Are Railroads Liable When Lightning Strikes?

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INTRODUCTION

Henry is a repairman who works for a railroad. One day, as a result of the railroad's negligence, a boiler begins to overheat and Henry is called on to fix it. While working, Henry becomes uncomfortably hot and removes his coat. After finishing his work, he reaches for a thermos of coffee but accidentally spills it on his arm, causing severe burns. If Henry had been wearing his coat, it would have prevented him from being burned. Is the railroad liable for Henry's injuries?[1]

Under the Federal Employers' Liability Act[2] (FELA), railroads are liable to their employees for injuries caused "in whole or in part" by the railroad's negligence.[3] Rather than establishing a workers' compensation system, FELA requires railroad employees to sue through the traditional tort system to recover for workplace injuries but eliminates common law barriers such as assumption of risk that made it difficult for employee-plaintiffs to recover in common law courts.[4] This means that employees hoping to recover for a workplace injury still have the burden of proving the traditional elements of a tort suit: duty, breach, causation, and damages.

Henry might bring suit against the railroad to recover for his injuries, arguing that *but for* the fact that the overheating boiler caused him to remove his coat, he would not have been burned by the coffee. He would claim that the railroad's negligent maintenance of the boiler caused his injury "in whole or in part."

A court applying common law proximate cause would likely reject this sort of claim. Proximate cause allows courts to cut off the

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1 For the source of this hypothetical, see *CSX Transportation, Inc v McBride*, 131 S Ct 2630, 2652 (2011) (Roberts dissenting).

2 Pub L No 60-100, ch 149, 35 Stat 65 (1908), codified as amended at 45 USC § 51 et seq.

3 45 USC § 51.

4 See 45 USC §§ 53–55. See also *Consolidated Rail Corp v Gottshall*, 512 US 532, 542 (1994); 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, 409–10 (2010).

chain of causation when an injury appears too attenuated, too unforeseeable, or too unnatural to justify holding the defendant liable.[5] Without a limit, a negligent act could create virtually unlimited liability for a defendant through an endless chain of but-for causation. Imagine a defendant-employer negligently starts a fire in the morning. The firemen extinguish the fire by lunch, but not before the fire spreads to the sandwich shop next door. Because the defendant's employees cannot eat lunch at the sandwich shop, they drive to a restaurant three miles down the road. On their way, the car breaks down and the employees get in a wreck and sustain severe injuries. *But for* the negligently created fire, the employees would not have been driving and would not have gotten into a wreck. The chain of causation is clear—one event leads to another, which leads to another—but imposing liability on the employer for the car wreck because of the negligently created fire seems absurd. Proximate cause allows courts to deny liability in cases involving such attenuated chains of causation.

For the first fifty years after FELA's enactment, plaintiffs were required to prove that their injuries were proximately caused by the railroad's negligence.[6] In *Rogers v Missouri Pacific Railroad Co*,[7] the Supreme Court cast doubt on whether proximate cause is the appropriate standard of causation for cases arising under FELA.[8] In 2011, the Supreme Court in *CSX Transportation, Inc v McBride*[9] cleared the record and held that traditional proximate cause is not the standard under FELA and that courts should apply a more "relaxed" standard of causation in these cases.[10] The *McBride* Court held that the appropriate test of causation under FELA is whether the railroad's negligence "played any part, even the slightest" in causing the employee's injury. Under this test, the defendant-railroad can be held liable "no matter how small" the causal connection might be.[11]

Based on this language, would the railroad be liable for Henry's burns? Did its negligence "play any part, even the slightest" in bringing about his injury? In *McBride*, the Court rejected the suggestion

5 See Kenneth S. Abraham, *The Forms and Functions of Tort Law* 124–25 (Foundation 3d ed 2007) ("[T]he doctrine of proximate cause operates as a limitation on the scope of the defendant's liability.").

6 See *New York Central Railroad Co v Ambrose*, 280 US 486, 489–90 (1930) (overturning a verdict in favor of the plaintiff where the plaintiff failed to prove the injuries were proximately caused by the railroad's negligence).

7 352 US 500 (1957).

8 Id at 506.

9 131 S Ct 2630 (2011).

10 Id at 2634–36.

11 Id at 2636.

that a railroad would be liable for such far-fetched claims, reasoning that courts can simply apply their "common sense" to bar recovery in cases involving attenuated causal chains. The language of the Court's holding, however, provides limited guidance as to when and why courts should deny such claims. If a plaintiff need only show that the defendant's negligence played any part, *no matter how small*, in causing an injury, it is unclear how courts can consistently and permissibly limit an otherwise limitless causal chain.

This Comment articulates how courts should approach questions about causation after *McBride*. Part I outlines the history of the standard of causation under FELA and how it evolved from proximate cause to the current standard. In Part II, this Comment examines the majority opinion in *McBride*. Part III then looks at the ways in which courts have responded to *McBride*. Here it is argued that two interrelated problems have arisen. First, the opinion's reliance on a "common sense constraint" provides little guidance for courts in determining the point at which liability should be cut off. Second, and more problematic, the *McBride* Court's statements about the role of foreseeability have led some courts to adopt a form of "free-standing negligence," leading to potentially limitless liability.

Finally, in Part IV, this Comment offers an interpretation of FELA's "relaxed" standard of causation that prevents limitless chains of causation. Drawing on common law doctrines developed in cases of coincidental harm, this Comment argues that the relaxed standard of causation allows courts to limit liability for harms that lack a "causal link" to the railroad's negligence. By engaging in a causal-link analysis, courts can comfortably exclude a significant portion of the more far-fetched cases where, as the *McBride* Court noted, common sense demands severing liability.

I. THE FELA STANDARD OF CAUSATION OVER TIME

FELA was enacted in 1908[12] as an effort to relieve railroad employees of harsh common law doctrines that often prevented recovery for on-the-job injuries.[13] The Act provides that "[e]very common carrier by railroad . . . shall be liable in damages to any

[12] The first version of FELA was enacted in 1906. See Pub L No 59-219, ch 3073, 34 Stat 232 (1906). The 1906 Act was struck down under the Commerce Clause. See *The Employers' Liability Cases*, 207 US 463, 499 (1908). The statute was retooled to withstand constitutional challenges and enacted in 1908. See Pub L No 60-100, ch 149, 35 Stat 65 (1908), codified as amended at 45 USC § 51 et seq.

[13] See Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 Harv J Leg 79, 81–82 (1992).

person suffering injury while he is employed by such carrier."[14] Railroad work was incredibly dangerous,[15] but common law doctrines such as the fellow-servant rule,[16] contributory negligence,[17] and assumption of risk[18] made it difficult for railroad workers to recover for work-related injuries.[19] FELA explicitly abrogated these barriers so that injured railroad employees would have a better chance of recovery.[20]

FELA, however, did not create a workers' compensation system but instead worked within the tort system.[21] The difference is significant. Under a typical workers' compensation system, employees agree to accept a predetermined amount of compensation for work-related injuries in exchange for forfeiting the right to sue their employers.[22] This accomplishes two things: First, employers enjoy limited liability and avoid unpredictable costs of litigation in favor of predictable costs paid into the workers' compensation program. Second, employees no longer have the burden of proving fault and are oftentimes compensated more quickly.[23]

A plaintiff hoping to recover for a work-related injury under FELA, however, still has to prove the traditional elements of duty, breach, causation, and damages. Rather than creating a no-fault insurance program, FELA simply creates a statutory tort scheme for railroad employees in which they retain traditional burdens.[24]

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14 45 USC § 51.

15 See Baker, 29 Harv J Leg at 81 (cited in note 13) ("[T]he 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.").

16 The fellow-servant rule holds that employees, with regard to actions against their employers, consent to the risk that their fellow employees might harm them "by virtue of their common employment." Richard A. Epstein, *Torts* § 8.7.1 at 204 (Aspen 1999).

17 Contributory negligence is a complete bar to recovery no matter the percentage of the plaintiff's fault. See id at § 8.1 at 188–89.

18 Assumption of risk bars recovery where the plaintiff knowingly and voluntarily assumed the risks of the dangerous activity in which he was engaged when he was injured. See id at § 8.6 at 198–203.

19 See Baker, 29 Harv J Leg at 81–82 (cited in note 13).

20 45 USC §§ 51–52 (fellow-servant rule); 45 USC § 53 (contributory negligence); 45 USC § 54 (assumption of risk). See also Baker, 29 Harv J Leg at 82 (cited in note 13).

21 See Baker, 29 Harv J Leg at 82–83 (cited in note 13).

22 See Ishita Sengupta, Virginia Reno, and John F. Burton Jr, *Workers' Compensation: Benefits, Coverage, and Costs, 2004* 6 (National Academy of Social Insurance July 2006), online at http://www.nasi.org/usr_doc/NASI_Workers_Comp_2004.pdf (visited Nov 24, 2012).

23 See id (explaining that "a worker who sustained an occupational injury or disease . . . receive[s] predictable compensation without delay, irrespective of who was at fault").

24 See *Rogers*, 352 US at 508. See also *Hardyman v Norfolk & Western Railway Co*, 243 F3d 255, 258 (6th Cir 2001); *Second Employers' Liability Cases*, 223 US 1, 4 (1912) (noting that the complaint in this case was that "the injuries proximately resulted from negligence of the plaintiff's fellow servants").

According to the Act, plaintiffs may recover when their injuries were caused "in whole or in part" by the railroad's negligence.[25] Since FELA's enactment, the Court's understanding of what it means to cause an injury "in whole or in part" has evolved. This Part explores three significant periods in the statute's history: the first fifty years of FELA, the Supreme Court's opinion in *Rogers*, and the post-*Rogers* period.

A. Causation in the First Fifty Years of FELA

For the first fifty years following FELA's enactment, courts applied traditional proximate cause in cases arising under the Act. Initially, courts were not preoccupied with the appropriate standard of causation. It was assumed that proximate cause, which was the standard of causation for traditional tort law, was the standard for torts arising under FELA.[26] For instance, in 1916 the Supreme Court held "that in order for the plaintiff to recover in [a FELA action] he must prove . . . that the injuries he sustained were the direct and proximate result of the negligence of the defendant."[27] Again in 1930 the Supreme Court held that when a plaintiff "completely failed to prove that the accident was proximately due to the negligence of the company . . . the verdict . . . can not be allowed to stand."[28] The case law during the first half of the twentieth century unequivocally demonstrates the use of proximate cause in FELA actions.[29]

The Supreme Court's seemingly unquestioned application of proximate cause in FELA suits was likely due to the text of the statute itself. As noted above, FELA explicitly abrogated several traditional common law doctrines, including the fellow-servant rule, contributory negligence, and assumption of risk.[30] The fact that some common law doctrines were explicitly abrogated by FELA most likely led courts to believe that other common law doctrines within tort law were intended to be left alone. In 1994, the Supreme Court held

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25 45 USC § 51.

26 See Baker, 29 Harv J Leg at 83 (cited in note 13) ("The Supreme Court's early approach to interpreting the FELA was to rely on traditional concepts of fault and proximate causation.").

27 *Chesapeake & Ohio Railway Co v Carnahan*, 241 US 241, 244 (1916).

28 *New York Central Railroad Co v Ambrose*, 280 US 486, 489–90 (1930).

29 See, for example, *Northwestern Pacific Railroad Co v Bobo*, 290 US 499, 503 (1934) (denying causation by noting that "there is nothing whatsoever to show that [the railroad's negligence] was the proximate cause of the unfortunate death"); *Raudenbush v Baltimore & Ohio R.R.*, 63 F Supp 329, 332 (ED Pa 1945), revd 160 F2d 363 (3d Cir 1947) ("Under [FELA], the carrier is liable only where its negligence was the proximate cause of the injuries to its employee, or his death.").

30 45 USC §§ 51–54.

that such a line of analysis was appropriate: "[A]lthough common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis."[31] In other words, the Court held that common law doctrines that would typically apply are still relevant under FELA if they are not explicitly abrogated by statute. If the purpose of FELA was to keep railroad injury claims within the domain of tort law, then the logical move for courts interpreting the statute was to apply traditional tort law doctrines unless explicitly told otherwise.

The first wrinkle in the doctrine might be traced to 1943. In *Brady v Southern Railway Co*,[32] the Supreme Court again affirmed that proximate cause was the appropriate standard under FELA.[33] The *Brady* Court denied liability for lack of negligence and in doing so acknowledged that proximate cause was the applicable standard of causation.[34] Here the Court defined proximate cause as requiring 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."[35]

Not every member of the Court agreed with the ruling in *Brady*. Justice Hugo Black dissented, arguing not only that there was reasonable proof of negligence but also that such negligence proximately caused Brady's death.[36] However, his definition of "proximate cause" would give pause to anyone familiar with the traditional concept:

> Surely this rail was the "proximate cause" if those words be used to mean an event which contributes to produce a result, which is the meaning Congress intended when it made railroads liable for the injury or death of an employee "due to" or "resulting in whole or in part from" the railroad's negligence.[37]

While it is certainly true that "proximate cause" is a complicated and often amorphous doctrine,[38] Justice Black's suggested definition is exactly what proximate cause *is not*. Proximate cause exists

31 *Consolidated Rail Corp v Gottshall*, 512 US 532, 544 (1994).

32 320 US 476 (1943).

33 Id at 483 ("The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause.").

34 Id at 478–84.

35 Id at 483.

36 *Brady*, 320 US at 485–89 (Black dissenting).

37 Id at 488–89.

38 See *Archer v Warner*, 538 US 314, 326 (2003); E.H. Schopler, *Tests of Causation under Federal Employers' Liability Act or Jones Act*, 98 ALR2d 653, § 2 (1964).

because liability for purely but-for causation is unacceptable, and a standard that *only* asks whether an action "contributes to produce a result" leads to such but-for liability.[39]

Why did Justice Black offer such an unorthodox conception of proximate cause? One explanation might be that Justice Black viewed proximate cause as context-dependent—a position later adopted by Justice Ruth Bader Ginsburg.[40] Justice Black might have been implicitly arguing that in the context of FELA proximate cause should be understood in a way that tracks the statutory text more closely than the traditional common law definition.

Whatever his reasoning, Justice Black offered a definition of proximate cause in *Brady* that sharply departed from the majority's routine application of the common law. Although he gave the appearance of merely applying the same standard of causation that courts had been applying for years, Justice Black's conception of proximate cause looks more like the groundwork for the relaxed standard the Court later adopted, which was explicitly *not* traditional common law proximate cause.

B. The *Rogers* Standard: "Played Any Part, Even the Slightest"

Traditional proximate cause was the standard used by courts interpreting FELA for fifty years, but in 1957, less than fifteen years after Justice Black's dissent in *Brady*, the Supreme Court revisited its understanding of causation in *Rogers v Missouri Pacific Railroad Co*.

In *Rogers*, the Court rejected the argument that FELA required a plaintiff to show that the railroad's negligence was "the sole, efficient, producing cause of injury."[41] The significant holding of the Court was that under FELA "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."[42]

The facts in *Rogers* were fairly simple. The plaintiff worked for the railroad and on the day of the injury was responsible for burning the vegetation on the sides of the tracks. Every once in a while a train would pass, and the plaintiff was required to move a safe

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39 See *Palsgraf v Long Island R. Co*, 162 NE 99, 103 (NY 1928) (Andrews dissenting) ("An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction. A cause, but not the proximate cause.").

40 See notes 75–79 and accompanying text.

41 *Rogers*, 352 US at 506.

42 Id (emphasis added).

distance from the track and watch the train for "hotboxes"—overheated wheel bearings that could lead to a fire. On one occasion, the plaintiff saw that a train was approaching and ran to a spot where he could watch for hotboxes. While he was watching, "he became enveloped in smoke and flames" caused by the passing train, which fanned the flames he had set to the shrubbery beside the tracks.[43] He turned to run but tripped and fell off a culvert, suffering serious injury.[44]

The plaintiff alleged that the railroad was negligent in requiring him to work in such close proximity to the tracks, where passing trains would fan the flames and smoke in his direction, and in maintaining the culvert where he was required to stand. These negligent actions by the railroad, according to the plaintiff, caused his injuries.[45]

As noted above, the Court held that the plaintiff need not prove the railroad's negligence was the sole and efficient cause of his injury, only that it "played any part, even the slightest" in causing the injury.[46] The issue in *Rogers* was how multiple causes should be treated under FELA. The lower court employed a test whereby causation was denied whenever more than one cause could be reasonably attributed to the injury—a test the *Rogers* Court referred to as requiring the railroad's negligence to be the "sole, efficient, producing cause of the injury."[47] That is, because a jury could reasonably conclude that the injury resulted either from the railroad's negligence or from the plaintiff's negligence, the lower court denied causation altogether. In *Rogers*, the Court explicitly rejected this method of determining causation. Instead, it held that the presence of multiple causes does not justify keeping a case from the jury.[48]

Despite primarily addressing a question about multiple causation, the *Rogers* Court made a number of declarations that puzzled

43 Id at 502.

44 *Rogers*, 352 US at 501–03.

45 Id at 502–03.

46 Id at 506.

47 Id at 506–07. The "sole efficient cause" test was applied by courts to deny liability when the plaintiff's actions could be attributed as the only cause of the injury. To make this determination, a court would ask whether the accident would still have happened if the party had not engaged in a particular act of negligence, and if not, the court would deny liability. See *Southern Railway Co v Youngblood*, 286 US 313, 317 (1932) (denying liability because accident would not have happened but for the plaintiff's disobedience of an order). The theory of sole causation arose from courts denying liability whenever the plaintiff's act came *after* the defendant's, on the grounds that only the "nearest" cause could constitute the proximate cause. This was replaced in the mid-nineteenth century by the doctrine of contributory negligence—which was *also* a complete bar to recovery at common law—on the fear that plaintiffs were not being held responsible for their negligence simply because it preceded a negligent act by the defendant. See Epstein, *Torts* § 8.1 at 188 (cited in note 16).

48 *Rogers*, 352 US at 506–08.

lower courts. In addition to the "played any part, even the slightest" language, the court went on to say that FELA cases "rarely present[] more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit."[49] Further, the Court held that a case should go to a jury where "the conclusion may be drawn that the negligence of the employer played any part at all in the injury or death."[50]

These declarations by the *Rogers* Court called into question what standard of causation courts should *generally* apply in FELA cases. A narrow interpretation of *Rogers* would find the Court's language applicable only to questions of multiple causation. That is, the "played any part, even the slightest" standard was not meant to relax the proximate cause analysis in general but rather only to do away with the multiple-cause barrier that traditional proximate cause might create. A broader interpretation of *Rogers*, however, would mean that the Court's holding introduced a more relaxed version of causation generally. Under this interpretation, the "played any part, even the slightest" standard would replace traditional proximate cause completely. Which way to interpret *Rogers*—narrowly or broadly—perplexed lower courts in the years following the decision.

C. After *Rogers*: Fifty Years of Confusion

After the Supreme Court handed down its decision in *Rogers*, lower courts split over its application.[51] Many courts continued to apply a traditional proximate cause standard in FELA cases. In *Dickerson v Staten Trucking, Inc*,[52] the court held that the plaintiff's claim failed as a matter of law because he failed to show that the negligence proximately caused the injuries.[53] In *Snipes v Chicago, Central & Pacific Railroad Co*,[54] the Iowa Supreme Court noted that plaintiffs must prove traditional proximate causation when bringing FELA suits.[55]

Other courts, however, began applying a more relaxed standard of causation after *Rogers*. In *Summers v Missouri Pacific Railroad System*,[56] the Tenth Circuit noted that federal courts of appeals had held that instructing juries to apply traditional proximate cause in

49 Id at 508.
50 Id at 507.
51 See Greenidge, Comment, 41 McGeorge L Rev at 417 (cited in note 4).
52 428 F Supp 2d 909 (ED Ark 2006).
53 Id at 915.
54 484 NW2d 162 (Iowa 1992).
55 Id at 164.
56 132 F3d 599 (10th Cir 1997).

FELA cases is reversible error.[57] In 2003, the Sixth Circuit applied a relaxed standard of causation in *Richards v Consolidated Rail Corp*.[58] Relying on *Rogers*, the court allowed a conductor to recover on a relaxed standard of causation when he hurt his back while checking the brakes on a train.[59] In doing so, the court explicitly noted that the standard of causation was relaxed after the "landmark decision" of *Rogers*.[60]

D. *Norfolk Southern Railway Co v Sorrell*: The Supreme Court Weighs In

Five decades after Justice William Brennan penned the *Rogers* opinion, the Supreme Court weighed in on the question lower courts had been wrestling with: What is the appropriate standard of causation for FELA suits? In a pair of dueling concurrences, Justice David Souter and Justice Ginsburg each outlined what they believed was the answer, foreshadowing the high court's ruling on the issue four years later.

In *Norfolk Southern Railway Co v Sorrell*,[61] the Court granted certiorari to decide whether the standard of causation under FELA should be the same for determining the employer's liability as it is for determining the liability of the employee due to contributory negligence.[62] The Court held that the standards for assessing the damages caused by the railroad's negligence and the employee's contributory negligence are the same[63] but declined to decide whether traditional proximate cause or a more relaxed standard is appropriate in FELA cases.[64]

A concurrence written by Justice Souter, joined by Justices Antonin Scalia and Samuel Alito, argued that "*Rogers* did not address, much less alter, existing law governing the degree of causation" required under FELA.[65] Justice Souter noted that *Rogers* only addressed "how to proceed when there are multiple cognizable causes

57 Id at 607, citing *Hausrath v New York Central Railroad Co*, 401 F2d 634, 636–37 (6th Cir 1968), *DeLima v Trinidad Corp*, 302 F2d 585, 587–88 (2d Cir 1962), and *Hoyt v Central Railroad*, 243 F2d 840, 843 (3d Cir 1957).

58 330 F3d 428 (6th Cir 2003).

59 Id at 431, 437.

60 Id at 433.

61 549 US 158 (2007).

62 See id at 164–65; Petition for Writ of Certiorari, *Norfolk Southern Railway Co v Sorrell*, No 05-746, *1 (US filed Dec 7, 2005) (available on Westlaw at 2005 WL 3369162).

63 *Sorrell*, 549 US at 171.

64 Id at 164.

65 Id at 173 (Souter concurring).

of an injury" and left alone the standard of causation already applied by courts.[66]

According to Justice Souter, the standard left alone by *Rogers* was proximate cause.[67] The rationale here was fairly straightforward. Before FELA, Justice Souter argued, "it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately," and the text of FELA does not explicitly abrogate this common law rule.[68] Because FELA expressly abrogated some common law doctrines, Justice Souter argued, courts should continue to apply those like traditional proximate cause that were not abrogated by statute. In fact, Justice Souter argued that Supreme Court precedent *demanded* the assumption that non-abrogated common law doctrines apply in FELA cases.[69]

Justice Souter explained that the confusion post-*Rogers* was based on a lack of clarity.[70] When the *Rogers* Court created the "played any part, even the slightest" test, it failed to concretely explain that the test was applicable only when determining how liability should be apportioned when there is a "multiplicity of causations."[71] While Justice Souter admitted that the *Rogers* opinion could have done a better job expressing this, the fact that *Rogers* relied on case law explicitly requiring proximate cause was sufficient to establish an "absence of any intent [by the *Rogers* Court] to water down the common law requirement of proximate cause."[72]

Justice Ginsburg also concurred in *Sorrell*, disagreeing sharply with Justice Souter about what the standard of causation under FELA actually is. Drawing on two earlier cases, Justice Ginsburg argued that the Supreme Court had already held that *Rogers* established a more relaxed standard of causation in FELA suits.[73] The *Sorrell* majority, Justice Ginsburg wrote, left in place the "played any

66 Id.

67 *Sorrell*, 549 US at 173–74 (Souter concurring).

68 Id.

69 Id at 174. Justice Souter pointed to more than one Supreme Court case establishing this principle whereby courts assume that common law doctrines apply if they are not expressly abrogated by the text of FELA. Id, citing *Norfolk & Western Railway Co v Ayers*, 538 US 135, 145 (2003), *Gottshall*, 512 US at 544, and *Second Employers' Liability Cases*, 233 US 1, 49–50 (1912).

70 *Sorrell*, 549 US at 175 (Souter concurring).

71 Id.

72 Id at 175–76.

73 Id at 177 (Ginsburg concurring), citing *Gottshall*, 512 US at 543 and *Crane v Cedar Rapids & Iowa City Railway Co*, 395 US 164, 166 (1969).

part, even the slightest" test that federal courts had been applying for fifty years.[74]

Interestingly, Justice Ginsburg disclaimed the notion that the relaxed standard under *Rogers* is an elimination of proximate cause.[75] Rather, she argued that proximate cause is *necessarily* a context-dependent formulation and that the *Rogers* standard is simply the appropriate version of proximate cause in the context of FELA suits.[76] In reaching this conclusion, Justice Ginsburg argued that proximate cause is "a judgment, at least in part policy based," and that "strong policy considerations" are behind the causation standard under FELA.[77] Here she recounted the familiar story behind FELA—that it was enacted so that the costs of the dangerous railroad industry would be shared in part by the railroad and not just its employees—and argued that out of this context arose the "far less exacting" standard suggested in *Rogers*.[78] According to Justice Ginsburg, *Rogers* held that "[w]henever a railroad's negligence is the slightest cause of the plaintiff's injury, it is the legal [proximate] cause, for which the railroad is properly held responsible."[79]

II. THE CONSTRAINTS OF COMMON SENSE: THE CAUSATION STANDARD UNDER *MCBRIDE*

Four years after *Sorrell*, the Supreme Court tackled the standard of causation question once and for all. Writing for the majority, Justice Ginsburg adopted the standard she had outlined in her concurrence in *Sorrell*.[80]

A. Fighting over Jury Instructions

McBride was a locomotive engineer who suffered a hand injury, which he claimed was caused by the railroad's negligence in requiring him to use an unsafe hand switch and failing to properly train him to use the equipment.[81]

74 *Sorrell*, 549 US at 177–78.

75 Id at 178.

76 Id ("It would be more accurate, as I see it, to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits.").

77 Id at 178–79.

78 *Sorrell*, 549 US at 179 (Ginsburg concurring).

79 Id at 180 (substituting the term "legal cause" for "proximate cause" in an effort to reduce confusion about what the concept requires).

80 See *McBride*, 131 S Ct at 2636 ("[W]e conclude that [FELA] does not incorporate 'proximate cause' standards developed in nonstatutory common law tort actions.").

81 Id at 2635.

By the time the case reached the Supreme Court, however, the real fight in *McBride* was over jury instructions. The jury instructions given by the district court read, "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."[82]

The railroad, CSX, argued that these jury instructions suggested nothing more than but-for causation was required while in fact the appropriate standard was proximate cause.[83] CSX asked the district court to provide jury instructions requiring "the plaintiff [to] show that . . . the defendant's negligence was a proximate cause of the injury."[84] A second set of instructions "would have defined 'proximate cause' to mean '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.'"[85] McBride, on the other hand, argued that the jury instructions were perfectly consistent with the relaxed standard of causation articulated in *Rogers*. Ultimately, the trial court used McBride's proposed jury instructions on the grounds that they adhered to the relaxed standard of causation under *Rogers* and that traditional proximate causation was not the appropriate standard under FELA.[86]

The crux of CSX's argument was that the jury instruction should incorporate the traditional concept of proximate cause and that, although there are multiple ways that jury instructions can achieve this result, the instructions given in this case required nothing more than a showing of but-for causation. As an example used while arguing before the Supreme Court, CSX suggested the "natural, probable, and foreseeable" instruction.[87]

B. The Relaxed Standard Prevails

The Supreme Court ultimately adopted *Rogers*'s relaxed standard of causation. Writing for the majority, Justice Ginsburg's rationale in *McBride* tracked her concurrence in *Sorrell*, which in turn

82 Id.

83 Brief for Petitioner, *CSX Transportation, Inc v McBride*, No 10-235, *50 (US filed Jan 13, 2011) (available on Westlaw at 2011 WL 141225).

84 *McBride*, 131 S Ct at 2635.

85 Id.

86 Id.

87 Transcript of Oral Argument, *CSX Transportation, Inc v McBride*, No 10-235, *9–10 (US Mar 28, 2011) (available on Westlaw at 2011 WL 1114431).

tracked the analysis that courts had used in applying a relaxed standard of causation after *Rogers*.

In addition to the arguments already discussed, Justice Ginsburg made two claims that are worth reviewing here. First, Justice Ginsburg clarified the role of foreseeability under FELA. Second, Justice Ginsburg argued that "common sense" acts as an implicit constraint to prevent the relaxed standard of causation from collapsing into purely but-for causation. The following Subsections review these points in turn.

1. The *McBride* standard and foreseeability.

In explaining the relaxed standard of causation, the majority in *McBride* also expounded on the role of foreseeability in FELA cases. Drawing on the previous Supreme Court case *Gallick v Baltimore & Ohio Railroad Co*,[88] the *McBride* Court noted that "foreseeability of harm" is still a component of *negligence* under FELA cases, but that when assessing causation, the *manner* and *extent* of harm need not be foreseeable for liability to attach.[89]

In *Gallick*, the railroad allowed a stagnant pool of water to fester and attract bugs. The plaintiff, who was required to work near this pool of water, was bitten by an insect. This led to an infection, which resulted in the amputation of both of his legs. The Court held the railroad negligent and relied on the fact that the harm of an insect bite was a reasonably foreseeable risk of allowing the pool of stagnant water to fester.[90] Because the harm was reasonably foreseeable, the Court did not engage in a discussion as to whether the manner or extent of harm was also foreseeable.

Building on *Gallick*, the Court in *McBride* held that although foreseeability remains a part of a court's negligence analysis under FELA, it should not be used for determining causation. This holding gave pause to the dissent, which feared that eliminating foreseeability means that the *only* causal relationship required is that the negligent act be the but-for cause of the injury.[91] The dissent believed that this created a standard whereby the railroad could be held liable for *any* harm that was caused by the negligent act—creating the potential for limitless liability. This potential problem, as described by the dissent, is examined further below.

88 372 US 108 (1963).

89 *McBride*, 131 S Ct at 2643.

90 *Gallick*, 372 US at 117–19.

91 *McBride*, 131 S Ct at 2645 (Roberts dissenting).

2. The "constraints of common sense" as an implicit limit on liability.

Chief Justice John Roberts, with Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito, dissented, arguing that the rule announced by the Court created a standard that is nothing more than but-for causation.[92] According to the dissent, the terms "even the slightest" and "no matter how small" indicate to a jury "that even the faintest whisper of 'but for' causation will do."[93] As Chief Justice Roberts explained,

> At oral argument, counsel for McBride explained that the correct standard for recovery under FELA is "but-for plus a relaxed form of legal cause." There is no "plus" in the rule the Court announces today. In this very case, defense counsel was free to argue "but for" cause pure and simple to the jury: "What we also have to show is defendant's negligence caused or contributed to [McBride's] injury. It never would have happened *but for* [CSX] giving him that train."[94]

Rejecting the dissent's fear of limitless liability, the *McBride* Court noted that common sense acts as an implicit constraint in FELA cases.[95] According to the majority it is "standard practice in FELA cases" for juries to be instructed to use common sense in determining whether causation exists.[96] By using common sense, "juries would have no warrant to award damages in far out 'but for' scenarios," and "judges would have no warrant to submit such cases to the jury."[97]

The Court pointed to two cases as examples of when common sense should limit liability in a FELA case. *Nicholson v Erie Railroad Co*[98] was decided in 1958 and was one of the first decisions that applied a relaxed standard of causation based on *Rogers*.[99] There, a female employee of the railroad worked in the Jersey Avenue Car Shops, which did not have a women's restroom. Because the shop did not have a women's restroom, the employee was forced to go to the yard and use a restroom on one of the trains. On the day the injury occurred, the employee boarded an empty train to use the

92 Id.
93 Id at 2647.
94 Id (citations omitted).
95 *McBride*, 131 S Ct at 2643 (majority).
96 Id.
97 Id.
98 253 F2d 939 (2d Cir 1958).
99 Id at 940.

restroom. When she finished, the train had started moving and passengers were hopping on and off. Once the train came to a stop, she reached for her purse and pocketbook and "was then struck by something carried by one of the passengers who had previously boarded the train. She fell and was injured."[100]

Before reaching its decision under the *Rogers* standard, the court assumed that failing to provide a women's lavatory could be considered negligent.[101] The court held that "it cannot be denied that . . . failure to supply toilet facilities 'played a part' in producing plaintiff's injury."[102] Despite both of these observations, the court denied causation under the relaxed *Rogers* standard because even under the relaxed standard of causation, "[t]he fault would be too far removed both in space and time from the injury."[103] The Court in *McBride* offered this case as an example of a court keeping the issue from the jury when there was nothing more than but-for causation.[104]

A second case the *McBride* Court relied on was *Moody v Boston and Maine Corp*.[105] In *Moody*, the plaintiff alleged that the railroad's negligent overworking of her husband caused him to have a heart attack.[106] Because the plaintiff's injury resulted from general work-related stress and not the specific negligent act of requiring him to work overtime, the court found a lack of causation under FELA.[107] Justice Ginsburg pointed to *Moody* and noted that "judges [ ] have no warrant to submit such cases to the jury," even under the relaxed standard of causation.[108]

In further support of its common sense constraint, the *McBride* majority noted that neither the dissent nor the defendant were able to uncover a case where the jury reached an absurd result based on the instructions, which allegedly allowed them to find liability based on but-for causation.[109] Given that the jury instructions endorsed by the Court in *McBride* had been used for years, the Court found it unconvincing when the dissent "conjur[ed] up images of falling pianos and spilled coffee" in an attempt to describe the implications of the majority's holding.[110]

100 Id.
101 Id.
102 *Nicholson*, 253 F2d at 941.
103 Id.
104 *McBride*, 131 S Ct at 2643, citing *Nicholson*, 253 F2d at 940–41.
105 921 F2d 1 (1st Cir 1990).
106 Id at 2–3.
107 Id at 5.
108 *McBride*, 131 S Ct at 2643–44, citing *Moody*, 921 F2d at 2–5.
109 *McBride*, 131 S Ct at 2641.
110 Id.

III. AFTER *MCBRIDE*: AMBIGUITIES UNRESOLVED

A. Courts Wrestle with the Relaxed Standard

McBride was decided only recently, so it is unsurprising that only a few courts have discussed and applied its ruling. A few recent cases, however, offer a glimpse into how courts will apply the relaxed standard of causation after *McBride*.

1. *Niederhofer* and the remoteness test.

The court in *Niederhofer v Illinois Central Railroad Co*[111] applied the relaxed standard of causation shortly after *McBride*. This case provides an illustrative example of how a court might apply a "common sense constraint." The plaintiff in *Niederhofer* was operating a repair truck as part of his duties as a "car man" when he collided with a railroad car due to accumulated snow and ice on the ground.[112] The accident itself was a "very minor fender bender," and neither the plaintiff nor the other passenger in the truck was harmed.[113] After the truck came to a complete stop, Niederhofer decided to call his supervisor to tell him about the accident. While on the phone, he exited the truck using its two exterior steps. Normally, the second step is approximately twenty inches from the ground, but because of the angle of the truck after the crash, the step was only approximately eight inches from the ground. Niederhofer was not paying attention when he stepped down and jammed his knee due to the shorter distance. He did not slip on any snow or ice; his injury was solely due to the fact that the second step was closer to the ground than he expected.[114]

The negligence alleged against the railroad was a failure to clear the accumulated snow and ice from the ground. This negligence, according to the court, was "sufficiently disconnected from Niederhofer's injury to relieve the railroad from liability, even under the slight causation standard under FELA."[115]

Analogizing to an earlier case that had applied the relaxed standard, *McDonald v Northeast Illinois Regional*,[116] the *Niederhofer* court defended its finding of insufficient causation: "[T]he defendants' alleged negligence *merely created the preceding situation*—it did

111 2011 Ill App Unpub LEXIS 2644.

112 Id at *2.

113 Id.

114 Id.

115 *Niederhofer*, 2011 Ill App Unpub LEXIS 2644 at *4.

116 249 F Supp 2d 1051 (ND Ill 2003).

not cause the plaintiffs' injuries; intervening actions and forces separate the defendants' negligent acts from the plaintiffs' injuries."[117] The court considered the disconnect between the injury in *Niederhofer* as being analogous to the disconnect in *Nicholson* and held that "the common sense limitation on causation" prevents such cases from moving forward.[118]

In *McDonald*, on which *Niederhofer* relied, the court held that there was no causal connection where an employee twisted his ankle after helping remove a forklift from the snow.[119] The facts of this case are fairly simple: One of the railroad's employees negligently drove a forklift into the snow where it became stuck. The plaintiff assisted in pushing the forklift out of the snow. After the forklift was free, the plaintiff tripped on his apron and twisted his ankle. The plaintiff argued that if not for the fact that the forklift was negligently driven and stuck in the snow, he would not have tripped on his apron. The court denied causation, holding that "[i]t is clear that the improper use of the forklift is irrelevant. . . . Plaintiff's only link to the injury . . . is that the operation of the forklift preceded his injury. This is not a legally recognized concept of causation."[120]

The *Niederhofer* court, and the earlier *McDonald* case it analogized to, applied the relaxed standard of causation using what appears to be the common law doctrine of remoteness. Courts applying the remoteness doctrine employ the same language the *Niederhofer* and *McDonald* courts did when noting that the negligence "merely created the preceding situation" for an injury to occur.[121]

What is left unclear with this analysis is how the court's application of the remoteness doctrine fits with the *McBride* jurisprudence in a way that courts can consistently apply to future cases. Is the test of remoteness the same for traditional proximate cause as it is for the relaxed standard? Is the court here simply saying that remoteness is a component of proximate cause that carries through in the *McBride* formulation? Or did the courts simply use common sense to determine that these cases were too remote to justify liability even under a relaxed version of remoteness? Because these courts applied a familiar proximate cause test, it is difficult to know what made the test

117 *Niederhoffer*, 2011 Ill App Unpub LEXIS 2644 at *4 (emphasis added).

118 Id at *4–5.

119 *McDonald*, 249 F Supp 2d at 1056.

120 Id.

121 See, for example, *Dixon v Kentucky Utilities Co*, 174 SW2d 19, 21 (Ky App 1943) (requiring that the negligence of a defendant needs to do more "than merely furnish the condition or give rise to the occasion by which the injury was made possible"); *Louisville & N. R. Co v Napier*, 3 SW2d 1070, 1071 (Ky App 1928).

relaxed, and how the principle might apply in a future case where the analogy is not quite as strong.

2. *Murphy* and *Page*: "Within the risk" as freestanding negligence.

Two courts have applied the relaxed standard of causation post-*McBride* by drawing on a test developed in the Sixth Circuit. In doing so, both courts noted that the Sixth Circuit had previously developed a "within the risk" approach to applying a relaxed standard under *Rogers*, and that this test remained applicable after *McBride*.

*a) Pre-*McBride*: The* Richards *case.* To reach their decisions after *McBride*, two courts looked at *Richards v Consolidated Rail Corp*, a Sixth Circuit case decided under the relaxed standard of causation before *McBride*.[122] In *Richards*, the plaintiff was a conductor who injured his back while attempting to determine why the train's automatic emergency air braking system had caused the train to unexpectedly stop.[123] To do so, the plaintiff was required to walk alongside the ballast "inspecting for visible causes" of the emergency braking.[124] During his inspection, Richards slipped and hurt his back. After the pain subsided, he finished his inspection and, finding nothing, concluded that the emergency brake was likely caused by a defective control valve (the "kicker").[125]

Under the relaxed standard of causation, the *Richards* court held that a reasonable jury could find that the defective kicker "played *any* part, even the slightest, in bringing about the plaintiff's injury."[126] This meant, according to the court, that "a reasonable jury could find that the plaintiff's injury was *within the risk* created by the defective appliance."[127] In this case, the "risk" created by the defective kicker included the fact that a conductor would have to walk the train, and an injury resulting from doing so is therefore within the risk created by the defective kicker.[128]

Explaining what it means for an injury to be "within the risk" created by the negligence, the court said, "[I]f as a result of [the negligence] a plaintiff is required to take certain actions and he or she is injured while taking those actions, the issue of causation generally

122 *Richards*, 330 F3d at 433.

123 Id at 431.

124 Id (noting that this procedure—referred to as "walking the train"—is part of the conductor's duty).

125 *Richards*, 330 F3d at 431.

126 Id at 437.

127 Id (quotation marks omitted) (emphasis added).

128 Id.

should be submitted to the jury."[129] The key point here is that as long as the conductor was required to go outside, *anything* that happens to him can be traced back to the negligently maintained brakes, and under the Sixth Circuit's "within the risk" analysis, the railroad can be held liable for whatever injury occurs.

b) Applying Richards *after* McBride*.* Two cases after *McBride* looked at *Richards* to understand how to apply the relaxed standard of causation.

Without deciding whether the standard was met, the Eastern District of Tennessee in *Murphy v CSX Transportation, Inc*[130] discussed the relaxed standard of causation applicable in FELA cases.[131] Here the court made two observations: First, the court found that, under *McBride*, a plaintiff does not have to establish that "the extent of the injury or the manner in which it occurred was probable or foreseeable."[132] The court explained that as long as the initial negligence is established, traditional constraints on proximate cause that consider whether the actual injury was foreseeable do not constrain the causal analysis.[133] The second observation the court made is that simple but-for causation is not enough to find a railroad liable. The plaintiff is required to "show *something* more than 'but for' causation."[134] The "something" is determined by applying *McBride's* common sense constraint. The court then noted that the Sixth Circuit in *Richards* created a test under the older *Rogers* relaxed standard that asks "whether the plaintiff's injury was 'within the risk' created by the negligence."[135]

In *Page v National Railroad Passenger Corp*,[136] the court applied the relaxed standard of causation in a case where a police officer employed by Amtrak was injured while removing a baggage cart from a track. Part of Donzel Page's duties included removing obstacles like the baggage cart that obstructed the railroad tracks. On this particular day, a train was attempting to pull onto the track so that passengers could load and unload, but a baggage cart had negligently been left on the track. Because he was in a hurry to clear the baggage cart ahead of the oncoming train, Page jumped off the platform and

129 *Richards*, 330 F3d at 437.

130 2011 WL 3881021 (ED Tenn).

131 See id at *4.

132 Id (quotation marks omitted), quoting *McBride*, 131 S Ct at 2643.

133 *Murphy*, 2011 WL 3881021 at *4 ("Once this freestanding negligence is established, the plaintiff must show that his injury 'result[ed] in whole or in part from the negligence.'").

134 Id.

135 Id, citing *Szekeres v CSX Transportation, Inc*, 617 F3d 424, 429 (6th Cir 2010).

136 28 A3d 60 (Md Ct Spec App 2011).

onto the track rather than using the stairs or the ramp.[137] He landed "a little off balance" and injured his hip.[138]

Page alleged that Amtrak was negligent in its "failure to take reasonable precautions to manage the baggage carts[, which] resulted in a baggage cart lying on a live track, thereby creating an unsafe workplace."[139] He further argued that because his injury occurred "while performing his duty of retrieving the cart from the track, Amtrak's negligence played some role in causing his injuries."[140] Applying the relaxed standard of causation—which the *Page* court referred to as an "unexacting threshold"—the court held that the plaintiff had met his burden of demonstrating that the employer's negligence may have "played any part, even the slightest" in causing the injury.[141]

Although the *Page* court was brief in its comparison to *Richards*, leaving much of the analysis up to the reader, it is easy to see the similarity between the conductor in *Richards* and the police officer in *Page*. Just as the conductor in *Richards* was required as a result of the negligence to venture outside and walk the train, the police officer in *Page* was required as a result of the negligence to hurriedly retrieve the baggage cart from the tracks. Because Page injured himself while taking actions as a result of the defendant's negligence, Page's injury could be considered "within the risk" of such negligence. Under the *Richards* application of the relaxed standard, the railroad's negligence could reasonably be the cause of the injury.

* * *

Reviewing a few post-*McBride* cases demonstrates the divergent and potentially contradictory approaches courts have taken in applying the relaxed standard of causation. *Niederhofer*, the first case reviewed, refused to find causation after the employer's negligence caused a truck to crash and the plaintiff was injured while stepping out of the truck to examine the accident. If the *Niederhofer* court had applied the relaxed standard similarly to *Murphy* and *Page*, though, the case is an easy one to pass on to the jury. Because the plaintiff was required to step out of the truck as a result of the negligence, it

137 Id at 62–63. According to the plaintiff's deposition, he dropped between four and five feet to the tracks. The plaintiff said that his decision to jump off the platform rather than use the ramps or stairs was "because he 'wanted to get the patrons off the train in a timely fashion' to avoid a train delay." Id at 63.

138 Id.

139 Id at 64.

140 *Page*, 28 A3d at 64.

141 Id at 62.

easily falls within the *Richards* concept of "within the risk" that *Murphy* endorsed and *Page* relied on.

The difficulty arises from ambiguity in the *McBride* Court's reference to common sense. The common sense of the *Niederhofer* court led to one line of analysis, whereas the common sense of the *Murphy* and *Page* courts led to another. This Comment presents a first step in developing a more coherent account of the relaxed standard of causation.

B. Fuzziness and Freestanding Negligence: The Problems Post-*McBride*

McBride presents two difficulties for lower courts. The first difficulty is that courts relying solely on "common sense" as the limit on liability apply a standard that appears almost identical to traditional proximate cause. The second difficulty is what the court in *Murphy* deemed "freestanding negligence," or the idea that once negligence has been established, the railroad can be held liable for virtually any resulting harm.

This Comment argues that these problems might be remedied by giving courts clear standards or tests that can be consistently applied by different courts and that are permissible under the *McBride* Court's explanation of the relaxed standard. Before offering one such test that succeeds in permissibly excluding many far-fetched cases, this Section examines more closely the difficulties arising post-*McBride*.

1. Muddying the water between proximate and relaxed causation.

As explained above, the courts in *Niederhofer* and *McDonald* held that the railroads were not liable for the plaintiffs' injuries because their negligence merely created a situation in which an injury might occur. These courts found that the causal chain lacked a certain directness; the negligence was too attenuated from the injury.[142]

The problem with this approach is that it is too difficult to determine where the line between traditional proximate cause and the relaxed standard is. The standard the courts employ in their analyses—that the negligence "merely created the preceding situation" for an injury to occur—derives from common law doctrines of remoteness used in determinations of proximate cause.[143] The court in

142 See text accompanying note 121.

143 See note 121.

Niederhofer appeared to apply this doctrine in a more relaxed way, but the only thing that appears to distinguish a relaxed version of "remoteness" from a traditional version of "remoteness" is common sense—an undefined standard that could easily vary from court to court.

The *McBride* dissent feared that, without a clearer standard than "common sense," courts would have trouble limiting liability.[144] In his dissent, Chief Justice Roberts argued that one of the primary benefits of the evolution of proximate cause as a doctrine is that it provides courts with a certain vocabulary to describe how the boundaries of liability will be drawn.[145] As Chief Justice Roberts wrote,

> Proximate cause supplies the vocabulary for answering such questions. It is useful to ask whether the injury that resulted was within the scope of the risk created by the defendant's negligent act; whether the injury was a natural or probable consequence of the negligence; whether there was a superseding or intervening cause; *whether the negligence was anything more than an antecedent event without which the harm would not have occurred*.[146]

The argument here is simply this: if courts rely *only* on their common sense in deciding when to limit liability, it is likely that they will resort to the familiar language of proximate cause, as the *Niederhofer* and *McDonald* courts demonstrate. When this is the case, it is unclear where the line is between the relaxed standard and more traditional proximate cause. The analysis the *Niederhofer* and *McDonald* courts engaged in is distinctly a common law proximate cause analysis, yet the courts gave little indication as to how their use of the doctrine was significantly different than how it would have been applied under proximate cause.

It might be the case, for instance, that the doctrine of remoteness is particularly well suited for application to the relaxed standard of causation. Or it might be that the courts in *Niederhofer* and *McDonald* were applying a *relaxed version* of remoteness using their common sense to limit liability. Whichever the case might be, what the courts have done here is say that they are relaxing the standard while giving little indication as to how or why their analysis is in fact relaxed.

144 *McBride*, 131 S Ct at 2651 (Roberts dissenting).

145 Id at 2652.

146 Id (emphasis added).

This is the peril of a standard based on common sense rather than a clear set of rules or tests. It is not the case that courts must give up every way of thinking about causation they have used in the past (such as remoteness), but it *is* the case that courts need to be able to articulate how and why use of a test that was traditionally part of proximate cause is justified and applicable under the *McBride* relaxed standard.

2. Runaway train: The problem of freestanding negligence.

"Freestanding negligence" is the idea that once a negligent act is established, the negligent actor can be liable for any resulting harm.[147] In *McBride*, the dissent argued that the language adopted by the majority leads to freestanding negligence, and freestanding negligence leads to limitless liability.[148]

As noted above, the Court in *McBride* affirmed a previous decision holding that, although foreseeability of harm is an element of negligence under FELA, neither the extent nor the manner of the harm must be foreseeable.[149] The dissent argued that such an application of foreseeability leads to limitless liability because as long as a negligent act is the but-for cause of the ultimate injury, the railroad may be held liable.[150]

Applying the relaxed standard of causation has led the Sixth Circuit to the very problem the dissent in *McBride* worried about. The Sixth Circuit held in *Richards* that the relaxed standard of causation is governed by a "within the risk" analysis—a doctrine that traditionally asks whether the injury was within the foreseeable risks that made the act negligent in the first place.[151] Interpreting the *Richards* test in light of *McBride* led the court in *Murphy* to adopt what looks like this limitless concept of freestanding negligence.

According to *Richards*, an injury is "within the risk" of the negligence "if as a result of [the negligence] a plaintiff is required to take certain actions and he or she is injured while taking those actions."[152] In *Richards*, because the conductor was *required* to walk along the

147 The court in *Murphy* used the term "freestanding negligence" to describe the interaction between negligence and causation in FELA cases. The *Murphy* court did not explicitly hold that "any" resulting harm is actionable, and thus, this Comment's use of the term "freestanding negligence" differs slightly from how the *Murphy* court described it. As argued in this Section, though, this definition is the implication of the language used in *Murphy* and *Richards*.

148 *McBride*, 131 S Ct at 2652 (Roberts dissenting).

149 See Part II.B.1. See also *McBride*, 131 S Ct at 2643.

150 *McBride*, 131 S Ct at 2651 (Roberts dissenting).

151 See Abraham, *The Forms and Functions of Tort Law* at 126 (cited in note 5).

152 *Richards*, 330 F3d at 437.

train, *any* accident that occurred while doing so was "within the risk" of the negligence.[153] Notably, this explanation of the "within the risk" doctrine is not consistent with its traditional formulation. Traditionally, the "within the risk" test is a form of foreseeability analysis.[154] The harm is within the risk of the negligence if it is the type of anticipated harm that made the action negligent in the first place.[155] The relaxed standard of causation, however, cannot depend on this sort of foreseeability analysis, and the *Richards* test does not look like a traditional "within the risk" analysis. Rather than asking if it was the type of anticipated harm that made the action negligent in the first place, the *Richards* court simply considered whether the injury occurred while the plaintiff was taking required actions as a result of the negligence.

Suppose that the conductor was not walking up and down dangerous hills but was instead walking across flatland and tripped over his own shoelaces. Is the railroad's negligence the cause of the conductor tripping? Or suppose even more dramatically that while walking the train, an earthquake hits causing the train to topple over. The conductor is injured by flying debris. Did the railroad's negligence cause the injury? According to the Sixth Circuit's "within the risk" analysis, *any* injury resulting while the conductor is walking the train is recoverable.

Common sense would lead many to object to the claim that the railroad's negligence caused these injuries, but the problem of freestanding negligence—as apparently embraced by courts applying the Sixth Circuit's "within the risk" standard—might lead to such a result.

Further complicating the matter is the fact that freestanding negligence appears directly at odds with the applications of the relaxed standard of causation by the *Niederhofer* and *McDonald* courts. If a court applied the *Richards* test, the plaintiff in *Niederhofer* should recover: the railroad's negligence caused the crash, and the plaintiff injured himself while getting out of the truck to inspect his vehicle and report to his boss on the damage. Just as predicted, relying solely on common sense has led these courts to apply inconsistent standards.

The two problems addressed in this Section—which compound into a third problem of inconsistent rulings—can be remedied by articulating clear standards or tests for determining causation that are justified under the *McBride* holding. In the following Part, this

153 See id.

154 See Abraham, *The Forms and Functions of Tort Law* at 126 (cited in note 5).

155 See id.

Comment begins the process of understanding the relaxed standard by offering one such test that is permissible under the jurisprudence of *McBride* and allows courts to exclude a significant amount of far-fetched cases from the jury.

IV. A CAUSAL-LINK APPROACH TO THE RELAXED STANDARD

The court in *Nicholson* commented on the importance of developing a rule for understanding the relaxed standard of causation, just as courts developed rules for understanding traditional proximate cause.[156] This Comment provides a first step toward formulating a coherent understanding of the *McBride* relaxed standard of causation. To achieve that end, this Comment argues that courts should apply the "causal-link analysis" used in common law cases of coincidental harm to exclude a significant number of far-fetched cases from moving to a jury. Using this analysis reaches the same results that Justice Ginsburg articulated in *McBride* but offers something more than "common sense" as the limiter to a causal connection.

Part IV.A argues that the causal-link analysis courts use when considering cases of coincidental harm is a useful way of conceiving of a place between but-for causation and traditional proximate cause. Part IV.B describes how the causal-link analysis fits within the goals of the *McBride* standard because it analytically falls between freestanding negligence and proximate cause. Further, the analysis stays true to the Court's explanation of the role of foreseeability under FELA. Finally, Part IV.C demonstrates that the causal-link analysis reaches the appropriate results in FELA cases by allowing courts to withhold from the jury cases like *Nicholson* and *Moody* while allowing findings of liability in cases like *Gallick* and *Richards*. This Part concludes by showing that the causal-link analysis prevents findings of liability in the more far-fetched hypotheticals posed by the dissent in *McBride*.

A. The Causal-Link Analysis

The *McBride* Court explained that the relaxed standard of causation lies somewhere between what this Comment refers to as freestanding negligence and traditional proximate cause. To better understand this, one should consider tort liability as requiring various thresholds that incrementally limit the scope of liability. At the bottom of the list is but-for causation. A system could be structured so that parties are held liable for any harm that they are the but-for

156 See *Nicholson*, 253 F2d at 941.

cause of, regardless of whether their action is negligent. This would be a system of strict liability. A stricter threshold is the requirement of negligence. Negligence requires courts to assess the duty of a party based on what harms a reasonable person would anticipate.[157] By considering whether an actor was negligent, a court narrows the scope of potentially actionable harms. Rather than just considering whether the actor was a but-for cause of the injury, the court considers whether the actor's *negligence* was the but-for cause of an injury.[158]

Considering only negligence and but-for causation creates what this Comment has referred to as freestanding negligence. Under traditional common law, courts are unwilling to adopt freestanding negligence, and proximate cause exists as a threshold that further narrows the range of injuries for which a party may be held liable.[159]

One type of case where courts have intervened to limit liability based solely on the actor's negligence being the but-for cause of harm is one of coincidental harm. The principle is best illustrated by a case—*Berry v Sugar Notch Borough*.[160] There, a driver was negligently speeding when a tree was blown over by a stormy wind, causing it to fall on his car.[161] The driver sued the borough for negligently allowing the tree to stand in a dangerous condition on the highway, but the borough argued that the driver's negligence in speeding caused the accident and barred recovery. The driver's negligence in this case was indeed a but-for cause: if the driver had been driving the speed limit, his car would not have been at the place where the tree fell at the time it fell. Despite the fact that the driver's negligent speeding was the but-for cause of the accident, the court held that it cannot "be said that the speed was the cause of the accident."[162]

Berry is a classic illustration of the coincidence principle.[163] When assessing the causation element of a tort, courts are unwilling to impose liability when the injury is coincidental.[164] As the court in *Berry* noted, "[t]hat his speed brought him to the place of the accident at the moment of the accident *was the merest chance*, and a thing which

157 See *Gallick*, 372 US at 117; *Palsgraf v Long Island R. Co*, 162 NE 99, 100 (NY 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation.").

158 See Abraham, *The Forms and Functions of Tort Law* at 103 (cited in note 5) (explaining that plaintiffs in tort must prove that the defendant's negligence was the cause of the injury in the suit).

159 Id at 124–25.

160 43 A 240 (Pa 1899).

161 Id.

162 Id.

163 See Richard A. Epstein, *Cases and Materials on Torts* 504 (Aspen 9th ed 2008).

164 See id.

no foresight could have predicted."[165] In other words, the driver's negligent speed had no effect on the chance that the injury would have occurred.[166] Driving *more* negligently would have prevented the injury just as much as driving less negligently, and from an ex ante perspective, the appropriate speed to drive to avoid injury is impossible to predict.[167]

The type of analysis in *Berry* and other coincidental cases has been referred to as the causal-link argument and is one of many tests courts use in making broader decisions about proximate cause.[168] The causal-link analysis says that a person's negligence is not the cause of an injury unless recurrence of the negligence actually increases the chance that harm will occur.[169] In other words, a court applying a causal-link analysis asks whether the risk of the injury that occurred was increased ex ante by the negligent act. *Berry* provides a helpful illustration: the driver in *Berry* could not know ex ante whether his negligently fast driving would increase the chance that a tree would fall on his car, and so the negligence was not the legal cause of the injury.

The causal-link argument is based on a theory of foreseeability but not necessarily the same concept of foreseeability that arises under traditional proximate cause. In *Berry*, the fact that "no foresight could have predicted" the accident made the court hesitant to find a causal link.[170] Commentators couch the argument as whether *recurrence* of the negligence would increase the risk of the same injury.[171] This requires a court to engage in a type of foreseeability analysis but, as will be examined below, leaves open the possibility that the causal link still exists even for highly unforeseeable injuries.

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165 *Berry*, 43 A at 240 (emphasis added).

166 See Epstein, *Cases and Materials on Torts* at 503 (cited in note 163) (emphasis added).

167 See *Berry*, 43 A at 240 ("The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety.").

168 See, for example, Ariel Porat, *Expanding Liability for Negligence Per Se*, 44 Wake Forest L Rev 979, 987 (2009) (noting that a causal-link requirement restricts liability more than but-for causation does by itself); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U Chi L Rev 69, 71 (1975) (arguing that a "causal link" exists when "recurrence of that act or activity will increase the chances that the injury will also occur"). See also Epstein, *Torts* § 10.7 at 260–62 (cited in note 16) (explaining how courts approach coincidental harm in making proximate cause determinations).

169 See Porat, *Expanding Liability* at 987–88 (cited in note 168); Calabresi, 43 U Chi L Rev at 71 (cited in note 168).

170 *Berry*, 43 A at 240.

171 See, for example, Porat, 44 Wake Forest L Rev at 987 (cited in note 168); Calabresi, 43 U Chi L Rev at 71 (cited in note 168).

B. How the Causal-Link Analysis Aligns with *McBride*

In *McBride*, the Court suggested that between but-for causation and traditional proximate cause lies a realm of relaxed causation: FELA proximate cause.[172] This Section argues that causal-link analysis fits within that realm and matches the understanding of foreseeability in FELA cases articulated by *McBride*.

1. The causal-link analysis is one missing piece between freestanding negligence and proximate cause.

Applying the *Rogers* standard, the *McBride* Court held that between the threshold of freestanding negligence and proximate cause there is a relaxed standard of causation. The relaxed standard of causation is *something more* than merely showing that a party's negligence was the but-for cause of an injury but something less than the more stringent standards of traditional proximate cause.[173] On the lower end of the spectrum, cases like *Nicholson* ("the bathroom case") and *Moody* ("the heart attack case") exemplify instances where a defendant's negligence meets the lower threshold of freestanding negligence but does not meet the requirements for the relaxed standard of causation. *Gallick* ("the insect bite case") and *Richards* ("the brakes case"), on the other hand, demonstrate how the relaxed standard of causation allows for liability where proximate cause would not. There are two standards, then, to measure the strength of the causal-link analysis as a way to apply the relaxed standard. First, the causal-link analysis cannot bar cases like *Gallick* and *Richards*, which the Court has indicated should proceed to a jury. Second, the argument for using the causal-link analysis is strengthened if it also explains why cases like *Nicholson* and *Moody* should not move to a jury.

The causal-link analysis analytically falls *between* traditional proximate cause and freestanding negligence—exactly how the *McBride* Court explained that courts should conceive of the relaxed standard of causation. When courts find a lack of a causal link, they acknowledge that the actor's negligence was the but-for cause of the injury[174] but need not consider inquiries more related to traditional

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172 See *McBride*, 131 S Ct at 2641.

173 Id at 2643.

174 See Porat, 44 Wake Forest L Rev at 987 (cited in note 168) (noting that "the fact that the wrongdoing in question was a 'but-for' cause of the harm that actually materialized is not sufficient to establish a causal relationship between the act and the harm").

proximate cause, such as whether the injury was the foreseeable result from the negligence.[175]

Further, the causal-link analysis does not implicate the components of traditional proximate cause that the *McBride* majority most firmly rejected: causal foreseeability.[176] The jury instructions that CSX pushed for and *McBride* rejected focused on the traditional aspects of proximate cause requiring a jury to assess the directness and foreseeability of the harm.[177] Although the causal-link analysis is a *component* of traditional proximate cause, it is analytically distinct from the more prominent doctrines that *McBride* rejected. Given that the Court in *McBride* held that the relaxed standard *is* a form of proximate cause, the question is not whether the causal-link analysis is something separate from proximate cause entirely, but rather whether it conforms with the requirements of the relaxed standard set forth in *McBride*. This Section and the following Section demonstrate that it does.

2. The causal-link analysis matches *McBride*'s understanding of foreseeability under FELA.

After establishing that the causal-link analysis analytically fits within the relaxed standard of causation, the second question is whether applying the causal-link analysis maps onto the *McBride* explanation of foreseeability. In *McBride*, the Court held that foreseeability of harm remains a part of the negligence inquiry but that in determining questions of causation, courts should not bar recovery for injuries that occur in an unforeseeable manner or to an unforeseeable extent.

A negligent act will increase the risk of a certain class of harms occurring. For instance, suppose a person negligently causes a car to run off the road. After the accident, a passenger in the car walks up the road to warn oncoming traffic and is struck by a car and injured. Although the *manner* in which this harm occurred might be considered

175 See Epstein, *Torts* §§ 10.7, 10.9, 10.12 at 260–62, 263–64, 269–72 (cited in note 16) (describing the causal-link analysis in cases of coincidental harm as a separate inquiry from other traditional components of proximate cause such as "directness and foresight" and "foreseeability"). One scholar has gone so far as to argue that the causal-link analysis is an analytically separate question from proximate cause. See Calabresi, 43 U Chi L Rev at 71–72 (cited in note 168) (describing causal-link analysis as based on whether an act increases the likelihood of a particular injury will occur and describing proximate cause as a conclusion that the tort system should allow recovery).

176 For elaboration on this point, see Part II.B.1.

177 See Part II.

unforeseeable, a court could reasonably determine that the negligent driving increased the risk that it would happen.[178]

This example perfectly captures how the causal-link analysis conforms to the *McBride* explanation of foreseeability under FELA. *Marshall v Nugent*,[179] from which these facts derive, has been cited as an example of the causal-link analysis in action.[180] Despite the fact that the accident might have happened in an unforeseeable *manner*, the injury was still of the type made riskier by the negligent act, so it fell within the scope of liability created by the causal-link analysis. This demonstrates how the causal-link analysis in practice stays true to the *McBride* requirement that the relaxed standard of causation need not consider whether the manner of harm was foreseeable. If this case arose under FELA, a court should find that because the risk of the injury occurring was increased by the negligence, the defendant could be held liable under the relaxed standard of causation.

Courts need not look beyond FELA for an example of what the *McBride* Court meant when it held that the *extent* of harm need not be foreseeable. In *Gallick*, the plaintiff was bitten by an insect and ultimately had both of his legs amputated. Here, the extent of harm was highly unforeseeable—it is not likely that an insect bite would result in amputation—but the Court still found that the railroad could be held liable under the relaxed standard of causation.[181] Using the causal-link analysis, it is clear that the employees are at an increased risk of being bitten by an infected insect when asked to work near pools of stagnant water that were allowed to attract vermin for years. Thus, the act increased the risk of the injury that occurred, and the railroad might be held liable under the causal-link analysis *regardless* of how unforeseeable the extent of the injury was. In this way, the causal-link analysis allows a case like *Gallick* to proceed to the jury, consistent with *McBride*'s explanation of the role of foreseeability under the relaxed standard.

C. The Causal-Link Analysis Reaches Common Sense Results

This Section demonstrates how the causal-link analysis will reach common sense results in FELA cases by applying it to the cases previously discussed. It then reviews the more absurd hypothetical cases proposed by the dissent in *McBride*, showing how the causal-link

178 See Abraham, *The Forms and Functions of Tort Law* at 139–40 (cited in note 5). The hypothetical posed is taken from *Marshall v Nugent*, 222 F2d 604, 607–08 (1st Cir 1955).

179 222 F2d 604 (1st Cir 1955).

180 See Epstein, *Torts* § 10.7 at 261 (cited in note 16).

181 *Gallick*, 372 US at 120.

analysis gives courts articulable reasons for denying liability in cases of attenuated causation. Finally, this Comment ends by exploring if, and when, a court might find a railroad liable when lightning strikes. By going through these various cases and hypotheticals, the goal is to demonstrate how the causal-link analysis is a useful tool for courts to use to exclude at least one class of far-fetched cases from moving to a jury while still permitting many of the cases to go forward that *McBride* suggests should be captured.

1. Causal-link analysis is consistent with the Supreme Court's FELA jurisprudence.

a) The causal-link analysis reaches the results McBride *requires.* The *Nicholson* case was offered by the *McBride* Court as an exemplar of a case not meeting the relaxed standard of causation.[182] In *Nicholson*, the court found that negligently failing to provide a women's restroom was not the cause of the plaintiff being knocked over by a passenger's luggage.[183] How would a causal-link analysis apply in this case?

Failing to provide a women's restroom does not increase the risk of being knocked over by a passenger's luggage. When the railroad failed to provide a women's restroom, it increased the chance of some injuries occurring, such as an injury from having to refrain from using the restroom for an excessively long period of time because no restroom is available nearby. But failing to provide a restroom does *not* increase the risk that someone will be injured from being knocked over by bumping into someone.

In fact—just as in *Berry*—remedying the negligence could have resulted in *increasing* the risk of the injury that ultimately occurred. Suppose the railroad provided a women's restroom closer to the shop but in a more crowded area. The railroad would have remedied its negligence but actually increased the risk that a woman might get knocked down and injured.

The corollary to this point, also made in *Berry*, is that it is possible that being even more negligent with respect to not providing a women's restroom would not increase the risk at all—and would perhaps decrease it. Suppose that in addition to not providing a women's restroom at the store, the railroad did not permit its employees to use any of the train car restrooms, and women had to travel back home to use the restroom. The likelihood of being

182 *McBride*, 131 S Ct at 2643.

183 *Nicholson*, 253 F2d at 941.

knocked over by a passenger's luggage is significantly less likely in the comfort of your own home, but the negligence of the railroad in failing to provide a women's restroom has been made worse. This is comparable to *Berry*, which noted that because driving *more* negligently would decrease the chance of the tree falling on the car to the same extent that driving less negligently would,[184] there is no risk-increasing relationship between what made the conduct negligent and the ultimate harm that occurred.

The second case *McBride* pointed to as an exemplary representation of the relaxed standard of causation, *Moody*, is an even more compelling example of why courts should use the causal-link analysis. In *Moody*, the court denied causation under the *Rogers* test because the plaintiff failed to allege that his heart attack was the result of a specific act of negligence rather than the "everyday experience" associated with "the severe stress of work."[185] The plaintiff worked overtime on several occasions, but twelve days lapsed between his last overtime shift and his heart attack. Also problematic was the fact that the plaintiff's expert never argued that the specific effects of overtime work caused the heart attack—instead arguing more generally that the stressful work environment was the cause.[186] In other words, according to the plaintiff's own expert the railroad's negligence—working the plaintiff overtime—did not increase the risk that this heart attack would occur twelve days later.

Consider *Moody* in this way: Working as a conductor comes with a set of background risks that exist even if the railroad creates a safe work environment. Those background risks include the risk of a stress-induced heart attack. The railroad was negligent in requiring Moody to work overtime, but Moody did not argue that the negligence created any more risk of a heart attack than otherwise exists due to the general stress associated with being a conductor. That is, given that twelve days lapsed between working overtime and the actual heart attack, the negligent overworking of Moody did not make having a heart attack *any more likely* relative to the background risks already present when the railroad is not negligent.

Certainly it is conceivable that working someone overtime could increase the risk of a heart attack. In this case, though, the heart attack occurred twelve days later, when the risks created by that *specific* act

184 *Berry*, 43 A at 240 ("[I]t might have been that a high speed alone would have carried him beyond the tree to a place of safety.").

185 *Moody*, 921 F2d at 5 (ruling that the plaintiff did not allege a particular event that jurors could have causally connected to the injury "as a matter of everyday experience").

186 Id.

of negligence had subsided,[187] and the plaintiff's own expert admitted as much by arguing that general work stress rather than the specific negligence was the cause. Under the causal-link analysis, the fact that the railroad's negligence did not make having a heart attack any riskier than it otherwise would be should lead a court to deny causation.

To further illustrate this point, *Moody* may be compared with another case where the causal-link analysis finds liability. In *Hines v Garrett*,[188] a railroad negligently dropped the plaintiff off at the wrong stop, and she was raped twice while waking through the woods to her intended destination. In this case, the railroad's negligence increased the risk of her being raped because it put her in a much more dangerous situation than if she had been dropped off close to her hotel. Suppose, though, that the plaintiff had not been raped and reached her hotel safely. The excess risk created by the railroad's negligence would subside, and if she was raped while staying in the hotel the railroad would not be held liable. Similarly, working the plaintiff overtime in *Moody* created excess risk that a heart attack would occur, but that excess risk subsided when the plaintiff was able to rest without working overtime for twelve days. Once the excess risk dissipates, the background risks return to neutral just as the case would have been had the plaintiff in *Hines* made it safely to the hotel.

*b) The causal-link analysis is a useful tool for the post-*McBride *courts in applying the relaxed standard.* The causal-link analysis resolves some problems courts have had in applying the relaxed standard of causation after *McBride*. The *Niederhofer* and *McDonald* courts held that the causation element was lacking because the negligence of the railroad merely created the circumstances for an accident to occur. As argued above, this analysis was difficult to square with *Richards*, where the court held that because the plaintiff was duty-bound to walk alongside the train as a result of the railroad's negligence, *any* resulting injury incurred while performing his duty was actionable. The causal-link analysis provides courts with a method of analyzing these cases that is consistent with the holding of *McBride* and does not lead to contradictory results.

Remember that in *McDonald* the plaintiff slipped on the ground after helping to push a forklift that was stuck in the snow and ice, and in *Niederhofer* the plaintiff jammed his knee after stepping out

187 The causal-link analysis presumes that when risks are increased, they will eventually subside and the background risks resume. See Epstein, *Torts* § 10.7 at 261 (cited in note 16) (comparing harms a defendant may be liable for when the "dangerous situation" still exists with harms that occur after the risks have subsided).

188 108 SE 690 (Va 1921).

of a truck that had crashed due to snow and ice. Under the causal-link analysis, the risk of the ultimate injury was not increased in *Niederhofer* or *McDonald*, but it was in *Richards*.

The plaintiff in *McDonald* would not have been walking away from the forklift if not for the negligence of the railroad, but because the plaintiff did not slip on any snow or ice, the negligence of the railroad did not increase the risk of him slipping. That is, there was nothing inherently riskier about walking where the plaintiff was when he fell than at any other time or place he might have been walking—it was *just as likely* that the plaintiff would trip over his apron regardless of whether the snow had caused the forklift to crash.[189] Further, even if the railroad had been *more* negligent and let snow and ice accumulate for days, the likelihood of the injury would not have been increased.

Similarly, the plaintiff in *Niederhofer* did not face an increased risk from stepping out of his truck because of the accident. This case is not as clear-cut as *McDonald*, where the relationship between slipping on one's apron is easily divorced from the snow and ice on the ground. It is arguable that the snow did increase the risk of injury by making the crash itself more likely, which in turn led to the plaintiff stepping out of his car and hurting his knee.

The stronger argument, though, is that stepping out of one's truck an additional time under non-risky conditions[190] should not be said to have increased the risk of injury relative to the background risks of this type of employment. An employee who drives trucks likely steps in and out of his truck many times a day—a number of times that likely varies from day to day. A realistic background risk associated with this job, then, is that you will enter and exit the truck under conditions that have a certain degree of safety but not that you will get in and out of your truck a specific number of times. Another way to say this is that under non-negligent working conditions, a truck driver's job contains the background risks of getting in and out of his truck a variable number of times depending on the day's tasks. Having to get out of the truck one more time does not increase the risk associated with the employee's job generally, so long as the act of getting in and out of the truck is not made riskier.

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189 It should be noted that nothing in the facts of this case suggests the negligence made it more likely that the plaintiff would trip on his apron—for instance, by making his apron come untied.

190 By "non-risky conditions" it is meant that there was nothing riskier about the activity of stepping out of the truck than otherwise would exist. A risky condition, for instance, might be if the snow had made the step slippery or the crash had damaged one of the steps, making it harder to walk on.

It is easy to imagine a situation where the crash *did* make getting into and out of the truck riskier. Suppose that the crash caused a safety rail or step to be damaged, making it harder to use. Or suppose that the crash happened in an area where there was loose gravel that was hard to land on safely rather than sturdy cement on which the truck would normally park. In these situations, the crash undoubtedly made getting in and out of the truck a riskier enterprise, and thus the background risks the truck driver typically faced were increased.

One counterargument might be to say that the railroad in *Niederhofer* did increase the risk because, when the distance of the step was changed from twenty to eight inches, the risk of injury was increased because the changed condition is what caused the employee to misjudge the distance to the ground and jam his knee. It is not clear, though, that just because the condition changed it was riskier. Arguably, the fact that the truck's step was only eight inches—rather than twenty—from the ground made stepping off the truck *less* risky.

Whichever way a court decides this issue, though, the causal-link analysis is a significant tool because it gives a court a *method* to make the decision that is understandable to parties who need to modify their behavior to conform to the law. Rather than relying solely on a common sense judgment that might differ from court to court, the causal-link analysis gives courts one method of analyzing the issue consistently from one case to another.

In *Richards* the plaintiff's risk of injury was increased by the negligence. If the brakes had not been negligently maintained, the plaintiff would have never had to walk the rough terrain to search for the problem. Unlike in *McDonald* and *Niederhofer*, where the injuries resulted from risks that existed regardless of the railroad's negligence, the risks that caused the injury *only* arose because of the negligence—without the negligence, the plaintiff would have stayed in the train and never have ventured outside. The negligent maintenance of the brakes caused it to stop, which required the conductor to walk alongside the train in potentially hazard-ridden terrain, which increased risks of injury relative to non-negligent maintenance of the brakes. Even if the accident were *highly* unlikely, the risk of the accident occurring was increased relative to the circumstances if the railroad had not been negligent because the conductor would have never been exposed to the rough, outside terrain.[191]

[191] It is worth noting that the analysis here, and in discussing the other cases, is constrained by the limited facts available. In litigating the *Richards* case, for instance, one might argue that the excess risk created by the negligence was neutralized by the risks the conductor

Distinguishing *Richards* from *Niederhofer* is useful for understanding how a court should use the causal-link analysis in these cases. *Niederhofer* found that there was no increased risk despite the fact that the injury occurred only because the plaintiff was required to step out of the truck after the accident occurred. In *Richards*, however, the court found that when the conductor was required to walk his train the negligence did increase the risk. The key distinction here is that the act of getting in and out of the truck in *Niederhofer* was no riskier because the plaintiff did it after the accident than it would have been in any of the other circumstances where getting in and out of a truck is an activity contained within the background level of risks. The conductor, on the other hand, was exposed to an entire class of risks by being forced to walk alongside the train in a rough, unknown terrain, and his injury was the result of one of those risks. If Niederhofer had to exit his truck on a terrain where his risk of injury was increased beyond the background risks (ignored by the law) associated with getting in and out of an otherwise safe truck, it would be more like *Richards*, and a court should send it to the jury.

2. Revisiting the hot coffee hypothetical.

Returning to the hypothetical posed by the dissent in *McBride* is a useful way to explore why the fears of unlimited liability can be curbed in a way that still significantly relaxes traditional proximate cause. The dissent's hypothetical is as follows: Suppose a railroad mechanic is required to repair a boiler that was malfunctioning due to the railroad's negligence and, because of excessive heat, removes his coat while he is working. The mechanic later goes to drink some coffee from his thermos but spills it on his arm causing a severe burn. If the mechanic had not removed his coat to fix the boiler, the coffee would have been absorbed by his sleeve rather than his arm. Is the railroad liable for his injury, which resulted from its negligent maintenance of the boiler?[192]

Applying the causal-link analysis to this case, the court could find that the railroad's negligence was not the cause of the injury. The negligent maintenance of the boiler did not result in an increased risk that a maintenance worker would spill coffee on himself and burn his arm.

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otherwise avoided. Such would be the case if walking up and down the hills were no more risky than walking through the narrow corridors on the train. Without more facts, it is a reasonable assumption that climbing up and down hills poses risks that would not be neutralized by a conductor otherwise sitting in a train.

192 See *McBride*, 131 S Ct at 2652 (Roberts dissenting).

It might be argued that the risk of burning oneself with hot coffee is higher when wearing short sleeves as opposed to a coat, and therefore the risk of injury was increased by the overheating boiler. While it is true that one is more likely to be burned when coffee is spilled on bare arms rather than covered arms, such an argument is a misapplication of the causal-link analysis.

Consider the hypothetical in the following way. The overheating boiler increases the probability that the repairman will remove his coat. At the same time, however, the overheating boiler *decreases* the probability that the repairman will drink a hot cup of coffee capable of burning him when spilled. After all, if the excess heat is actually causing the repairman to overheat to the extent that he would remove his coat, it becomes much less likely that he would drink something that hot at all. What this means is that although the chance of being burned was increased *if* the repairman decides to drink coffee, that excess risk would be neutralized by the simultaneous decrease in the chance that the repairman would drink coffee at all. The risk of actually spilling the coffee is neither increased nor decreased, but the risk of being burned when the boiler overheats is balanced by the decreased likelihood that an overheated repairman would drink something so hot.

The hypothetical can be further enhanced to demonstrate how upon knowing more facts about the case the causal-link analysis might come out differently. Suppose the railroad requires its repairmen to wear long coats for protection from injury, and the overheating boiler made it dangerous not to keep the coat on. It might be argued that because the repairman had to remove his coat while repairing the boiler, the railroad can be held liable, at least in part, for harms against which the coat is normally designed to protect. This is because the background risks are firmly established for this employee as not including harms that the safety coat would protect him from. If, on the other hand, the employee works in a variety of locations and sometimes wears a coat but sometimes does not due to personal preference about temperature, the case is harder to make. The background risks associated with his job do not necessarily exclude something like hot coffee spilling and burning him. Another way the facts might be changed is by inquiring whether the railroad is aware that its repairmen drink coffee on the job—perhaps it might even supply it.

All of these changes in the hypothetical illustrate how knowing what the background risks associated with the employee's job duties are would affect a court's determination of whether the risk was

actually increased—and thus whether the causal-link analysis would find liability. The fact that hard cases exist—cases that really press on the idea of whether or not risk was actually increased—is no trouble. This Comment seeks to give courts one tool they can use to coherently analyze the causation question, but it does not purport to solve every difficult case that might arise under a myriad of factual nuances.

In other words, the causal-link analysis is one method courts might use to sever liability. Knowing this, parties can present coherent arguments for their case, and courts can systematically consider, in a consistent fashion, which cases ought to be dismissed under the causal-link analysis. Some cases that go on to a jury might seem farfetched to those used to the more constrained limits of traditional proximate cause, but the causal-link analysis provides a coherent method to exclude at least one class of cases from moving forward in a manner consistent with the more relaxed standard of *McBride*.

3. *Richards* redux: Are railroads liable when lightning strikes?

Dramatically asked, and perhaps timidly answered: Are railroads liable when lightning strikes? The answer suggested by this Comment is maybe. Consider a variation on *Richards* to understand why this is the case.

If the plaintiff in *Richards* had been struck by lightning rather than injuring his back, the causal-link analysis would allow for liability. The negligence of the railroad would have forced the plaintiff to walk the train, introducing him to a class of risks associated with working outside, which he would not otherwise have been exposed to. Even though a lightning strike is a highly unforeseeable manner in which the risk manifested itself, the *McBride* standard—supported in the causal-link analysis—does not limit liability based on an unforeseeable *manner* of injury. The fact that being struck by lightning is an injury only possible if the plaintiff is outside walking, rather than comfortably riding in the train, means that the railroad's negligence increased the risk of the accident occurring.

But lightning strikes might not always be recoverable harm. Imagine the plaintiff in *Richards* is more like the plaintiff in *Page*, and it is the job of the plaintiff to gather baggage carts left around the work area. This is a job that requires working outside, which means the plaintiff is exposed to the risk of being struck by lightning every day, *regardless of whether* the railroad is negligent. Suppose a railroad negligently leaves a baggage cart on the track, just as was done in *Page*, and the plaintiff is struck by lightning while retrieving it. In this

case, the negligence did not increase ex ante the risk of being struck by lightning—it was just as likely that the plaintiff would have been struck by lightning while gathering a non-negligently placed cart from a different location. Further, if the railroad had been even more negligent, leaving the cart in a more dangerous location, the plaintiff would not have been in the same spot to be struck by lightning. In this case, there would be no liability because the risk of being struck by lightning would not be increased by the railroad's negligence.

A counterargument here might be that by leaving the cart on the track, the railroad increased the time the employee would be outside, thus raising the risk of being struck by lightning. It seems unlikely, though, that an employee whose job requires working outside for varying lengths of time faces an increased risk of injury because an employer negligently left a cart on the track. Consider the problem this way: If the employee had left the cart outside but not negligently on the track, the plaintiff would be exposed to the same risks. There is nothing about the negligence itself that created an increased risk because the plaintiff worked outside regardless of whether the employer was or was not negligent.

CONCLUSION

The causal-link analysis is a test courts can use to exclude at least one class of cases that should not move forward under the relaxed standard. Analytically, this test fits comfortably between the two extremes of requiring nothing more than but-for causation and the traditional wealth of constraints present in proximate cause analysis. It allows courts to sever liability not based on foreseeability—as *McBride* instructed—but it does not exclude any cases the Court has indicated should be included. At the very worst, the causal-link analysis might not be strict enough, but it presents courts with the ability to exclude many far-fetched cases in a consistent and coherent manner.