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NOTES

PROXIMATE CAUSE UNDER THE JONES ACT

The Jones Act, enacted by Congress in 1920, provides a right of action against the employers of seamen killed or injured in the course of their employment. An election is given to the seaman or his representative between an action at law, with trial by jury, and a suit in admiralty, tried to the court. The standards of liability to be applied in such an action are not set forth; instead the Federal Employers' Liability Act is incorporated by reference. The FELA provides for recovery by the employees of an interstate carrier by rail for injuries resulting "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

From its inception the Jones Act has been treated by the courts as remedial legislation, to be liberally construed in favor of the injured seaman. This attitude has resulted in a broadened definition of negligence, and an extension of the employer's liability to kinds of harm not generally compensable at common law.

For the past decade the emphasis has been on causation, with the result that a number of courts in FELA and Jones Act cases have fundamentally departed from the common law concept of proximate cause. The purpose of this note is to explore the nature and extent of this departure.

Proximate, or "legal," cause embraces two distinct problems. The first is the problem of causation in fact, which deals with the part actually played by the defendant's negligence in producing the plaintiff's injury. The second, and much more difficult, problem is that of determining when a negligent defendant should be relieved of liability for the harm he has in fact caused. The two problems have little affinity and must, therefore, be considered separately.

Causation in Fact

A defendant, no matter how negligent, can be liable only when his conduct has in fact been a cause of the damage in question. This issue of causal connection is basically a simple one, a matter of common experience which the jury is well suited to handle. The only questions of law involved concern, first, the amount of

5 Jamson v. Encarnacion, 281 U.S. 635, 1930 A.M.C. 1129 (1930) (assault on seaman by superior is "negligence").
8 RESTATEMENT (SECOND), TORTS §§ 430-31 (1965).
9 See GREEN, RATIONALE OF PROXIMATE CAUSE 139 (1927).
proof required of the plaintiff in order to justify submission of his case to the jury, and second, the formula by which the jurors are to determine the issue of causation once it is in their hands. With respect to both questions there has been in Jones Act and FELA cases an abandonment of settled common law principles.

**Sufficiency of the Evidence**

At common law the plaintiff has the burden of proving that it is more probable than not that the defendant made a substantial contribution to his injury. The balance of probabilities must weigh in his favor. The jury is not permitted to speculate, and if it is just as likely that causation is lacking, the defendant is entitled to a directed verdict. A few early Jones Act cases rigorously applied this rule, but before long a more liberal tendency developed which insisted upon less proof and permitted more speculation by a usually sympathetic jury. When a seaman elected to sue in admiralty, without a jury, a rule was developed that permitted the court to infer much that was lacking on the issue of causation.

This liberal approach to causation in Jones Act cases was due more to the generally sympathetic attitude of the courts toward seamen than to the statute’s incorporation of the FELA. Then in *Schultz v. Pennsylvania R.R.* the United States Supreme Court shifted the emphasis to the peculiar language of the FELA, which provides for recovery by railway employees for injuries resulting “in whole or in part” from employer negligence. The Court found in this provision a congressional intent to relax the employee’s burden of proof on the issue of causation. A year after *Schultz* the Supreme Court reiterated this position in *Rogers v. Missouri Pac. R.R.*, an FELA case which has become the leading case on causation under both the Jones Act and the FELA. Rogers was a railroad worker who was injured while seeking to escape from a dangerous situation allegedly created by the

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10 Kramer Service, Inc. v. Wilkins, 184 Miss. 483, 186 So. 625 (1939); see Prosser § 41, at 245.
11 An exception to the rule has been recognized where the plaintiff has proved the negligence of two or more defendants, and that one of them caused his injury. In this situation several courts have put the burden of proof on the issue of causation on the negligent defendants. See Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), annot., 5 A.L.R.2d 91 (1949); Prosser § 41, at 247.
17 352 U.S. 500 (1957).
negligence of his foreman. The Missouri Supreme Court reversed a judgment in his favor, partly on the ground that from the evidence it appeared at least equally probable that the plaintiff had created the emergency by his own inattention to his duties, and therefore there was no case for the jury. In reversing this Missouri holding the United States Supreme Court made it crystal clear that the common law rule with respect to the sufficiency of the evidence of causation has no place in the FELA.

Under this statute 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. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.18

This test has been applied in a number of subsequent FELA and Jones Act cases,19 and it is now quoted as a matter of course in almost every case arising under these statutes. It has reduced the plaintiff's burden of proof on the issue of causation almost to the vanishing point, and as a result it is a rare court that takes a case away from the jury.20

The “Test” of Causation

The second problem arises after it is determined that the plaintiff's proofs justify submission of the issue of causation in fact to the jury. This problem involves the formula by which the issue is to be decided. How great must be the part played by the defendant's negligence in producing the plaintiff's injury for it to be deemed a cause thereof? The common law answer to this question is probably no more than a statement of the average juror's conception of causation, based on everyday experience. The traditional rule is that the defendant's negligence must be a cause sine qua non—a factor without which the harm would not have occurred.21 The conduct in question may have played some trivial part in the occurrence, but if without it the result would have been the same, the requisite causation is lacking, and there is no liability.

There is one situation in which this traditional formula breaks down. This is where two forces of independent origin, either of which would alone have produced the damage, combine to bring it about.22 Here, without either force the result would have been the same, and thus by the traditional formula neither is a cause. To meet this situation a different rule was developed, that the defendant's

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18 Id. at 506-507.
20 The plaintiff must, however, have at least some circumstantial evidence to justify an inference of causation. See Miller v. Farrell Lines, 247 F.2d 503, 1957 A.M.C. 2015 (2d Cir. 1957), cert. denied, 355 U.S. 913 (1957), which held that even by the Rogers test, the plaintiff had failed to carry his burden on this issue. When a seaman elects to sue his employer in admiralty the judge's finding of no causation is protected on appeal by the “clearly erroneous” rule [FED. R. CIV. P. 52(a)]. Prendis v. Central Gulf S.S. Co., 330 F.2d 893 (4th Cir. 1963).
21 Prosser § 41, at 242-43.
22 Id. at 243.
negligence is a cause if it is a "substantial factor" in producing the result. Since this substantial factor test has certain other relatively minor advantages over the sine qua non rule, it has been adopted by the Second Restatement of Torts as the formula for determining the issue of causation in fact. Except in the one rather unusual situation outlined above, however, the two tests are generally thought to convey to the jury the same idea: the defendant must play a material part in the outcome.

A few courts have apparently interpreted Rogers v. Missouri Pac. R.R. as leaving intact these common law formulas in FELA and Jones Act cases. Since the rule of the Rogers case was formulated as "the test of a jury case," they have reasoned that once it is met the issue must go to the jury, but in deciding it the jury may still utilize the common law formulas. The great majority of the lower federal and state courts to consider the question have rejected this view and held that the plaintiff is entitled to a jury instruction that the employer's negligence was a cause of his injury if it played "any part, even the slightest" in the occurrence. This appears to be the correct interpretation of the Rogers case. While it is true

24 See Prosser § 41, at 244. Chief among these advantages is that it serves, more clearly than the sine qua non formula, to exclude the defendant's conduct as a cause where he has made a real, but clearly insignificant contribution to the result. Prosser gives the example of the man who carelessly tosses a lighted match into a raging forest fire.
25 RESTATEMENT (SECOND), TORTS § 431 (1965).
26 Prosser § 41, at 244.
28 This seems to be the view taken in the Ninth Circuit. See Bertrand v. Southern Pac. Co., 282 F.2d 569 (9th Cir. 1960), cert. denied, 365 U.S. 816 (1960), where the court approved a traditional instruction on causation. The one requested by the plaintiff, however, stated the Rogers rule as the "test of liability," and the court objected to this phraseology. Compare McEwen v. Spokane Int'l R.R., 325 F.2d 491 (9th Cir. 1963).
that the United States Supreme Court framed its rule in terms of the test of a jury case, the opinion leaves little doubt that it was intended to serve as the test of causation as well.\textsuperscript{30}

Thus in the area of causation in fact there has indeed been a striking departure from the common law. Under the Rogers rule the defendant's negligence need not be a substantial factor, nor one without which the harm would not have occurred. It is a "cause" if it played even the slightest part in the injury or death, and if there is any evidence at all to support such a conclusion, the issue is always for the jury.

\textbf{Proximate Cause}

The consequences of an act may be infinite in number and variety, while the act itself may be but a slight departure from the standard of conduct imposed by law. For this reason the common law has always recognized that a defendant's liability must be limited to those consequences which bear some reasonable relation to his wrong.\textsuperscript{31} Here the concern is not with the part played by the defendant's negligence in producing the plaintiff's injury. This problem of proximate cause is properly reached only when it is established that the defendant's contribution to the damage in question was sufficiently material for a causal connection to exist between them.

Writers have long debated the proper approach to this problem, but all have agreed that it is one of policy.\textsuperscript{32} Reduced to its simplest terms, the question in every case is the same: between a defendant who has been negligent and a plaintiff who has been harmed as a result, upon whom should the loss be placed? The answer calls for a delicate balancing of individual and social interests. Rigid rules have proved unworkable in an area dominated by considerations of policy, but the law requires some degree of predictability. So the common law has evolved general guidelines for determining what is "proximate" and what is "remote." These standards are themselves so wrapped in controversy that it is difficult to compare and contrast them with the standards employed in Jones Act and FELA cases. Yet there have in recent years been some departures from the prevailing common law guidelines, and the remainder of this section is an attempt to delineate the nature and scope of this departure. Since its genesis is to be found in decisions of the United States Supreme Court, it is important to inquire first what this Court has done with the subject.

\textbf{The Supreme Court and Jones Act Proximate Cause}

\textbf{Rogers v. Missouri Pac. R.R.}\textsuperscript{33} dealt with the problem of causation in fact. The Supreme Court of Missouri had seen in the case a problem of proximate cause,\textsuperscript{34} but on the facts as viewed on appeal by the United States Supreme Court, this issue was not presented. The Rogers case, however, has a significance beyond its liberal rule of causation in fact. This importance lies in the approach of

\textsuperscript{33} 352 U.S. 500 (1957).
\textsuperscript{34} Rogers v. Thompson, 284 S.W.2d 467, 473 (Mo. 1955).
the Court toward the entire theory of liability under the FELA. The opinion makes it clear that the Court regards this as a special statutory liability, distinct from liability for negligence at common law. Liberal standards of recovery had long obtained in Jones Act and FELA cases, but this had been accomplished within the framework of common law negligence concepts. In the Rogers case the FELA, and with it the Jones Act, cast off from its common law moorings and set an independent course, guided not by the ancient hand of the common law, but by the commands of a Supreme Court anxious to secure compensation whenever possible to the victims of industrial accidents.

What are the incidents of this new liability? Simplicity is to be its keystone. Only negligence itself remains substantially in its common law form, retaining the element of reasonable foreseeability of harm sufficiently grave to outweigh the utility of the defendant's conduct, and even this issue must be handed to the jury if supported by a scintilla of evidence. Given employer fault, the path to recovery is to be kept uncluttered. Swept aside are the common law formulae for determining causation, and in their place is a rule defining the defendant's negligence as a cause if it played any part at all in the plaintiff's injury.

With guidelines such as these it is small wonder that lower courts have viewed the Rogers case as requiring a relaxation of some of the common law standards of proximate cause. But which of the common law guidelines must go, and with what are they to be replaced? These questions were left unanswered by the Rogers case because they were not presented.

In Kernan v. American Dredging Co. the United States Supreme Court demolished one well-established common law rule for limiting liability, and, by way of dictum, raised the specter that there may be no limitation at all. This was a Jones Act case involving the violation of a statute. At common law the problem of limiting the defendant's liability is easiest when negligence is predicated on such a violation. The courts look simply to the purpose of the statute violated by the defendant. If the harm caused to the plaintiff is found to be of a character against which the legislation was designed to protect, they look no further. The statute both qualifies the act of the defendant as negligent and sets tightly the bounds of his liability. The written law which usually reveals the purpose of the statute without great difficulty, and the well-settled policy of strict construction have been said to set this rule apart from any court-made rule for limiting the actor's liability when no statute is involved. The basic problem, however, is the same, though the solution is much easier when there is a statute.

In the Kernan case the Supreme Court held this test of statutory purpose inapplicable to Jones Act cases. The owner of a tug had violated a Coast Guard

40 See Prosser § 35, at 196-97.
regulation requiring the maintenance of a white light not less than eight feet above the water. The tug carried instead an open flame lamp at a height of only three feet. Upon the surface there lay an accumulation of waste petroleum products which the owner had no reason to expect; these were ignited by the flame from the lamp, and in the ensuing fire a seaman died on board the tug. The court declined to find a broad safety purpose in the statute for the protection of seamen to bring it within the common law rule. It conceded that the only purpose of the regulation was the prevention of collisions, but held this to be immaterial. The act done in violation of statute caused the death, and this was enough to create liability.

The Kernan decision was frankly one of policy. The Court expanded on the Rogers theme that liability under the Jones Act and the FELA is distinct from ordinary negligence liability at common law. Congress, by not defining in detail the standards to apply in these special statutory actions, had left the courts free to adjust these standards to “meet changing conditions and changing concepts of industry’s duty toward its workers.” Under prevailing industrial conditions and modern concepts of the distribution of risks inherent in these conditions, the old test of statutory purpose was held to be out of place.

Mr. Justice Brennan, for the majority, then moved beyond the immediate problem of violation of statute, and summarized his view of liability under the Jones Act and the FELA in the following language:

The theory of FELA is that where the employer’s conduct falls short of the high standard required of him by this Act, and his fault, in whole or in part, causes injury, liability ensues. And this result follows whether the fault is a violation of a statutory duty or the more general duty of acting with care.

This language certainly indicates a departure from the limits which the common law has sought to place on the liability of negligent defendants. It is so broad, however, that it reveals little more. Given its literal effect, it would mean that there are no longer any limits at all and that the employer is to be liable for all injuries in which some breach of duty, statutory or otherwise, plays even the slightest part. It has not been given this effect in subsequent cases. Liability has in fact been limited to consequences not too extraordinary in light of the risk created by the employer. Even when there has been a violation of statute, the employer has been relieved of liability where harm has followed not directly and immediately, but through a series of strange and unrelated events.
Once it is admitted that liability is to be limited short of causation in fact, neither the Rogers rule of causation nor the expansive language of Kernan can be of much value in determining where the bounds of that liability are to be set. One can only look to decisions since Rogers to see where the courts have tended to draw the line.

Direct Consequences

Results are said to be “direct” when they flow from the application of the defendant’s negligence to circumstances existing at the time and place of his act.\(^{47}\) When some external force, human or otherwise, materializes after his act and changes the situation he has created, the results are no longer direct.

When results are direct, the common law has long been torn between two opposing views. One would hold, in effect, that all direct results are “proximate,”\(^ {48}\) on the theory that this very directness establishes a sufficient relation between the injury and the conduct producing it to justify holding the defendant liable. The other view would limit the defendant’s liability to the “foreseeable” consequences of his negligence,\(^ {49}\) making the tests of negligence and proximate cause substantially the same. This limitation actually has two branches: foreseeability of the particular plaintiff who has been injured and foreseeability of the result which has befallen him. The former is largely the product of Palsgraf v. Long Island R.R.,\(^ {50}\) in which Judge Cardozo held that unless the defendant could foresee that his conduct involved the risk of some injury to the plaintiff, he violated no duty owed to the plaintiff, and thus as to this individual he was not negligent. If Cardozo’s position is accepted, the other branch of the limitation, requiring that the results of the defendant’s negligence be foreseeable, should follow.\(^ {51}\)

While foreseeability, in both of its branches, has been gaining ground as the criterion of proximate cause at common law,\(^ {52}\) the trend in FELA and Jones Act cases appears to be in the other direction. With respect to foreseeability of the plaintiff, no Jones Act case has been found adhering to the Palsgraf position. A few older FELA cases\(^ {53}\) utilized Palsgraf to defeat recovery by railroad workers, but these cases have been criticized\(^ {54}\) and it is doubtful whether they have any

The court held this injury entirely too remote from the employer’s violation of the Safety Appliance Act. See also Coray v. Southern Pac. Co., 335 U.S. 520 (1949) involving a more direct, though unusual, result. In Holloway v. Butler, 1960 A.M.C. 203 (S.D. Fla. 1959), an employee, relying on Kernan, sought to invoke a nuisance ordinance of the city of Smurra Beach, Florida. His purpose is not made clear in the brief report of the case, but the court had little sympathy with the attempt. Noting that Kernan was a Jones Act case, the court dismissed it as “dictum.” Compare Marshall v. Isthmian Lines, 334 F.2d 131, 1964 A.M.C. 1686 (5th Cir. 1964) (longshoreman’s negligence action).

\(^{47}\) McLaughlin, Proximate Cause, 39 Harv. L. Rev. 149, 163 (1925).
\(^{49}\) See, e.g., Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So. 2d 780 (1942).
\(^{50}\) 248 N.Y. 339, 162 N.E. 99 (1928).
\(^{51}\) See Posser, Proximate Cause in California, 38 Calif. L. Rev. 369, 399 (1950).
\(^{52}\) Prosser § 50, at 305-06.
\(^{54}\) Ehrenzweig, Loss-Shifting and Quasi Negligence: A New Interpretation of the Palsgraf Case, 8 U. Cin. L. Rev. 729, 741 (1941).
present vitality. On the other hand, recovery has been allowed under the FELA since Rogers even though the plaintiff was apparently beyond the zone of any foreseeable danger created by the defendant.\textsuperscript{55} In the area of results as well, foreseeability seems to be out of fashion as a device for limiting the liability of the negligent employer. In a number of cases since Rogers, jury instructions containing the conventional "natural and probable" formula have been held erroneous, along with those embodying the traditional test of causation in fact.\textsuperscript{56} The entire tenor of the Supreme Court's opinion in the Kernan case makes unlikely a "foreseeability" limitation on the employer's liability, at least when the results of his negligence are direct.

It is most probable that the alternative view, which imposes liability for all direct consequences, will gain general acceptance. This is strongly indicated by Gallick v. Baltimore & O.R.R.,\textsuperscript{57} which involved a railway employee who was bitten by an insect from his employer's stagnant pond, and as a result lost both of his legs. In response to special interrogatories the jury found negligence and causation, but also found that no injury to the plaintiff could have been foreseen by the defendant. Since this last response appeared irreconcilable with the finding of negligence, the Court interpreted it to mean that the insect bite was foreseeable, while the severe consequences were not. The Court went on to hold the defendant liable for these consequences.

Once the jury's responses had been harmonized in this manner, the case is comparable with In re Polemis,\textsuperscript{58} the famous English case of direct causation where the defendant's servants negligently dropped a board into the hold of a ship, exposing the cargo to some damage. The board when it fell touched off a spark which resulted in the loss of the vessel by fire. The defendant was held liable for this totally unforeseeable result on the ground that it flowed directly from his negligence. The difficulty with the analogy between Polemis and Gallick, however, is that the latter involved a special situation—the unforeseeable consequences of a negligent impact on the person of the plaintiff. This is a situation in which all courts, even those committed to the foreseeability limitation, find liability.\textsuperscript{59} Thus the Court, in holding the employer liable, relied primarily on common law authorities. Its decision was bolstered, however, by the following language:

[W]e have no doubt that under a statute where the tortfeasor is liable for death or


\textsuperscript{56} See Page v. St. Louis Southwestern Ry., 312 F.2d 84 (5th Cir. 1963); Delama v. Trinidad Corp., 302 F.2d 585, 1962 A.M.C. 2346 (2d Cir. 1962); Hoyt v. Central R.R., 243 F.2d 840 (3d Cir. 1957).

\textsuperscript{57} 372 U.S. 108 (1963).


\textsuperscript{59} Larson v. Boston Elevated R.R., 212 Mass. 262, 98 N.E. 1048 (1912); Turner v. Minneapolis St. Ry., 140 Minn. 248, 167 N.W. 1041 (1918); Ommsky v. Charles Weinham & Co., 113 Minn. 422, 129 N.W. 845 (1911); Keegan v. Minneapolis & St. Louis R.R., 76 Minn. 90, 78 N.W. 965 (1899); McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911); Prosser, Proximate Cause in California, 38 CALIF. L. REV. 369, 394-95 (1950). See Prosser § 50, at 300: "It is as if a magic circle were drawn about the person, and one who breaks it, even by so much as a cut on the finger, becomes liable for all resulting harm to the person, although it may be death."
injures in producing which his “negligence played any part, even the slightest” such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act.\textsuperscript{60}

Thus statement seems to indicate that the concept of direct causation, which extends the liability of the negligent defendant beyond foreseeability, will ultimately prevail in FELA and Jones Act cases.

\textit{Intervening Causes}

As long as consequences are direct, without the intervention of a third person, or a force of nature, it is quite possible to lay aside foreseeability as a test of the proximate. This is because the defendant’s liability is limited by the situation existing at the time and place of his act. This situation can remain unchanged for only so long. Thus, the possible results of the defendant’s conduct, while they may be very great, are not unlimited.

When there are intervening causes, however, the possibilities are literally infinite. Here, the courts, as a rule of necessity, have been forced to apply a foreseeable limitation on liability.\textsuperscript{61} Thus, at common law and under the Jones Act\textsuperscript{62} in the past, the general rule has been that unforeseeable intervening causes supersede the defendant’s negligence and relieve him of liability. It is in this area that it is most difficult to discern the extent to which there has been a departure from common law guidelines in Jones Act and FELA cases since \textit{Rogers}. This difficulty is due in large measure to the fact that there are various types of intervening causes, and on some of these the common law policy is far from clear. It is therefore necessary to examine each of these separately.

Foreseeable intervening causes are no problem. They are part of the risk created by the defendant’s negligence, and courts, both at common law\textsuperscript{63} and under the Jones Act\textsuperscript{64} have no difficulty in holding him liable. At one point in the history of the common law the idea gained favor that the intervening negligence of a third person, even if foreseeable, relieved the original wrongdoer of liability. This doctrine of the “last human wrongdoer” is now largely a matter of history and it is now generally agreed that such negligence, and even criminal misconduct,

\textsuperscript{60} 372 U.S. at 120-21.


\textsuperscript{62} Repsholdt v. United States, 205 F.2d 852, 1953 A.M.C. 1416 (7th Cir. 1953) (semblé); Naylor v. Isthmus S.S. Co., 187 F.2d 538, 1951 A.M.C. 632 (2d Cir. 1951) (by implication); Jackson v. Pittsburg S.S. Co., 131 F.2d 668, 1943 A.M.C. 885 (6th Cir. 1942); Lorang v. Alaska S.S. Co., 2 F.2d 300, 1924 A.M.C. 1240 (W.D. Wash. 1924).


may be part of the risk to which the defendant exposed the plaintiff, and does not affect his liability. In an occasional Jones Act case a shipowner exhumes the old theory and the court recites from the Rogers case to show that it has no place in the Jones Act. The reliance on Rogers is unnecessary; the old doctrine has little vitality anywhere.

After foreseeable intervening causes come those which have been characterized as "normal" intervening causes. When the defendant endangers another he is commonly held liable for injuries suffered by his victim while seeking to escape, and by his victim's rescuer. When he has negligently inflicted an injury on the plaintiff, his liability often extends to subsequent injuries sustained by the plaintiff as a result of the original harm. These things are not really foreseeable in the sense that the defendant could be expected to have had them in mind at the time of his conduct, and thus they cannot be considered part of the risk that made him negligent. They are, however, so normal to the situation he has created that they do not relieve him of liability. Rogers v. Missouri Pac. R.R. was itself such a case. The plaintiff was required by his duties to stand close to passing trains in the vicinity of burning brush. A speeding tram fanned the flames in his direction, and in seeking to escape he fell into a culvert. On this point the U.S. Supreme Court declared no departure from the common law. Self-defensive efforts to escape are considered normal to the emergency created by the defendant.

Ammar v. American Export Lines involved the problem of a second injury. The plaintiff fell from a platform while working on board ship, suffering severe head injuries which resulted in recurrent "blackouts." Twenty months after the original injury the plaintiff had a blackout and lost consciousness while trying out a friend's motorcycle. The motorcycle hit a wall, and the plaintiff was grievously injured. The employer was held liable for the subsequent injuries. The court relied heavily on the "liberal guidelines" established by the Rogers case. These

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65 Eldredge, Culpable Intervention as Superseding Cause, 86 U. Pa. L. Rev. 121, 125 (1937).
67 Prosser, Proximate Cause in California, 38 Calif. L. Rev. 369, 404-06 (1950).
68 E.g., Tuttle v. Atlantic City R.R., 66 N.J.L. 327, 49 Atl. 450 (1901).
69 Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921). An older Jones Act case indicating some of the limitations on the rescue doctrine is Santie v. Mesech Steamboat Co., 41 F Supp. 397 (S.D.N.Y. 1941). Plaintiff, a bartender on board defendant's passenger ship, noticed a small fire in a cabin. He picked up a fire extinguisher and raced into the room, where he immediately panicked at the sight of the flames and smoke. Instead of departing by the door through which he has just entered, he ran across the room and put his hand through a port hole, cutting himself severely. The court held that the defendant's employees were not negligent in starting the fire, but even if they had been, plaintiff could not recover.
70 E.g., Squires v. Reynolds, 125 Conn. 366, 5 A.2d 877 (1939).
71 Prosser, Proximate Cause in California, 38 Calif. L. Rev. 369, 404 (1950).
72 352 U.S. 500 (1957).
73 Actually the Court viewed the self defensive effort of Rogers as foreseeable, and thus part of the risk created by the foreman who assigned him the two duties. The result is the same as if the effort to escape had been regarded as a "normal," though unforeseeable, intervening cause. See Rogers v. Missouri Pac. R.R., 352 U.S. 500, 503 (1957).
74 326 F.2d 955, 1964 A.M.C. 631 (2d Cir. 1964).
were said to preclude "the application of causation analysis to limit liability for remote damages."\textsuperscript{75}

How great a departure is the\textit{ Ammar} case from the common law? Contributory negligence aside, it is very likely that at common law the plaintiff's conduct, in riding a motorcycle when he knew he was subject to blackouts, would be held to remove his second injury from the realm of the "normal."\textsuperscript{76} But this is by no means certain. Like so many other questions of proximate cause, it would depend on the court, and perhaps on the jury. And who can say what the\textit{ Ammar} court would have done if twenty years rather than twenty months had passed, or if instead of riding a motorcycle Ammar had committed suicide in despair at the prospect of lifelong blackouts?\textsuperscript{77} The case does go quite far, and at least it indicates that under the Jones Act, since\textit{ Rogers}, more remote hazards of this type may be regarded as "normal."

The final group of intervening causes to be considered are those which are neither foreseeable nor normal to the risk created by the defendant. Here the general rule, both at common law\textsuperscript{78} and under the Jones Act,\textsuperscript{79} has been that the defendant is relieved of liability. This rule is subject to the qualification that if the result is itself foreseeable from the defendant's negligence he is not relieved of liability by the unforeseeability of the intervening cause which brought it about.\textsuperscript{80}

Since the\textit{ Rogers} case, foreseeability has apparently fallen from favor as a test of proximate cause in Jones Act cases. This has already been noted in the area of direct results, but it appears to hold true even when there are intervening causes. Certainly it is no longer a factor for the jury to consider; under the frequently approved instruction the jury determines only negligence and causation in fact.\textsuperscript{81} Nor is there any indication that the court uses "foreseeability" as the sole criterion of proximate cause. The term is rarely mentioned. Where, then, does the employer's liability stop under the FELA and the Jones Act? The cases, which are few in number, reveal only that his liability is limited far short of causation in fact. In one FELA case,\textsuperscript{82} for example, the defendant supplied its messenger with a defective motorcycle which broke down during his rounds, forcing him to resort

\textsuperscript{75}Id. at 959, 1964 A.M.C. at 635.
\textsuperscript{76}See Sporna v. Kalina, 184 Minn. 89, 237 N.W. 841 (1931).
\textsuperscript{77}See McMahon v. City of New York, 16 Misc. 2d 143, 141 N.Y.S.2d 190 (1955).
\textsuperscript{79}Cases cited note 62 supra.
\textsuperscript{82}Simpson v. Texas & N.O.R.R., 297 F.2d 660 (5th Cir. 1962).
to public transportation. After alighting from the bus he was struck by an automobile while crossing a street. The plaintiff stressed the Rogers rule of causation, but causation would appear to be present by any formula; had the motorcycle been properly maintained the plaintiff would not have taken the bus, and would never have been in the path of the car that hit him. The court, however, said that the "causal connection" between negligence and injury was "broken" by this sequence of events. In another case a railroad failed to supply a restroom for the employees of its station cafeteria. The plaintiff was thus required to use the facilities of a railroad car, and after doing so she was knocked down and injured by a passenger on board the car. Thus injury was held "too far removed both in space and time" from the employer's omission to provide a restroom, and there was no liability.

It may be thought that in these cases no injury could have been anticipated from the employer's conduct, and therefore he was not negligent at all. In each case, however, the court recognized that under the liberal rules established by Rogers the plaintiff had made out a jury case of negligence. However, negligence and causation were not enough. What happened to the plaintiff was so remote, so unrelated in time, space or probability to any harm threatened by the defendant that one feels almost instinctively that to hold the employer liable would be going too far. Cases like these bring home the point that the FELA recovery is still based upon negligence. The standards of recovery may be very liberal, but liability must be traced to a wrong on the employer's part. As long as this is true, it is very likely that courts will be unable to ignore completely the relation between that wrong and the harm it causes.

Shifting Responsibility

Superseding causes are not the only devices by which at common law a negligent defendant may be relieved of liability by subsequent events. In certain cases the conduct of a third person, or of the plaintiff himself, may be such that responsibility "shifts" from the defendant. The most important difference between this concept and that of superseding cause is that the conduct of the third person may be perfectly foreseeable, and yet it permits the defendant to avoid responsibility. The principal ingredient of shifting responsibility appears to be an element of conscious choice on the part of a third person to exploit or disregard the danger of the situation created by the defendant.

This concept is not unknown to admiralty courts. In The Lusitana a steamship company ignored repeated warnings from the German government that the ship would be sunk if she ventured into forbidden waters. The Germans made good their threat and sent the Lusitana to the bottom along with many of her passengers. Although it was negligent for the company to proceed with the voyage

83 Id. at 662.
85 Id. at 941.
88 Prosser, Proximate Cause in California, 38 Calif. L. Rev. 369, 409 n.192 (1950).
89 Ibid.
90 251 Fed. 715 (S.D.N.Y. 1918).
under these circumstances, it was relieved of liability by the wilful act of a foreign power. 91

The principle of shifting responsibility was apparently applied in a fairly recent Jones Act case, Myles v. Quinn Menhaden Fisheries. 92 An itinerant fisherman was returning to his employer's fishing boat after a night of drinking. The customary means of ingress to the boats was through an unlighted spur track. The fisherman fell asleep on the tracks, and a train amputated both his legs. After reaching a settlement with the railroad, he sued his employer in admiralty, alleging failure to provide a safe means of ingress. Emphasizing the quality of the railroad's conduct in continually backing unlighted trains into the darkness after it knew of the use of the spur track by seamen, the court held that this, and not any employer negligence, was "the proximate cause" of the injury. 93

Conclusion

The history of the Jones Act may be viewed as a continuing struggle on the part of the courts to liberalize the standards of recovery under a statute predicking liability on negligence. The modern high point in this struggle came in the Rogers case, where the United States Supreme Court banished from the FELA and the Jones Act some of the most familiar incidents of negligence liability at common law. The seaman who elects to bring his action at law may now have a jury trial on the issues of negligence and causation with even the slightest evidence, and in most courts he has the benefit of an instruction permitting the jury to find causation present if the employer's negligence made the slightest contribution to his injury. These are fundamental departures from the common law; their import lies in the fact that in the ordinary case, where the conduct in question clearly exposed the employee to the very hazard which has occurred, he can recover almost as a matter of course. He must prove negligence, but once he has done so, causation is rarely a problem.

Not all cases, however, are "ordinary." When the employer's negligence threatens the plaintiff with a different peril than that which it has actually caused, there is a problem of proximate cause. Here the Jones Act waters are troubled

91 See also The Mars, 9 F.2d 183 (S.D.N.Y. 1914), where a tug negligently collided with a barge, holing her side. The crew of the barge continued to load her until the hole in the hull was submerged, and the barge sunk. The tug was not held liable for the loss of the barge. The case is discussed in Green, Rationale of Proximate Cause 153 (1927).

92 302 F.2d 146, 1962 A.M.C. 1626 (5th Cir. 1962).

93 See also Inman v. Baltimore & O.R.R., 361 U.S. 138 (1959), where a railroad flagman alleged that the defendant negligently assigned him multiple duties at a busy intersection, causing him to be injured by a drunken driver. In a five to four decision, the Supreme Court held that, even under liberal FELA rules, plaintiff had not made out a jury case of negligence. Although the express ground of decision was lack of proof on the negligence issue, the majority stressed the intoxication and recklessness of the driver. In In re Atlas' Petition, 350 F.2d 592 (7th Cir. 1965), cert. denied, 382 U.S. 988 (1965), the court indicated that willful intoxication or other serious misconduct on the part of the injured seaman may permit the negligent employer to avoid responsibility. Cf. Mentsma v. United States, 164 F.2d 976 (9th Cir. 1947); Colban v. Petterson Lighterage & Towage Corp., 24 A.D.2d 870, 264 N.Y.S.2d 403, 1966 A.M.C. 365 (App. Div. 1965).