouri Supreme Court on several issues. 352 U.S. at 562-63 (Harlan, J., dissenting). In light of the nuanced factual situation in Rogers, Justice Brennan’s inaccurate characterization of the lower court’s opinion, and his erroneous recollection of basic common law principles, the author thinks that Justice Frankfurter had a point.
Though finding ample support in the record for knowledge of a dangerous condition, Brennan affirmed the Missouri Supreme Court’s view that Rogers would have fallen in his haste to escape the fire, but disagreed with its opinion of the spreading fire. In his view, it was “common experience” that a passing train would fan nearby flames. Consequently, the jury could have properly found a causal link between an out-of-control flame kicked up by a passing train and the risk of injury created by assigning Rogers to his duties.

Justice Brennan then seized on the lower court’s description of the fire as “extraordinary,” interpreting the opinion as saying that Rogers’ conduct was the “sole cause” of the injury. This interpretation did not fairly represent the lower court’s opinion. The Missouri court went out of its way to declare the fire an extraordinary event, thus exonerating both Rogers and the railroad of responsibility. Moreover, Justice Brennan adopted explicitly the lower court’s implied view that Rogers was at fault for spreading the fire. The lower court actually argued that the plaintiff was bound to fall once he made a hasty retreat from the flame and smoke:

> It seems to us that the fire--unattended and unwatched as it was--swept northwardly by the wind of the passing train toward defendant's culvert so that plaintiff (who had left the fire unattended) was obliged to move blindly away and fall, was something extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert.

Because the fire itself was “extraordinary” and could not have been anticipated by Rogers or the railroad, neither party’s negligence could have caused the injury. In traditional tort

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75 Justice Brennan’s cursory review of the evidence in Rogers contrasts with an opinion he authored while a member of the Supreme Court of New Jersey, which meticulously reviewed the facts allegedly constituting contributory negligence. Compare Pangborn v. Central R. Co. of N. J., 112 A.2d 705, 18 N.J. 84 (N.J., 1955) (Brennan, J.) (detailed recitation of various factual scenarios and available inferences).

76 Rogers, 352 U.S. at 503.

77 This is probably correct, especially for railroad workers defoliating active rail lines. Rogers, 352 U.S. at 501; Thompson, 284 S.W.2d at 468. If so, however, then both the foreman and Rogers would have known this, especially since Rogers had seen the railroad burning off foliage before he began employment. Rogers, 352 U.S. at 501; Thompson, 284 S.W.2d at 468. Rogers had no subjective expectation that he was in danger, and it is not clear why he should have had one. This was Rogers’ first time burning off weeds in his two months working for the railroad, and he testified that he expected the wind to have little effect on the flame. Thompson, 284 S.W.2d at 469.

78 Rogers, 352 U.S. at 504. The Missouri Supreme Court had actually refused to adopt a “sole proximate cause” standard urged by a railroad. Adams v. Atchison, Topeka & Santa Fe Rwy. Co., 280 S.W.2d 84, 92-93 (Mo. 1955). Some cases refer to a “sole proximate cause,” but in those cases the court was simply referring to the situation where the injury was caused in no part by railroad negligence. See Young v. New York, Chicago & St. Louis Rwy. Co., 291 S.W.2d 64, 68 (Mo. 1956) (“But there can be no recovery under the act when the employee's negligence is shown to have been the sole cause of his injury and the defendant's act is no part of the causation, and it is proper for the court to so instruct the jury.”); Rhinelander v. St. Louis-San Francisco Rwy. Co., 257 S.W.2d 655, 658 (Mo. 1953) (“In appellant's brief she concedes that under the Federal act, as in Missouri, that if the death or injury was caused solely by the negligence of a third party or of the plaintiff, then, of course, the plaintiff cannot recover, citing our case of Kenefick v. Terminal R. Ass'n of St. Louis[,]”) (citations omitted).

79 Thompson, 284 S.W.2d at 472.

80 Had the Missouri Supreme Court held that a passing train would typically accelerate a fire (and thus been a
terminology, the Missouri Supreme Court treated the accelerated fire as an intervening cause.\textsuperscript{81} Justice Brennan ignored this fact, treating the lower court’s opinion as manipulation of the rule.

Having reinstated the jury’s findings of negligence, Justice Brennan next addressed the issue of causation. His approach focused on the threshold at which a jury may decide causation: “. . . 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.”\textsuperscript{82} Relying on the earlier opinion of Coray v S. Pacific Co., which reaffirmed the jury’s role in determinations of proximate causation and rejected “dialectical subtleties” in its interpretation,\textsuperscript{83} Justice Brennan renewed the Court’s commitment to the uncontroversial principle that the judge may not take a case from the jury based on disputes about the weight of the evidence.\textsuperscript{84} The case should have gone to the jury “whether or not the evidence allow[ed] the jury a choice of other probabilities”\textsuperscript{85} and whether the judge believed that one alternative was more probable than another.\textsuperscript{86}

Justice Brennan turned sharply away from the typical pattern under prior FELA cases, emphasizing FELA’s variations on the common law. Seeking to expound a practical statutory standard governing injuries “due in whole or in part” to employer negligence,\textsuperscript{87} he used a constellation of similar phrases to describe the applicable causation standard for compensable negligence: “played a part,”\textsuperscript{88} “at least in part,”\textsuperscript{89} “played any part, even the slightest,”\textsuperscript{90} and “played any part at all in the injury or death.”\textsuperscript{91} Brennan thus articulated a “simple-partial” causation standard, in which the court determines only the “narrowly limited” question of “whether, with reason, the conclusion may be drawn that negligence of the employer played any

\begin{footnotesize}
\begin{enumerate}
\item Are there any state MO cases at this time finding an intervening proximate cause in a FELA case?
\item Rogers, 352 U.S. at 507-08.
\item 335 U.S. 520 (1949) (rejecting reliance on “philosophical” causes to determine “proximate cause” in the legal sense).
\item Rogers, 352 U.S. at 506.
\item Rogers, 352 U.S. at 507.
\item Rogers, 352 U.S. at 505-06.
\item Rogers, 352 U.S. at 508.
\item Rogers, 352 U.S. at 503;
\item Rogers, 352 U.S. at 505.
\item Rogers, 352 U.S. at 506.
\item Rogers, 352 U.S. at 507.
\end{enumerate}
\end{footnotesize}
part at all in the injury or the death.”

Having established the statutory allowance for compensation despite multiple causes, Justice Brennan then inexplicably mischaracterized the lower court’s rule as “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.”

Yet common law doctrines of proximate causation did not require evidence showing a defendant to be the “sole” cause. Nor had the lower court implied that the causation standard required proof of the defendant as “sole” cause of the injury. The common law had long permitted theories of multiple and concurrent causation.

Even FELA case law prior to Rogers had expressly approved the use of multiple-cause approaches as a component of “proximate cause” and comparative negligence.

The text of the statute makes Brennan’s conclusion even odder. By explicitly including injuries caused “in part” by railroad negligence, the statute cannot mean that a plaintiff must prove a “sole” cause. Section 3 of FELA permits reduction of the railroad’s liability based on a showing that the plaintiff contributed to her own injury, a nonsensical provision if the plaintiff must show “sole” causation.

It is true, of course, that some courts had used the idea of proximate causation as a tool to deprive plaintiffs of compensation under certain circumstances, and Thompson was one of those cases. The Missouri Supreme Court’s aggressive application of proximate cause was erroneous as applied to a concurrent or intervening cause case, as even the earlier proximate cause decisions showed. The statute’s express allowance for partial causation imposed a

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92 Rogers, 352 U.S. at 506-07.
93 Rogers, 352 U.S. at 506.
94 Justice Souter’s concurrence in Norfolk Southern v. Sorrell repeats the mistake. 127 S.Ct. 799, 810-11 (2007) (“We rejected Missouri’s ‘language of proximate causation which made a jury question about a defendant's liability dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury. The notion that proximate cause must be exclusive proximate cause undermined Congress's chosen scheme of comparative negligence by effectively reviving the old rule of contributory negligence as barring any relief, and we held that a FELA plaintiff may recover even when the defendant's action was a partial cause of injury but not the sole one.”) (citations and quotations omitted).
95 See McBride, supra note 35, at 138-41 and accompanying footnotes.
96 See Spokane & Inland Empire R. Co. v. Campbell, 241 U.S. 497, 503-05 (1916) (approving jury instructions hinting that proximate causes could not concur because the jury was not bound by the hints).
97 See Union Pacific R. Co. v. Hadley, 246 U.S. 330, 333 (1918) (Holmes, J.) (“But it is said that in any view of the defendant's conduct the only proximate cause of Cradit's [the decedent’s] death was his own neglect of duty. But if the railroad company was negligent it was negligent at the very moment of its final act. It ran one train into another when if it had done its duty neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than enquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not "result in part from the negligence of any of the employees" of the road.”).
98 Thornton, supra note 23, at 99 (discussing multiple cause cases).
100 See notes 48 and 49 supra.
responsibility to treat cases involving multiple causes more leniently than did the common law. Nonetheless, Rogers could have vindicated the plaintiff simply by reinstating the jury’s verdict, and by reforming the rule governing submission of cases to the jury. No new causation standard was necessary. Justice Brennan was right to note that the statute gave the Court the responsibility of filling in the gaps of the statute, but he was wrong to suggest that FELA supplanted the common law in every particular. Justice Brennan’s view overread the mandate of the statute, resulting in a vastly different standard.

3. The Aftermath of Rogers and the Inevitability of Proximation

Rogers swept away almost 50 years of consistent Supreme Court jurisprudence applying common law notions of proximate cause in one form or another, replacing it with a “simple-partial” causation standard. Having announced the death of proximate causation under FELA in broad terms, Justice Brennan appeared to deny the legitimacy of any principle limiting the range of the causal relationship between railroad negligence and employee injury, so long as the evidence would justify the jury in finding a causal relationship.

Though it was a departure from previous law, Rogers did not hold that causation was optional. Such a standard would have allowed the judge to take causation away from the jury with the slightest uncontradicted evidence of causation, and that was not the subsequent practice of the Supreme Court. Rogers made very clear that the evidence had to justify a belief “with reason” that the alleged negligence caused the injury. This formulation raised more questions than it answered. Justice Brennan’s affirmation of “rational” limits – not a controversial position – begged the question of how far a jury could go within the physical chain to find legal causation. As we shall see shortly, the high court could not long avoid creating new limitations.

101 See Lavender v. Kurn, 327 U.S. 645, 653 (1946) (“It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury’s verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. . . . We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. It was not unreasonable to conclude that these conditions constituted an unsafe and dangerous working place and that such conditions contributed in part to Haney's death, assuming that it resulted primarily from the mail hook striking his head.”).

102 It is unclear whether Justice Frankfurter actually read Justice Brennan’s opinion before penning his dissent, in which he described Rogers as one of “four insignificant cases” decided that day. 352 U.S. at 546 (Frankfurter, J., dissenting). One year later, with a pang of regret, Justice Frankfurter joined Justice Harlan’s dissent in Sinkler v. Missouri Pacific R. Co., which noted Rogers as the case where the Supreme Court accelerated its process of converting FELA into a workers’ compensation system. 356 U.S. at 332-33.

103 Rogers, 352 U.S. at 506-08. Justice Harlan commented in his dissent to Rogers and the other three cases that the Court seemed to be asking whether there was “any scintilla of evidence” supporting the verdict, as opposed to the traditional standard of whether “the evidence is sufficient to convince a reasoning man.” 352 U.S. at 564 (Harlan, J., dissenting). As tempting as that reading has been to many a railroad employee’s lawyer, Justice Brennan repeatedly noted that the boundaries of rational inference constrain what is properly considered a jury question.
Still, the post-Rogers trend was to increase the scope of liability for railroads. In 1958, one year after Rogers, Justice Harlan accused Justice Brennan of trying to create a worker’s compensation system using FELA. Harlan argued that recent opinions—all written by Justice Brennan—had articulated lower standards of fault and causation, imposed absolute liability for some breaches of duty, and wrongly refused to eliminate railroad liability where the negligence occurred on the part of a contractor for the railroad. These decisions, all of which enlarged FELA well beyond its prior constructions, reflected Justice Brennan’s view that “an evolving public policy” favored shifting the losses from death and injury to the railroad industry.

Brennan argued that FELA (as well as the Jones Act, which follows FELA precedents) established a statute “of the most general terms” that allowed the Court to fashion remedies for injured workers. The Supreme Court, he argued, was obediently following Congress’s intentions by developing and enlarging the scope of FELA remedies “to meet changing conditions and changing concepts of industry’s duty toward its workers.” That may have been a plausible explanation at the time, but the more plausible explanation is that the court was concerned about the threshold for just trial, not the substantive standards. Increasingly, lower courts departed from the general principle—adhered to for decades—that FELA was founded on common law principles subject to statutory qualifications, and began to cite Rogers for the proposition that FELA was “an avowed departure from the rules of the common law.”

Only a year later, in 1959, the Supreme Court backtracked from Rogers in a 5-4 decision. In Inman v. Baltimore Ohio R. Co., the Court affirmed a lower court’s determination that the cause of the plaintiff’s injury was a drunk driver breaking criminal and traffic laws, not the railroad’s failure to provide the plaintiff adequate protection. Though Inman is a case primarily about the sufficiency of evidence for negligence, it indicates the Court’s significant discomfort with lenient standards. The majority had little interest in elaborating on Rogers.

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106 Kernan, 355 U.S. at 432 (1958) (Jones Act) (Brennan, J.)

107 Kernan, 355 U.S. at 432.

108 See note 48 supra.


111 See Inman, 361 U.S. at 141-42 (Whittaker, J., concurring) (“Notwithstanding this, it seems to me that the facts of this case make it crystal clear that the Court’s opinion lacks not a whit in fully comporting with the standards of care of the mythical ‘reasonable man,’ for, like the Ohio Court of Appeals, I simply cannot see any substantial evidence—or even a scintilla or an iota of evidence— of negligence on the part of respondent that caused, or
writing only a short opinion focusing on the absence of negligence in the particular case. Significantly, Justice Douglas dissented (and Justice Brennan joined the dissent), arguing that the lenient standard articulated in Rogers required a finding of causation.\textsuperscript{112} Aside from this brief hiccup in FELA causation jurisprudence, lower courts largely followed the Court’s expansive reasoning in Rogers.  

Though the Inman majority seemed to back away from Rogers, at least in rhetoric, until recently Congress and the Supreme Court remained largely content with Rogers.\textsuperscript{113} In a 2007 case, Norfolk Southern Ry. Co. v. Sorrell, railroad counsel tried to “smuggle” proximate cause into the grant of certiorari through a related issue. The Court refused to answer the additional question, holding only that the causation standard for railroad and contributory negligence is the same, whatever it may be.\textsuperscript{114} Justice Souter was less cautious, penning a heroic concurrence in which he, Justice Scalia, and Justice Alito tried valiantly to reconcile Justice Brennan’s opinion in Rogers with the earlier case law.\textsuperscript{115} Though ultimately unpersuasive, Justice Souter’s analysis cast enough doubt on Rogers to provoke one state high court to adopt Justice Souter’s concurrence as law, though the federal appellate courts are largely agreed that Rogers articulates a lower standard.\textsuperscript{116}  

As this article is written, the Supreme Court has granted certiorari to resolve the precise question of “Whether the Federal Employers' Liability Act requires proof of proximate causation.”\textsuperscript{117} Both parties have followed Souter’s concurrence in Sorrell, attempting to remake Rogers in their own image.\textsuperscript{118} In this author’s opinion, however, the Supreme Court would do

\textsuperscript{112} Inman, 361 U.S. at 145-46 (Douglas, J., dissenting).

\textsuperscript{113} See, e.g., Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994) (“We have liberally construed FELA to further Congress' remedial goal. For example, we held in Rogers v. Missouri Pacific R. Co. that a relaxed standard of causation applies under FELA. We stated that '[u]nder this statute the test of a jury case is simply whether the injury or death for which damages are sought.'”) (citations omitted) (Thomas, J.).

\textsuperscript{114} 127 S.Ct. 799, 805 (2007) (“We agree with Sorrell that we should stick to the question on which certiorari was sought and granted. We are typically reluctant to permit parties to smuggle additional questions into a case before us after the grant of certiorari.”); see also Sorrell, 127 S.Ct. at 812 (Ginsburg, J., concurring in the judgment) (“These decisions answer the question Norfolk sought to ‘smuggle . . . into’ this case, i.e., what is the proper standard of causation for railroad negligence under FELA”) (citations omitted).

\textsuperscript{115} Sorrell, 127 S.Ct. at 809-12 (Souter, J., concurring) (“FELA changed some rules but, as we have said more than once, when Congress abrogated common law rules in FELA, it did so expressly. . . . FELA said nothing, however, about the familiar proximate-cause standard for claims either of a defendant-employer's negligence or a plaintiff-employee's contributory negligence, and throughout the half-century between FELA's enactment and the decision in Rogers, we consistently recognized and applied proximate cause as the proper standard in FELA suits. . . . Rogers left this law where it was.”). This is quite a stretch.

\textsuperscript{116} See CSX Transp., Inc. v. McBride, No. 08-3557, slip op. at 24-27, 35-36 (7th Cir. 2010), cert. granted (2010) (reviewing federal appellate and state supreme court decisions commenting on Rogers) and accompanying notes; see also Petition for a Writ of Certiorari at 23-27, CSX Transp. Co. v. McBride, No. 10-235 (2010) and accompanying notes.

\textsuperscript{117} CSX Transp., Inc. v. McBride, 598 F.3d 388 (7th Cir. 2010), cert. granted Nov. 29, 2010 (citations omitted).

better to abandon Rogers entirely and articulate a clear standard.

III. RECONSIDERING ROGERS

This section will propose an alternative to the Rogers causation standard. The proposed standard limits railroad liability to situations where the plaintiff’s injury was under the foreseeable control of the defendant railroad. First, this Section will attempt to interpret the statutory phrase “resulting in whole or in part” in light of its common law roots, and accordingly draw conclusions about the necessary criteria for any appropriate causation standard. Second, it will explain the proposed “foreseeable control” standard and provide some concrete examples of its application within the railroad setting. The proposed standard should provide litigants with a fairer, more precise tool for determining the outer boundaries of railroad liability.

The discussion that follows will rely on the traditional analytical distinction between cause-in-fact and proximate cause.119 Cause-in-fact is the requirement that the defendant’s conduct cause the plaintiff’s injury in some physical way, while proximate causation determines the legal scope of the defendant’s responsibility.

A. Preliminary statutory issues

To begin, recall that the statutory text compensates injuries “resulting in whole or in part” from the railroad’s negligence. In a technical grammatical sense, the reverse of the statute would forbid causation only where no railroad negligence resulted in an injury, leaving no possible limiting principle. Though this approach has the advantage of simplicity, the earliest courts avoided such the technical and grammatical approach. It would render the link between the injury and the alleged act or omission a nullity at worst, and a formality at best.120

The phrase’s purpose is more evident in its relationship to the rest of the statute. The words “in whole or in part” align the causation standard with several departures from the common law that presuppose multiple causal relationships. For example, FELA expressly abrogated the prevailing doctrine of contributory negligence and replaced it with comparative negligence, permitting recovery where the employee’s injury was partly the result of his own fault.121 Damages in such a case would be reduced by the proportion of the employee’s

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119 There is practically no debate over whether the substance of the FELA statute depends on state law, so this article will not address it beyond this footnote. Second Employers’ Liability Act Cases, 223 U.S. 1, 57 (1912); Seaboard Air Line R. Co. v. Horton, 233 U.S. 492, 503 (1914); Roberts, supra note 6, at 198-99; John A. Walgren, FEDERAL EMPLOYERS’ LIABILITY ACT 19-26 (1916). FELA would make little sense as a national regime if it were ultimately dependent on state legal standards, and accordingly pre-empts all state causes of action and defenses. Roberts, supra note 6, at 11-12. Allowing state standards would recreate and perpetuate the “babel of judicial voices” that existed prior to the FELA’s enactment. Roberts, supra note 6, at 34. Not all courts, however, appreciated or implemented FELA’s consistency, and some continued to apply local law. See, e.g., Louisville & N. R. Co. v. Johnson, 171 S.W. 847 (Ky. 1914) (applying local standard of negligence).

120 Without a limiting principle, the causation standard raises annoying metaphysical questions: would causation exist where, but for the railroad’s negligence, the injured plaintiff’s grandmother would not have conceived the injured plaintiff’s mother?

121 See 45 U.S.C. § 53. From the earliest days, the rule was that a plaintiff could recover if the defendant’s
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negligence, but not eliminated. Such a regime rests on the assumption that an injury could be caused “in part” by the defendant railroad and “in part” by the employee. Likewise, no employee could be determined to have assumed the risk, regardless of his relative negligence, so long as the injury was caused “in whole or in part” by the railroad.

Yet the phrase “in whole or in part” qualifies “resulting,” i.e. causation, and is not merely a way to ensure consistency with abrogated doctrines. Common law doctrines of causation did not expressly allow multiple causes, but allowed for them nonetheless. A fortiori, therefore, the statute’s express allowance for multiple causation alters the underlying common law doctrine by loosening the causation standard. Congress’s choice here is confusing, though, because FELA did not expressly derogate proximation.

The explicit allowance for partial or multiple causes can best be described as expressing a Congressional preference for a finding of mixed causation in cases where the common law might have preferred a single cause. Common law courts accommodated multiple cause doctrine into the cause-in-fact prong; the only question here is the size of the divergence from the common law, and the corresponding scope of the limiting principle. The proper standard thus lies somewhere in between simple cause-in-fact and pure “proximate cause.” In the sections that remain, I will articulate the “foreseeable control” standard that should define the limits of legal causation under FELA.

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123 See Walgren, supra note 119, at 60.
124 § 54.
125 Sorrell, 127 S.Ct. at 810 (Souter, J., concurring) (“FELA changed some rules but, as we have said more than once, when Congress abrogated common law rules in FELA, it did so expressly. . . . FELA said nothing, however, about the familiar proximate-cause standard for claims either of a defendant-employer’s negligence or a plaintiff-employee’s contributory negligence, and throughout the half-century between FELA’s enactment and the decision in Rogers, we consistently recognized and applied proximate cause as the proper standard in FELA suits.”). Early treatises seem to assume that proximate cause applies to FELA’s causation standard. Roberts, supra note 6, at 20 (stating “proximate cause” without supporting case citations), but see id. at 23-24 n.5. One early treatise totally ignores the issue, reserving its discussion for the much older Federal Safety Appliance Act. Thornton, supra note 23, at 233.
126 The portion of the statute covering mechanical defects uses the equally vague phrase “due to.”
128 As a practical matter, few FELA cases arise with multiple co-defendants, since plaintiffs have few incentives to join them (cf. 772 SW2d 66, Tex. 1989). The more likely case is something along the lines of Rogers, where the plaintiff’s actions combine with the railroad’s to create a risk, or multiple non-negligent causes combine with one negligent cause.
129 In any case, there is no real dispute that cause-in-fact is necessary for recovery under FELA.
B. A Railroad-Specific Causation Standard: “Foreseeable Control”

FELA addresses a narrower set of cases than did the common law because it covers only injuries that occur within the context of interstate commerce by rail. Within that set of cases, a common set of factors provide guidance for pursuing Congress’s goal of fair compensation to injured employees, but according to a standard based on the industry’s safety concerns.\(^\text{130}\) The standard proposed below permits finding of proximate causation only where, at the time of his negligent conduct, the defendant could have reasonably foreseen that the conduct could cause an injury and that he would have sufficient control over the outcome to enable prevention or mitigation of the injury.

1. The Greatest Safety Factor: Control

Because FELA incorporates a standard of fault, the causation standard governing the physical relationship between risk and injury must take account of the predictable outcomes of risky acts. If an employee commits a negligent act while performing an ordinarily non-risky activity, she has no reason to anticipate an injury. If she is ultimately injured by that work, then the assignment of the work should not be the legal cause of the injury.

The common law doctrine of “foreseeability” generalizes this analysis: the defendant railroad is not liable unless it could have reasonably foreseen that its conduct would result in an injury.\(^\text{131}\) Under the proposed standard, however, the analysis turns on the railroad’s ability to foresee its control over the injury. “Foreseeability” modifies the extent to which the railroad could have used its power to ensure employee safety, not the likelihood of the injury itself. Just as the causation standard should take account of the foreseeability of the results of negligence, so it should take account of the defendant’s ability to avoid or mitigate the injury, as seen at the time of the conduct. Put differently, the defendant should be responsible for injuries if she should have known, at the time she acted, that she would be able to affect the last link in the causal chain.

Different work environments require different levels of control, and environments involving complex systems with many interdependencies tend to generate extensive management structures. In the military context, for example, the Army and the Marine Corps retain chains of command that push responsibility downward, though retaining alignment with a general objective known as “commander’s intent.”\(^\text{132}\) Junior members of each unit retain substantial responsibility for the operation, and orders evolve as the combat environment evolves.\(^\text{133}\) The

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\(^{130}\) FELA bars a finding of comparative employee fault if the injury is caused in whole or in part by the railroad’s violation of a statute or regulation enacted for the safety of employees. 45 U.S.C. § 53, 54a. The statute also precludes employees from contracting away their right to recovery. 45 U.S.C. § 55.

\(^{131}\) This raises an interesting question: what is “foreseeable” for a railroad having such extensive knowledge of its safety risks? Federal regulations require the reporting of any injuries on the job, so the railroad company must know of any injuries similar to the one suffered by the individual plaintiff, and has the opportunity to create risk mitigation rules.

\(^{132}\) Boris Groysberg et al., Which of These People Is Your Future CEO?, HARVARD BUS. R., Nov. 2010, at 84.

\(^{133}\) Id.
leadership environment tends to be complex and resistant to organization, so battle plans tend to be flexible and robust. In this environment, the interdependencies are simple and well-understood, so there is little need for micromanagement. The Navy and the Air Force, by contrast, have highly integrated management systems that prevent tightly coupled operational components from deviating from assigned parameters. The reason for these tight controls is obvious: deviation can be catastrophic, and many changes have unanticipated effects. Consequently, simple failures can become cascading failures as the chain of causation propagates through the system. To control these risks, the Navy and the Air Force developed process-driven command structures that enable precision, though at the expense of some flexibility.

In the railroad work environment, risks and injury are often in close physical and causal proximity. Heavy machinery operates in a confined space, with little margin for error. Like Navy or Air Force operations, railroad industry work forces workers to interact the machinery as part of a complex system, where small mistakes can mean serious injury or death. Because the system is designed to work within these precise tolerances, certain risk-injury linkages can be anticipated. Methods to avoid some of these linkages have been articulated in the form of operating rules and federal safety regulations. Federal law requires most railroads to develop and keep a comprehensive set of operating safety rules, covering general and more precise forms of danger. Each rule is designed to give clear guidance to employees in certain hazardous situations. Consequently, the rules as a whole serve a strong predictive function, forbidding conduct that plainly poses a risk of injury. Similarly, the railroads are subject to a variety of federal regulations designed for the sole purpose of mitigating operational risk. As a whole, the strictures imposed by rule and regulation give the railroads and employees a discrete set of potential risks that can be mitigated simply by conformity.

These rules and regulations represent a high level of control. Because employees know the rules and are disciplined for infractions as a matter of course, it is reasonable to conclude that employees are aware that disobedience creates risks and obedience avoid them. Breaking a

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134 Id.
135 Id. at 83.
136 Id.
137 Id. at 83-84. The Army and the Marine Corps
139 See generally 49 C.F.R. Parts 213 et seq.
140 See 49 C.F.R. Parts 213 et seq.
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rule immediately opens the door to certain types of danger, and a “control” requirement simplifies the jury’s task in drawing a causal link between the infraction and any resulting injury.\textsuperscript{143} If no rule or regulation applies to the particular situation that resulted in an injury, the causation question is less clear, but just as simple: could the defendant have foreseen a way to avoid or mitigate the particular injury at the time of the negligence? If so, then she had foreseeable control over the end of the causal chain, and therefore should be responsible.

Even if the railroad was negligent, proximate cause should terminate the chain of causation where the railroad’s control ends. What the control requirement takes from plaintiffs by adding an additional element to the causation standard, it gives back by simplifying the jury’s analysis.\textsuperscript{144} Moreover, it focuses the principle on the railroad’s ability to provide a safe working environment for its employees.

The “foreseeable control” test would ease the burden on plaintiffs whose injuries directly resulted from a rule or regulatory violation.\textsuperscript{145} Such infractions are predictable, ordinary injuries, rendering them foreseeable as a matter of course, and therefore within the control of the violator.\textsuperscript{146} At the other end of the spectrum, injuries not within the ordinary and predictable scope of railroad operations would tend to fall outside the scope of “foreseeable control.” The limiting effect of this test is more pronounced in complicated cases because it asks whether the defendant could foresee its level of control over the possible results of its conduct. Where there was no control, there was no causation, and the “foreseeable control” principle narrows liability.

Control is a key component of fairness. It is hardly fair to hold a negligent defendant or contributorily negligent plaintiff responsible for foreseeable consequences that were nonetheless entirely out of their control at the time of decision.\textsuperscript{147} Likewise, it is relatively fairer to hold a

\textsuperscript{143} A simple application of this principle involves an operating rule setting out two conditions under which an employee may occupy the roof of a rail car or engine. Rule 1.21, General Code of Operating Rules (3d. ed. 1994), available at http://www.sdrm.org/faqs/rulebook/general.html#1.21 (last visited Dec. 1, 2010). An employee may not occupy the roof if the car or engine is moving, protecting the potential violator against obvious dangers like falling, and protecting employees on the ground from falling equipment or persons. The rule forbids occupying the roof without authority, a condition that locates control in a supervisor who may be able to avoid an injury, or at least take responsibility for the situation.

\textsuperscript{144} Cf. Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 32-33 (1944) (case submitted to jury where violation of rule resulted in employee’s death, and both employee and railroad were aware of customs and practices of the railroad).


\textsuperscript{146} The “control” analysis is also consistent with the Court’s decisions about the right to recovery for contractors or others claiming to be “employees” under railroad control. See Kelley v. Southern Pac. Co., 419 U.S. 318, 323-26 (1974) (applying “control” analysis to plaintiff formally employed by trucking company but injured while working on top of railroad car); Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1, 5-6 (1963) (employee of B&O railroad was “employee” of B&O under FELA while performing tasks on P&LE property and on P&LE train under common law loaned-servant doctrine, which asked whether B&O had “immediate control and supervision” of the plaintiff); Ward v. Atlantic Coast Line R. Co., 362 U.S. 396, 397-98 (1960) (per curiam); but see North Carolina R. Co. v. Zachary, 232 U.S. 248, 260-61 (1914) (plaintiff “employed” by railroad during a brief detour to his home because his interstate commerce activity was in futuro).

\textsuperscript{147} Cf. SENATE COMM. ON THE JUDICIARY, AMENDING THE EMPLOYERS’ LIABILITY ACT, S. Doc. No. 76-661, at 4 (1939) (“The present [assumption of the risk] rule apparently ignores the fact that the master, and not the servant, has control over the conditions which affect the safety of employees. In justice, the master ought to be held liable
party responsible for consequences entirely within her control. Legal causation should therefore incorporate the level of control that a party has over the consequences of her negligence. This principle is orthogonal to harm-within-the-risk analysis, which limits liability whenever the injury does not lie within the risk or intention of the negligent act. In other words, the negligence and the last link in the causal chain have to match. “Foreseeable control,” by contrast, imposes liability based on the party’s ability to alter the course of events.

An individual actor is unlikely to be able to anticipate all the precise consequences of her actions in a complex organization like a railroad, which has many actors and many dangerous pieces. By restricting the analysis to “foreseeable control,” a jury can consider whether the railroad was capable of avoiding the injury without focusing on a single employee. Rather, the jury would examine whether any railroad actor could have, at the time of the negligence, anticipated and avoided or mitigated the particular injury that was the ultimately result.

2. Practical Examples

On the facts of Rogers, applying a “foreseeable control” test would achieve the same result without appealing to a “featherweight” causation standard. Recall that the key question was whether an accelerated fire is a foreseeable consequence of burning weeds along the right-of-way while trains pass. The Missouri Supreme Court said that the acceleration was not foreseeable, while Justice Brennan (correctly, in my view) said that it was. Both the Missouri court and the Supreme Court agreed that the plaintiff’s injury was a natural and probable consequence of fleeing an approaching fire. Under this proposed standard, they should have asked the additional question of whether the foreman could have reasonably foreseen his ability to avoid or mitigate the injury that actually resulted. If so, the jury could have concluded that the combined tasks were mutually exclusive, and that privileging one over another would likely result in injury. The foreman was Missouri Pacific’s means of control over the work assignment, and he would have been capable of structuring the assignment to prevent or mitigate injuries resulting from a passing train.

What if Missouri Pacific sets “stop” or “slow” signals on the track near the Rogers crew, but a train’s brakes malfunction because of negligent maintenance, causing the train to proceed down the track? Rogers’ injury is within the foreseeable control of the railroad at the time of the negligence because the railroad retained control over the work assignment through its foreman at the site. Because the foreman had control over his employees’ exposure to fire and wind, he had control and the railroad is liable.

Now consider an identical situation, except that the train belongs to a different railroad, but is using Missouri Pacific’s tracks. The result would be the same for the same reasons: the

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for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.”)

148 Michael Moore has made an analogous argument from a retributivist perspective: because proximate causation expresses some principle, and the principle should be justice, the legal standard may rightly incorporate that notion of justice. MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 96-97 (2009) (“[I]n tort law the function of proximate-cause doctrines is to serve corrective justice. That justice demands that one pay for all and only the harms one has caused. Tests of proximate causation thus must separate the true causers who are obligated to compensate, from the non-causers who have no such obligation.”)
foreman retained control over the work site. In this case, harm-within-the-risk would require a different result because the injury reasonably expected from maintenance negligence would probably not include flight from a fire accelerated by wind. The “foreseeable control” standard would eliminate any requirement that the particular injury be the result of the specific negligence.

The outcome is different, however, if in addition to the above, the passing train derails unexpectedly as it passes Rogers’ position on the right-of-way, crushing him. Though the foreman is negligent in that case, and but-for that negligence Rogers would not have been standing where he was, the foreman’s negligence is not a proximate cause of Rogers’ injury. The foreman could avoid or mitigate the results of a freak derailment by moving the crew away from the track, but he could not have reasonably foreseen this course of action at the time of the work assignment. His ability to prevent or mitigate the particular injury was therefore an unreasonable condition at the time of the negligence. In such a case, the “foreseeable control” test reaches the same result as harm-within-the-risk, but for a different reason.

Under the above approach, the doctrines of intervening causes would continue to be available, with the proviso that “[t]he criteria by which one ascertains what is or is not an intervening cause are the very same criteria by which one decides what a cause is at all.” In other words, the doctrine of intervening cause adds no analytical value beyond the determination of whether any contributing cause is, in fact, a legal cause of the injury. Therefore, findings of intervention would, under this standard, collapse into the main analytical principle. This is an important point, because the “control” requirement’s neutrality between causes from railroad negligence and third-party negligence is what makes it possible to find multiple causes. This neutrality enables broader recovery in some cases, but without abandoning all reasonable limitations.

IV. Conclusion

“Causation” is difficult to define, and FELA’s causation standard is no exception. The definitional task is complicated by the statutory language allowing recovery only where the defendant’s negligence resulted “in whole or in part” in the plaintiff’s injury. Though common law negligence did not permit every cause to become a legal cause, neither did it require proof that the defendant’s conduct was a sole, efficient, producing cause of the injury. With that in mind, the courts should continue to be wary of taking the issue from the jury. The Supreme Court has repeatedly rejected opportunities to create distinctions in FELA causation that cut too finely between facts, preferring that the jury should do the bulk of the work. The standard

149 MOORE, supra note 148, at 233 (“A proximate cause is a ‘direct cause’, and a direct cause is any cause-in-fact of the harm where no intervening cause has intervened. Such a direct-cause test of proximate causation relies on the notion of intervening cause to fill out entirely the legal requirement of proximate cause.”). One early case provides an excellent example of the application of a test similar to the “foreseeable control” test above. See St. Louis-San Francisco R. Co. v. Mills, 271 U.S. 344, 347-48 (1926) (finding no evidence that failure to provide guards during a strike was the proximate cause of plaintiff’s death).

150 See Coray v S. Pac. Co., 335 U.S. 520, 524 (1949) (“The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose.”).
above provides a simple rule for juries to follow, and aligns the railroad’s financial incentives with its safety responsibilities. Application of the “foreseeable control” test would ultimately enable juries to carry out their crucial responsibilities while providing litigants with predictability and simplicity.