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THE (UN)FORESEEN EFFECTS OF ABROGATING  
PROXIMATE CAUSATION IN  
*CSX TRANSPORTATION, INC. V. MCBRIDE*:  
THE NEW ROLE OF FORESEEABILITY UNDER  
FELA AND THE JONES ACT

*Kyle W. Ubl\**

INTRODUCTION

Every year at law schools across the country, first-year law students grapple with the famous debate between Benjamin N. Cardozo and William S. Andrews contained in *Palsgraf v. Long Island Railroad Co.*<sup>1</sup> The case is especially useful pedagogically for articulating the foreseeability test in relation to the elements of duty, breach, and proximate causation. The facts of the case are worth recounting:

Plaintiff [Palsgraf] was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the plat-

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\* Candidate for Juris Doctor, Notre Dame Law School, 2013; Bachelor of Arts, English and Music, University of Notre Dame, 2010. I am indebted to Professors Jeffrey Pojanowski, Jay Tidmarsh, and Amy Barrett as well as Mr. Christopher Wray for their insight and advice during the preparation of this Note. I am also grateful to the editors and staff of the *Notre Dame Law Review* for their editorial assistance. All errors are my own. This Note is dedicated to my wife, Jenny, for her unending support.

1 162 N.E. 99 (N.Y. 1928).

form many feet away. The scales struck the plaintiff, causing injuries for which she sues.<sup>2</sup>

Given the package's apparent innocuousness and Mrs. Palsgraf's relative distance from the departing train, Judge Cardozo found that the Long Island Railroad Company did not breach its duty of care with respect to Mrs. Palsgraf,<sup>3</sup> and therefore, he set aside the question of causation.<sup>4</sup> More simply put, Judge Cardozo found that Mrs. Palsgraf did not fall within the zone of danger that a reasonable person would have foreseen, so the railroad company owed her no duty as a matter of law. Judge Andrews took a different approach. Relying upon a far more expansive definition of duty,<sup>5</sup> Judge Andrews would have used foreseeability further down the line-up of tort elements, using proximate causation rather than duty as the gatekeeper of liability.<sup>6</sup> Judge Cardozo's insistence upon using foreseeability in a duty determination is significant: for Andrews, the case would have been for the jury, and not the judge, to decide.<sup>7</sup>

In June 2011, the United States Supreme Court heard yet another railroad case, this time involving an employee-plaintiff suing under the Federal Employers' Liability Act ("FELA"),<sup>8</sup> the federal statute controlling negligence claims of railroad workers against their employers. In *CSX Transportation, Inc. v. McBride*,<sup>9</sup> Justice Ginsburg—writing for a 5-4 majority—held that FELA, as well as the Jones Act,<sup>10</sup>

2 *Id.* at 99.

3 *Id.* ("The conduct of the defendant's guard . . . was not a wrong in its relation to the plaintiff [Palsgraf], standing far away. . . . Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.").

4 *Id.* at 101 ("The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability [i.e., duty and breach] is always anterior to the question of the measure of the consequences that go with liability.").

5 *Id.* at 103 (Andrews, J., dissenting) ("Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.").

6 *Id.* at 104 (describing the foreseeability test of proximate causation as the question, "[B]y the exercise of prudent foresight, could the result be foreseen?").

7 *Id.* at 105 ("No request was made to submit the matter [of proximate causation] to the jury as a question of fact, even would that have been proper upon the record before us.").

8 45 U.S.C. § 51 (2006).

9 131 S. Ct. 2630 (2011).

10 The portion of the Merchant Marine Act of 1920 (better known as the "Jones Act"), codified at 46 U.S.C. § 30104 (2006), governs the negligence claims of maritime plaintiffs against their maritime employers. This section cross-references FELA as the controlling scheme for suits arising under the Jones Act. Therefore, cases interpreting FELA such as *McBride* apply equally to Jones Act litigation. For the sake of clarity and manageability, this Note will proceed by discussing only the FELA and

do “not incorporate ‘proximate cause’ standards developed in non-statutory common-law tort actions.”<sup>11</sup> While Justice Ginsburg and the majority abrogated proximate causation in the FELA context, they explicitly refused to reject the foreseeability test entirely. Rather, the majority—resembling Judge Cardozo’s approach in *Palsgraf*—relied upon foreseeability to act as an arbiter of liability by acknowledging that “reasonable foreseeability of harm” is proper to the determination of negligence.<sup>12</sup>

This Note discusses whether the *McBride* majority’s insistence upon a foreseeability test at the duty and breach determinations offers as much defensive relief to the railroad industry as implied by the majority. In doing so, the Note proceeds in three parts: Part I offers an overview of FELA’s text, legislative history, and policy justifications as well as landmark FELA cases culminating in the *McBride* litigation which forms the basis of this Note; Part II analyzes the central question of whether and how foreseeability functions as a defensive tactic for railroads at the duty and breach stages as well as whether and how foreseeability functions differently in duty and breach decisions as compared to proximate cause determinations; and Part III proposes model jury instructions that reflect a balanced reading of *McBride* alongside the backdrop of FELA’s history and this Note’s conclusions.

## I. AN OVERVIEW OF FELA’S HISTORY AND ITS JUDICIAL INTERPRETATIONS

FELA does not function in the manner of modern-day workers’ compensation systems in which injured employees are automatically entitled to recovery for medical costs and lost wages in exchange for employers’ immunity from negligence liability.<sup>13</sup> Rather FELA, originally enacted in 1908, allows railroad employees to sue their employer

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railroad litigation context, although the conclusions of this Note—in theory—likewise pertain to the Jones Act.

11 *McBride*, 131 S. Ct. at 2634.

12 *Id.* at 2643 (“[R]easonable foreseeability of harm’ . . . is indeed ‘an essential ingredient of [FELA] *negligence*.’ . . . The jury, therefore, must be asked, initially: Did the carrier ‘fai[I] to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances[?]’ In that regard, the jury may be told that ‘[the railroad’s] duties are measured by what is reasonably foreseeable under like circumstances.’” (citations omitted)). As explained below, “negligence” is an ambiguous term standing for duty and breach. This Note will proceed—as does the *Restatement (Third) of Torts*—by referring to the elements separately to gain greater analytical and definitional clarity.

13 See Jerry J. Phillips, *An Evaluation of the Federal Employers’ Liability Act*, 25 SAN DIEGO L. REV. 49, 50 (1988).

for any injury “resulting in whole or in part from the negligence” of the railroad.<sup>14</sup> Railroad employees suing under FELA experience an inverse of the give-and-take imposed by workers’ compensation. That is, whereas workers’ compensation claimants enjoy the guarantee of recovery confined to predetermined statutory caps, FELA plaintiffs receive the full amount of damages actually incurred but *only if* they show fault on the part of the employer.<sup>15</sup> Additionally, FELA removes certain barriers to plaintiffs’ claims at common law, including the fellow-servant doctrine,<sup>16</sup> contributory negligence,<sup>17</sup> assumption of risk,<sup>18</sup> and liability-exempting contracts.<sup>19</sup>

For the most part, FELA’s modifications of these common law tort doctrines are textually clear and have presented relatively little controversy by way of judicial interpretation. But the same cannot be said of FELA’s treatment of causation. A significant body of scholarship and litigation has been dedicated to the statutory language “resulting in whole or in part,”<sup>20</sup> attempting to discern whether or not these words are a legislative modification of the common law requirement of actual and proximate causation. The remainder of Part I explores this debate.

14 45 U.S.C. § 51 (2006).

15 See Thomas E. Baker, *Why Congress Should Repeal the Federal Employers’ Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 83–84 (1992) (“As for the amount of damages, those ‘[s]ituations in which employees fail to establish some degree of negligence on the part of the railroad . . . define the lower end of the FELA payment range’—zero recovery. The upper limit is less determinable. Recoverable damages include lost wages, medical expenses, estimated future earnings, and payment for pain and suffering.” (footnotes omitted)).

16 45 U.S.C. § 51. This section makes clear that a railroad cannot escape liability for employees’ injuries merely because the injuries resulted from the negligence of fellow employees. This section imputes the negligence of all the railroad’s “officers, agents, [and] employees” onto the railroad itself. *Id.*

17 45 U.S.C. § 53 (2006) (“[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . .”).

18 45 U.S.C. § 54 (2006) (“[E]mployee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.”).

19 45 U.S.C. § 55 (2006) (“Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . .”).

20 45 U.S.C. § 51.

A. *The Statutory Text and Interpretational Preliminaries*

FELA provides, in relevant part:

Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, . . . 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, road-bed, works, boats, wharves, or other equipment.<sup>21</sup>

Perhaps the first question to be asked in approaching a statutory text is whether or not the statute bears a plain meaning. Here, as mentioned above, the controversy is centered on the italicized phrase “resulting in whole or in part.” Justice Thomas—one of the Court’s textualists—voted with the *McBride* majority.<sup>22</sup> To be fair, Justice Thomas did not file a separate concurring opinion. But his joining the majority suggests that—consistent with his interpretive philosophy—he was able to identify a plain meaning in those six words. This certainly is not an unreasonable literal reading on Justice Thomas’s part. That is, the words “in any part” fairly suggest that liability should be imposed even when the defendant was a minute slice in the overall pie graph of causation.<sup>23</sup>

However, other textualists on the Court voted in dissent. Chief Justice Roberts’s dissenting opinion was based, in part, on textualist arguments, and was joined by Justices Alito and Scalia, who routinely ascribe to textualist theory. According to modern textualist theory, a phrase such as the one disputed here can be read either as an unambiguous term-of-art (an unlikely argument given the vast historic debate over the phrase) or as an ambiguous phrase that—when read by an ordinary, reasonable speaker of the English language—still requires the application of a proximate causation test.<sup>24</sup> Chief Justice Roberts’s dissenting opinion does not take this approach. Instead, he

21 *Id.* (emphasis added).

22 The majority was comprised of Justices Ginsburg, Breyer, Kagan, Sotomayor, and Thomas. Notably, this was the only alignment of those five justices in a 5-4 majority in the entire 2010 term of the Court. See *The Statistics*, 125 HARV. L. REV. 362, 368 & n.r (2011).

23 Indeed, this reading likely has led to the now-standard FELA instruction that the plaintiff need only demonstrate that the railroad’s negligence “played a part, no matter how small, in bringing about the injury.” See *infra* note 74 and accompanying text.

24 See WILLIAM N. ESKRIDGE JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 235–38 (2d ed. 2006) (describing Justice Scalia’s form of new textualism).

offers a different type of textualist argument by considering the overall structure of FELA. Observing that Congress devoted entire sections of FELA to the abrogation of the fellow-servant doctrine, contributory negligence, assumption of risk, and liability-exempting contracts,<sup>25</sup> Chief Justice Roberts relies on the interpretive canon *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”) to argue that Congress would not have done away with proximate cause *sub silentio*.<sup>26</sup>

Arguably, Chief Justice Roberts’s very use of the statute’s structure—as opposed to the relevant phrase—indicates that he could not find a plain meaning in those six words. Unable to find clear meaning themselves in the statute’s text, the majority relied heavily on the statute’s legislative purpose and history, to which Part I.B is dedicated.

### B. FELA’s Legislative History and Early Interpretations

While it may seem that workers in other more dangerous professions should also have a bite at the FELA apple, the railroad industry’s unique place under FELA is a product of American industrial history. In the years before and after the Civil War, the federal government granted over 175 million acres of land to railroad owners.<sup>27</sup> By the early 1900s, the railroad industry had become the largest industrial employer in the United States and was responsible for a majority of the nation’s passenger travel and freight shipping.<sup>28</sup> With these benefits came many perils: “The injury rate among railroad employees in the late nineteenth century was horrific—the average life expectancy of a switchman was seven years, and a brakeman’s chance of dying from natural causes was less than one in five.”<sup>29</sup> President Theodore Roosevelt nationalized the issue in a 1907 message to Congress: “The practice of putting the entire burden of loss to life or limb upon the victim or the victim’s family is a form of social injustice in which the

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25 See *supra* notes 16–19 and accompanying text.

26 See *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2646 (2011) (Roberts, C.J., dissenting).

27 See Baker, *supra* note 15, at 81.

28 See Arnold I. Havens & Anthony A. Anderson, *The Federal Employers’ Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310, 315 n.4 (1987) (reporting that in 1901, the railroad industry employed 1,071,169 laborers, transported 607,278,121 passengers, and carried 1,089,226,440 tons of freight (citing INTERSTATE COMMERCE COMMISSION, SIXTEENTH ANNUAL REPORT 71–72 (1902))).

29 See Baker, *supra* note 15, at 81.

United States stands in unenviable prominence.”<sup>30</sup> Legislative intervention was soon to follow.

When the House Committee on the Judiciary published a report regarding FELA on April 4, 1908, however, proximate causation was not listed as one of the common law elements explicitly modified to favor FELA claimants.<sup>31</sup> Moreover, on February 28, 1906, in a hearing conducted by the House Committee on the Judiciary, H.R. Fuller had described the need for FELA to “give the employee greater rights in the courts by lifting from his shoulders the financial burden of those accidents incident to industrial employment over which he has no control, and which . . . equity demands that he should not be held responsible for.”<sup>32</sup> Fuller went on to say, “[w]hile men on railroads are required to have a certain amount of education, the ordinary railroad man, if he is disabled from employment, is not fit to go into an office and run it like men who have had the benefit of better education.”<sup>33</sup> Fuller advocated for a system in which railroad workers hold a clear advantage in litigation to recover not only for medical costs but also lost wages—a radical view in an era when workers’ compensation was still considered unconstitutional.<sup>34</sup> Significantly, however, Fuller never contended in his testimony before the committee that common law causation standards should be changed.

While not a direct indication of legislative intent, a survey of the scholarship published on the heels of FELA suggests that scholars and judges understood the statute to leave common law proximate causation intact. In his 1909 treatise on railroad employer liability, Edward

30 See PHILIP J. DOHERTY, *THE LIABILITY OF RAILROADS TO INTERSTATE EMPLOYEES* 43 (1911).

31 H.R. REP. NO. 60-1386, at 1 (1908) (“[The proposed bill] abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employee, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. . . . The bill also provides that, to the extent that any contract, rule, or regulation seeks to exempt the employer from liability created by this act, to that extent such contract, rule, or regulation shall be void.”).

32 *Liability of Employers: Hearing on H.R. 239 Before the H. Comm. on the Judiciary*, 59th Cong. 46 (1906) (statement of Mr. H.R. Fuller, Legislative Representative of the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen, the Order of Railway Conductors, and the Brotherhood of Railroad Trainmen).

33 *Id.* at 174.

34 See Baker, *supra* note 15, at 82–83 (“[W]hen the FELA was passed, workers’ compensation was still a novel idea of uncertain validity. . . . The validity of workers’ compensation laws under the Constitution was not generally established until 1917. Thus, it is not surprising that Congress did not consider workers’ compensation a viable legislative option in the turn-of-the-century debates over the FELA.” (footnotes omitted)).

J. White explicitly mentioned a proximate causation test for FELA litigation: “If the injury could not have been foreseen as a natural or probable result of the alleged negligent act, it is not, generally, held to be the proximate result of such act.”<sup>35</sup> Similarly, in 1916, Daunis McBride asserted that “[p]roximate cause is still to be determined according to the general existing rules on that subject, and this generally is a question for the jury.”<sup>36</sup>

In the end, the legislative history is somewhat inconclusive. While neither the text of the statute nor accompanying legislative reports indicate any explicit intention to overhaul FELA causation standards, one might read more deeply into the remedial purpose of the statute. That is to say, one of the statute’s clear purposes was to alleviate litigation burdens on railroad workers so that they could more easily recover for on-the-job injuries. Relying on the interpretive canon that remedial statutes should be interpreted to advance their stated remedy, FELA might then be read to include a relaxed causation standard to make litigation outcomes more plaintiff-friendly.

*C. Courts, Not Congress, Take the Lead:  
Relaxing the Proximate Causation Burden*

Less than five years after the passage of FELA, discontent over its ineffectiveness began to surface.<sup>37</sup> In 1910, a six-member commission—appointed by the President, the House, and the Senate—was formed to conduct a study of employers’ liability under FELA. The commission issued a report in 1912, which stated: “The [common-law] system [of employers’ liability] has been outgrown and should be abandoned, putting in the place of it a law based *not upon fault* but upon the *fact* of injury resulting from accident in the course of employment . . . .”<sup>38</sup> Despite the commission’s extensive report as well

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35 1 EDW. J. WHITE, *THE LAW OF PERSONAL INJURIES ON RAILROADS* § 23 (1909).

36 DAUNIS MCBRIDE, *RICHEY’S FEDERAL EMPLOYERS’ LIABILITY, SAFETY APPLIANCE, AND HOURS OF SERVICE ACTS* 139 (2d ed. 1916).

37 See Melissa Sandoval Greenidge, Comment, *Getting the Train on the Right Track: A Modern Proposal for Changes to the Federal Employers’ Liability Act*, 41 *McGEORGE L. REV.* 407, 411 (2010) (“Efforts to reform FELA began shortly after it was enacted. Regardless of these efforts, the only significant changes to the FELA occurred in 1939, when Congress made recovery easier for railroad employees by abolishing the traditional defense of assumption of the risk.” (footnotes omitted)).

38 REPORT OF COMMISSION TO INVESTIGATE THE MATTER OF EMPLOYERS’ LIABILITY AND WORKMEN’S COMPENSATION, S. DOC. NO. 62-338, at 15 (2d Sess. 1912).

as numerous political and academic criticisms of FELA since then,<sup>39</sup> FELA has been left largely unchanged in the face of numerous bills proposing either to overhaul FELA or abolish it altogether.<sup>40</sup> These calls for reform and the perceived failure of Congress to act upon them have forced FELA plaintiffs' attorneys and the courts to carve away at early interpretations of FELA to create a more employee-friendly litigation environment.<sup>41</sup> In doing so, they have turned to the words "resulting in whole or in part" and have begun to craft what is now known as FELA's relaxed causation standard.

The case universally cited for concretizing FELA's relaxed causation standard is *Rogers v. Missouri Pacific Railroad Co.*<sup>42</sup> This case involved a railroad worker who was tasked by his employer with burning weeds near a train track with a hand torch.<sup>43</sup> He was also instructed to step off the tracks when trains approached and to

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39 In 1989, the House of Representatives Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce held the first oversight hearings regarding FELA since the 1930s. See Baker, *supra* note 15, at 79–80. This attempt at legislative reform was instigated, in part, by a body of academic scholarship highlighting the economic and policy failings of FELA. See, e.g., Havens & Anderson, *supra* note 28, at 310 (urging "congressional consideration of a statute to repeal FELA and to afford interstate rail workers the same injury recovery protections available to almost all other workers in this country" due to FELA's inherent flaws including unpredictable awards, high transaction costs, divisiveness, and undue delay). For post-1989 criticisms, see generally Baker, *supra* note 15 (arguing that FELA fails to incentivize workplace safety, prevents full compensation due to comparative fault reductions, imposes administrative inefficiencies, and presents inconsistencies when compared to other national transportation industries) and Greenidge, *supra* note 37 (arguing that FELA, initially designed to compensate for death and highly traumatic injuries, is not well-suited for cumulative-trauma disorders which form the bulk of modern-day claims under FELA). But see Phillips, *supra* note 13, at 49 (suggesting that "available data indicates that these charges are either unsupported or demonstrably incorrect," that FELA provides "a real and valuable incentive to promote employee safety," and that its "cost of operation is commensurable with that of comparable workers' compensation systems and it is not an unduly slow procedure"). While both sides of this debate present compelling economic and policy arguments, at the end of the day, Congress has refused to repeal FELA for over one hundred years. For this reason, this Note endeavors to explore the remaining basket of litigation tactics that the legislature and courts have left for FELA plaintiffs and defendants.

40 See Greenidge, *supra* note 37, at 411–12.

41 For indications that courts have broadly interpreted FELA toward its remedial end, see *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542–43 (1994) ("Congress crafted a federal remedy that shifted part of the 'human overhead' of doing business from employees to their employers. . . . We have liberally construed FELA to further Congress'[s] remedial goal.").

42 352 U.S. 500 (1957).

43 *Id.* at 501–02.

observe passing trains for overheating axles known as hotboxes.<sup>44</sup> When the worker stepped off the tracks to inspect a passing train, the locomotive fanned the burning weeds and the resulting flame forced the worker to jump off a culvert, causing serious injury.<sup>45</sup> The Missouri Supreme Court reversed a jury verdict in the worker's favor, holding instead that the worker was wholly responsible for his injuries.<sup>46</sup> The United States Supreme Court restored the jury's finding for the worker, holding that the proper FELA test 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."<sup>47</sup> Even after *Rogers*, however, debate continued as to whether that case lessened or in any way affected the common-law tests of causation.

Justices Souter and Ginsburg—in their separate concurring opinions in *Norfolk Southern Railway Co. v. Sorrell*<sup>48</sup>—took opposing sides on the fifty years of jurisprudence dedicated to the interpretation of *Rogers*. In *Sorrell*, the majority refused to issue an opinion regarding causation as the parties had not fully briefed the issue nor had the railroad properly preserved it for appeal.<sup>49</sup> That did not stop Justice Souter,<sup>50</sup> who read *Rogers* merely as an affirmation of FELA's commitment to comparative fault rather than an abrogation of common-law proximate causation, from commenting: "*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury."<sup>51</sup> Under his reading, then, *Rogers* is "no authority for anything less than proximate causation in an action under FELA."<sup>52</sup> Justice Ginsburg, on the other hand, asserted in her own concurring opinion that courts have properly read *Rogers* to mean "that a relaxed standard of causation applies

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44 *Id.* at 502–03.

45 *Id.* at 501.

46 *See Rogers v. Mo. Pac. R.R. Co.*, 284 S.W.2d 467, 472–73 (Mo. 1955).

47 *Rogers*, 352 U.S. at 506.

48 549 U.S. 158 (2007).

49 *Id.* at 165 ("[W]e prefer not to address [the question of causation] when it has not been fully presented. We also agree with Sorrell that it would be unfair at this point to allow Norfolk to switch gears and seek a ruling from us that the standard should be proximate cause across the board.").

50 *Id.* at 172–73 (Souter, J., concurring) ("The briefs and arguments here did, however, adequately address the case of ours with which exploration will begin, and I think it is fair to say a word about the holding in *Rogers v. Missouri Pacific R.R. Co.*").

51 *Id.* at 173.

52 *Id.* at 177.

under FELA.”<sup>53</sup> Citing several decisions leaning toward relaxed causation,<sup>54</sup> Justice Ginsburg suggested that FELA’s remedial purpose and juror comprehension concerns demanded that proximate causation be relaxed in the FELA context.<sup>55</sup> Only four years later, Justice Ginsburg’s view became the law.

*D. McBride: Justice Ginsburg’s Final Blow to Proximate Causation*

It was only a matter of time until the Supreme Court resolved the lingering questions about FELA proximate causation framed by the Souter-Ginsburg concurrences in *Sorrell* due to outcome disparities they would continue to cause in lower-court litigation.<sup>56</sup> In *McBride*, the Court took its opportunity. The case involved a railroad engineer, Mr. McBride, who was assigned to a local run between Evansville, Indiana, and Mount Vernon, Illinois, that involved frequent starting and stopping to add and remove rail cars.<sup>57</sup> When he arrived at the train yard one day, Mr. McBride learned that he was to use a large “wide-body” train engine, a type of locomotive typically used for long-distance runs.<sup>58</sup> After questioning the type of equipment he was instructed to use, he was told “to take the train as is.”<sup>59</sup> At trial, Mr. McBride contended that the configuration of braking controls was “unsafe, because switching with heavy, wide-body engines required constant use of a hand-operated independent brake.”<sup>60</sup> He asserted that CSX was twice negligent: “First, the railroad required him to use

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53 *Id.* (Ginsburg, J., concurring) (quotations omitted).

54 *See id.* at 177–78 (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 531 (1994), *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 163 (1969), *Summers v. Missouri Pacific Railroad Systems*, 132 F.3d 599 (10th Cir. 1997), and *Oglesby v. South Pacific Transportation Co.*, 6 F.3d 603 (9th Cir. 1993) as support for a relaxed causation reading of *Rogers*).

55 *See id.* at 179–81 (contending that “FELA was prompted by concerns about the welfare of railroad workers” and that “[i]f the term ‘proximate cause’ is confounding to jurists, it is even more bewildering to jurors”).

56 *See Greenidge, supra* note 37, at 417 (“Resolving this division [over causation] is crucial, because the FELA provides for concurrent state and federal jurisdiction. Without resolution, railroad employees will continue to experience differing outcomes in claims for injury compensation depending on whether they file in state or federal court and whether that court applies the traditional or more relaxed standard of causation.” (footnote omitted)).

57 *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2635 (2011).

58 *Id.*

59 *Id.*

60 *Id.*

equipment unsafe for switching; second, CSX failed to train him to operate that equipment.”<sup>61</sup>

Part of CSX’s defense strategy was to argue for additional jury instructions with respect to causation. Two instructions that CSX requested are pertinent for the purposes of this discussion:

1. [T]he plaintiff [must] show that . . . the defendant’s negligence was a proximate cause of the injury.<sup>62</sup>
2. Proximate cause means “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.”<sup>63</sup>

The trial court rejected these instructions and used instead the Seventh Circuit’s pattern instruction for cases brought under FELA: “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.”<sup>64</sup> This pattern instruction used by the trial court did benefit the railroad insofar as it rejected a finding of negligence by the doctrine of *res ipsa loquitur*.<sup>65</sup> But it did not impose a limitation on the near boundless world of

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 The *Restatement (Third) of Torts* defines *res ipsa loquitur* as a situation in which “[t]he factfinder may infer that the defendant has been negligent when the accident causing the plaintiff’s harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 17 (2011). That is not to say *res ipsa loquitur* never applies in the FELA context. For example, Comment d to Seventh Circuit FELA Jury Instruction 9.01 observes:

The doctrine of *res ipsa loquitur* applies in FELA cases and, in appropriate circumstances, permits an inference of negligence on the part of the railroad for railroad-related injuries. For circumstances which warrant an instruction on the doctrine of *res ipsa loquitur*, see *Robinson v. Burlington N. R.R. Co.*, 131 F.3d 648, 652–655 (7th Cir. 1997) . . . .

See COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 9.01 (rev. 2009) available at [www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/7th\\_cir\\_instruc\\_2009.pdf](http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_cir_instruc_2009.pdf). For a recent instance of *res ipsa loquitur* applied to FELA, see *Page v. Nat’l R.R. Pass. Corp.*, 28 A.3d 60, 72–74 (Md. Ct. Spec. App. 2011) (“[T]he pertinent question in FELA cases is not whether the facts ‘fit[ ] squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding . . . [of] . . . negligence.’” (alterations in original) (quoting *Jesionowski v. Bos. & Me. R.R.*, 329 U.S. 452, 457 (1947))).

actual—or “but for”—causation;<sup>66</sup> therefore, CSX appealed on its objection to the failure to charge the jury with respect to proximate causation. The Seventh Circuit affirmed, citing *Rogers*,<sup>67</sup> and the Supreme Court then granted certiorari.<sup>68</sup>

While the *McBride* dissenters preferred a plain reading of the statute,<sup>69</sup> the majority insisted upon reading FELA alongside the many cases which have interpreted its text since 1907, most notably *Rogers*: “*Rogers* is most sensibly read as a comprehensive statement of the FELA causation standard . . . [which] is distinct from the usual proximate cause standard.”<sup>70</sup> CSX’s leading argument before the Supreme Court rested primarily on Justice Souter’s concurring opinion in *Sorrell* and his assertion that FELA’s “resulting in whole or in part” language was merely an affirmation of FELA’s insistence on comparative fault rather than contributory negligence as a defense mechanism.<sup>71</sup> In response to CSX’s concern that the trial instruction “opens the door to unlimited liability [by] inviting juries to impose liability on the basis of ‘but for’ causation,” Justice Ginsburg stated that it is not accurate to characterize either *Rogers* or *McBride* as eliminating “the concept of proximate cause in FELA cases.”<sup>72</sup> Rather, she wrote, “Under FELA, injury ‘is proximately caused’ by the railroad’s negligence if that negligence ‘played any part . . . in . . . causing the injury.’”<sup>73</sup> In

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66 Justice Ginsburg observes herself that “[i]njuries have countless causes, and not all should give rise to legal liability.” *McBride*, 131 S. Ct. at 2637 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 273 (5th ed. 1984)). She also quotes Judge Andrews’s *Palsgraf* dissent: “[B]ecause 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.” *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting). While CSX argued that these policy concerns in play at common law should also apply in the FELA context, Justice Ginsburg and the majority remained unconvinced.

67 *McBride v. CSX Transp., Inc.*, 598 F.3d 388 (7th Cir. 2010).

68 *CSX Transp. Inc. v. McBride*, 131 S. Ct. 644 (2010) (granting certiorari).

69 *McBride*, 131 S. Ct. 2630, 2646, 2650 (2011) (Roberts, C.J., dissenting) (critiquing the majority for failing to “rest its argument on its own reading of FELA’s text” and observing that the Court has not and should not make a habit of deciding cases based on a “show of hands” of the federal circuits).

70 *Id.* at 2638–40 (majority opinion). Justice Ginsburg bolsters her reading of *Rogers* by pointing out that “Congress has had [more than 50] years in which it could have corrected our decision in [*Rogers*] if it disagreed with it, and has not chosen to do so.” *Id.* at 2641 (alterations in original) (quoting *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991)). In addition, she points to the policy goals of stability and predictability served by observing the doctrine of stare decisis. *Id.*

71 *Id.* at 2638.

72 *Id.*

73 *Id.*

his dissent, Chief Justice Roberts pointed out that nothing in the majority's language "requires anything other than 'but for' cause."<sup>74</sup> In oral argument before the Supreme Court, counsel for McBride frequently used the phrase "but-for plus a relaxed form of legal cause" to describe the FELA causation standard.<sup>75</sup> As Chief Justice Roberts observed, however, "[t]here is no 'plus' in the rule" announced by the majority.<sup>76</sup> State and lower federal courts citing *McBride* appear to adopt Chief Justice Roberts's reading of the majority rule as well.<sup>77</sup> This characterization of the majority opinion by Chief Justice Roberts and later citing courts seems fair. Perhaps Justice Ginsburg impliedly agreed in her intimations about the new role of breach determinations in FELA litigation that proximate cause is no longer on the table for railroads.

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74 *Id.* at 2647 (Roberts, C.J., dissenting) (observing that "[t]he terms 'even the slightest' and 'no matter how small' make clear to juries that even the faintest whisper of 'but for' causation will do" and that "the causation test the Court embraces contains no limit on causation at all").

75 *Id.*

76 *Id.* That being said, other jurisdictions have applied a "substantial factor" rule that essentially creates a "but-for plus" style tort context. For example, "[i]n California, the standard jury instruction on actual causation makes no mention of the 'but-for' test and instead instructs the jury that carelessness on the part of a defendant is a cause of an injury if it 'is a substantial factor in bringing about [the injury].'" JOHN C. P. GOLDBERG ET AL., TORT LAW 230 (2d ed. 2008). The California Supreme Court has opined "that the substantial factor instruction is preferable because jurors are more likely to misconstrue the but-for instruction as asking them to isolate the 'sole' cause of a plaintiff's injury, rather than asking them to determine whether a defendant's carelessness was a cause of the injury." *Id.*

77 For readings of *McBride* as a *complete* abrogation of proximate causation, see *Murphy v. CSX Transportation, Inc.*, No. 1:10-CV-35, 2011 WL 3881021, at \*4 (E.D. Tenn. Sept. 2, 2011) ("According to Defendant, . . . the traditional concept of proximate cause should govern the case. The common law of negligence, however, does not strictly apply in FELA cases. . . . To make [a] showing [under FELA], a plaintiff must prove that the railroad reasonably should have foreseen that its conduct 'would or might result in a mishap and injury.' Foreseeability, therefore, is an 'essential ingredient' in proving breach, but not foreseeability of any *particular* injury." (footnote omitted) (citations omitted)) and *Page v. National Railroad Passenger Corp.*, 28 A.3d 60, 74 (Md. Ct. Spec. App. 2011) ("As we have discussed above, the doctrine of proximate causation plays no role in determining whether a railroad is liable for an employee's injuries. The applicable test in a FELA case is 'whether . . . employer negligence played any part, even the slightest, in producing the injury.'" (quoting *McBride*, 131 S. Ct. at 2638 n.2)).

*E. Breach and Foreseeability: The Next Battleground*

Indeed, Justice Ginsburg did not hide the ball but instead prophesied future litigation under FELA.<sup>78</sup> She clarified near the end of the majority opinion that, while foreseeability no longer is in play with respect to proximate cause, the reasonable foreseeability of harm is still “an essential ingredient of [FELA] *negligence*.”<sup>79</sup> In other words, the jury can be instructed on foreseeability for its determination of *breach*<sup>80</sup>: “Did the carrier ‘fai[I] to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances[?]’”<sup>81</sup> Under this instruction, the majority suggests that “juries would have no warrant to award damages in far out ‘but for’ scenarios.”<sup>82</sup> In this statement, the majority appears to blur the varying roles of foreseeability in determinations of breach and causation—the very distinction called to mind in *Palsgraf*. Part II contemplates whether foreseeability will, in fact, accomplish within the breach element what the majority suggests it might.

II. THE ROLE OF FORESEEABILITY SANS PROXIMATE CAUSATION

In his *McBride* dissent, Chief Justice Roberts introduces a colorful hypothetical about falling pianos to confront the majority’s assertion that foreseeability—in its role as “an essential ingredient of [FELA] *negligence*”—will sufficiently protect defendants.<sup>83</sup> Chief Justice Roberts observes that “if [an individual] drop[s] a piano from a window and it falls on a person, there is no question that [individual] was negligent and could have foreseen that the piano would hit some-

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78 In his dissent, Chief Justice Roberts does not characterize the majority’s commentary in this regard as a prediction. Rather, he sees it as a subtle admission that they are “creating a troubling gap in the FELA negligence action and [that they] ought to do *something* to patch it over.” *McBride*, 131 S. Ct. at 2651 (Roberts, C.J., dissenting).

79 *Id.* at 2643 (majority opinion).

80 Again, while the *McBride* decision uses the umbrella term “negligence” to describe the compound duty-breach determination, this Note distinguishes between the two elements for clarity of analysis.

81 *Id.* (alterations in original) (quoting *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 118 (1963)). The majority offered even further clarification of the test: “In that regard, the jury may be told that ‘[the railroad’s] duties are measured by what is reasonably foreseeable under like circumstances.’ Thus, ‘[i]f a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition.’” *Id.* (alterations in original) (citations omitted).

82 *Id.*

83 *Id.* at 2651 (Roberts, C.J., dissenting).

one—as, in fact, it did.”<sup>84</sup> This particular scenario—an easy case, to be sure—presents no problem for the majority’s rule because the answer to a foreseeability test at each element (i.e. breach and proximate causation) is the same. We can imagine that an overly simplified jury verdict form in Chief Justice Roberts’s hypothetical tort case might look something like this:

*Breach:* The defendant was negligent if you find that a reasonable person in similar circumstances would have reasonably foreseen “a mishap and injury.”<sup>85</sup> Was the defendant negligent? Answer: Yes.

*Proximate Cause:* The defendant’s negligence is a proximate cause of the injury if you find that a reasonable person in similar circumstances would have reasonably foreseen that the negligence would result in “the mishap and injury” that was suffered.<sup>86</sup> Was the negligence a proximate cause of the injury? Answer: Yes.

The causation test affirmed by the majority in *McBride* would not affect this outcome. And so, in an easy case, no untoward result will arise.

The same cannot be said of more difficult cases in which “the negligence does not directly produce the injury to the plaintiff.”<sup>87</sup> To demonstrate this sort of case, Chief Justice Roberts modified his hypothetical: “[An individual] drop[s] a piano; it cracks the sidewalk; during sidewalk repairs weeks later a man barreling down the sidewalk on a bicycle hits a cone that repairmen have placed around their work-site, and is injured.”<sup>88</sup> In this case, the breach determination by the jury would remain the same because it only asks whether a mishap or injury was foreseeable.<sup>89</sup> This question is forward-looking only and does not demand that a particular injury be considered. However, this case would likely produce a different result with respect to proximate cause. We could expect that a reasonable jury would place the particular injuries suffered by the cyclist outside the realm of reasonable foreseeability.<sup>90</sup> And so, at common law, while the unsuspecting

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84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 See W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 746 (2005) (“The brand of foreseeability associated with breach is one of general focus. That is, it does not examine the foreseeability of the particular injury suffered by the plaintiff, but the foreseeable likelihood and severity of injuries that might have occurred. This focus is tied to foreseeability’s role in deciding a defendant’s blameworthiness.” (footnote omitted)).

90 See *id.* at 749 (“Under the rubric of proximate cause, by contrast, the foreseeability inquiry is not general but specific to the particular injury suffered by the partic-

pedestrian would recover, the cyclist would not.<sup>91</sup> Not so under FELA after *McBride*.<sup>92</sup> The majority's test would instead ask the jury only whether the piano-dropping defendant "played a part—no matter how small—in bringing about the [cyclist's] injury."<sup>93</sup> According to this test, even the cyclist recovers because—as explained above—the *McBride* test is only a long-winded phrasing of a but-for determination. In all likelihood, the reasonable jury would conclude that without the dropped piano, the cyclist would not have been injured as he was, so he would recover.

The majority gave short shrift to this hypothetical result:

[A] half century's experience with *Rogers* gives us little cause for concern [as] CSX's briefs did not identify even *one* trial in which the instruction generated an absurd or untoward award. Nor has the dissent managed to uncover such a case . . . (citing no actual case but conjuring up images of falling pianos and spilled coffee).<sup>94</sup>

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ular plaintiff at hand. Even where injury of some kind to some person was foreseeable and therefore supports a finding of breach, a plaintiff may fail to survive the proximate cause inquiry where the defendant's actions resulted in 1) an unforeseeable type of injury, 2) an injury occurring in an unforeseeable manner, or 3) injury to an unforeseeable plaintiff." (footnotes omitted)).

91 *McBride*, 131 S. Ct. at 2651 (Roberts, C.J., dissenting) ("Was I negligent in dropping the piano because I could have foreseen 'a mishap and injury'? Yes. Did my negligence cause '[the] mishap and injury' that resulted? It depends on what is meant by cause. My negligence was a 'but for' cause of the injury: If I had not dropped the piano, the bicyclist would not have crashed. But is it a legal cause [at common law]? No." (citations omitted)). Chief Justice Roberts's example is strikingly similar to the classic example offered by the ALI Reporters in the *Restatement (Third)* in explaining the scope of the risk test:

Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d, illus. 3 (2010).

92 Assuming, for argument's sake, that the cyclist is eligible to sue under FELA.

93 *McBride*, 131 S. Ct. at 2635. This instruction echoes the Seventh Circuit pattern instruction. See COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, *supra* note 65, § 9.02.

94 *McBride*, 131 S. Ct. at 2641 (footnote omitted). Indeed, Chief Justice Roberts offered yet another hypothetical—this one involving a railroad—in which the defendant is held liable (improperly so, in Roberts's mind) under the majority's test:

Moreover, the majority cites two cases involving so-called “far out ‘but for’ scenarios” in which the plaintiff was denied recovery under the *Rogers* rule: *Nicholson v. Erie Railroad Co.*<sup>95</sup> and *Moody v. Boston & Maine Corp.*<sup>96</sup> The majority seems to imply that these cases were properly decided and would be decided in the same fashion post-*McBride*. The remainder of Part II evaluates that claim.

A. *Deciding Nicholson v. Erie Railroad Co. Post-McBride*

*Nicholson* involved a female employee of Erie Railroad Company who worked at the Jersey Avenue Car Shops in the Jersey City Yards.<sup>97</sup> The railroad did not provide a woman’s restroom at that work location, and therefore she became “accustomed to use the lavatory in any one of the cars standing on tracks adjoining the shop awaiting use.”<sup>98</sup> On December 31, 1947, the plaintiff wanted to use a restroom before leaving for home, and so the yard foreman escorted her to an empty train.<sup>99</sup> While using the lavatory on the train, the car began moving toward a station where passengers began boarding.<sup>100</sup> Once she believed the boarding process was complete, she exited the lavatory and was struck by a suitcase brought on board by one of the passengers. She brought suit for her injuries under FELA.<sup>101</sup> After the close of the entire case, the judge dismissed the plaintiff’s case for failure to establish a claim under FELA with respect to causation.<sup>102</sup>

In *McBride*, Justice Ginsburg writes, “applying *Rogers*, [the] appellate court [in *Nicholson*] affirmed [the] lower court’s dismissal for lack

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A railroad negligently fails to maintain its boiler, which overheats. An employee becomes hot while repairing it and removes his jacket. When finished with the repairs, he grabs a thermos of coffee, which spills on his now-bare arm, burning it. Was the risk that someone would be harmed by the failure to maintain the boiler foreseeable? Was the risk that an employee would be burned while repairing the overheated boiler foreseeable? Can the railroad be liable under the Court’s test for the coffee burn? According to the Court’s opinion, it does not matter that the “manner in which [the injury] occurred was not . . . foreseeable,” so long as some negligence—any negligence at all—can be established.

*Id.* at 2652 (Roberts, C.J., dissenting) (alterations in original) (citations omitted).

95 253 F.2d 939 (2d Cir. 1958).

96 921 F.2d 1 (1st Cir. 1990).

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

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

of causation.”<sup>103</sup> It is not clear, however, that the Second Circuit read *Rogers* in 1958 the same way the *McBride* majority did in 2011. In fairness to the majority, the Second Circuit did cite *Rogers* for the proposition that “[t]he F.E.L.A. has its own rule of causation [and that t]he question of causation is one for the jury if ‘the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury.’”<sup>104</sup> This admittedly does not sound so unlike *McBride*. But then, while acknowledging that the railroad’s “failure to supply toilet facilities ‘played a part’ in producing [the] plaintiff’s injury,” the court ruled that this was insufficient to establish FELA liability.<sup>105</sup> Justice Ginsburg seems to suggest that this is the *Nicholson* court properly using its “common sense” to throw out a “far out ‘but for’ scenario.”<sup>106</sup> But the court never once proclaims it is acting on its “common sense.” Rather, it announced another justification for its ruling: “[T]he cause and effect here were *too far removed* from one another in space and time to satisfy the requirements of the F.E.L.A.”<sup>107</sup> This limitation by the Second Circuit upon “but for” causation is called “proximate cause” by law students and professors. Counsel for *McBride*—at oral argument—called it “but for plus.”<sup>108</sup>

Whether we call it proximate cause, common sense, or “but for plus” might seem to be a matter of pointless syntax since the *McBride* majority and—presumably—the dissent would agree that *Nicholson* was rightly decided in 1958. However, it is far from clear that *Nicholson* would be similarly decided today after *McBride*. Written only a year after *Rogers* was handed down, the *Nicholson* court observed that “[t]he courts must work out case by case the F.E.L.A. causation rule just as they worked out, case by case, the common law causation rule; until we have more precedents it is difficult to formulate such a rule.”<sup>109</sup> After *McBride*, the court could hardly suggest that the rule has not yet been formulated. It has been. And as the dissent observes, it contains no meaningful “plus” factor to throw out cases like *Nicholson*.<sup>110</sup> Indeed, *Nicholson* is best described as a but-for fact set. Con-

103 *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2643 (2011).

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

105 *Id.* at 941. That is, the defendant’s conduct was a “but for” cause of the injury: if the defendant had supplied indoor toilet facilities, the plaintiff would not have used the lavatory on the train car where the passenger’s baggage struck her.

106 *McBride*, 131 S. Ct. at 2643.

107 *Nicholson*, 253 F.2d at 941 (emphasis added).

108 Transcript of Oral Argument at 38, 44, *McBride*, 131 S. Ct. 2630 (No. 10-235).

109 *Nicholson*, 253 F.2d at 941.

110 *McBride*, 131 S. Ct. at 2647 (Roberts, C.J., dissenting) (“There is no ‘plus’ in the rule the Court announces today.”).

cisely stated, the chain of causation can be traced as follows: but-for the lack of toilet facilities, the plaintiff would not have been instructed to use the rail-car lavatory; but-for the plaintiff using the rail-car lavatory, she would not have been injured as she was. While a “substantial factor” version of but-for causation would do away with this case,<sup>111</sup> such iterations of actual causation are not found in the *Nicholson* majority opinion. Rather, the *McBride* majority can only cling to its assertion that judges and juries should use their “common sense.” Unfortunately, this is a feeble and unpredictable standard for railroads and their workers to employ in litigation.<sup>112</sup>

### B. *Turning to the Restatement (Third)*

Without proximate causation, cases such as *Nicholson* will now hinge on duty and breach determinations. Conveniently, the *Nicholson* court commented upon that very issue in dicta:

The violation of duty here claimed to exist is the failure to supply women’s toilet facilities in the shop. If we were to apply the conventional law of negligence plaintiff would clearly be without right of recovery. At common law, in a case such as this, a defendant is negligent only when his conduct involves an unreasonable risk of subjecting the plaintiff to the hazard from which the harm results.<sup>113</sup>

It is not clear, however, that this sort of “no-negligence” ruling would—or even should—repeat itself today.<sup>114</sup> The *Restatement (Third)* speaks strongly against the use of such “no-negligence” rulings when used by judges to usurp the fact-finding role of the jury in determining breach.<sup>115</sup> The *Restatement (Third)* would reserve “no-duty” findings to those “exceptional cases, when an articulated counter-

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111 See GOLDBERG ET AL., *supra* note 76, at 230.

112 The dissent disparages the majority for failing to devise a workable substitute test: “[I]t is often easier to disparage the product of centuries of common law than to devise a plausible substitute—which may explain why Congress did not attempt to do so in FELA.” *McBride*, 131 S. Ct. at 2645 (Roberts, C.J., dissenting).

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

114 Justice Ginsburg makes this same conflation herself when she refers to the role of foreseeability in determining FELA “negligence” as opposed to duty and breach as separate elements. This is not helpful for purposes of analysis. Therefore, this Note proceeds by considering duty and breach as distinctive elements as does the *Restatement (Third)*.

115 See Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1252 (2009) (describing the *Restatement (Third)* and its evolving position on the duty element).

vailing principle or policy warrants denying or limiting liability in a particular class of cases.”<sup>116</sup>

While this determination admittedly could swing both ways, a modern-day Ms. Nicholson could make a strong argument that FELA’s history, purpose, and design suggest that claims brought under FELA should not be denied or limited as a class. Justice Ginsburg herself points out that defendants under FELA already have the benefit of a limited, foreseeable class of cases as the statute is limited only to claims by their employees.<sup>117</sup> Here, the *McBride* majority is correct to assert that foreseeability is “an essential ingredient of [FELA] *negligence*” as it figures prominently in the jury’s breach determination as described by the *Restatement (Third)* on “Negligence”:

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.<sup>118</sup>

Notably, this section of the *Restatement (Third)* “blends together a Hand-formula balancing approach with an assertion about the importance of ‘foreseeability’ in breach analysis.”<sup>119</sup> Rather than asking for a “hindsight answer,” the *Restatement (Third)* suggests that juries ought to “answer . . . the question from the point of view of the reasonable person.”<sup>120</sup> Thus, the Hand formula is styled as balancing the “foreseeable likelihood” and the “foreseeable severity” of any (as opposed to a particular) harm against the “burden of precautions.”<sup>121</sup>

116 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(b) (2010).

117 *McBride*, 131 S. Ct. at 2636 (“Liability under FELA is limited in these key respects: Railroads are liable only to their employees, and only for injuries sustained in the course of employment.”).

118 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010).

119 See Zipursky, *supra* note 115, at 1250.

120 *Id.*

121 The Hand formula was articulated famously by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947): “[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .” *Id.* at 173. The *Restatement (Third)* is not the only modern promulgation of the Hand formula. See, e.g., *Cardi*, *supra* note 89, at 745 (describing breach as a balancing of “1) the degree of foreseeable likelihood, from the point of view of a reasonable person in defendant’s position, that defendant’s actions might result in injury; 2) the range in severity of foreseeable injuries; and 3) the benefits and burdens of available precautions or alternative manners of conduct”).

A jury might swing either way in the *Nicholson* case if given this type of breach instruction. We can imagine an employee-plaintiff arguing that the burden of constructing a restroom facility—even a temporary one—is relatively low. But one can also imagine railroad-defendants arguing that failure to provide an onsite bathroom does not conjure up in one’s mind reasonably foreseeable injuries that are either likely or severe.<sup>122</sup> The point here is not to arrive at a foolproof prediction of a jury outcome, but rather to observe that *Nicholson* is not necessarily the same case after *McBride* as it was before.

C. *Why Moody v. Boston & Maine Corp. Should Not Allay Our Fears*

In *Moody*, a railroad conductor’s widow sued the Boston & Maine Corporation alleging that her husband’s heart-attack death was caused by “the long hours he had worked and the interruptions to his rest during his off-duty hours.”<sup>123</sup> Mr. Moody, in the month before his death, had been kept on duty on ten occasions for more than twelve hours. In dicta, the court opined that the railroad owed no duty under general negligence law because Mrs. Moody “ha[d] failed to establish that [Boston & Maine] could or should reasonably have foreseen that [Mr. Moody] would suffer a heart attack from stress of which [Boston & Maine] was never informed.”<sup>124</sup> Despite this opinion, Mrs. Moody’s claim moved past the duty and breach determinations under the negligence per se doctrine because the hours worked by her husband were a violation of the Hours of Service Act.<sup>125</sup> The court, however, granted summary judgment for the railroad due to Mrs. Moody’s inability to establish causation.<sup>126</sup>

As with *Nicholson*, Justice Ginsburg cites this case as a “far out ‘but for’ scenario” in which the court used its “common sense” to produce a correct result.<sup>127</sup> But unlike *Nicholson*, the court never acknowledged that “but for” causation ever could be established in this case. Instead, it ruled that “[t]he causation element is simply absent from the record” due to Mrs. Moody’s inability to present evidence of an “‘accident’ or event that jurors, as a matter of everyday experience,

122 Of course, the creative plaintiff’s lawyer will posit foreseeable harms: medical complications caused by delayed urination, emotional distress wrought from working in a sexist environment, etc.

123 *Moody v. Bos. & Me. Corp.*, 921 F.2d 1, 2 (1st Cir. 1990).

124 *Id.* at 3 (alterations in original).

125 *Id.* (“Boston and Maine violated the Hours of Service Act, 46 U.S.C. §§ 61–66 . . . by forcing Mr. Moody to work in excess of a twelve hour shift with inadequate intervening rest periods.”).

126 *Id.* at 5.

127 *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2643 (2011).

could causally connect with the injury alleged.”<sup>128</sup> The *McBride* court expects *Moody* to allay our fear of bizarre “but for” situations such as the injured cyclist establishing liability against the man dropping Steinways. However, the majority’s use of this case becomes irrelevant when we realize it would be decided the same way under the majority’s or the dissent’s framework—not because a jury would exercise properly its common sense to limit “but for” anomalies but rather because proximate cause would be a non-issue.

#### D. *McBride and the Hypothetical Rattlesnake*

During the *McBride* oral argument, Mr. Charles A. Rothfeld, appellate counsel for CSX Transportation, presented the following hypothetical: “[A] train stops because of [a] defective brake. No one is injured. [The c]onductor gets off the train to walk along [the track] and see what’s going on, trips and turns his leg, or is bitten by a snake.”<sup>129</sup> Presumably, Rothfeld’s point in devising the hypothetical was to test the boundaries of causation before the court. He opined that these injuries would not fall within the realm of common law proximate cause because “the risk of someone getting off the train and having a fortuitous injury is not the kind of risk that gave rise to the negligence. . . . [I]t’s negligent to have a defective brake, but not because there’s a bystander who might be bitten by a snake . . . .”<sup>130</sup> The underlying implication was that any ruling by the court that abrogated proximate cause would lead to these troubling results for railroad defendants. Justice Breyer, though apparently untroubled by the twisted ankle, agreed that liability for the snake bite would be undesirable and therefore questioned: “Is there a case like that? . . . I agree with you about the snake. Is there any case about the snake?”<sup>131</sup>

Ultimately, the majority described the rattlesnake as a “conjure[d] up image” or a situation to be resolved by “common sense.”<sup>132</sup> But perhaps Rothfeld was right to fear the hypothetical rattlesnake. Under the frame of analysis used above with respect to *Nicholson*, it seems that the rattlesnake-bitten train conductor might succeed under *McBride*. Justice Scalia unequivocally and concisely explained at oral argument why the majority’s “but for plus” rule would fail to throw out the snake bite case if the standard is whether “the railroad’s

128 *Moody*, 921 F.2d at 5.

129 Transcript of Oral Argument at 14–15, *McBride*, 131 S. Ct. 2630 (No. 10-235).

130 *Id.* at 15–16.

131 *Id.* at 16.

132 *McBride*, 131 S. Ct. at 2641.

negligence played any part, even the slightest, in producing the injury”<sup>133</sup>:

Once you abandon a proximate cause requirement, however you want to define that, I don’t see why the snake isn’t covered [by FELA]. . . . The train wouldn’t have stopped, the conductor wouldn’t have gotten off, he wouldn’t have been bitten by the snake.<sup>134</sup>

Justice Scalia dismissed properly any question in our minds as to but-for causation providing a defense to this claim. Railroads must now turn to duty and breach in hope of aid against the hypothetical rattlesnake. But it is not clear that they will find it there, either.

Professor Zipursky observes that, with respect to duty, the *Restatement (Third)* announces “a strong default rule that each person has a duty to exercise reasonable care not to injure others [and that] this default rule almost operates as a presumption.”<sup>135</sup> Allowing one’s employee to operate a locomotive with a defective brake would appear to trigger this rule, particularly because the *Restatement (Third)* disapproves of foreseeability as a factor in a judge’s determination of duty.<sup>136</sup> Zipursky explains that this helps to limit “no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.”<sup>137</sup> Nor would railroads likely be able to argue in the rattlesnake case that “the facts proffered really are too weak to lead a reasonable mind to think that there was negligence.”<sup>138</sup> In addition, even if a judge was troubled by the prospect of the tort system allowing recovery for the hypothetical snake bite, the ALI Reporters concluded that courts should defer to the jury: “When . . . reasonable minds could differ about the competing risks and burdens or the foreseeability of the risks in a specific case, . . . courts should not use duty and no-duty determinations to substitute their evaluation for that of the factfinder [at breach].”<sup>139</sup>

133 *Id.* at 2636.

134 Transcript of Oral Argument at 31.

135 Zipursky, *supra* note 115, at 1251.

136 *See id.* at 1251–52.

137 *Id.* at 1252; *see also* Dilan A. Esper & Gregory C. Keating, *Abusing “Duty”*, 79 S. CAL. L. REV. 265, 269 (2006) (“[W]hen duty is a live issue in every case it is impossible to draw a principled line between the provinces of judge and jury. Judges are inevitably drawn into second-guessing jury decisions on issues of reasonable conduct and care.”).

138 Zipursky, *supra* note 115, at 1252.

139 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. i (2010).

We arrive again at breach as the last battlefield. The *Restatement (Third)*—as explained above—suggests that breach be determined by balancing the “foreseeable likelihood” and the “foreseeable severity” of *any* (as opposed to a particular) harm against the “burden of precautions.” Here, it would seem, the railroad loses. Surely, the reasonable jury would determine the foreseeable likelihood and severity of any harm presented by defective locomotive brakes to be extremely high. While the burden of providing operative brakes may also be exceedingly high, it seems unlikely that a weighing of the Hand formula would ever place this cost higher than the likely harm to life and limb.

### III. THE FELA LITIGANT’S WEAPON-OF-CHOICE: JURY INSTRUCTIONS

While railroads are unlikely to avoid liability in the case of the hypothetical rattlesnake, all is not lost to them. First, railroad defendants can argue under comparative fault that the plaintiff is responsible for some or most of the damages suffered.<sup>140</sup> Moreover, railroads have much to gain in the breach arena in cases where railroad conduct—as in *Nicholson*—is less likely to tip the Hand formula scale in favor of the plaintiff. Surely, this has always been the case, even before *McBride*, but now the foreseeability-at-breach argument is a far more consequential issue. In addition, while *McBride* has effectively foreclosed any further discussion of proximate causation or anything resembling it, railroad defendants might urge causation instructions that more closely resemble the statutory language without any unnecessary surplusage. Perhaps the most natural vehicle for plaintiffs and defendants to argue these issues is through proposed jury instructions.

#### A. Proposed Instructions for Breach under FELA

In FELA cases brought in the Seventh Circuit, juries are instructed on their negligence—or breach—determination as follows:

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140 To be sure, railroads—as always—can use comparative fault to limit their liability to an employee whose personal negligence accounted for some or all of the injury. That being said, comparative fault will not be a cure in any and every case, but rather only those cases in which the railroad can successfully argue that the employee should bear a portion of the fault. For example—in the case of the hypothetical rattlesnake—if the railroad can show that the employee was aware of a hissing and rattling snake and would have been able to back away to safety with the exercise of reasonable care, then the jury might very well find the employee liable for a significant portion of the injury. But if a reasonable person—in the employee’s position—would not have been aware of the rattlesnake, then a comparative fault argument will be of little use to a railroad defendant in the case of the hypothetical snake bite.

Plaintiff brings this action under the Federal Employers Liability Act or FELA. FELA requires Defendant to exercise reasonable care to provide a reasonably safe workplace.

To succeed in his FELA claim, Plaintiff must prove two things by a preponderance of the evidence:

1. Defendant was negligent;
2. Defendant's negligence caused or contributed to Plaintiff's injuries.

Negligence is the failure to use the care that a reasonably prudent person would use in the same circumstances. The law does not say how a reasonably prudent person should act. That is for you to decide.<sup>141</sup>

This instruction is problematic insofar as it does not allow for railroads to instruct the jury on the reasonable foreseeability of harm which—as discussed earlier—the *McBride* majority held is still “an essential ingredient of [FELA] *negligence*.”<sup>142</sup>

Crafting FELA instructions after *McBride* presents a new challenge given the majority's insistence that juries are “scarcely aided by charges” phrased with overly legalistic language.<sup>143</sup> Justice Ginsburg cited a study suggesting that “85% of actual and potential jurors were unable to understand a pattern proximate cause instruction similar to the one requested by CSX.”<sup>144</sup> However, the *McBride* majority's instruction is guilty of the opposite problem: utter lack of assistance to the jury. It may be true that jurors cannot understand phrases such as “natural, probable, and foreseeable,”<sup>145</sup> but informing them that it is for them to decide how a reasonably prudent person should act without any aid is equally undesirable. Justice Ginsburg, herself, tipped her hat to the *Restatement (Third)* for its efforts to simplify the language of tort law.<sup>146</sup> Perhaps a FELA breach instruction that bears resemblance to the ALI Reporters's modified Hand formula would provide railroad-defendants the benefit of a foreseeability of risk instruction and employee-plaintiffs the opportunity to argue that the burden of prevention was comparatively small.<sup>147</sup> The following language would serve to accomplish these goals for a FELA breach instruction:

141 COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, *supra* note 65, § 9.01.

142 *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2634 (2011) (alterations in original) (quoting *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963)).

143 *Id.* at 2642.

144 *Id.*

145 *Id.*

146 *Id.*

147 Since *McBride*, attorneys and courts have already used jury instructions laden with hints of the Hand balancing test. See, e.g., *Jacobs v. Dakota, Minn. & E. R.R.*

The plaintiff-employee brings this action against the defendant-railroad under the Federal Employers' Liability Act or FELA. FELA places upon the defendant a duty to exercise reasonable care to provide a reasonably safe workplace.

To succeed in this claim, the plaintiff must prove two things by a preponderance of the evidence:

1. That the defendant breached that duty; and
2. The defendant's breach of that duty caused or contributed to the plaintiff's injuries.

Breach is the failure to use the care that a reasonable person would use in the same circumstances to provide a reasonably safe workplace.

In determining whether the defendant breached its duty, you should consider the following factors: 1) the reasonably foreseeable likelihood of any harm associated with the defendant's conduct; 2) the reasonably foreseeable severity of any harm associated with the defendant's conduct; and 3) the burden or cost of precautions to eliminate or reduce the risk of harm associated with the defendant's conduct.

The *Restatement (Third)* insists on a sharper distinction between duty and breach to clarify the role of judge and jury. For this reason, a FELA instruction that does away with the conflation of duty and breach under the umbrella of "negligence" provides analytical benefit not only to the jury, but also to judges and attorneys. Additionally, while the instructions strongly echo the factors suggested by the Hand formula, it does not require a mathematical balancing. This resolves Zipursky's concern that the formula should not be "algebraic or monetized" as it "does not come close to supplying the meaning of 'negli-

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Corp., 806 N.W.2d 209 (S.D. 2011) ("In this case, the trial court instructed the jury on foreseeability under FELA as 'requir[ing] Defendant to guard against those risks of dangers of which it knew or by the exercise of due care should have known. In other words Defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances.' The trial court further instructed that 'because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required in the use of ordinary care will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence in the case. As the danger that should reasonably be foreseen increases, so the amount of care required by law also increases.'"). The proposed instructions in this Note seek to clarify this balancing in terms more understandable by lay juries. Of course, as these terms become more clear and definite, defense attorneys will have to present the burden factor delicately to a jury. Indeed, any suggestion that a risk was contemplated by a railroad but dismissed due to the excessive costs of eliminating the risk is not likely to sit well with the average juror.

gence’ as a matter of positive law.”<sup>148</sup> Zipursky is also concerned that—in adopting the Hand formula—the Reporters had to admit that this balancing theory assumes “that the actor is aware of that risk, but has tolerated that risk on account of the burdens involved by risk-prevention measures” while Prosser argued “most negligence in tort law is a matter of inadvertence.”<sup>149</sup> In the FELA context, however, much of Zipursky’s concern can be set aside by the fact that FELA assumes a limited world of plaintiffs. That is, the statute affords plaintiffs an environment with fewer defensive obstacles because the class of plaintiffs is limited and therefore railroads—we presume—will develop a heightened sensitivity to on-the-job dangers. The statute, by design, encourages the railroad to make risk-prevention considerations a part of its everyday business calculus. Finally, Zipursky observes that the Reporters’s styling of the Hand formula removes the modifier “reasonably” which is part of “[t]he classic concept of foreseeability in negligence law.”<sup>150</sup> Because—as Zipursky argues—this modifier plays a necessary role in determining breach and references to the “reasonable person” are contained elsewhere in the proposed FELA instruction above, the modifier remains in this Note’s proposed styling of the Hand formula.

#### B. *Eliminating Surplusage in Instructions for Causation under FELA*

One might assume that, after *McBride*, railroads are foreclosed from adding any limiting language to a jury causation instruction. That may be true, but perhaps railroads can and should argue that some of the surplusage should be retired. The *McBride* majority justifies the “but for” causation standard it adopts based on its adherence to the statutory text: “What qualified as . . . legally sufficient cause in FELA cases . . . [is] determined by the statutory phrase ‘resulting in whole or in part,’ which Congress ‘selected . . . to fix liability’ in language that was ‘simple and direct.’”<sup>151</sup> If that is the case, then we should wonder why courts allow instructions rife with surplusage such as this: “Defendant ‘caused or contributed to’ Plaintiff’s injury if Defendant’s negligence *played a part—no matter how small*—in bring-

148 Zipursky, *supra* note 115, at 1255.

149 KEETON ET AL., *supra* note 66, § 31.

150 Zipursky, *supra* note 115, at 1256–57 (“The modifier ‘reasonably’ in ‘reasonably foreseeable’ is not simply there to ward off the idea that any probability above zero renders the conduct foreseeable. It is there to press the jury to think about whether it is a *reasonable demand* (i.e., not an unreasonable demand or not an unfair demand or not a crazy demand) of others to anticipate consequences so far out.”).

151 CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2639 (2011) (quoting Coray v. S. Pac. Co., 335 U.S. 520, 524 (1949)).

ing about the injury.”<sup>152</sup> If the majority meaningfully espouses juror comprehension and faithfulness to the statutory text as two of its goals, then it seems that railroads could propose the following more simple and more statutorily-faithful instruction: The defendant caused or contributed to the plaintiff’s injury if the injury resulted in whole or in part from the defendant’s negligence.

#### CONCLUSION

Like Judges Cardozo and Andrews in *Palsgraf*, the *McBride* majority faced a decision as to which negligence element should serve as the primary gatekeeper to liability. In the end, they chose neither Judge Cardozo’s duty nor Judge Andrews’s proximate cause regime. Instead, they turned to the breach element, coupling it with the complicated notion of foreseeability grappled with by Cardozo and Andrews in *Palsgraf*. But the *McBride* majority opinion should not strike us as a complete surprise. Given the long line of “relaxed causation” FELA cases flowing from *Rogers*, Justice Ginsburg’s position is more faithful to precedent—and arguably the statutory text—than the dissent’s position. In addition, Justice Ginsburg’s reading of FELA accounts for its remedial purpose grounded in the historical plight of railroad workers. Despite these strengths, two criticisms can be lodged against the majority opinion. One of them might be described as jurisprudential. Justice Ginsburg suggested that if Congress did not care for the active judicial interpretations of FELA since the 1950s, it could have taken action and that to date, it has not done so.<sup>153</sup> This sort of justification brings about important questions of the proper relationship between the judiciary and the legislative process. Those questions, of course, have not been contemplated by this Note.

The other criticism of the *McBride* decision which has formed the basis of this Note questions whether the use of foreseeability at breach will prove effective in eliminating far out but-for cases in the FELA context. While the majority casually employs the word “proximate” occasionally throughout its opinion, no one could reasonably claim that proximate causation is still on the table for FELA litigants. Therefore, the doctrine of proximate causation developed at common law to delineate those actual causes that are legally culpable from those that are not is no longer available to FELA defendants. What remains now for FELA litigants is a new battleground marked by the role of foreseeability at breach. Unfortunately for railroad defendants, it is quite clear that breach does not require the exacting relationship

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152 *Id.* at 2635 (emphasis added).

153 *See supra* note 70.

between conduct and injury necessary to make as strong a defensive argument as one might under common law proximate causation. What is more, the uncertainty over the state of causation and breach is only compounded by the majority's reliance on the "common sense" of jurors to discern the proper boundaries of FELA liability. In order to inject some semblance of guidance into the jury box, litigants are likely to turn to proposed instructions to shape the breach determination. Because of the Court's inability to define adequately a new regime of foreseeability, railroad defendants continue to litigate in a tort context plagued by definitional and analytical ambiguity. Given their uncertain control over far out but-for cases, railroads might finally begin to wonder whether they would not be better served—along with their employees—by a no-fault system with liability caps.