

acted by Congress,⁷⁵ and by the minority in terms of the costs to the Supreme Court in time and effort spent in evaluating the quantum of evidence necessary to create a jury question.⁷⁶

Although the considerations present in the FELA cases were not inherently different from those in any civil case where the direction of a verdict or a decision of an issue by the court may raise *sub silentio* the issue whether the Seventh Amendment right to a jury trial has been impaired by court usurpation of the jury function, cases under the FELA, which retained the common-law requirements of negligence as a prerequisite to recovery, involved peculiarly difficult decisions as to the adequacy of proof of negligence. "Special and important reasons for the grant of certiorari in these cases are certainly present," the Court wrote in a leading case, "when lower federal and state courts persistently deprive litigants of their right to a jury determination."⁷⁷ The operating test was: "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 for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on ground 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

⁷⁵ *E.g.*, *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943), in which Justice Black's opinion of the Court initiated the line of cases here considered; *Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943); *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944). See *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 507–10 (1957). Trial by jury is "part and parcel of the remedy afforded railroad workers" under the FELA. *Bailey v. Central Vermont Ry.*, 319 U.S. at 354. "The difference between the majority and minority of the Court in our treatment of FELA cases concerns the degree of vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment." *Harris v. Pennsylvania R.R.*, 361 U.S. 15, 17 (1959) (Justice Douglas concurring). "[T]his Court is vigilant to exercise its power of review . . . to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers v. Missouri Pacific R.R.*, 352 U.S. at 509.

⁷⁶ *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting), contains a lengthy review and critique of the Court's practice.

⁷⁷ *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 510 (1957).