TORTS

STATUTORY LIABILITY OF RAILROAD TO INJURED EMPLOYEE

An action was brought under the Safety Appliance Act[1] against a railroad for an alleged violation of the Act which resulted in the death of an employee. The employee of the railroad was in charge of a motor track car, which was placed on the rails 900 to 1200 feet to the rear of a freight train.[2] Both the train and the track car proceeded eastward. The employee and another aboard the track car sat facing the west, so that, as the track car proceeded to the east, the two men were in effect traveling backward. The air brake system with which the freight train was equipped suddenly brought it to an emergency stop, although there was actually no emergency. The stop was caused by the fact that one of the fittings on the air hose line had become disconnected due to worn threads.[3] While the freight train was thus stopped, a man on the freight's caboose noticed that the track car had approached to within 150 feet of the rear end of the freight. Attempts were made to signal the men on the track car, but, because they were facing in the opposite direction, these efforts to warn were in vain. The track car crashed into the rear of the caboose, and the employee was killed. The trial court directed a verdict for the railroad. Held, on appeal to the Supreme Court of Utah, that the trial court had not erred. *Coray v. Southern Pacific Co.*, 185 P.2d 963 (Utah 1947).

In disposing of the case, the court pointed out that the uncontroverted evidence showed a violation of the Safety Appliance Act by the railroad.[4] Such violation imposes liability upon a carrier for any injury to an employee caused "in whole or in part" by the violation.[5] Contributory negligence has

1. 27 Stat. 531 (1893), 45 U.S.C. §1.
2. A company rule required that track cars be operated at least 400 feet to the rear of any train.
3. The air brake system is so arranged that so long as the air pressure in the system is maintained, the brakes cannot be set. Release of the pressure sets the brakes. Thus, should there be any leak in the air brake line, it would become immediately apparent, for the escape of air at the leak would so decrease the pressure in the system as to set the brakes, making it impossible for the train to proceed until the leak had been discovered and repaired.
4. The section of the Safety Appliance Act relating to train brake systems is cited supra, n.1.
5. 35 Stat. 65 (1908), 45 U.S.C. §51, as amended, 35 Stat. 1404 (1939), 45 U.S.C. §51.

been abolished as a defense. For the court, the question thus became: Was the emergency stop occasioned by the defective air hose fitting wholly or partially a cause of the employee's death? It was held that the defective appliance had merely created a "condition" upon which the negligence of the employee had operated. Although the railroad failed to comply with the Safety Appliance Act, its violation in this regard was held not to be the cause of the employee's death. That this injury should follow as a consequence of the railroad's conduct was considered so highly extraordinary as to defeat recovery. The court thus framed its opinion in terms of principles of foreseeability and causation.[6]

The plaintiff in the instant case sued, the opinion states, for an alleged violation of the Safety Appliance Act. That statement of the theory of the action does not adequately indicate the nature of this and similar litigation. The case is one which was in fact brought under the Federal Employers Liability Act.[7] That statute gives the injured railroad employee a cause of action against his employer for injury or death occasioned in whole or in part by the employer's negligence. Where the railroad has violated a provision of the Safety Appliance Act, that violation amounts to negligence *per se* and may be relied on as a basis for recovery under the Federal Employers Liability Act.[8] Where the negligence which the employee alleges is a violation of the Safety Appliance Act, not only will his own contributory negligence not go to diminish his recovery of damages;[9] it is said, fur-

6. This note does not attempt to treat the problem of the case in terms of causation, adopting the view that the result of the case is better understood by discussing it in terms of "negligence." See Harper, "Torts" §73 (1933).

7. The citation is given supra, n.5.

8. The employee need then only show that a defect in an appliance, in violation of the Safety Appliance Act, in fact existed. He does not assume the burden of proving that the violation had its origin in the employer's want of due care. That burden would be on the employee, however, if his cause of action were founded on the Federal Employers Liability Act, and the negligence alleged consisted of a default other than a violation of the Safety Appliance Act. See Brady v. Terminal R.R. Assn., 303 U.S. 10, 15 (1937); Louisville & N. R.R. v. Layton, 243 U.S. 617, 620, 621 (1917); Chicago, B. & Q. Ry. v. United States, 220 U.S. 559, 570 (1911); St. Louis, I.M. & S. Ry. v. Taylor, 210 U.S. 281, 295 (1908); 4 Elliott, "Railroads" §1997 (3d ed. 1922).

9. Contributory negligence is a factor, however, where the injured employee sues under the FELA and founds his action on some act of negligence other than the violation of a provision of the Safety Appliance Act. In such an action the plaintiff's contributory

ther, that the employer may not rely on the employee's contributory negligence for *any* purpose.[10]

The courts, state and federal, are bound to take judicial notice of the two statutes, and of the interplay of one with the other. Thus, where the employee alleges facts which make out a cause of action under the Federal Employers Liability Act, the court before which the case is heard will dispose of the suit in the light of that statute (and in the light of the Safety Appliance Act, if applicable) even though the complaint makes no mention of the statute or statutes.[11]

The principal question in Federal Employers Liability Act cases is: Was the conduct of the railroad an act of negligence toward the employee? It is clear that the decision in the instant case is the correct one if it can be said that there was no negligence; *i.e.*, if the railroad was guilty of no breach of duty to exercise due care with respect to harms which might foreseeably have befallen this employee. At this point it is proposed merely to inquire as to the existence of negligence on the part of the railroad, irrespective of the matter of contributory negligence and of statutes.

An actor is not, of course, bound so to regulate his conduct as to avoid subjecting others to risks which are entirely unforeseeable.[12] The action of a court in directing a verdict for the railroad could amount to a determination that the events leading up to the accident were not of the sort which

---

negligence will be compared with that of the defendant, and if both negligences stand in a causal relationship to the injury there will be a diminution of damages proportionate to the influence of the plaintiff's negligence in bringing about the harm. The doctrine of comparative negligence has no applicability when the employee bases his FELA action on a violation of the Safety Appliance Act. 35 Stat. 66 (1908), 45 U.S.C. §53.

The defense of assumed risk has never been available to the railroad in employees' suits under the FELA based on violations of the Safety Appliance Act. Until rather recently, however, that defense was available in a "straight" FELA action. Abolition of the defense was accomplished by statute. 35 Stat. 66 (1908), 45 U.S.C. §54, as amended, 53 Stat. 1404 (1939), 45 U.S.C. §54. For an example of the operation of the doctrine of assumption of risk before and after the 1939 amendment to the FELA compare Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943), with Seaboard Air Line Ry. v. Horton, 233 U.S. 492 (1914).

10. See Grand Trunk Ry. v. Lindsay, 233 U.S. 42, 50 (1914).

11. Missouri, K. & T. Ry. v. Wulf, 226 U.S. 570 (1913). See Grand Trunk Ry. v. Lindsay, supra n.10, at 48; 4 Elliott, "Railroads" §1979 (3d ed. 1922).

12. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); Wood v. Pennsylvania R.R., 177 Pa. 306, 35 A. 699 (1896).

could reasonably have been expected to follow the railroad's conduct. Obviously, the direction of a verdict for a defendant in such circumstances becomes more defensible as the conduct of the deceased or injured person becomes the more unexpected. If the circumstances of the instant case disclose a situation of patent unforeseeability, the decision can not be quarreled with. If, on the other hand, the events following on the railroad's conduct were merely *improbable*, then the propriety of the trial court's disposition of the case may be called into question. Whether or not injury to the employee was reasonably to have been foreseen and was thus the legal result of the railroad's conduct is a question which may well be answered by asking the further ones: Was the employee of the general class of persons threatened by the operation of a train defectively equipped as here, and, was the harm which befell of the general class of harms which such operation made likely?[13] The answers to the two questions indicate the presence or absence of negligence. Since the Federal Employers Liability Act requires a showing of negligence, the same questions have relevance in determining the statutory duty of a railroad. It is difficult to discover who, if not this employee, is to be included in the group of persons to whom harm may reasonably have been expected to occur as a consequence of the employer's act. The duty of a railroad to have its braking system in such repair as to obviate the possibility of an unexpected stop could run to few persons other than those immediately following the defectively equipped train. With regard to the type of harm which the conduct occasioned, it is understood that in order for a defendant to incur liability, he need not have foreseen the exact manner in which harm would be visited upon one in the protected class. It is sufficient if the injury suffered is one of a type which might foreseeably follow the activity.[14] Thus, here the employee was arguably within that group of persons to whom the railroad's conduct might create an unreasonable risk, and the resulting harm was arguably of the general type the occurrence of which (because it was reasonably to have been foreseen) the railroad had a duty to exercise due care to avoid. If the case, therefore, presented no question other than that of the existence

13. See Harper, "Torts" §73 (1933).

14. New York Eskimo Pie Corp. v. Rataj, 73 F.2d 184 (C.C.A. 3d 1934); Johnson v. Kosmos Portland Cement Co., 64 F.2d 193 (C.C.A. 6th 1933), cert. denied, 290 U.S. 641 (1933).

of the railroad's negligence, it is clear that on the facts the employee was entitled to go to the jury. The case, of course, is not that simple. There is the complicating factor of the employee's unusual conduct.

The problem of the foreseeability of the negligent plaintiff is one that was unknown to the common law, where contributory negligence was always available as a defense. It is not unusual, however, for the common law to impose liability upon a defendant who is chargeable with foreseeing that a third person will intentionally[15] or negligently[16] harm the plaintiff (the defendant's conduct having placed the plaintiff in a position in which he may foreseeably be harmed by the negligence or wilful wrong of a third person). There is an analogy to be found between that sort of case and the principal case, where by statute the defendant is not relieved of liability to the plaintiff whom the common law would consider contributorily negligent. That is to say, if a defendant may be liable for injury suffered by a plaintiff from the negligent or wilful conduct of a third person, may not a statute have the effect of making the defendant liable for injury to a negligent plaintiff?

The inquiry under the statute is: Does the Federal Employers Liability Act, in conjunction with the Safety Appliance Act, impose upon a carrier a duty in favor of persons circumstanced as was this employee (a duty, *i.e.*, not to permit train braking systems unexpectedly to stop trains)? The gist of an action brought under the Federal Employers Liability Act is *still* negligence. But it must be remembered that Congress has said that a violation of a provision of the Safety Appliance Act shall be considered negligence *per se* for purposes of suit under the Federal Employers Liability Act.[17] Therefore, when the employee bases his cause of action on the railroad's failure to comply with the congressionally established standard, recovery should follow, unless one or the other or both of the following situations obtain: (1) the em-

15. Lillie v. Thompson, 332 U.S. 459 (1947) (suit was in fact brought under a statute. Held, that the question was for the jury); Hines v. Garrett, 131 Va. 125, 108 S.E. 690 (1921); Restatement, "Torts" §449 (1934).

16. Kliebenstein v. Iowa Ry. & Light Co., 193 Iowa 892, 188 N.W. 129 (1922); Restatement, "Torts" §449 (1934).

17. What is to constitute negligence may, with certain limitations, be determined by the legislature by its prescription of what shall constitute standard conduct. Restatement, "Torts" §285 (1934).

ployee has not suffered a harm of the type against the occurrence of which Congress sought to protect him by the enactment of the Safety Appliance Act; (2) the employee is not of that group of persons to whom Congress meant to extend the protection of the Safety Appliance Act.[18] It has been established that the two statutes create a duty seasonably to stop in the event of an emergency. That duty runs to train crew members aboard the train.[19] It has also been held that an employee aboard a train may recover for injuries sustained as the result of an unexpected stop caused by a defective train brake system.[20] It is impossible to see what factor removes those riding behind a train from the protected class. It is equally difficult to see how it could be ruled, as a matter of law, that the harm which here occurred was not at all of the type to be anticipated.[21] Yet the Utah court states expressly that the purpose of the provision was not that of " . . . protecting other employees *because* the train was stopped by the brakes."[22] So to circumscribe the class of employees to whom the protection of the Safety Appliance Act is to run is to set out, as the dissenting opinion in the *Coray* case makes plain,[23] a proposition to which it is difficult to assent. Despite the unusual conduct of the employee, a broader interpretation[24] of the statute compels the conclusion that, in

18. Thus, the problem here is precisely the one which arose in the leading English case of Gorris v. Scott, L.R. 9 Exch. (1874). There a statute required that ships transporting animals to England be equipped with pens whereby diseased animals might be segregated from the healthy ones. The defendant's ship, on which the plaintiff's sheep were being brought to England, was not so equipped. On the voyage a high sea washed the plaintiff's sheep from the deck. Held, that the plaintiff, who based his action on the violation of the statute, could not recover, since the statute's object was to prevent the importation of diseased animals into England, and not to protect the animals from the perils of the sea.
19. Spokane & I. E. R. R. v. Campbell, 241 U.S. 497 (1916).
20. Chesapeake & O. Ry. v. Smith, 42 F.2d 111 (C.C.A. 6th 1930), cert. denied, 282 U.S. 856 (1930).
21. But cf. Eckenrode v. Pennsylvania R.R., 164 F.2d 996 (C.C.A. 3d 1947), cert. granted, 16 U.S.L. Week 3299 (U.S. April 6, 1948).
22. Coray v. Southern Pacific Co., 185 P.2d 963, 969 (Utah 1947).
23. Id. at 574.
24. The question whether the Safety Appliance Act is to be given a broad or narrow construction has been a vexing one for the United States Supreme Court. In 1915, for example, the Court ruled that when, in a coupling operation, an employee riding at the head of a string of moving cars was crushed as the string met the standing cars to which it was to be coupled, the injured employee would not be permitted a recovery. This result, although the accident

the instant case, the directing of a verdict for the defendant was error.

The principal case shows, again, that our federal statutory scheme of compensation for injured railroad empoyees is inadequate.[25] Though the employer is deprived of his common law defenses, the employee "is not given a remedy, but only a lawsuit."[26] In an area in which industrial accidents are numerous and often severe, the injured employee must yet wait upon the determination of a jury to know if he will be made whole.

Even to those who think a railroad should not stand in a paternalistic relation to its employees, it must occur that the recovery structure of the Federal Employers Liability Act is entirely outmoded when contrasted with the workmen's compensation systems.[27]

UNAUTHORIZED PRACTICE OF LAW

TAX COUNSELING BY ACCOUNTANTS

Bercu, a certified public accountant, was consulted concerning a corporation's 1943 federal income tax return. A

---

would never have occurred had the first of the standing cars been equipped with the couple-on-impact type coupler prescribed by the Safety Appliance Act. It was held that the injured employee was not within the class of persons meant to be protected by the Act's coupling provisions. St. Louis & S. F. R. R. v. Conarty, 238 U.S. 243 (1915). Two years later an employee who had been injured in a coupling accident brought his case before the Supreme Court. The defendant urged upon the Court its decision in the Conarty case. The latter case was somehow distinguished away, and a recovery was allowed. Louisville & N. R. R. v. Layton, 243 U.S. 617 (1917). By 1921 there had been a return to the Conarty learning in respect to coupling accidents. Lang v. New York C. R. R., 255 U.S. 455 (1921). In 1923, the Court had this to say with respect to the manner in which the coverage of the statute was to be interpreted: " . . . [the employee] can recover if the failure to comply with the requirements of the act is a . . . cause of the accident, . . . although [he is] not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." Davis v. Wolfe, 263 U.S. 239, 243 (1923).

25. See Mr. Justice Frankfurter, concurring in Tiller v. Atlantic Coast Line R. R., 318 U.S. 54,71,72,73 (1943).

26. Mr. Justice Jackson, concurring in Miles v. Illinois C. R. R., 315 U.S. 698, 707 (1942).

27. For a recommendation that railroad accidents be comprehended within some sort of workmen's compensation plan see Schoene and Watson, "Workmen's Compensation in Interstate Railways" 47 Harv.L.Rev. 389 (1934) passim. To the same effect is the language of Mr. Chief Justice Taft, speaking in 1929 before the American Law Institute. A relevant excerpt appears in 19 Am.Lab. Leg. Rev. 380 (1929).