

Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 10-236

CSX TRANSPORTATION, INC., PETITIONER *v.*
ROBERT MCBRIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[June 23, 2011]

JUSTICE GINSBURG delivered the opinion of the Court,
except as to Part III-A.*

This case concerns the standard of causation applicable in cases arising under the Federal Employers' Liability Act (FELA), 45 U. S. C. §51 *et seq.* FELA renders railroads liable for employees' injuries or deaths "resulting in whole or in part from [carrier] negligence." §51. In accord with the text and purpose of the Act, this Court's decision in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), and the uniform view of federal appellate courts, we conclude that the Act does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

I

Respondent Robert McBride worked as a locomotive

*JUSTICE THOMAS joins all but Part III-A of this opinion.

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engineer for petitioner CSX Transportation, Inc., which operates an interstate system of railroads. On April 12, 2004, CSX assigned McBride to assist on a local run between Evansville, Indiana, and Mount Vernon, Illinois. The run involved frequent starts and stops to add and remove individual rail cars, a process known as "switching." The train McBride was to operate had an unusual engine configuration: two "wide-body" engines followed by three smaller conventional cabs. McBride protested that the configuration was unsafe, because switching with heavy, wide-body engines required constant use of a hand-operated independent brake. But he was told to take the train as is. About ten hours into the run, McBride injured his hand while using the independent brake. Despite two surgeries and extensive physical therapy, he never regained full use of the hand.

Seeking compensation for his injury, McBride commenced a FELA action against CSX in the U. S. District Court for the Southern District of Illinois. He alleged that CSX was twice negligent: First, the railroad required him to use equipment unsafe for switching; second, CSX failed to train him to operate that equipment. App. 24a-26a. A verdict for McBride would be in order, the District Court instructed, if the jury found that CSX "was negligent" and that the "negligence caused or contributed to" McBride's injury. *Id.*, at 23a.

CSX sought additional charges that the court declined to give. One of the rejected instructions would have required "the plaintiff [to] show that . . . the defendant's negligence was a proximate cause of the injury." *Id.*, at 34a. Another 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." *Id.*, at 32a.

Instead, the District Court employed, as McBride re-

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quested, the Seventh Circuit's pattern instruction for FELA cases, which reads:

"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." *Id.*, at 31a.

For this instruction, the Seventh Circuit relied upon this Court's decision in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957). The jury returned a verdict for McBride, setting total damages at \$275,000, but reducing that amount by one-third, the percentage the jury attributed to plaintiff's negligence. App. 29a.

CSX appealed to the Seventh Circuit, renewing its objection to the failure to instruct on "proximate cause." Before the appellate court, CSX "maintain[ed] that the correct definition of proximate causation is a 'direct relation between the injury asserted and the injurious conduct alleged.'" 598 F.3d 388, 393, n. 3 (2010) (quoting *Holmes v. Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992)). A properly instructed jury, CSX contended, might have found that the chain of causation was too indirect, or that the engine configuration was unsafe because of its propensity to cause crashes during switching, not because of any risk to an engineer's hands. Brief for Defendant-Appellant in No. 08-3557 (CA7), pp. 49-52.

The Court of Appeals approved the District Court's instruction and affirmed the judgment entered on the jury's verdict. *Rogers* had "relaxed the proximate cause requirement" in FELA cases, the Seventh Circuit concluded, a view of *Rogers* "echoed by every other court of appeals." 598 F.3d, at 399. While acknowledging that a handful of state courts "still appl[ied] traditional formulations of proximate cause in FELA cases," *id.*, at 404, n. 7, the Seventh Circuit said it could hardly declare erroneous

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an instruction that "simply paraphrase[d] the Supreme Court's own words in *Rogers*," *id.*, at 406.

We granted certiorari to decide whether the causation instruction endorsed by the Seventh Circuit is proper in FELA cases. 562 U. S. ____ (2010). That instruction does not include the term "proximate cause," but does tell the jury defendant's negligence must "pla[y] a part—no matter how small—in bringing about the [plaintiff's] injury." App. 31a.

II

A

The railroad business was exceptionally hazardous at the dawn of the twentieth century. As we have recounted, "the physical dangers of railroading . . . resulted in the death or maiming of thousands of workers every year," *Consolidated Rail Corporation v. Gottshall*, 512 U. S. 532, 542 (1994), including 281,645 casualties in the year 1908 alone, S. Rep. No. 61-432, p. 2 (1910). Enacted that same year in an effort to "shif[t] part of the human overhead of doing business from employees to their employers," *Gottshall*, 512 U. S., at 542 (internal quotation marks omitted), FELA prescribes:

"Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier" 45 U. S. C. §51 (emphasis added).

Liability under FELA is limited in these key respects: Railroads are liable only to their employees, and only for injuries sustained in the course of employment. FELA's language on causation, however, "is as broad as could be framed." *Urie v. Thompson*, 337 U. S. 163, 181 (1949). Given the breadth of the phrase "resulting in whole or in

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part from the [railroad's] negligence," and Congress' "humanitarian" and "remedial goal[s]," we have recognized that, in comparison to tort litigation at common law, "a relaxed standard of causation applies under FELA." *Gottshall*, 512 U. S., at 542–543. In our 1957 decision in *Rogers*, we described that relaxed standard as follows:

"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." 352 U. S., at 506.

As the Seventh Circuit emphasized, the instruction the District Court gave in this case, permitting a verdict for McBride if "[railroad] negligence played a part—no matter how small—in bringing about the injury," tracked the language of *Rogers*. If *Rogers* prescribes the definition of causation applicable under FELA, that instruction was plainly proper. See *Patterson v. McLean Credit Union*, 491 U. S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation . . ."). While CSX does not ask us to disturb *Rogers*, the railroad contends that lower courts have overread that opinion. In CSX's view, shared by the dissent, *post*, at 9–10, *Rogers* was a narrowly focused decision that did not touch, concern, much less displace common-law formulations of "proximate cause."

Understanding this argument requires some background. The term "proximate cause" is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* §42, p. 273 (5th ed. 1984) (hereinafter *Prosser and Keeton*). "What we . . . mean by the word 'proximate,'" one noted jurist has explained, is simply this: "[B]ecause of convenience, of public policy, of a rough sense of justice,

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the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 352, 162 N. E. 99, 103 (1928) (Andrews, J., dissenting). Common-law "proximate cause" formulations varied, and were often both constricted and difficult to comprehend. See T. Cooley, *Law of Torts* 73-77, 812-813 (2d ed. 1888) (describing, for example, prescriptions precluding recovery in the event of any "intervening" cause or any contributory negligence). Some courts cut off liability if a "proximate cause" was not the sole proximate cause. Prosser and Keeton §65, p. 452 (noting "tendency . . . to look for some single, principal, dominant, 'proximate' cause of every injury"). Many used definitions resembling those CSX proposed to the District Court or urged in the Court of Appeals. See *supra*, at 2-3 (CSX proposed key words "natural or probable" or "direct" to describe required relationship between injury and alleged negligent conduct); Prosser and Keeton §43, pp. 282-283.

Drawing largely on Justice Souter's concurring opinion in *Norfolk Southern R. Co. v. Sorrell*, 549 U. S. 158, 173 (2007), CSX contends that the *Rogers* "any part" test displaced only common-law restrictions on recovery for injuries involving contributory negligence or other "multiple causes." Brief for Petitioner 35 (internal quotation marks omitted).¹ *Rogers* "did not address the requisite directness of a cause," CSX argues, hence that question continues to be governed by restrictive common-law formulations. *Ibid.*

B

To evaluate CSX's argument, we turn first to the facts of *Rogers*. The employee in that case was injured while burning off weeds and vegetation that lined the defen-

¹In *Sorrell*, the Court held that the causation standard was the same for railroad negligence and employee contributory negligence, but said nothing about what that standard should be. 549 U. S., at 164-165.

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dant's railroad tracks. A passing train had fanned the flames, which spread from the vegetation to the top of a culvert where the employee was standing. Attempting to escape, the employee slipped and fell on the sloping gravel covering the culvert, sustaining serious injuries. 352 U. S., at 501–503. A Missouri state-court jury returned a verdict for the employee, but the Missouri Supreme Court reversed. Even if the railroad had been negligent in failing to maintain a flat surface, the court reasoned, the employee was at fault because of his lack of attention to the spreading fire. *Rogers v. Thompson*, 284 S. W. 2d 467, 472 (Mo. 1955). As the fire “was something extraordinary, unrelated to, and disconnected from the incline of the gravel,” the court felt “obliged to say [that] plaintiff's injury was not the natural and probable consequence of any negligence of defendant.” *Ibid.*

We held that the jury's verdict should not have been upset. Describing two potential readings of the Missouri Supreme Court's opinion, we condemned both. First, the court erred in concluding that the employee's negligence was the “sole” cause of the injury, for the jury reasonably found that railroad negligence played a part. *Rogers*, 352 U. S., at 504–505. Second, the court erred insofar as it held that the railroad's negligence was not a sufficient cause unless it was the more “probable” cause of the injury. *Id.*, at 505. FELA, we affirmed, did not incorporate any traditional common-law formulation of “proximate causation[,] which [requires] the jury [to] find that the defendant's negligence was the sole, efficient, producing cause of injury.” *Id.*, at 506. Whether the railroad's negligent act was the “immediate reason” for the fall, we added, was “an irrelevant consideration.” *Id.*, at 503. We then announced the “any part” test, *id.*, at 506, and reiterated it several times. See, e.g., *id.*, at 507 (“narro[w]” and “single inquiry” is whether “negligence of the employer played any part at all” in bringing about the injury); *id.*, at 508

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(FELA case "rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury").²

Rogers is most sensibly read as a comprehensive statement of the FELA causation standard. Notably, the Missouri Supreme Court in *Rogers* did not doubt that a FELA injury might have multiple causes, including railroad negligence and employee negligence. See 284 S. W. 2d, at 472 (reciting FELA's "in whole or in part" language). But the railroad's part, according to the state court, was too indirect, not sufficiently "natural and probable," to establish the requisite causation. *Ibid.* That is the very reasoning the Court rejected in *Rogers*. It is also the reasoning CSX asks us to resurrect.

Our understanding is informed by the statutory history and precedent on which *Rogers* drew. Before FELA was enacted, the "harsh and technical" rules of state common law had "made recovery difficult or even impossible" for injured railroad workers. *Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 3 (1964). "[D]issatisfied with the [railroad's] common-law duty," Congress sought to "supplan[t] that duty with [FELA's] far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers*, 352 U. S., at 507. Yet, *Rogers* observed, the Missouri court and other lower courts continued to ignore FELA's "significant[t]" departures from the "ordinary common-law

²In face of *Rogers*' repeated admonition that the "any part . . . in producing the injury" test was the *single* test for causation under FELA, the dissent speculates that *Rogers* was simply making a veiled reference to a particular form of modified comparative negligence, i.e., allowing plaintiff to prevail on showing that her negligence was "slight" while the railroad's was "gross." *Post*, at 9-10. That is not what *Rogers* conveyed. To repeat, *Rogers* instructed that "the test of a jury case [under FELA] is simply whether . . . employer negligence played any part, even the slightest, in producing the injury." 352 U. S., at 506.

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negligence" scheme, to reinsert common-law formulations of causation involving "probabilities," and consequently to "deprive litigants of their right to a jury determination." *Id.*, at 507, 509–510. Aiming to end lower court disregard of congressional purpose, the *Rogers* Court repeatedly called the "any part" test the "*single*" inquiry determining causation in FELA cases. *Id.*, at 507, 508 (emphasis added). In short, CSX's argument that the *Rogers* standard concerns only division of responsibility among multiple actors, and not causation more generally, misses the thrust of our decision in that case.

Tellingly, in announcing the "any part . . . in producing the injury" test, *Rogers* cited *Coray v. Southern Pacific Co.*, 335 U. S. 520 (1949), a decision emphasizing that FELA had parted from traditional common-law formulations of causation. What qualified as a "proximate" or legally sufficient cause in FELA cases, *Coray* had explained, was determined by the statutory phrase "resulting in whole or in part," which Congress "selected . . . to fix liability" in language that was "simple and direct." *Id.*, at 524. That straightforward phrase, *Coray* observed, was incompatible with "dialectical subtleties" that common-law courts employed to determine whether a particular cause was sufficiently "substantial" to constitute a proximate cause. *Id.*, at 523–524.³

Our subsequent decisions have confirmed that *Rogers*

³The dissent, while recognizing "the variety of formulations" courts have employed to define "proximate cause," *post*, at 2, does not say which of the many formulations it would declare applicable in FELA cases. We regard the phrase "negligence played a part—no matter how small," see *Rogers*, 352 U. S., at 508, as synonymous with "negligence played any part, even the slightest," see *id.*, at 506, and the phrase "in producing the injury" as synonymous with the phrase "in bringing about the injury." We therefore approve both the Seventh Circuit's instruction and the "any part, even the slightest, in producing the injury" formulation. The host of definitions of proximate cause, in contrast, are hardly synonymous.

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announced a general standard for causation in FELA cases, not one addressed exclusively to injuries involving multiple potentially cognizable causes. The very day *Rogers* was announced, we applied its "any part" instruction in a case in which the sole causation issue was the directness or foreseeability of the connection between the carrier's negligence and the plaintiff's injury. See *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523-524 (1957) (plurality opinion).

A few years later, in *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963), we held jury findings for the plaintiff proper in a case presenting the following facts: For years, the railroad had allowed a fetid pool, containing "dead and decayed rats and pigeons," to accumulate near its right-of-way; while standing near the pool, the plaintiff-employee suffered an insect bite that became infected and required amputation of his legs. *Id.*, at 109. The appellate court had concluded there was insufficient evidence of causation to warrant submission of the case to the jury. *Id.*, at 112. We reversed, reciting the causation standard *Rogers* announced. *Id.*, at 116-117, 120-121. See also *Crane v. Cedar Rapids & Iowa City R. Co.*, 395 U.S. 164, 166-167 (1969) (contrasting suit by railroad employee, who "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation," with suit by nonemployee, where "definition of causation . . . [is] left to state law"); *Gottshall*, 512 U.S., at 543 ("relaxed standard of causation applies under FELA").⁴

⁴CSX and the dissent observe, correctly, that some of our pre-*Rogers* decisions invoked common-law formulations of proximate cause. See, e.g., *Brady v. Southern R. Co.*, 320 U.S. 476, 483 (1943) (injury must be "the natural and probable consequence of the negligence" (internal quotation marks omitted)). Indeed, the "natural or probable" charge that CSX requested was drawn from *Brady*, which in turn relied on a pre-FELA case, *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U.S. 469.

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In reliance on *Rogers*, every Court of Appeals that reviews judgments in FELA cases has approved jury instructions on causation identical or substantively equivalent to the Seventh Circuit's instruction.⁵ Each appellate court has rejected common-law formulations of proximate cause of the kind CSX requested in this case. See *supra*, at 2–3. The current model federal instruction, recognizing that the “FELA causation standard is distinct from the usual proximate cause standard,” reads:

“The fourth element [of a FELA action] is whether an injury to the plaintiff resulted in whole or part from the negligence of the railroad or its employees or agents. In other words, did such negligence play any

475 (1877). But other pre-*Rogers* FELA decisions invoked no common-law formulations. See, e.g., *Union Pacific R. Co. v. Huxoll*, 245 U. S. 535, 537 (1918) (approving instruction asking whether negligence “contribute[d] ‘in whole or in part’ to cause the death”); *Coray v. Southern Pacific Co.*, 335 U. S. 520, 524 (1949) (rejecting use of common-law “dialectical subtleties” concerning the term “proximate cause,” and approving use of “simple and direct” statutory language). We rely on *Rogers* not because “time begins in 1957,” *post*, at 7, but because *Rogers* stated a clear instruction, comprehensible by juries: Did the railroad’s “negligence pla[y] any part, even the slightest, in producing [the plaintiff’s] injury”? 352 U. S., at 506. In so instructing, *Rogers* replaced the array of formulations then prevalent. We have repeated the *Rogers* instruction in subsequent opinions, and lower courts have employed it for over 50 years. To unsettle the law as the dissent urges would show scant respect for the principle of *stare decisis*.

⁵See *Moody v. Maine Central R. Co.*, 823 F. 2d 693, 695–696 (CA1 1987); *Ulfik v. Metro-North Commuter R.*, 77 F. 3d 54, 58 (CA2 1996); *Hines v. Consolidated R. Corp.*, 926 F. 2d 262, 267 (CA3 1991); *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F. 3d 432, 436 (CA4 1999); *Nivens v. St. Louis Southwestern R. Co.*, 425 F. 2d 114, 118 (CA5 1970); *Tyree v. New York Central R. Co.*, 382 F. 2d 524, 527 (CA6 1967); *Nordgren v. Burlington No. R. Co.*, 101 F. 3d 1246, 1249 (CA8 1996); *Claar v. Burlington No. R. Co.*, 29 F. 3d 499, 503 (CA9 1994); *Summers v. Missouri Pacific R. System*, 132 F. 3d 599, 606–607 (CA10 1997); *Sea-Land Serv., Inc., v. Sellan*, 231 F. 3d 848, 851 (CA11 2000); *Little v. National R. Passenger Corp.*, 865 F. 2d 1329 (CA12 1988) (table).

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part, even the slightest, in bringing about an injury to the plaintiff?" 5 L. Sand et al., *Modern Federal Jury Instructions—Civil* ¶89.02, pp. 89–38, 89–40, and comment (2010) (hereinafter Sand).

Since shortly after *Rogers* was decided, charges of this order have been accepted as the federal model. See W. Mathes & E. Devitt, *Federal Jury Practice and Instructions* §84.12, p. 517 (1965) (under FELA, injury "is proximately caused by" the defendant's negligence if the negligence "played any part, no matter how small, in bringing about or actually causing the injury").⁶ The overwhelming majority of state courts⁷ and scholars⁸ similarly comprehend FELA's causation standard.

In sum, the understanding of *Rogers* we here affirm "has been accepted as settled law for several decades." *IBP, Inc. v. Alvarez*, 546 U. S. 21, 32 (2005). "Congress has had [more than 50] years in which it could have corrected our decision in [*Rogers*] if it disagreed with it, and has not chosen to do so." *Hilton v. South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991). Countless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of "stability" and "predictability"

⁶All five Circuits that have published pattern FELA causation instructions use the language of the statute or of *Rogers* rather than traditional common-law formulations. See Brief for Academy of Rail Labor Attorneys as *Amicus Curiae* 19–20.

⁷See *id.*, at 21–22, 25–27 (collecting cases and pattern instructions). The parties dispute the exact figures, but all agree there are no more than a handful of exceptions. The Seventh Circuit found "[a]t most" three. 598 F. 3d 388, 404, n. 7 (2010).

⁸See, e.g., DeParcq, *The Supreme Court and the Federal Employers' Liability Act, 1956–57 Term*, 36 Texas L. Rev. 145, 154–155 (1957); 2 J. Lee & B. Lindahl, *Modern Tort Law: Liability and Litigation* §24:2, pp. 24–2 to 24–5 (2d ed. 2002); A. Larson & L. Larson, 9 *Larson's Workers' Compensation Law* §147.07[7], pp. 147–19 to 147–20 (2010); Prosser and Keeton §80, p. 579.

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that the doctrine of statutory *stare decisis* aims to ensure.
Ibid.

III

CSX nonetheless insists that proximate causation, as captured in the charge and definitions CSX requested, is a concept fundamental to actions sounding in negligence. The *Rogers* “any part” instruction opens the door to unlimited liability, CSX worries, inviting juries to impose liability on the basis of “but for” causation. The dissent shares these fears. *Post*, at 5–6, 15–16. But a half century’s experience with *Rogers* gives us little cause for concern: CSX’s briefs did not identify even *one* trial in which the instruction generated an absurd or untoward award.⁹ Nor has the dissent managed to uncover such a case. *Post*, at 13–14 (citing no actual case but conjuring up images of falling pianos and spilled coffee).

While some courts have said that *Rogers* eliminated the concept of proximate cause in FELA cases,¹⁰ we think it “more accurate . . . to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits.” *Sorrell*, 549 U. S., at 178 (GINSBURG, J., concurring in judgment). That understanding was expressed by the

⁹ Pressed on this point at oral argument, CSX directed us to two cases cited by its *amicus*. In *Richards v. Consolidated Rail Corp.*, 330 F. 3d 428, 431, 437 (CA6 2003), a defective brake malfunctioned en route, and the employee was injured while inspecting underneath the train to locate the problem; the Sixth Circuit sent the case to a jury. In *Norfolk Southern R. Co. v. Schumpert*, 270 Ga. App. 782, 783–786, 608 S. E. 2d 236, 238–239 (2004), the employee was injured while replacing a coupling device that fell to the ground because of a negligently absent pin; the court upheld a jury award. In our view, the causal link in these cases is hardly farfetched; in fact, in both, the lower courts observed that the evidence did not show mere “but for” causation. See *Richards*, 330 F. 3d, at 437, and n. 5; *Schumpert*, 270 Ga. App., at 784, 608 S. E. 2d, at 239.

¹⁰ See, e.g., *Summers*, 132 F. 3d, at 606; *Oglesby v. Southern Pacific Transp. Co.*, 6 F. 3d 603, 609 (CA9 1993).

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drafters of the 1965 federal model instructions, see *supra*, at 11-12: Under FELA, injury "is proximately caused" by the railroad's negligence if that negligence "played any part . . . in . . . causing the injury." Avoiding "dialectical subtleties" that confound attempts to convey intelligibly to juries just what "proximate cause" means, see *Coray*, 335 U.S., at 524, the *Rogers* instruction uses the everyday words contained in the statute itself. Jurors can comprehend those words and apply them in light of their experience and common sense. Unless and until Congress orders otherwise, we see no good reason to tamper with an instruction tied to FELA's text, long employed by lower courts, and hardly shown to be unfair or unworkable.

A

As we have noted, see *supra*, at 5-6, the phrase "proximate cause" is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes. Prosser and Keeton explain: "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." §41, p. 264. To prevent "infinite liability," *ibid.*, courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim.

The term "proximate cause" itself is hardly essential to the imposition of such limits. It is a term notoriously confusing. See, e.g., Prosser and Keeton §42, p. 273 ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins. . . . It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness. For this reason 'legal cause' or perhaps even 'responsible cause' would be a more appropriate term." (footnotes omitted)).

And the lack of consensus on any one definition of "proximate cause" is manifest. *Id.*, §41, p. 263. Common-

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law formulations include, *inter alia*, the "immediate" or "nearest" antecedent test; the "efficient, producing cause" test; the "substantial factor" test; and the "probable," or "natural and probable," or "foreseeable" consequence test. Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 103, 106–121 (1911); Smith, Legal Cause in Actions of Tort (Concluded), 25 Harv. L. Rev. 303, 311 (1912).

Notably, CSX itself did not settle on a uniform definition of the term "proximate cause" in this litigation, nor does the dissent. In the District Court, CSX requested a jury instruction defining "proximate cause" to mean "any cause which, in natural or probable sequence, produced the injury complained of." App. 32a. On appeal, "CSX maintain[ed] that the correct definition . . . is a 'direct relation between the injury asserted and the injurious conduct alleged.'" 598 F. 3d, at 393, n. 3. Before this Court, CSX called for "a demonstration that the plaintiffs injury resulted from the wrongful conduct in a way that was natural, probable, and foreseeable." Tr. of Oral Arg. 9–10.

Lay triers, studies show, are scarcely aided by charges so phrased. See Steele & Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N. C. L. Rev. 77, 88–92, 110 (1988) (85% of actual and potential jurors were unable to understand a pattern proximate cause instruction similar to the one requested by CSX); Charrow & Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 Colum. L. Rev. 1306, 1353 (1979) (nearly one quarter of subjects misunderstood proximate cause to mean "approximate cause" or "estimated cause"). In light of the potential of "proximate cause" instructions to leave jurors at sea, it is not surprising that the drafters of the Restatement (Third) of Torts avoided the term altogether. See 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm §29 (2005) (confining liability to "harms that result from the risks that made the actor's conduct tortious"); *id.*,

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Comment *b*.

Congress, it is true, has written the words "proximate cause" into a number of statutes.¹¹ But when the legislative text uses less legalistic language, *e.g.*, "caused by," "occasioned by," "in consequence of," or, as in FELA, "resulting in whole or in part from," and the legislative purpose is to loosen constraints on recovery, there is little reason for courts to hark back to stock, judge-made proximate-cause formulations. See Smith, *Legal Cause in Actions of Tort* (Continued), 25 Harv. L. Rev. 223, 235 (1912).

B

FELA's language is straightforward: railroads are made answerable in damages for an employee's "injury or death resulting in whole or in part from [carrier] negligence." 45 U. S. C. §51. The argument for importing into FELA's text "previous judicial definitions or *dicta*" originating in non-statutory common-law actions, see Smith, *Legal Cause in Actions of Tort* (Continued), *supra*, at 235, misapprehends how foreseeability figures in FELA cases.

"[R]easonable foreseeability of harm," we clarified in *Gallick*, is indeed "an essential ingredient of [FELA] negligence." 372 U. S., at 117 (emphasis added). The jury, therefore, must be asked, initially: Did the carrier "fail[] to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances[?]" *Id.*, at 118. In that regard, the jury may be told that "[the railroad's] duties are measured by

¹¹See, *e.g.*, Act of Sept. 7, 1916, ch. 458, §1, 39 Stat. 742-743 (United States not liable to injured employee whose "intoxication . . . is the proximate cause of the injury"); Act of Oct. 6, 1917, ch. 105, §306, 40 Stat. 407 (United States liable to member of Armed Forces for post-discharge disability that "proximately result[ed] from [a pre-discharge] injury"); Act of June 5, 1924, ch. 261, §2, 43 Stat. 389 (United States liable for "any disease proximately caused" by federal employment).

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what is reasonably foreseeable under like circumstances." *Ibid.* (internal quotation marks omitted). Thus, "[i]f a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition." *Id.*, at 118, n. 7 (internal quotation marks omitted).¹² If negligence is proved, however, and is shown to have "*played any part, even the slightest, in producing the injury,*" *Rogers*, 352 U. S., at 506 (emphasis added),¹³ then the carrier is answerable in damages even if "the extent of the [injury] or the manner in which it occurred" was not "[p]robable" or "foreseeable." *Gallick*, 372 U. S., at 120–121, and n. 8 (internal quotation marks omitted); see 4 F. Harper, F. James, & O. Gray, *Law of Torts* §20.5(6), p. 203 (3d ed. 2007); 5 *Sand* 89–21.

Properly instructed on negligence and causation, and told, as is standard practice in FELA cases, to use their "common sense" in reviewing the evidence, see Tr. 205 (Aug. 19, 2008), juries would have no warrant to award damages in far out "but for" scenarios. Indeed, judges would have no warrant to submit such cases to the jury. See *Nicholson v. Erie R. Co.*, 253 F. 2d 939, 940–941 (CA2 1958) (alleged negligence was failure to provide lavatory for female employee; employee was injured by a suitcase while looking for a lavatory in a passenger car; applying *Rogers*, appellate court affirmed lower court's dismissal for lack of causation); *Moody v. Boston and Maine Corp.*, 921 F. 2d 1, 2–5 (CA1 1990) (employee suffered stress-related

¹² A railroad's violation of a safety statute, however, is negligence *per se*. See *Kernan v. American Dredging Co.*, 355 U. S. 426, 438 (1958).

¹³ The dissent protests that we would require only a showing that "defendant was negligent in the first place." *Post*, at 13. But under *Rogers* and the pattern instructions based on *Rogers*, the jury must find that defendant's negligence in fact "played a part—no matter how small—in bringing about the injury." See *supra*, at 2–3, 11–12 (Seventh Circuit pattern instruction and model federal instructions).

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heart attack after railroad forced him to work more than 12 hours with inadequate breaks; applying *Rogers*, appellate court affirmed grant of summary judgment for lack of causation). See also *supra*, at 13 (*Rogers* has generated no extravagant jury awards or appellate court decisions).

In addition to the constraints of common sense, FELA's limitations on who may sue, and for what, reduce the risk of exorbitant liability. As earlier noted, see *supra*, at 4, the statute confines the universe of compensable injuries to those sustained by employees, during employment. §51. Hence there are no unforeseeable plaintiffs in FELA cases. And the statute weeds out the injuries most likely to bear only a tenuous relationship to railroad negligence, namely, those occurring *outside* the workplace.¹⁴

There is a real risk, on the other hand, that the "in natural or probable sequence" charge sought by CSX would mislead. If taken to mean the plaintiff's injury must *probably* ("more likely than not") follow from the railroad's negligent conduct, then the force of FELA's "resulting in whole or in part" language would be blunted. Railroad negligence would "probably" cause a worker's injury only if that negligence was a dominant contributor to the injury, not merely a contributor in any part.

* * *

For the reasons stated, it is not error in a FELA case to refuse a charge embracing stock proximate cause terminology. Juries in such cases are properly instructed that a

¹⁴ CSX observes, as does the dissent, *post*, at 4, that we have applied traditional notions of proximate causation under the RICO, antitrust, and securities fraud statutes. But those statutes cover broader classes of potential injuries and complainants. And none assign liability in language akin to FELA's "resulting in whole or in part" standard. §51 (emphasis added). See *Holmes v. Securities Investor Protection Corporation*, 503 U. S. 258, 265-268 (1992); *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U. S. 519, 529-535 (1983); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U. S. 336, 342-346 (2005).

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defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part—no matter how small—in bringing about the injury." That, indeed, is the test Congress prescribed for proximate causation in FELA cases. See *supra*, at 9, 13. As the courts below so held, the judgment of the U. S. Court of Appeals for the Seventh Circuit is

Affirmed.

NOTES

1. Drunken Sailor Revisited. An intoxicated sailor who did not return from shore leave and was later discovered drowned was acting in the course of employment within the meaning of the Jones Act when he disappeared, according to *Daughenbaugh v. Bethlehem Steel Corp.*, 891 F.2d 1199, 1206 (6th Cir. 1989). The shipowner's awareness or acquiescence in an unwritten policy permitting drunken seaman to return to the ship created a duty for the ship's officers, who had initially assumed responsibility of escorting the seaman to the vessel. A superior officer may recover in situations where a subordinate seaman has also been negligent. The seaman's negligence is attributable to the employer while the officer who failed to properly supervise is contributorily negligent. The injured officer's recovery was reduced by 25%, the percentage set to cover his contributory negligence. *Kelly v. Sun Transportation Co.*, 900 F.2d 1027 (7th Cir. 1990).
2. Plaintiff's Lack of Due Care. According to *Colburn v. Bunge Towing, Inc.*, 833 F.2d 372 (5th Cir. 1989), an employer must have notice and opportunity to correct an unsafe condition before Jones Act liability can result. There can be no employer or vessel owner liability if the undisputed facts show that the injury arose solely from the victim's own lack of due care. *Alrayshi v. Rouge Steel Co.*, 702 F. Supp. 1334 (E.D. Mich. 1989). Employer or vessel owner liability may also be removed if an accident occurred despite a minimal threat to safety and no consequential risk of harm. *Miller v. Patton-Tully Transportation Co.*, 878 F.2d 1103 (8th Cir. 1989). *Kelly v. Sun Transportation Co.*, 900 F.2d 1097 (7th Cir. 1990) (officer can recover for seaman's negligence, but possibility of contributory negligence due to improper supervision). *Earl v. Bouchard Transportation Co., Inc.*, 917 F.2d 1320 (2d Cir. 1990) held that the following instruction to the jury was proper: "if you find that the plaintiff was injured because he was following the orders of his superior, the Captain, then you cannot find that there was contributory negligence." A decision reaching the same conclusion is *Simeonoff v. Hiner*, 249 F.3d 883 (9th Cir. 2001).
3. The Role of the Trier-of-Fact in Jones Act Cases. The jury or trier-of-fact's role in determining negligence in Jones Act cases is well-guarded from judicial encroachment. For example, *Wooden v. Missouri Pacific Railroad Co.*, 862 F.2d 560 (5th Cir. 1989) holds that a directed verdict in a FELA case is only appropriate when there is a complete absence of probative facts supporting the Plaintiff's position. Likewise, the standard to overturn a jury's verdict is more stringent than traditional negligence actions and requires a similar showing of a complete absence of probative facts to support the non-movant's position. *Boyle v. Pool*

Offshore Co., 893 F.2d 713 (5th Cir. 1990); *Cobb v. Rowan Companies*, 919 F.2d 1089 (5th Cir. 1990).

4. Employer-Employee Relationship. Whether an injured worker was acting as an employee at the time of injury for purposes of FELA is a question of fact for the jury. *Lowery v. Illinois Central Gulf Railroad Co.*, 891 F.2d 1187 (5th Cir. 1990). See *Matute v. Lloyd Bermuda Lines*, 931 F.2d 231 (3rd Cir. 1991) for a discussion of "employer" for Jones Act purposes. Also, *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247 (3d Cir. 1994); *Wolstiffer v. Atlantis Submarines, Inc.*, 848 F. Supp. 1489 (D. Hawaii 1994).
5. Comparative Negligence. Court allowed a comparative negligence issue to go to the jury involving the plaintiff's hearing loss, and his off-duty activities. *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 11 (1st Cir. 1998) distinguishes between negligence on the part of the injured seaman and the prohibition of assumption of risk being charged against him. Basically, the distinction is whether a safe alternative was available. *Paul v. Missouri Pac. R.R. Corp.*, 963 F.2d 1058 (8th Cir. 1992). See also, *Sandstrom v. Chicago and N.W. Trans. Co.*, 907 F.2d 839 (8th Cir. 1990) (FELA case stating that assumption of the risk cannot be charged to the plaintiff), and *Ries v. Nat. R.R. Passenger Corp.*, 960 F.2d 1156 (3d Cir. 1992) (discussed OSHA, FELA, and contributory negligence.) *Toth v. Grand Trunk Railroad*, 306 F.3d 335 (6th Cir. 2002) is a FELA case in which the trial court instructed the jury to return a verdict for the defendant in the event the plaintiff's conduct was the sole cause of the injury. The jury returned a verdict favoring the defendant, and it was affirmed. In an action by a seaman to recover from the shipowner for personal injuries sustained when he slipped and fell while on shore duty because he was wearing insufficient boots under icy conditions, the court concluded that while neither assumption of risk nor contributory negligence will bar a seaman's recovery under either the doctrine of seaworthiness or Jones Act, when the plaintiff has also been negligent, any damages awarded are to be mitigated in accordance with the doctrine of comparative negligence. *Webb v. Dresser Industries*, 536 F.2d 603 (5th Cir. 1976). Similarly, *Yehia, supra*, states that a seaman who slipped on an unsafe deck may be held comparatively negligent only if a safer route to traverse the ship were available.
6. Res Ipsa Loquitur. The tort doctrine of *res ipsa loquitur* may be used to establish Jones Act negligence if, (1) the event is of a type which ordinarily does not happen in the absence of someone's negligence; (2) the instrumentality causing the accident was, at the time, within the "exclusive control" of the defendant; and (3) the accident was not due to any voluntary

or contribution by the plaintiff. *Olsen v. States Line*, 378 F.2d 217 (9th Cir. 1967). See also, *Lone Star Indust. v. Mays Towing Co.*, 927 F.2d 1453 (8th Cir. 1992) (court applies R.I.L. after a vessel arrives with a gash in its hull), *Bradshaw v. Freightliner Corp.*, 937 F.2d 197 (5th Cir. 1991) (an example of the Texas test and application of R.I.L.), and *Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832 (8th Cir. 1992) (court upholds a request for R.I.L. instruction in a FELA case). *Boudreaux v. United States*, 280 F.3d 461 (5th Cir. 2002) concluded that *res ipsa loquitur* could not be applied to the seaman's personal action since the plaintiff's negligent conduct contributed to the accident (fn. 5). There is also a suggestion of the concept being used to establish unseaworthiness. *Havens v. F/T PILOT MIST*, 996 F.2d 215 (9th Cir. 1993).

7. Releases. *Sea-Land Service, Inc. v. Sellan*, 231 F.3d 848 (11th Cir. 2000) involves a seaman who experienced a previous back injury while working for the same vessel owner. The release contained an agreement by which the plaintiff agreed not to work in the future for Sea-Land, and provided further that the company shall bear no responsibility for future liability if for some reason he should become a future employee. He sailed again for Sea-Land and experienced an injury. The terms of the previous release were sustained. The Ninth Circuit negated a release in which the injury turned out to be more serious than the seaman thought at the time of the settlement. *Orsini v. O/S SEABROOKE*, 247 F.3d 953, 959 (9th Cir. 2001).

The Supreme Court settled a conflict between lower courts by holding that a settling defendant is not liable to a non-settling defendant by way of contribution. *Boca Grande Club, Inc. v. Florida Power & Light Co., Inc.*, 511 U.S. 222, 114 S. Ct. 1472, 128 L.Ed.2d 165 (1994). Further, a reduction in any recovery made by the plaintiff from the non-settling defendant is reduced by the settling defendant's percentage of fault which contributed to the accident. The Court rejected a monetary reduction based upon the amount of the settlement. *McDermott, Inc. v. AmClyde and River Don Castings, Ltd.*, 511 U.S. 202, 114 S. Ct. 1461, 128 L. Ed.2d 148 (1994). But, a non-settling defendant who is not prejudiced by the settlement has no standing to complain of the settlement. *Teal V. Eagle Fleet Inc.*, 933 F.2d 341 (5th Cir. 1991). See Also, *Molett v. Penrod Drilling Co.*, 919 F.2d 1000 (5th Cir. 1990) (Court discusses how reasonableness of a settlement is determined); and *Cooper v. Loper*, 923 F.2d 1045 (3rd Cir. 1991) (for a discussion of the burden on the party who is seeking indemnity, after it has settled with the plaintiff). *Noble Drilling Inc. v. Davis*, 64 F.3d 191 (5th Cir. 1995) holds that a settlement agreement between the injured seaman and his employer can be enforced, but the court must conduct a hearing and enter appropriate findings. *Richards v. Relentless, Inc.*, 341 F.3d 35 (1st Cir. 2003) reviews the burden of proof

being on the defendant to sustain and release in the event the injured seaman is not represented by an attorney, the explanation that needs to be given to this particular seaman by the defendant at the time the release is signed, and the special issue and charge given the jury regarding the validity of the release.

8. **Violation of Regulations.** *Frugé v. Parker Drilling Co.*, 337 F.3d 558 (5th Cir. 2003) focused upon a worker injured on a fixed platform offshore Louisiana. The issue was whether the violation of regulations pursuant to the Minerals Management Service, a federal statute, created a duty independent of state law. The court reached a negative conclusion. Reliance was placed on *Romero v. Mobil Exploration & Producing North America, Inc.*, 939 F.2d 307, 310-11 (5th Cir. 1991), which concluded that a violation of this statute does not give rise to a private cause of action.
9. **Waiver.** An injured maritime worker may on occasion receive compensation benefits pursuant to the Longshoremen's & Harbor Workers' Compensation Act or a state compensation system prior to alleging seaman's status for the purpose of the Jones Act. *Mooney v. City of New York*, 213 F.3d 65 (2d Cir. 2000) holds that there must be a final order in a state compensation matter in order for a Jones Act action to be waived. Citing *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81, 91 (1991) and *Reyes v. Delta Dallas Alpha Corporation*, 199 F.3d 626 (2d Cir. 1999) - "the receipt of voluntary worker's compensation payments under a federal worker's compensation statute does not bar a subsequent action under the Jones Act, unless the claimant received a formal award from the compensation board settling his claims in their entirety."
10. **Unseaworthy crew.** *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *aff'd on this particular issue* at 498 U.S. 275, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990), arose when a crew member was assaulted by another crew member. The Appellate Court held that the vessel was unseaworthy as a matter of law, stating that the plaintiff had proved the seaman was not equal in disposition and seamanship to ordinary men in the calling, a situation equivalent to a dangerous mast or defective line. Thus, the shipowner had breached his absolute duty to provide members of the crew with a seaworthy vessel.
11. **Insufficient help.** *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d 626 (2d Cir. 1999) concerns the assignment of one crewmember to carry a 150-pound load that was customarily performed by two. The situation was temporary since the co-worker was

ill. The court found against the vessel owner on the unseaworthiness issue. An earlier U.S. Supreme Court opinion was cited in support of the proposition that a vessel is unseaworthy if too few crewmen are assigned to perform a particular task in a safe and prudent manner. *Moore v. M/V SALLY J.*, 27 F. Supp. 2d 1255 (W.D. Wash. 1999) focuses upon a crewmember's injury that occurred while following instructions to restore a stove to a "like new" condition. The court found inadequate supervision that translated into unseaworthiness and Jones Act negligence. Also, inadequate equipment was furnished the plaintiff.

12. Peymann instruction: A *Peymann* instruction precludes a plaintiff's recovery on an unseaworthiness claim if the unseaworthy condition of the vessel is due solely to the plaintiff's failure to perform his assigned duties. *Peymann v. Perini Corp.*, 507 F.2d 1318, 1323 (1st Cir. 1974), *cert. denied*, 421 U.S. 914 (1975). In a dissent to the majority's holding in *Yehia*, 898 F.2d at 1185, the *Peymann* instruction is discussed as a two-step process.

In the course of the court's instructions on unseaworthiness, the court gave a *Peymann* instruction:

If you find that the condition of unseaworthiness, which was the cause of the plaintiff's accident, was due solely to the failure of the plaintiff to carry out his duty to his employer, then you must find for the defendant in this case.

The instruction requires the jury first find the vessel unseaworthy, and then that the unseaworthiness was a cause of the plaintiff's accident before determining whether the unseaworthiness was caused by the plaintiff.

Also, a condition which is contemporaneous with the accident is not considered to be an unseaworthy condition. *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186 (5th Cir. 1991). Also, if the worker is in the process of remedying the condition, there can be no claim for unseaworthiness if the injury results from this condition. *Hughes v. Conticarriers and Terminals, Inc.*, 6 F.3d 1195, 1197 (7th Cir. 1993).

13. Who is not entitled to warranty of Seaworthiness. A Jones Act seaman cannot claim the warranty of seaworthiness on a vessel to which he was not assigned as a crewmember. He is not a Sieracki seaman to third party vessels. *Smith v. Harbor Towing and Fleeting Inc.*, 910 F.2d 312 (5th Cir. 1990), *reh'g denied*, 917 F.2d 559, *cert. denied*, 499 U.S. 906, 111 S. Ct. 1107, 113 L. Ed. 2d 216 (1991). Since 1972, the warranty is not available to a person covered by the LHWCA. *Harwood v. Partenreederei*, 944 F.2d 1187 (4th Cir. 1991). See also, *Yoash v. McLean Contract Co.*, 907 F.2d 1481 (4th Cir. 1990) (a worker performing the job of a pile driver is not a seaman and not owed seaworthiness); and *Palmer v. Tayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991) (a public relations agent was not covered by the duty of seaworthiness). A crewmember's guest does not come within the warranty of seaworthiness scope of protection. *In Re Fisherman's Wharf Fillet, Inc.*, 83 F. Supp. 2d 651 (E.D. Va. 1999).
14. Who is entitled to Seaworthiness warranty. "Sieracki" workers who are not covered by the Longshore Act. *Cbats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993); *Cormier v. Oceanic Contractors*, 696 F.2d 1112, 1113 (5th Cir.), *cert. denied*, 464 U.S. 821 (1983).
15. A condition of unseaworthiness can be shown if the vessel's equipment malfunctions during normal use. *Havens v. F/T POLAR MIST*, 996 F.2d 215, 218 (9th Cir. 1993).
16. *Brister v. A.W.I., Inc.*, 946 F.2d 350 (9th Cir. 1991), discusses the distinction between the Jones Act and unseaworthiness causation definition. *Magnussen v. Yak, Inc.*, 73 F.3d 245 (9th Cir. 1996). Ms. Magnussen was assigned as a cook aboard the vessel. She previously requested rubber mats for use on the galley's deck; they were not supplied. The jury found negligence on the part of the employer-vessel owner but no unseaworthiness of the vessel. The trial court concluded that the two findings were inconsistent. The Ninth Circuit reversed this conclusion by concluding that a seaworthy vessel could be distinguished from the "discrete act of operative negligence in the failure to supply the mats." See also, *Calo v. Ocean Ships, Inc.*, 57 F.3d 159, 161-62 (2d Cir. 1995) (distinguishes between a discrete act of operative negligence satisfying the Jones

Act standards in view of the jury finding the vessel to have been seaworthy): For a similar result, note *Magnussen v. Yak, Inc.*, 73 F.3d 245 (9th Cir. 1996).

17. *Carr v. PMS Fishing Corporation*, 191 F.3d 1, 3 (1st Cir. 1999) states that "[A] shipowner is absolutely liable for injuries arising from the vessel's unseaworthiness;" however, a recovery can be denied if the seaman's action is subject to the Limitation of Liability Act, 46 U.S.C. § 30501. The vessel owner has the burden to establish that the unseaworthy condition that caused the injury was without its "privity or knowledge."

18. *Jackson v. OMI Corp.*, 245 F.3d 525 (5th Cir. 2001) complements the *Erftmiller* decision since the injured seaman tripped over a doorway's coaming aboard the M/V OMI CARRIER. The Fifth Circuit reversed as clearly erroneous the trial's court's conclusions of the doorway not "being reasonably fit for its intended purpose," as well as the plaintiff not being provided with "a safe place to work."

19. Notice requirement. The vessel owner will generally not be liable on a theory of negligence if the owner has no actual or constructive notice of the defect causing the injury. *Commiskey v. Chandris, S.A.*, 719 F. Supp. 1183 (S.D.N.Y. 1989). A similar case is *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989), which resulted from the plaintiff's slip and fall on a wet spot, holding that the critical issue was the length of time the wet spot had been on the dance floor. See also, *Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990) and *Lee v. Regal Cruises, Ltd.*, 916 F. Supp. 300 (S.D.N.Y. 1996). *Courville v. Cardinal Wireline Specialists*, 775 F. Supp. 929 (W.D. La. 1991) concerns a vessel owner having notice of non-skid tape needing a replacement; the tape has been ordered five months prior to the accident. The court finds the vessel owner liable due to there being the requisite notice of the condition for the purpose of establishing negligence.

20. Negligence due to conduct of the ship's physician. A shipowner cannot be held liable for the alleged malpractice of the ship's doctor, assuming the vessel owner used reasonable care in the selection process. *Barbetta v. SS BERMUDA STAR*, 848 F.2d 1364 (5th Cir. 1988);

Mascolo v. Costa Crociere, S.p.A., 726 F. Supp. 1285 (S.D. Fla. 1989); and *Commiskey*, 719 F. Supp. 1183 (S.D.N.Y. 1988).

21. Kermerac remedy not always available. A non-seaman, non-longshoreman was injured on a jack-up rig on the outer continental shelf, with the trial court applying the general maritime duty of care the *Kermerac* negligence standard to the accident. However, the Fifth Circuit corrected this misconception by holding that the proper avenue of recovery was via the LHWCA through the OCSLA. *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir. 1989). Cf. *Alphin v. Marquest Maritime, S.A.*, 747 F. Supp. 1223 (E.D. Tex. 1990) (a grain inspector is not covered by 905(b), and therefore is owed the standard of reasonable care). There is a suggestion of the vessel owner owing to a passenger a degree of care higher than the *Kermerac* test. *Smith v. Southern Gulf Marine Co. Number 2, Inc.*, 791 F.2d 416, 419 (5th Cir. 1986).
22. Forum selection. A foreign forum selection clause incorporated into the contract for passage on the ticket cover is enforceable. *Carnival Cruise Lines v. Shute*, 499 U.S. 589 (1991); *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905 (3rd Cir. 1988). A contrary result was reached in *Stobaugh v. Norwegian Cruise Line, Ltd.*, 5 S.W.3d 232 (Tex. App.--Houston [14th Dist.] 1999, writ denied), *cert. denied*, 531 U.S. 820 (2000). The court refused to enforce the forum selection clause calling for litigation in Miami, Florida due to the notion of fundamental fairness. The court noted that the clause was not mentioned in the promotional brochure, and the first notice afforded the plaintiffs was the receipt of the ticket 23 days before the vessel's sailing. A similar conclusion was reached in *Schaff v. Sun Line Cruises, Inc.*, 999 F. Supp. 924 (S.D. Tex. 1998) on the theory that the passenger received no notice of the forum selection clause prior to the receipt of a non-refundable ticket.
23. 46 U.S.C. § 183(b)(3) permits a sea carrier to contractually limit the time in which a suit for injuries may be filed by passengers, provided that time is at least one year. This limit must be reasonably communicated to the passenger. A ticket may provide the notice if the physical characteristics of the ticket are such to reasonably communicate the notice, and the

passenger's receipt of the ticket was within a time frame that permitted a review. *Ward v. Cross Sound Ferry*, 273 F.3d 520 (2d Cir. 2001) concluded that insufficient time was given to the plaintiff. As to minors, the limitation period is tolled for a three-year period for the appointment of a minor's representative. The limitation period commences once this representation is appointed. For a discussion on this point, note *Gibbs v. Carnival Cruise Lines, Inc.*, 314 F.3d 125 (3d Cir. 2002). *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002) reviews the provisions of the Athens Convention that permits a vessel owner to limit its monetary liability to \$60,000 for the death of a passenger. The court recognized that this was possible, but the reference to the Convention with nothing more gave insufficient notice to the passenger. This court also focused upon the test for the intentional infliction of emotional distress, and concluded that the conduct must be so outrageous and extreme in degree that it goes beyond all possible bounds of utterly intolerable decency in a civilized society.

24. Other categories of the *Kermarac* duty of reasonable care: *River Transportation Associates v. Wall*, 5 F.3d 97 (5th Cir. 1993) (owner of barge owes this duty to a captain of a tug moored alongside the barge); *Smith v. Harbor Fleeting, Inc.*, 910 F.2d 312 (5th Cir. 1990) (seaman from another vessel owed the duty of reasonable care if aboard a vessel owned by a third party); *Alphin v. Marquest Maritime, S.A.*, 747 F. Supp. 1223 (E.D. Tex. 1990) (grain inspector not covered by the Longshoremen's & Harbor Workers' Compensation Act). *McMellon v. United States*, 338 F.3d 287, No. 02-1494 (4th Cir. 2003) has an excellent discussion of the maritime law negligence concept and its origin. An assault by a crewmember upon a passenger distinguished *Kermarac* from this factual situation, and held the vessel owner-employer to be subject to an absolute form of liability. *Morton v. DeOliviera*, 984 F.2d 289 (9th Cir. 1993).

25. Duty of a classification society. An organization of this type appoints a surveyor to inspect a vessel to determine if it is in adequate condition "for class" (a requirement of insurance underwriters). Generally speaking, a non-party cannot recover from the classification society for a negligent inspection. Only those non-clients who the inspection service "actually

knows will receive inaccurate information come within the scope of the due care duty." *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530 (5th Cir. 2003).

26. Zone of Danger Requirement for a Cause of Action Based on Stress. *Szymanski v. Columbia Transportation, Inc.*, 154 F.3d 591 (6th Cir. 1998) concerns a seaman's action for stress due to an incompetent co-worker aboard the vessel. The court adopts the "zone of danger" requirement of the Supreme Court. This requires a physical injury to the plaintiff or in the zone where an impact is possible. The plaintiff could not meet the requirements; therefore, no Jones Act recovery. Also, if he could not recover under the Jones Act, there can be no recovery pursuant to the warranty of seaworthiness. You cannot reach award damages for an unseaworthiness theory if the result cannot be reached under the Jones Act (FELA); that does not mean the theory of liability but the injury being a compensable one pursuant to the principles of maritime law.