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IN THE SUPREME COURT OF THE UNITED STATES

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CSX TRANSPORTATION, INC., :

Petitioner :

v. : No. 10-235

ROBERT MCBRIDE :

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Washington, D.C.

Monday, March 28, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

CHARLES A. ROTHFELD, ESQ., Washington, D.C.; on behalf of Petitioner.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in case 10-235, CSX Transportation v. McBride.

Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONER

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court:

In this case we find ourselves in the happy situation of having to try to convince the Court that its prior decisions were correct. Just 5 years after the enactment of FELA, the Court declared that it was obvious that the statute contained a proximate cause requirement. The Court went on to repeat that conclusion over and over again in almost two dozen decisions over the next 40 years. Our submission this morning is that the Court when it made these statements got it right.

JUSTICE KENNEDY: How did it happen that in FELA we have proximate cause light? It's just a different proximate cause than we see in other -- in other torts cases. How -- how did that come about?

MR. ROTHFELD: Well, we -- we -- our

1 submission is that that is not correct, that that is not  
2 what FELA provides for at all. And in the Court's  
3 initial decisions, the ones that I referred to, it  
4 stated very clearly that the ordinary proximate cause  
5 rule applies. The -- the proximate cause test that the  
6 Court stated in cases like Brady was the traditional  
7 proximate cause standard.

8 JUSTICE KENNEDY: Can you read the cases as  
9 indicating that more deference is given to juries in  
10 FELA cases than in other cases?

11 MR. ROTHFELD: Well, that -- that's -- is a  
12 separate one from the one we have here. I mean, we are  
13 talking here about the nature of the -- the elements of  
14 the cause of action that have to be demonstrated by --  
15 by the plaintiff; and so there -- the question of how  
16 much of that evidence there has to be to get to the jury  
17 is a separate question that's not presented here.

18 Our submission, since you posed the  
19 question, is that there is no different standard; that  
20 FELA was not intended to depart from the ordinary common  
21 law procedural approaches in that respect, either.

22 But on the question that's presented --

23 JUSTICE SCALIA: But juries usually find  
24 against railroads anyway, right?

25 MR. ROTHFELD: I -- I wouldn't want to

1 commit myself to answering that question affirmatively,  
2 Your Honor.

3 The Court has said that -- that FELA was  
4 enacted to address particular problems in the  
5 administration of the common law prior to 1908.

6 JUSTICE GINSBURG: It also said that there's  
7 a relaxed standard of causation. I think that's what  
8 Justice Kennedy is referring to when he said "proximate  
9 cause light." But we have said in more than one case  
10 that there is a relaxed standard of causation in FELA  
11 cases. Was that wrong?

12 MR. ROTHFELD: I think there are two ways to  
13 respond to that, Justice Ginsburg. The first is that up  
14 until the Rogers decision, which is -- which is one of  
15 the ones which has created I think some confusion in  
16 this area, the Court was quite clear and unambiguous  
17 that proximate cause in FELA applied in the ordinary  
18 sense.

19 As I say, in cases like the Brady case the  
20 Court stated what proximate cause means; it stated in --  
21 in entirely traditional terms that -- that the plaintiff  
22 had to demonstrate that the injury followed in a  
23 natural, probable foreseeable way from the wrongful  
24 conduct, and so that -- that was the standard.

25 The Rogers case, which was the source of

1 some of the confusion in this area, in our view, as --  
2 as we think Justice Souter correctly demonstrated in his  
3 opinion in Sorrell, and as we explain at some length in  
4 our brief, Rogers we think did not address causation at  
5 all. The Rogers case was a situation in which there  
6 were a multiplicity of causes, and the question was what  
7 -- what should -- should the rule be when there are a  
8 number of -- of entities that contribute to the  
9 accident. It had nothing to do with remoteness or  
10 directness of the cause, what we usually think about  
11 when we talk about proximate cause.

12 In -- in the years since Rogers was decided,  
13 when the Court -- got out of the business of deciding  
14 FELA cases on the facts, it had not had occasion on --  
15 in any case to address specifically what proximate cause  
16 meant in the FELA context.

17 JUSTICE SOTOMAYOR: Counsel --

18 JUSTICE SCALIA: Well, we have used that  
19 language. You -- you have not responded to -- to the  
20 question where -- where did this language that does  
21 appear in our -- in our cases about the relaxed  
22 standard, where -- where does that come from?

23 MR. ROTHFELD: That -- that comes from, W  
24 submit, from sort of a loose description of what was  
25 going on in the Rogers case, which involved a

1 multiplicity of causes rather than directness and  
2 remoteness of causes, and so the cases in which that  
3 language appears, which are the Crane case and the  
4 Gottshall case, did not involve causation at all. The  
5 question of causation was not presented to the Court in  
6 those cases.

7 JUSTICE GINSBURG: It has nothing to do with  
8 the line of cases I think in the '40s in the FELA cases  
9 where the message of this Court seemed to be quite  
10 clear, FELA cases go to juries? There are a number of  
11 cases with reverse dissents that seem to -- to say just  
12 that.

13 MR. ROTHFELD: Well, that -- that goes to  
14 the question that Justice Kennedy raised at the outset,  
15 which is how much evidence, whatever the standard of  
16 causation is, how much evidence must there be to go to  
17 the jury? And our presentation here is that FELA did  
18 not change the ordinary standard on -- on that question.  
19 But that -- but that is not the question that's  
20 presented in this case.

21 JUSTICE GINSBURG: Well, what -- can you  
22 explain to me -- I mean, here the judge charged in the  
23 words of the statute, and they are also the words used  
24 in the model Federal instruction: Did plaintiff's  
25 injury result in whole or in part from the railroad's

1 negligence?

2                   You would say: Was plaintiff's injury  
3 proximately caused. And as you no doubt know,  
4 Mr. Rothfeld, that term "proximate cause," it just loses  
5 juries. So considering that these cases go to the jury,  
6 what do you say to the instruction that's now given,  
7 based on the words of the statute, "Did plaintiff's  
8 injury result in whole or part from the railroad's  
9 negligence"? What should the judge charge instead of  
10 that?

11                   MR. ROTHFELD: Well, I think there are --  
12 there are two parts to your question, Justice Ginsburg.  
13 One -- one is, what's wrong with the instruction that  
14 was given here; and the other is can juries understand  
15 proximate cause as a concept.

16                   On -- on the first point, we have no  
17 objection to the instruction containing the language of  
18 the statute. The problem is that to be comprehensible  
19 and intelligently applied by jurors, it has to say more  
20 than that. Proximate cause we submit is an element of  
21 the cause of action and that has to be explained to a  
22 jury. It couldn't be the case in a Sherman Act case,  
23 for example, that a judge could simply charge the jury:  
24 You are to determine whether there has been an  
25 unreasonable restraint of trade; now go to the jury room



1 and answer that question. There is a lot more that has  
2 to go into that cause of action, including, as it  
3 happens, proximate cause.

4 JUSTICE KAGAN: Mr. Rothfeld, could you  
5 explain to me how it would have made a difference in  
6 this case, that instruction?

7 MR. ROTHFELD: It -- it would have made a  
8 difference I guess in two respects. One is that the  
9 plaintiff's theory has never at any point been that  
10 there was proximate cause in this case. He did not  
11 contend that there was before the -- the district court  
12 and he does not contend in his brief before this Court  
13 that there was proximate cause made out. And so --

14 JUSTICE GINSBURG: Well, maybe explain the  
15 difference. I mean, you were answering my question, and  
16 I asked how would you tell the jury? You said it's okay  
17 to say: Did plaintiff's injury result in whole or in  
18 part from the railroad's negligence, but the judge must  
19 say something more. So what is the something more?

20 MR. ROTHFELD: The something more is what  
21 this Court said in its Brady decision, in which it  
22 described -- the decision in Brady, which is cited and  
23 discussed in our opening brief in -- in some detail.  
24 Brady described what proximate cause means in the FELA  
25 context; and it means, the Court said, that there must

1 be a demonstration that the plaintiff's injury resulted  
2 from the wrongful conduct in a way that was natural,  
3 probable, and foreseeable. That -- that was a  
4 traditional statement, is still today a traditional  
5 statement of proximate cause.

6 JUSTICE GINSBURG: Natural, probable, and  
7 foreseeable?

8 MR. ROTHFELD: And foreseeable. That --  
9 that language was taken in the Brady case directly from  
10 the Court's decision, 1876 decision in the Kellogg  
11 decision, which we also cite in our brief, which states  
12 --

13 JUSTICE SOTOMAYOR: Can you tell me -- there  
14 is an article that suggests that juries don't actually  
15 understand what "proximate cause" means; and I think,  
16 and Justice Ginsburg can correct me, that what does that  
17 mean to a jury -- natural, probable, and foreseeable?

18 MR. ROTHFELD: Well --

19 JUSTICE SOTOMAYOR: Are the three phrases  
20 different? And how much more detail do you have to get  
21 in to describe that difference in a comprehensible way?

22 MR. ROTHFELD: Well, that -- that was the  
23 second part of Justice Ginsburg's question, and I got  
24 distracted, and I'm happy to address it. I think most  
25 of the criticism of proximate cause as being confusion

1 to the jury has actually been directed at the word  
2 "proximate," that commentators and some courts have said  
3 that's a confusing word, it suggests immediacy, it  
4 suggests closeness in time, it sounds like  
5 "approximate," and so juries find it confusing.

6 But there is -- once it's spelled out, I  
7 mean, the fact is juries have been applying proximate  
8 cause, which has been a fundamental, settled, universal,  
9 universally accepted part of common law of torts, in the  
10 medicine context in particular, and it has been settled  
11 for 150 years.

12 JUSTICE SCALIA: Apparently only FELA juries  
13 cannot understand it; all other juries find it okay.

14 MR. ROTHFELD: Well, I -- it is our  
15 submission that FELA juries would have no more  
16 difficulty applying it than do juries under the Sherman  
17 Act or RICO or the securities laws or, the other  
18 statutes that this Court has said include a proximate  
19 cause requirement, or that juries apply every day in  
20 courts across the country in court cases.

21 CHIEF JUSTICE ROBERTS: I just don't -- and  
22 maybe this has already been asked, but I'm not sure from  
23 a juror's perspective that it makes terribly much  
24 difference the exact formulation of this instruction. I  
25 think a juror who sees an employee is suing the

1 railroad, and it turns out that what the railroad did  
2 had very little or nothing to do with what happened to  
3 the employee, they don't need an instruction about  
4 natural, foreseeable causes. They're just not going to  
5 give the awards, or they're going to give the awards  
6 even though the railroad didn't do anything that  
7 affected the employee.

8           It's a -- it's a nuance that I just don't  
9 think has any practical significance.

10           MR. ROTHFELD: Well, we have to assume that  
11 juries follow jury instructions. That's the fundamental  
12 premise of the system, and there is no reason to doubt  
13 that in the ordinary case, in which the contents of  
14 proximate cause are -- are explained to the jury in an  
15 intelligent -- in a way that -- that people can  
16 comprehend.

17           JUSTICE SCALIA: Your client is entitled to  
18 have the jury disregard a proper instruction, right?  
19 That's what you're arguing?

20           MR. ROTHFELD: If the -- if the jury --

21           JUSTICE SCALIA: Juries disregard  
22 instructions on probable cause, on proximate cause.  
23 They probably do it in non-FELA cases, too.

24           MR. ROTHFELD: Well, I -- I --

25           JUSTICE SCALIA: But you're entitled to have

1    them disregard the correct instruction rather than an  
2    incorrect instruction, right?

3                   MR. ROTHFELD:   I will endorse that.

4                   CHIEF JUSTICE ROBERTS:   My point is that I  
5    don't see much practical difference between what you  
6    argue is the correct instruction and what your friend  
7    argues is the correct instruction.

8                   MR. ROTHFELD:   Well, certainly, in terms --

9                   CHIEF JUSTICE ROBERTS:   I mean, law  
10   students, professors, and some judges have had trouble  
11   defining the concept of proximate cause for centuries.  
12   I don't know why we expect a juror to be able to  
13   navigate through those nuances, either.

14                   MR. ROTHFELD:   Well, I -- the -- the  
15   principle of proximate cause, the idea that there has to  
16   be some limitation beyond but-for causation on  
17   liability, has been universally recognized.  Recognized  
18   by -- by courts, by this Court, by commentators, by the  
19   Restatement.  The Third Restatement, just published,  
20   clearly endorsed it.  They use -- they quibble about the  
21   terminology, but they clearly endorsed the absolute  
22   necessity of a proximate cause limitation on liability.

23                   JUSTICE KENNEDY:   Do you think that over the  
24   last few decades, there's been an increasing emphasis on  
25   foreseeability as a component of proximate cause?

1           MR. ROTHFELD:  There -- there probably has  
2   been.  I mean, I'll defer again to the Third  
3   Restatement, which has a very useful summary of the  
4   course of the law in this area.  And the principal tests  
5   that are now being used by courts are foreseeability and  
6   directness, which are closely related, I think.  I mean,  
7   clearly, as this Court stated just this month in the  
8   Stout case, it stated a test of proximate cause in terms  
9   of whether --

10           JUSTICE GINSBURG:  Could you give some  
11  examples of what causes would be proximate and what  
12  causes would not so qualify?  Something that's -- you  
13  said but-for is no good.  So what would be a but-for  
14  cause but not a proximate cause?

15           MR. ROTHFELD:  A but-for cause in this  
16  context would be, there's a defective brake on -- on the  
17  locomotive and it comes to a sudden stop.  If the  
18  conductor, standing in the locomotive when the train  
19  stops, is thrown to the floor and injured, clearly that  
20  is proximate cause.  It -- it is -- it is an injury that  
21  is related to the risk that made the conduct actionable  
22  in the first place.

23           The reason that having defective brakes is  
24  negligent and gives rise to a cause of action is because  
25  it can cause an accident that will cause people to fall,

1 cause the train to hit something, will cause derailment.  
2 That's why it is negligent, and if the kind of injury  
3 that follows from the accident is related to that risk,  
4 that clearly is proximate cause.

5 The kind which is not would be, train stops  
6 because of the defective brake. No one is injured.  
7 Conductor gets off the train to walk along and see  
8 what's going on, trips and turns his leg, or is bitten  
9 by a snake.

10 JUSTICE KAGAN: Mr. Rothfeld, are there any  
11 cases like that in the FELA world? You know, I take it  
12 that this basic instruction that was given in this case  
13 is the instruction that's given in most cases. If you  
14 look across the range of cases, do you find jurors  
15 awarding damages in the kind of situation that you're  
16 talking about? In other words, is this a real-world  
17 problem?

18 MR. ROTHFELD: They did in precisely the  
19 case I just described, a case called Richards from the  
20 Sixth Circuit, which is cited in the amicus brief  
21 submitted by the Association of American Railroads. The  
22 train stops because of a defective brake, the conductor  
23 gets off, walks along, turns his ankle and sues.

24 Clearly, the risk of someone getting off the  
25 train and having a fortuitous injury is not the kind of

1 risk that gave rise to the negligence. I mean, it's  
2 negligent to have a defective brake, but not because  
3 there's a bystander who might be bitten by a snake or  
4 turn -- turn his ankle.

5 JUSTICE BREYER: Is there a case like that?

6 MR. ROTHFELD: As I said, the Richards case.

7 JUSTICE BREYER: Yes, but I mean somebody  
8 might think that having to go off and patrol a thing in  
9 a rough area is something that happens with a sudden  
10 stop: You run a risk of turning your leg.

11 I agree with you about the snake. Is there  
12 any case about the snake?

13 MR. ROTHFELD: I -- I can't cite you a snake  
14 case directly, but --

15 JUSTICE BREYER: Okay. So the furthest --  
16 the furthest -- the furthest that you go is the case of  
17 sudden stop in the wilderness, gets off, rough area, and  
18 twists his ankle.

19 MR. ROTHFELD: Or I'll -- I'll cite you --

20 JUSTICE BREYER: I don't know. Is that  
21 proximate cause or not? Maybe it isn't.

22 MR. ROTHFELD: I'll give you two answers to  
23 that, Your Honor. First of all, there are other cases.  
24 Another case, for example, cited in the amicus brief  
25 that I referred to is the Schlumpert case from Georgia,



1 in which there's a defective coupling device lying on  
2 the ground. If it had -- if it had fallen off the train  
3 because it was defective and fallen on someone's foot,  
4 clearly that's proximate cause. But it's on the ground.  
5 The employee comes along, picks it up, throws off --  
6 throws off his -- throws out his back, and sues. That  
7 is not the kind of -- of injury that one would foresee  
8 comes from having defective couplers.

9 CHIEF JUSTICE ROBERTS: And do you want --  
10 what instruction would you give that would tell the jury  
11 to allow damages in one of those -- the first of the  
12 coupling cases, but not in the second?

13 MR. ROTHFELD: The instruction we ask for is  
14 the one this Court gave -- said should be given in the  
15 Brady case: Natural, foreseeable, and probable. It is  
16 not --

17 CHIEF JUSTICE ROBERTS: Are jurors going to  
18 sit there and say, one of those is natural, foreseeable,  
19 and probable, but the other isn't?

20 MR. ROTHFELD: I would -- I would say that  
21 it is --

22 CHIEF JUSTICE ROBERTS: I don't know what  
23 "natural" means. You know, so it's not a supernatural  
24 situation?

25 (Laughter.)

1                   MR. ROTHFELD: Well -- well, I'm just  
2 quoting the Court's language to you, Your Honor. But --  
3 but certainly, foreseeable and probable, one would say  
4 that --

5                   CHIEF JUSTICE ROBERTS: It's not foreseeable  
6 that if you drop a coupling where it's not supposed to  
7 be, somebody will come along and try to pick it up and  
8 move it?

9                   MR. ROTHFELD: Well, but it's not  
10 foreseeable in the sense that it is unrelated to the  
11 risk that gave rise to -- to the cause of action in the  
12 first place. I mean, it's foreseeable in the sense that  
13 anything is foreseeable.

14                   If I give the classic example: I drive -- I  
15 drive you to New York, from Washington to New York, and  
16 I drive too fast, exceeding the speed limit. That's  
17 negligent. It's negligent because I run the risk, if I  
18 drive too fast, of hitting somebody, of hitting another  
19 car, of driving off the road. And so if I do that and  
20 you're injured as I drive you to New York, you can sue  
21 me.

22                   But that doesn't happen. I drive -- I get  
23 to New York safely, you get out of the car, and as soon  
24 as you get out, you are struck by lightning. It's a  
25 but-for cause of your being struck by lightning that I

1 drove too fast. You wouldn't have been there when the  
2 lightning struck.

3 JUSTICE BREYER: You could have been bitten  
4 by a snake when you're getting out of t car.

5 (Laughter.)

6 JUSTICE BREYER: But there has been no such  
7 case, to your knowledge?

8 MR. ROTHFELD: Or -- or, more likely, you  
9 could have been hit -- hit by a car driving across Fifth  
10 Avenue too fast.

11 JUSTICE KAGAN: Mr. Rothfeld, your  
12 instruction actually used the term "probable cause."  
13 Are you -- "proximate cause." Are you saying now that  
14 that's not necessary, that as long as you say  
15 "reasonable and foreseeable," you would be satisfied?

16 MR. ROTHFELD: Well, I think that it should  
17 include the term "proximate" simply because that has  
18 traditionally been the requirement. That's what this  
19 Court has said in cases like Brady. It's what the Court  
20 has said in cases applying other proximate cause --  
21 other elements of proximate causation in other  
22 circumstances. But it is the concept.

23 I mean, as I said, "proximate" is a  
24 confusing word. That has been recognized sort of across  
25 the board. So it has to be spelled out and unpacked.

1 JUSTICE KAGAN: So why use it at all? If  
2 you think that "reasonable" or "foreseeable" are less  
3 confusing words, why shouldn't we just tell the jury to  
4 use those words instead?

5 MR. ROTHFELD: I -- again, I don't think  
6 that it is essential that it use the word "proximate" if  
7 it spells out what is meant by "proximate" in -- in --  
8 as --

9 JUSTICE GINSBURG: And the spelling out is  
10 natural, probable, and foreseeable?

11 MR. ROTHFELD: Again, that is the term that  
12 this Court used in Brady, and that is -- is closely  
13 related --

14 JUSTICE KENNEDY: Although your proposed  
15 instruction didn't use the word "foreseeable"?

16 MR. ROTHFELD: It did not use the word  
17 "foreseeable." It used "natural and probable." But  
18 we -- we endorse, again, the test that this Court has  
19 stated in the FELA context very clearly in the Brady  
20 case. There are -- as has been noted in some of the  
21 questioning, there has been discussion between courts  
22 and commentators over the years about what the best way  
23 is to define proximate cause and explain it to the jury.

24 I mean, in terms of the question posed by  
25 the Chief Justice, does it actually make any difference,

1 I think not only do we have to assume that it makes a  
2 difference, because juries are presumed to follow their  
3 instructions, but the kind of instruction that was given  
4 here was essentially a but-for instruction, that if you  
5 find that -- that in any respect, the injuries  
6 essentially would not have occurred but for the  
7 misconduct, for the -- for the negligence of the  
8 railroad --

9 JUSTICE ALITO: Could you explain how it  
10 might have made a difference in this particular case  
11 based on the facts of the case? As I understand it,  
12 Mr. McBride's theory was that as a result of having to  
13 use the independent brake extensively over a long period  
14 of time with this wide-bodied cab, his hand got tired  
15 and it fell, and it hit the independent brake.

16 Is that -- that's the theory?

17 MR. ROTHFELD: Well -- that -- that --  
18 that's his explanation of the accident. The theory of  
19 negligence, as I understand it, as it was presented to  
20 the jury by his expert was that the configuration of the  
21 train that he was driving was unsafe because it -- it  
22 could lead to derailments, it could lead to breaking of  
23 the couplers.

24 As explained by his expert, the -- the  
25 theory was not that there was something unsafe about the

1 arrangement of the braking system, and so, I think that  
2 the -- the way in which a proximate cause instruction  
3 properly given here could have made a difference is that  
4 the jury could have found, well, yes, it was negligent  
5 to have these five locomotives arranged in the way that  
6 they were, but that had nothing to do, except in a but-  
7 for sense, with the fact that the -- the -- that  
8 Mr. McBride's hand was injured; that the jury could have  
9 made that determination and so it could have made a  
10 difference.

11 Now, I mean, the fact is there was no  
12 proximate cause argument made below because the  
13 instruction that was given by the district court  
14 excluded it. And so, as I said before, the -- the  
15 theory of the case advanced by Mr. McBride below simply  
16 didn't take account of proximate cause.

17 Now, if the -- if we prevail here and the  
18 case goes back, he will be free to argue under a proper  
19 instruction that there was proximate cause, that somehow  
20 the configuration of the train affected his -- his  
21 handling of the brake.

22 JUSTICE SOTOMAYOR: You're really suggesting  
23 that the defense attorney here wouldn't have argued the  
24 concept of proximate cause in saying the negligence had  
25 nothing to do with him just deciding to hit the brake?

1 MR. ROTHFELD: The --

2 JUSTICE SOTOMAYOR: -- I -- I -- I -- it's  
3 farfetched, don't you think, that because the judge  
4 refused to give a proximate cause charge that the idea  
5 of it wasn't argued to the jury: What we did didn't  
6 cause this.

7 MR. ROTHFELD: Well, there -- there is no  
8 question that what the railroad did caused in the but-  
9 for sense. Mr. McBride would not have been in the cab  
10 operating the brake system had it -- had it not been for  
11 the configuration of the -- of the locomotives. And, so  
12 if we assume that the configuration of the locomotives  
13 was negligent, then but for the negligence of -- of the  
14 railroad, this would not have occurred. And that in  
15 fact is -- is the terms in which the case was argued to  
16 the jury by Mr. McBride's lawyer, who said, in so many  
17 words: But for the negligence of the railroad, this  
18 would not have occurred.

19 JUSTICE SCALIA: So the -- but the question  
20 is, what was your argument? What was your side's  
21 argument? Did you argue, in effect, proximate cause?

22 MR. ROTHFELD: Our side argued that there  
23 was no negligence at all, that -- that -- that the  
24 configuration of the railroad was perfectly proper, and  
25 that -- the -- the -- there was a contributory

1 negligence component to what was going on here. In  
2 fact, the jury found that Mr. McBride was contributorily  
3 negligent in part, and that was part of the -- of the  
4 defense presentation, too.

5 But just two or three -- to take a step back  
6 to first principles, on the assumption that proximate  
7 cause -- that there is a difference between instructing  
8 the jury on proximate cause and not, because the court  
9 -- it has been a part of tort law, you know, for time  
10 immemorial on the assumption that it does make a  
11 difference and it has been an important part of tort law  
12 because it has been universally recognized by courts, by  
13 academics, by the Respondent that there has to be some  
14 limitation on liability beyond but-for causation. If  
15 there is not, there is the danger of sort of infinite  
16 liability, of limitless liability, and particularly of  
17 fortuitous liability, because there is no way that the  
18 defendant in a situation like this can anticipate that  
19 it's going to be held liable for this kind of injury.

20 So proximate cause has been regarded as an  
21 essential component of the tort law. And that being so,  
22 FELA creates a Federal cause of action for negligence,  
23 it creates a Federal tort. It -- a fundamental  
24 principle of statutory interpretation, this Court has  
25 applied many times, most recently just this month in the



1 Staub case, that when Congress creates a Federal tort,  
2 it means to adopt the general background of tort law,  
3 and Congress --

4 JUSTICE GINSBURG: Are there any -- any  
5 negligence-type statutes? I mean this one, I mean, it's  
6 odd to say that the judge erred in reading to the jury  
7 the words of the statute, did plaintiff's injury result  
8 in whole or in part from railroad negligence. All that  
9 Federal statutes, negligence statutes that use the word  
10 "proximate" --

11 MR. ROTHFELD: There are -- there are  
12 Federal statutes that use the word "proximate." I don't  
13 know that there are any negligence statutes. So far as  
14 I understand from our review of the law, at the time  
15 that Congress enacted FELA in 1908, there -- there were  
16 no such statutes that made use of the term "proximate."

17 And the presumption then, as now, is that  
18 when Congress creates what amounted to a Federal tort,  
19 the assumption is that it intends to adopt a background  
20 of tort law. That was true in the Sherman Act, it was  
21 true in RICO, it was true in securities laws, it was  
22 true just as earlier this month in the Staub case, a  
23 statute which did not use the term "proximate."

24 JUSTICE GINSBURG: But you said your defense  
25 at trial was not about causation, it was no negligence,

1 right?

2 MR. ROTHFELD: Well, that's -- that's right.  
3 Given the instruction that the jury received, which does  
4 not -- did not include a proximate cause requirement,  
5 and given that if one assumes that there was negligence,  
6 there is no doubt that the -- that the injury here was  
7 the but-for product of that negligence, there sort of  
8 was no room for negligence to be argued to the jury on  
9 the defense side. I mean, for proximate -- for --  
10 for -- for causation to be argued on the defense side.

11 JUSTICE ALITO: Assume you could talk to the  
12 jury and the jury says to you: We found negligence, so  
13 we don't want to hear about that; and we've found but-  
14 for causation and we don't want to hear about that; now,  
15 explain to us why there isn't proximate cause here?  
16 What more -- what -- what would you say?

17 MR. ROTHFELD: In -- in this case we would  
18 say the negligence that is being presented to you and  
19 that you have presumably found is that the configuration  
20 of these locomotives was dangerous because it could lead  
21 to derailment, it could lead to breaking of the couplers  
22 between the cars. That is the negligence. And  
23 proximate cause, properly understood, means that the  
24 injury on which the plaintiff is suing has to follow in  
25 a probable, natural, foreseeable way from that -- that

1 negligence.

2 JUSTICE KAGAN: But wasn't the theory  
3 different, Mr. Rothfeld? Wasn't the theory that the  
4 configuration of the train made the braking and the  
5 switching much more difficult for the person in this  
6 position?

7 MR. ROTHFELD: Well, if I may, I'll answer  
8 that and then sit down.

9 That, as I say, was not the theory that was  
10 presented by the plaintiff's expert. To the extent that  
11 that is -- is a viable theory, it could be presented on  
12 remand. The argument can be made. I think it's a  
13 difficult argument, but -- but it was not presented to  
14 the jury here because there was no proximate cause  
15 instruction, so there was no opportunity for the  
16 question to be -- be -- be vetted.

17 And with that, thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Frederick.

20 ORAL ARGUMENT OF DAVID C. FREDERICK

21 ON BEHALF OF THE RESPONDENT

22 MR. FREDERICK: Thank you, Mr. Chief

23 Justice, and may it please the Court:

24 This case is a case that presents a  
25 non-existent problem and a solution that is in search of

1 a non-existent problem, because there are no real  
2 reported cases where there have been problems arising  
3 under the Rogers instructions that have become the model  
4 instructions under the Federal Rules for over 50 years.

5 And if could I just begin, Justice Kennedy,  
6 with your question which opened this up, proximate cause  
7 serves two principal functions. One is to limit the  
8 scope of the persons to whom the tortfeasor owes a duty;  
9 and the second is to limit the kinds of injuries that  
10 that person would be liable for.

11 The innovation in FELA that is so important  
12 to understand about why the relaxed causation standard  
13 became the accepted standard under FELA was that FELA,  
14 by its plain terms, did away with the first concept of  
15 proximate cause because it limited the duty to the  
16 employee by the employer. There is no one outside of  
17 that relationship that can bring an action under FELA.

18 And the second thing that it did was it put  
19 into what is now section 51 that if the negligence  
20 results in, quote, "in whole or in part" from the  
21 negligence of the railroad, that is enough for injury.  
22 At common law the proximate cause standard required that  
23 the railroad's negligence be the sole cause. So the  
24 innovation that created the relaxation in the causation  
25 standard was the inclusion of these words in part, and

1 so over time --

2 JUSTICE SCALIA: Of course, the other side  
3 says that what that meant, and -- and -- and the  
4 language of our cases seems to support that, "in whole  
5 or in part" simply eliminated the common law doctrine of  
6 contributory negligence, whereby if the plaintiff also  
7 had been negligent, the plaintiff could not recover,  
8 and -- and FELA uses a -- a -- a comparative negligence  
9 standard.

10 MR. FREDERICK: And this Court has rejected  
11 that kind of approach almost from the beginning of the  
12 statute. In Campbell in 1916, the Court asked whether  
13 FELA has completely eliminated the idea of proximate  
14 cause. The Court has eliminated and the plain language  
15 precludes the sole cause, immediate cause, direct cause,  
16 last cause, substantial factor --

17 JUSTICE SCALIA: Why doesn't "in whole or in  
18 part" apply to the elimination of contributory  
19 negligence? Isn't that an adequate explanation for the  
20 language?

21 MR. FREDERICK: It's -- it's not one that's  
22 consistent with the Court's cases. And let me point you  
23 back to the day Rogers was decided. If we accept for  
24 purposes of argument -- and I'm only accepting it for  
25 these purposes -- that Rogers was only about multiple

1 causes, on the very same day it decided two other cases  
2 that arguably were only about single causes. It decided  
3 a case under the Jones Act, the Ferguson case, and it  
4 decided another case under FELA, the Webb case. In both  
5 of those cases, there were no multiple causes, there was  
6 no contributory negligence; but what the Court said was  
7 that on today we are announcing this standard, we apply  
8 that standard to overturn directed verdicts where juries  
9 had come to the conclusion that the railroad's  
10 negligence had played a part, even a slight one, in  
11 producing the injury sustained by the worker.

12 JUSTICE KENNEDY: Do you think that the  
13 phrase in the statute "in whole or in part" allows  
14 juries to impose liability based on but-for causation?

15 MR. FREDERICK: No. The --

16 JUSTICE KENNEDY: Why -- why not?

17 MR. FREDERICK: As this Court put a gloss on  
18 that language in Rogers, it -- it construed those words  
19 to mean that the railroad's negligence has to be found  
20 to have played a role, however slight, in producing the  
21 injury. Thus in Mr. --

22 JUSTICE SCALIA: That's what but-for cause  
23 means. Tell me about the snake. Is the snake covered?

24 MR. FREDERICK: No.

25 JUSTICE SCALIA: Why not?

1 MR. FREDERICK: Because the railroad's  
2 negligence there --

3 JUSTICE SCALIA: Once you abandon a  
4 proximate cause requirement, however you want to define  
5 that, I don't see why the snake isn't covered, or the  
6 lightning on 42nd Street.

7 MR. FREDERICK: Because there the railroad's  
8 negligence played no part in producing the jury. It's  
9 the producing aspect that provides a little bit more --

10 JUSTICE SCALIA: Sure it did. The train  
11 wouldn't have stopped, the conductor wouldn't have  
12 gotten off, he wouldn't have been bitten by the snake.  
13 If the -- if the car had not traveled to New York over  
14 the speed limit, the -- the passenger wouldn't have been  
15 on 42nd Street when the lightning struck. I mean, how  
16 can you say it didn't play a part? Of course it played  
17 a part.

18 MR. FREDERICK: It was certainly an element  
19 of the existence of the condition. But what the Court's  
20 cases, Justice Scalia, after Rogers have done, and I  
21 think this is an important part of the history, is that  
22 there are a couple of outlier cases, to be sure. Courts  
23 have corrected them all by saying that the judge -- that  
24 the jury could not have reasonably found based on common  
25 experience that this snake bite or what have you was

1 proximately related to -- played a part.

2 JUSTICE BREYER: As I read the statute -- as  
3 I read the statute, it insists, as interpreted in  
4 Rogers, that the negligence has to play a part in  
5 producing, and in the snake case the negligence doesn't  
6 matter. It's simply the timing, et cetera. And is --  
7 that's how I read it.

8 MR. FREDERICK: Yes.

9 JUSTICE BREYER: And I guess that's how  
10 courts have read it. I'm not sure; you know. And I  
11 suspect from the answers I've gotten so far there's  
12 never been a court that read it differently.

13 MR. FREDERICK: That's correct.

14 JUSTICE SCALIA: Is that correct?

15 MR. FREDERICK: Yes.

16 JUSTICE SCALIA: That negligence didn't play  
17 a part?

18 MR. FREDERICK: Yes.

19 JUSTICE SCALIA: But for the negligence, the  
20 train would not have stopped. How can you say the  
21 negligence didn't play a part? Had the train not  
22 stopped, he wouldn't have been walking along and been  
23 bitten by the snake.

24 MR. FREDERICK: Justice Scalia --

25 JUSTICE SCALIA: I mean do words mean



1 anything? How can you possibly say that negligence  
2 didn't play a part? It obviously did. It seems to me  
3 you're arguing for -- not the nonexistence of proximate  
4 cause. Nobody in his right mind could argue for the  
5 nonexistence of proximate cause. You are arguing for  
6 some different -- different definition of proximate  
7 cause, and I would like to know what that -- what that  
8 new definition is, as opposed to the definition that Mr.  
9 Rothfeld proposed.

10 MR. FREDERICK: Well, let me start with this  
11 by saying that the Court and the language of the statute  
12 have already eliminate six possibilities for proximate  
13 cause; and the question now is whether there's something  
14 additive to the words that Mr. Rothfeld now proposes for  
15 the first time, because this was not language that they  
16 proposed in their proffered jury instruction, which can  
17 be found in the red brief at page 11. There they  
18 followed the Illinois proposed instruction which says  
19 "natural or probable sequence." That language does not  
20 appear in Brady. In Brady, a 1943 case from this Court,  
21 the words are used "natural and probable consequence," a  
22 consequence, of course, being a result, a sequence being  
23 an order of events.

24 Now, their instruction rests on the word  
25 "probable," which of course in common understanding and

1 most juries would commonly understand, "probable" means  
2 more likely than not, which is directly in contention  
3 with the statutory words "in part," and directly  
4 contrary to the way courts had universally understood  
5 this language since Rogers.

6 JUSTICE BREYER: I don't know if they said  
7 this, but I mean, as I read it, I thought the reason  
8 that negligence doesn't play a part is the act which was  
9 negligent played a part, of course; it was "but for";  
10 but the fact that it is negligent is totally irrelevant,  
11 because it's not within the risk in any sense  
12 whatsoever.

13 Now as I -- you know the area. I don't put  
14 -- don't just agree with me because I'm saying it. Is  
15 that roughly the --

16 MR. FREDERICK: That is correct, Justice  
17 Breyer. And in the cases -- and there really are only a  
18 few cases where you can find these kind of outlier facts  
19 and these kind of, you know, "out there" situations, and  
20 one of the reasons is because FELA is only a  
21 compensatory damages statute. It only addresses the  
22 actual injury and the compensation for the worker.  
23 There are no punitive damages, there are no attorney's  
24 fees, there are no treble damages.

25 JUSTICE KENNEDY: You're in the jury room

1 and a juror says: This wouldn't have happened but for  
2 the wide locomotive; therefore, there should be  
3 liability. What -- and assume the jury has all of the  
4 Federal reports in there and the judge lets them read.  
5 What -- what is there for another juror to say that this  
6 is wrong?

7 MR. FREDERICK: The negligence theory here,  
8 Justice Kennedy, if I could go back to that, was not  
9 stated in a way that we would subscribe to by -- by Mr.  
10 Rothfeld. Our theory of negligence at trial was  
11 twofold.

12 One was that these wide-bodied locomotives  
13 were not appropriate for the switching exercise that the  
14 train men were doing on that day, and in fact the  
15 supervising engineer said this was the only time that he  
16 was aware in his long experience where these wide-body  
17 locomotives were used for this specific purpose which  
18 required a lot of braking activity.

19 The second theory of negligence was that Mr.  
20 McBride was put to this purpose without proper training.  
21 He has complained on the day; he was uncomfortable and  
22 he didn't know whether he could operate that locomotive;  
23 and the jury was entitled reasonably to infer that that  
24 poor training was a --

25 JUSTICE SOTOMAYOR: How did any of those

1 things cause his injury?

2 MR. FREDERICK: Because --

3 JUSTICE SOTOMAYOR: You've used the  
4 formulation negligence played a part in the injury. So  
5 how did those things play a part?

6 MR. FREDERICK: His -- let's start with his  
7 poor training. There was testimony that a person who  
8 was more skilled in the art of dealing with a wide-bodied  
9 locomotive would be able to manipulate the independent  
10 brake with the automatic brake in a way that would not  
11 cause the repetitive stress that Mr. McBride suffered.  
12 And there was further testimony that using a wide-body  
13 locomotive, which is more difficult to manipulate for  
14 the switching operations, and here we're talking about  
15 moving in and off main tracks to couple trains, train  
16 cars so that they can be used for a longer  
17 destination -- that that kind of equipment was not  
18 suited for the purpose.

19 Mr. McBride's testimony was when he had used  
20 the wide-body locomotive, he had done so on long trips  
21 over long distances that didn't require the same kind of  
22 ready, manipulative braking of the independent brake.

23 JUSTICE SCALIA: And you don't assert that  
24 that's a foreseeable consequence of the negligence of  
25 using a wide-body train?

1 MR. FREDERICK: It's foreseeable if the  
2 railroad is using a piece of equipment without training  
3 the person.

4 JUSTICE SCALIA: Well, you -- you don't --

5 MR. FREDERICK: For a purpose that it's not  
6 ordinarily used for.

7 JUSTICE SCALIA: You say it doesn't have to  
8 be foreseeable.

9 MR. FREDERICK: They didn't ask for  
10 foreseeability, Justice Scalia.

11 JUSTICE SCALIA: Oh, so you -- you conceded  
12 that it ought to be foreseeable.

13 MR. FREDERICK: What I -- I would say this  
14 Court --

15 JUSTICE SCALIA: I'm trying to see what your  
16 case is because I can't believe you don't believe in  
17 proximate cause. I just think you're -- you're giving a  
18 different definition of it, and I'm trying to figure out  
19 what your definition of it is.

20 MR. FREDERICK: My definition, what I think  
21 the Court did in Rogers was to try to end the debate  
22 over how confusing the word proximate cause is in these  
23 kind of cases by offering simple and direct instructions  
24 that juries could understand and apply, and that has  
25 been the case over the last 50 years.

1 JUSTICE SCALIA: Do it. I'm still waiting  
2 to hear your instruction, which is supposedly something  
3 other than "but for." Is it just "but for"?

4 MR. FREDERICK: I would take the words of  
5 Rogers. I think the jury here was properly instructed.

6 JUSTICE SCALIA: With -- what are the words?  
7 Give me the words.

8 MR. FREDERICK: The words are on page 10 of  
9 the red brief, Justice Scalia, and it follows the model  
10 form instruction that's used in all the Federal courts,  
11 "defendant caused or contributed to plaintiff's injury  
12 if defendant's negligence played a part no matter how  
13 small in bringing about the injury. The mere fact that  
14 an injury occurred does not necessarily mean that the  
15 injury was caused by negligence."

16 JUSTICE SCALIA: You don't think that's "but  
17 for"?

18 MR. FREDERICK: Whether you think it's "but  
19 for" or not I think is beside the point.

20 JUSTICE SCALIA: I don't care whether I  
21 think. We've got words here. What do those words mean?

22 MR. FREDERICK: Those words mean that "but  
23 for" plus a relaxed form of legal cause associating the  
24 negligence in playing a part in produce the injury.  
25 That's how Rogers understood it.

1 JUSTICE SCALIA: Negligence is a given; the  
2 negligence is not what I'm asking about. I'm asking  
3 about causality, and what you have just read is "but  
4 for" cause.

5 MR. FREDERICK: Well, I would disagree with  
6 that Justice Scalia, and I think the Rogers Court  
7 disagreed with that too, because after Rogers this Court  
8 upheld in Inman a case on a directed verdict where it  
9 concluded after the Rogers instructions had been used  
10 that nonetheless the negligence of the railroad had not  
11 played a part. That's a case involving a drunk driver  
12 who hit a flag man at the site of where the flag man was  
13 operating.

14 JUSTICE SOTOMAYOR: Can I -- can I go back a  
15 second and perhaps follow up Justice Scalia's question  
16 in a slightly different way? Do you believe a railroad  
17 can be held liable for a harm it could not reasonably  
18 foresee?

19 MR. FREDERICK: Yes.

20 JUSTICE SOTOMAYOR: All right. Now,  
21 perhaps, we can get to why, under what formulation, if  
22 it didn't know harm was going to happen or could happen.

23 MR. FREDERICK: Well --

24 JUSTICE SOTOMAYOR: Reasonably foreseeable.

25 MR. FREDERICK: Yes. I think that the

1 concept of foreseeability is one that has alternated in  
2 and out of this Court's cases, but let's take the case  
3 of Gallick in 1963, where a fetid pool with vermin and  
4 rats were allowed to live by the railroad's negligence,  
5 and it was believed that an insect was growing -- insect  
6 bodies were growing in that fetid pool, and as a result  
7 of that insect bite, the injured worker's legs had to be  
8 amputated by the effect of this insect bite.

9 Now, many people would argue -- in fact, the  
10 lower court had concluded -- that it was not reasonably  
11 foreseeable that the railroad's negligence in allowing  
12 that stagnant pool to exist would nonetheless lead to  
13 the injury sustained by the worker.

14 JUSTICE SOTOMAYOR: It might not be  
15 reasonably foreseeable that an amputation would occur,  
16 but it was reasonably foreseeable that some injury to  
17 people would happen as a result of these infected insect  
18 bites, no? That's what the court ultimately said.

19 MR. FREDERICK: That's correct. But what  
20 the court had also done was to rely on earlier cases in  
21 which it's saying these concepts really are relaxed  
22 because the purpose of FELA is to provide a substitute,  
23 if you will, for workers' compensation, where if you can  
24 establish negligence on the part of the railroad and it  
25 causes, in part, the injury, the railroad will be liable



1 for that.

2           And that's why this -- these concepts of  
3 proximate cause really are getting at a different  
4 problem, which is that when these statutes are enacted,  
5 you're trying to guard the defendant's liability against  
6 the entire world. And that's why it makes sense to  
7 impose some kind of restriction for foreseeability or  
8 for directness, because otherwise anybody could be  
9 liable to anybody else. Here, that problem is removed,  
10 because the railroad is the only -- can only be sued,  
11 under FELA, by the employee, and only if its negligence  
12 plays a role in producing that injury.

13           If I could go back to the words that  
14 Mr. Rothfeld's trial counsel had proposed, the "probable  
15 sequence" word is now not even used anymore in Illinois.  
16 So it would be very odd to think that you would reverse  
17 an instruction here, where the proffered instruction by  
18 the railroad doesn't even state what -- the proximate  
19 cause instruction in the model language.

20           Now the model language under Illinois calls  
21 for the natural and ordinary course of events. That's  
22 how proximate cause is now done under the Illinois  
23 proposed instructions. And it's hard to know how that  
24 language, Mr. Chief Justice, takes us any different from  
25 the common instruction that all juries are given, to use

1 their common experience and their common sense in  
2 evaluating the evidence. If what proximate cause now  
3 means under these types of standards is the ordinary  
4 course of events, all we're doing is asking juries to  
5 apply their common sense without introducing the word  
6 "proximate cause," which has been demonstrated to  
7 confuse juries because most of them, you know, many  
8 think that "proximate" means something like estimate  
9 or --

10 JUSTICE SCALIA: If the other side doesn't  
11 insist on that, the other side -- we'll give you that  
12 one.

13 MR. FREDERICK: And we're delighted with  
14 that concession, Your Honor.

15 JUSTICE GINSBURG: Mr. Frederick, suppose a  
16 juror says, We wouldn't -- goes to the judge and says,  
17 We would like to have an explanation of, what does it  
18 mean that the injury results in whole or in part from  
19 the railroad's negligence? What would the judge  
20 respond?

21 MR. FREDERICK: Justice Ginsburg, I'm not  
22 entirely sure how a trial judge would take a request for  
23 further clarification of this word's -- this Court's  
24 words that clarify the "resulting in whole or in part  
25 from." I'm not aware of any cases where anyone

1 challenged the use of the Rogers language on the ground  
2 that it wasn't simple and direct and therefore couldn't  
3 be understood.

4 JUSTICE SCALIA: Well, this jury found it,  
5 though. What -- what would you tell the jury?

6 MR. FREDERICK: I beg your pardon?

7 JUSTICE SCALIA: This jury found it unclear  
8 and asks you. What would you say?

9 MR. FREDERICK: I think -- and I've never  
10 served as a trial judge, but I think my -- my direction  
11 would be to go back and try again based on the words  
12 that are there, because the whole idea behind these  
13 words was to try to end the debate between this Court  
14 and many State courts that simply didn't grasp that FELA  
15 was intended to provide a remedial statute with a  
16 causation element that was a weaker causation element  
17 than in normal negligence cases. And so this Court was  
18 taking dozens of cases under FELA between the 1930's and  
19 the 1950's in which the Court was looking at directed  
20 verdicts by State supreme courts that were overturning  
21 jury verdicts. And the whole idea behind making this  
22 the language of what constitutes a jury case was to  
23 remove the appellate review process from a lot of these  
24 things and to leave these questions up to the common  
25 sense of the jury.

1 JUSTICE ALITO: Well, what if the jury says,  
2 Well, does it mean that but for the negligence, the  
3 injury would not have occurred? Then what would the  
4 trial judge say?

5 MR. FREDERICK: If the jury asked a  
6 question, I think the judge would write back and say,  
7 No, that's not correct, the words -- please focus on the  
8 words: The negligence playing a part, however small, in  
9 producing the injury. I mean, I'm not aware if juries  
10 get to this but for versus what is a relaxed --

11 JUSTICE SCALIA: You think that eliminates  
12 but-for cause, to tell them that negligence plays a  
13 part, no matter how small, in the injury? You think  
14 that eliminates but-for, rather than invites it?

15 MR. FREDERICK: No, Justice Scalia, our  
16 position is that it is but-for plus a relaxed form of  
17 legal cause that's been well-recognized in the cases and  
18 hasn't produced a problem. Surely the burden is on the  
19 railroad to come up -- I would have thought that if they  
20 wanted to overturn the pattern instructions that have  
21 been used in nearly a half a million cases since Rogers  
22 was handed down, that they would have more than a case  
23 that they cite from one of their amici. I mean, they  
24 don't even cite the Richards case in their main briefs.

25 And so surely -- you know, we're here to

1 debate these hypotheticals, I would suppose, but they  
2 don't have any relation to the real world.

3 JUSTICE ALITO: Suppose the jury asks, Is it  
4 sufficient, is it necessary for the injury to be  
5 foreseeable? What does the trial judge say then?

6 MR. FREDERICK: I think the trial judge  
7 says, No, it is not necessary for it to be foreseeable  
8 in a direct -- if the negligence plays a part, however  
9 small, in producing the injury.

10 And that's why in cases like the Ferguson  
11 case, which was decided the same day as Rogers -- I  
12 mean, that's a very out-there set of facts, where the  
13 ship steward -- and remember, what you decide here also  
14 applies in the Jones Act for sea workers as well. But  
15 in that case, the Court said it was a jury question,  
16 whether the failure to provide an appropriate to  
17 implement to scoop hardened ice cream from the freezer  
18 on the ship was foreseeable, whether or not the ship's  
19 steward, in serving the ice cream, would reach for a  
20 butcher knife to try to chip away and lead to the  
21 severing of two of his fingers.

22 I mean, we're talking about a dangerous  
23 situation, Justice Alito. At the time that FELA was  
24 enacted, in a year prior to that, some 12,000 people  
25 died and there were hundreds of thousands of injuries,

1 and the idea behind the statute was to provide a broad  
2 remedy so that rail workers could be compensated, not  
3 get extra damages like punitive damages, but just  
4 compensated for their injuries. And so the result is  
5 that railmen know they're going to have to go before  
6 juries exercising their common sense, and juries have,  
7 in many, many cases, ruled in favor of the railroads.  
8 And that system ought to be allowed to continue.

9           If I could go back to one last point, and  
10 that is the idea of statutory stare decisis. We believe  
11 that because Rogers construed the "in whole or in part"  
12 language, it's entitled to statutory stare decisis where  
13 jury instructions have used that language.

14           And at some level, this case is not too far  
15 from the Hylton case, which was decided in the early  
16 '90s, except the difference is in Hylton, the Court had  
17 dealt with a case from the early 1960s called Parden.  
18 And that case had had many of the underpinnings of -- of  
19 the question there that had been discredited or undercut  
20 by subsequent decisions.

21           Here, there are no cases since Rogers that  
22 suggest doubt on the general validity of the Rogers  
23 rule. You have the cases that were decided in the  
24 immediate proximity of Rogers; you have Gallick in  
25 1963 --

1 JUSTICE GINSBURG: We have three justices of  
2 this Court that say Rogers is irrelevant because it had  
3 to do only with multiple causes.

4 MR. FREDERICK: And my answer to that,  
5 Justice Ginsburg, is that after Rogers, the Court  
6 applied the Rogers language to single cause cases. We  
7 have Webb, we have Ferguson, we have Kernan, we have  
8 Gallick, we have the statement in Crane that comparing  
9 the actions of the nonemployee, the -- the explanation  
10 for why the nonemployee has to go to common law is  
11 because there are these special features of FELA, one of  
12 which is no common law proximate cause and the  
13 elimination of contributory negligence and assumption of  
14 the risk.

15 And then subsequently when the Court in  
16 Ayers and then in Gottshall says very clearly these are  
17 ways that FELA has departed from the common law and from  
18 the other statutes, in Gottshall the Court was very  
19 clear that it is relaxed causation and that this is one  
20 of the departures from normal common law standards. It  
21 would seem odd to hold now that all of a sudden we're  
22 going to talk about common law standards for causation  
23 where the Court over a series of decision over the last  
24 hundred years has knocked out six of the prevailing  
25 versions of proximate cause that were then in vogue.

1 That would be a very odd way to -- to rule.

2 JUSTICE SOTOMAYOR: Mr. Frederick, go back  
3 again and tell me what a -- what a judge would say to a  
4 jury so he or she doesn't say but-for is not, not using  
5 those words, tell me in simple, plain language how a  
6 judge differentiates to a jury the difference between  
7 but-for and this causation. What would a judge say?

8 MR. FREDERICK: Okay, I would start with the  
9 language in Rogers, and then I would say --

10 JUSTICE SOTOMAYOR: The -- that negligence  
11 played a part in the injury?

12 MR. FREDERICK: Right. In producing --  
13 producing the injury.

14 JUSTICE SOTOMAYOR: Producing the injury?

15 MR. FREDERICK: That's correct. And that  
16 part of that played a part -- you know, rests on the  
17 common sense of whether or not a jury thinks that a  
18 particularly improbable set of -- of events is something  
19 that would be within the common experience of someone to  
20 view as --

21 JUSTICE SCALIA: It sounds like  
22 foreseeability you're talking.

23 MR. FREDERICK: It's a relaxed form of  
24 foreseeability in much the same way.

25 JUSTICE SCALIA: I thought you said no



1 foreseeability?

2 MR. FREDERICK: What I said was that this  
3 Court's cases go back and forth on the idea of  
4 foreseeability and whether or not it's necessary.

5 JUSTICE SCALIA: Do you want to go back or  
6 forth? Which do you want?

7 (Laughter.)

8 MR. FREDERICK: I think it's foreseeable  
9 here in this case that using the wrong equipment with  
10 the wrong training would produce an injury like the one  
11 that my client suffered. And so I would stand on that  
12 basis, and I would further stand on the ground that this  
13 Court --

14 JUSTICE KENNEDY: Well, at -- at -- at least  
15 that, it seems to me, is a jury question.

16 MR. FREDERICK: That's right, Justice  
17 Kennedy, and the jury here applied the statute the way  
18 it was intended. It found fault with my client, and it  
19 found fault with the railroad and it apportioned damages  
20 accordingly.

21 JUSTICE KENNEDY: But -- but -- but it was  
22 not instructed on foreseeability?

23 MR. FREDERICK: And they didn't ask for a  
24 foreseeability instruction. So, you know, reversing  
25 when -- when they haven't asked for the correct

1 statement of the law is not something this Court  
2 ordinarily does.

3 JUSTICE ALITO: Wasn't Mr. --

4 JUSTICE GINSBURG: They -- they -- they did  
5 ask for proximate cause?

6 MR. FREDERICK: They defined proximate cause  
7 by saying natural or probable sequence, Justice  
8 Ginsburg. That's how proximate cause was defined in  
9 their words, and the way they defined it didn't include  
10 the word "foreseeability."

11 JUSTICE SCALIA: That sounds like a good  
12 definition of foreseeable, doesn't it? It's natural and  
13 probable.

14 MR. FREDERICK: Probable, though, doesn't --

15 JUSTICE SCALIA: Could something be natural  
16 and probable and not foreseeable?

17 MR. FREDERICK: Justice Scalia, the word  
18 "probable" is more likely than not, which is the  
19 stronger standard, it's intention with the words "in  
20 part" in the statute. Result in part is not something  
21 that is more likely than not. For that reason, we  
22 believe the Court should adhere to the Rogers approach.  
23 It's worked, it's allowed juries to exercise their  
24 common sense without being confused by these elusive  
25 proximate cause formulations.

1           The other side has failed to identify a  
2 problem, and there's not the slightest reason to think  
3 that any alternative formulation would work any better.

4           JUSTICE ALITO: Could I just ask you this  
5 factual question? Was it Mr. McBride's theory that his  
6 injury resulted from the repetitive use of the  
7 independent brake or was it that the -- as a result of  
8 the repetitive use his hand fell down and it hit the  
9 independent brake, and that was the cause of the injury?

10          MR. FREDERICK: I think it's -- both  
11 theories were presented, and they were both based on the  
12 improper equipment that he was asked to use and his  
13 improper -- improper training he had been given, which  
14 are classic jury questions concerning negligence and  
15 causation.

16          Thank you.

17          CHIEF JUSTICE ROBERTS: Thank you, counsel.

18          Mr. Rothfeld, you have 4 minutes.

19                   REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

20                           ON BEHALF OF THE PETITIONER

21          MR. ROTHFELD: Thank you, Your Honor, just a  
22 few quick points. First, although my friend Mr.  
23 Frederick has struggled valiantly, I think that he is  
24 unable to explain how his test is any different from a  
25 "but for" causation.

1 JUSTICE BREYER: How about eggshell skull?

2 MR. ROTHFELD: That is a different kind of  
3 problem.

4 JUSTICE BREYER: It is not foreseeable.

5 MR. ROTHFELD: It has been -- the rule of  
6 common law from --

7 JUSTICE BREYER: You're just saying, it's  
8 all foreseeable, not foreseeable.

9 MR. ROTHFELD: No. The question is whether  
10 or not the kind of -- the risk of -- that there would be  
11 an injury follows from the -- the nature of the  
12 misconduct that gives rise to liability in the first  
13 place, and it is -- common law has always recognized  
14 that if you're risking a particular kind of injury, that  
15 someone is going to be hit, you take your victim as your  
16 find them, and that is put -- put in a different basket  
17 of -- of doctrine altogether.

18 So -- so first, again I -- there is no  
19 alternative to proximate cause, but "but for" cause;  
20 that's been universally recognized as an unacceptable  
21 basis for liability.

22 Second, if I could return to our snake just  
23 for a moment. It has been recognized that the -- the  
24 nature of the protection that's provided by the tort law  
25 is related to the -- to the risk of injury that gives

1 rise to liability in the first place. If there -- the  
2 risk of injury is that a defective brake is going to  
3 lead to a derailment or an accident, injury that follows  
4 from that risk is compensable; injury that does not,  
5 like walking along and turning your leg or being bitten  
6 by a snake is in a different category, it's not  
7 predictable and foreseeable or natural in that sense.

8 JUSTICE SOTOMAYOR: Why not, if you know  
9 that there are snakes along this route, just like  
10 there's an infected vermin or insects or something else?  
11 I --

12 MR. ROTHFELD: Well, the question would be  
13 one for the jury if it's properly instructed. And in  
14 fact in the Gallick case, as I think Justice Sotomayor,  
15 you -- you have recognized, the Court said that that was  
16 foreseeable. And the jury -- the issue can be posed to  
17 the jury, the jury can determine whether it is a natural  
18 problem.

19 JUSTICE SOTOMAYOR: So it's not that it's a  
20 matter of law?

21 MR. ROTHFELD: No. That -- that's right,  
22 that's right.

23 JUSTICE SOTOMAYOR: A matter of law, there  
24 was -- there could be no proximate cause. You're  
25 arguing that a jury should determine whether or not they

1 could anticipate somebody slipping on a slope?

2 MR. ROTHFELD: That -- that's generally  
3 right. I mean, there will be circumstances, as the  
4 restatement says, that -- in which it's so clear that it  
5 is not a -- a probable, natural, foreseeable consequence  
6 of -- of the wrongful conduct, that it should not go to  
7 the jury. And --

8 JUSTICE ALITO: Isn't -- isn't Mr. Frederick  
9 right in saying that asking whether something is  
10 probable is very different from asking whether it's  
11 foreseeable?

12 MR. ROTHFELD: They -- clearly they are  
13 closely related. I mean the Court in Brady stated  
14 that -- that test, as natural, probable, foreseeable.  
15 If it is natural and probable, it is likely to be  
16 foreseeable. And --

17 JUSTICE ALITO: Well, if it's probable it's  
18 foreseeable, but it can be foreseeable even though it's  
19 not probable.

20 MR. ROTHFELD: Well, it -- but I think what  
21 probable means in this context it has to be foreseeable,  
22 not simply in the theoretical, I can foresee if I drive  
23 too fast in New York, maybe there will be a lightning  
24 strike -- I mean, I can imagine that. But it has to  
25 have -- pass a certain threshold to --

1 JUSTICE SCALIA: If that's true, that --  
2 everything that's natural and probable is foreseeable,  
3 but not everything that's foreseeable is natural and  
4 probable, you were requesting a jury instruction that  
5 didn't go as far to help you as was possible, but you  
6 were still requesting a jury instruction that was on the  
7 road.

8 MR. ROTHFELD: That's -- to me the only  
9 question now here before this Court is whether we are  
10 entitled to a jury instruction that states properly the  
11 nature of the proximate cause test, and if the case goes  
12 back under that standard, then the arguments that have  
13 been suggested by Mr. Frederick can be presented to the  
14 jury. But -- but as you say, Justice Scalia, that's  
15 right; and to the extent that there was anything wrong  
16 with the instruction, we would provide it.

17 JUSTICE SCALIA: This case go to the jury?

18 MR. ROTHFELD: I think it would be open to  
19 argue that it's so clear that -- that there was no  
20 proximate cause that it shouldn't; but that's a question  
21 to be posed on remand.

22 JUSTICE KAGAN: I'm sorry, Mr. Rothfeld, I  
23 didn't understand what you just said, because the  
24 requested jury instruction that -- that you gave was any  
25 cause which in natural or probable sequence produced the

1 injury. Is that right?

2 MR. ROTHFELD: That was the requested  
3 instruction.

4 JUSTICE KAGAN: So that's essentially saying  
5 that the jury has to say it's 51 percent likely to  
6 produce the injury, isn't that right?

7 MR. ROTHFELD: I -- it was not put in those  
8 terms. I -- I would not think --

9 JUSTICE KAGAN: Well, it says natural or  
10 probable, and probable means more likely than not, which  
11 is 51 percent.

12 MR. ROTHFELD: I -- again, it was not --  
13 unpacking those terms, and I would say it does not have  
14 to be -- the answer is -- is no. The jury doesn't  
15 define that it is -- it is necessarily going to be the  
16 outcome, but it has to find that there is some  
17 substantial probability that it will be the outcome,  
18 before liability can attach, would be our -- our  
19 submission.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
21 The case is submitted.

22 MR. ROTHFELD: Thank you, Your Honor.

23 (Whereupon, at 12:02 p.m., the case in the  
24 above-entitled matter was submitted.)

25



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