

## **Does Proximate Cause Have a Place in the FELA? U.S. Supreme Court to Decide**

### ***Product Liability Advisory***

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In a development that should be of interest to all lawyers who confront issues of tort causation, the U.S. Supreme Court has agreed to review the standard of causation under the Federal Employers Liability Act (FELA). *McBride v. CSX Transportation, Inc.*, 598 F.3d 388 (7th Cir. 2010), *cert. granted*, --- S.Ct. ----, 2010 WL 3267521 (U.S. November 29, 2010) (No. 79-3109).

Railroad defense lawyers and FELA plaintiffs' attorneys have long disputed the causation standard that applies to personal injury claims brought by railroad workers injured in employment. Plaintiffs contend that proximate cause is not required to prevail under the FELA. Since the FELA's birth in the early 1900s, court decisions have created more confusion than clarity. Plaintiffs' attorneys have successfully used the confusion to more often than not impose a concept of causation that is almost no standard at all. A typical instruction will tell the jury that the railroad is liable if its negligence played any part in the plaintiff's injury, *even in the slightest and no matter how small*.

The "even in the slightest" language derives from the case of *Rogers v. Missouri Pacific Railroad Company*, which addressed the issue in the context of concurring causes. 352 U.S. 500, 506 (1957). Plaintiffs also rely on *Consolidated Rail Corporation v. Gottshall* for their causation arguments, thanks to its dictum that the *Rogers* causation framework applies in all FELA cases. 512 U.S. 532 (1994). *Gottshall* confused what had seemed to be a clear distinction for assessing causation in cases involving multiple causes. More recently, *Norfolk Southern Railroad Company v. Sorrell* contributed to the controversy with Justice David Souter's concurrence dispelling the notion that FELA causation deviated from the "law governing the degree of causation necessary for redressing negligence." 549 U.S. 158, 173 (2007) (Souter, J., concurring).

The Court will use the Seventh Circuit Court of Appeals' decision in *McBride* to address FELA causation and hopefully confirm that proximate cause has been and will be a required element of any successful FELA claim. The specific issue in *McBride* is the following jury instruction: "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 Seventh Circuit held that there was no error in the instruction and declined to rule that common law proximate causation is required to establish liability under the FELA. A ruling is expected by the summer of 2011.

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