THE SAFETY APPLIANCE ACT AND THE FELA: A PLEA FOR CLARIFICATION

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INTRODUCTION

The first Federal Safety Appliance Act[1] was enacted sixty years ago after the maiming and killing of men who worked with railroad equipment became a national scandal of such proportion that President Harrison in three successive annual messages[2] demanded that Congress force the railroads to install appliances designed to eliminate some of the more hazardous aspects of railroad work. The Acts[3] do not create, for injured individuals, a federal cause of action imposing civil liability upon railroads for violations. Rather, they merely impose sanctions in the form of penalties to be collected in suits brought by the United States for failure to install or maintain in efficient condition the required appliances.[4] Civil liability arises from failure to comply only if an injured person can demonstrate that the Acts are an expression of policy to protect a class of people, of which he is a member, against the forbidden conduct.[5] The titles of the various acts which now make up the Federal Safety Appliance Act have identified railroad employees and travelers upon railroads as within the protected class. Although during the hearings preceding the first Act[6] and subsequent amendments[7] the chief proponents of the new legislation were representatives of railroad employees and of state railroad commissions,

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[1] 27 STAT. 531 (1893), 45 U. S. C. §§1-7 (1946).

[2] SEN. REP. No. 1049, 52d Cong., 1st Sess. 1-3 (1892).

[3] The Federal Safety Appliance Acts consist of 27 STAT. 531 (1893), 45 U. S. C. §§1-7 (1946); 32 STAT. 943 (1903), 45 U. S. C. §§8-10 (1946); 36 STAT. 298 (1911), 45 U. S. C. §§11-16 (1946). The Boiler Inspection Acts, 36 STAT. 913 (1911), as amended, 45 U. S. C. §§22-34 (1946), follow the same pattern and raise identical problems but are not discussed herein.

[4] 27 STAT. 531 (1893), 45 U. S. C. §6 (1946); 32 STAT. 943 (1903), 45 U. S. C. §§9, 10 (1946); 36 STAT. 298 (1911), 45 U. S. C. §§12, 13 (1946).

[5] Brady v. Terminal R. R. Ass'n, 303 U. S. 10, 14 (1938); Fairport, P. & E. R. R. v. Meredith, 292 U. S. 589, 596 (1934); St. Louis & S. F. R. R. v. Canarty, 238 U. S. 243, 249 (1915). See generally with respect to the question of the extent to which violation of a criminal or penal statute may be the basis for a personal civil action: Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105 (1948); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932).

[6] *E.g.*, H. R. REP. No. 3014 (PROTECTION OF EMPLOYEES AND PROPERTY OF RAILROADS), 57th Cong., 1st Sess. (1890); SEN. REP. No. 1049, 52d Cong., 1st Sess. (1892); H. R. REP. No. 1678 (SAFETY OF RAILWAY EMPLOYEES AND THE TRAVELING PUBLIC), 52d Cong., 1st Sess. (1892).

[7] *E.g.*, SEN. REP. No. 1930, 57th Cong., 1st Sess. (1902); H. R. REP. No. 2916 (SAFETY OF EMPLOYEES AND TRAVELERS UPON RAILROADS), 57th Cong., 2d Sess. (1902); SEN. REP. No. 250, 61st Cong., 2d Sess. (1910).

the attention of the committees was focused upon appliances that would either eliminate or reduce the risk connected with operation of and working upon railroad equipment. As a result the protected class is broader than that spelled out by the titles.[8] Since the attention of Congress was directed toward hazardous activities and the basis of the civil action is violation of a statutory duty, it would seem that a railroad employee who is injured in setting a defective hand brake on a railroad car on a shipper's siding and an employee of the shipper injured in releasing the same defective brake to move the car on the shipper's siding are equally within the protected class. Our purpose is to examine the extent to which courts have dwelt upon technical distinctions and failed to consider the basic question of whether the policy of the Act is served by imposing liability upon the defendant carrier.[9]

I

Of all the groups conceivably entitled to the protections of the Act, the railroad employee is in the most favored position, not because the titles of the acts identify him but because his cause of action is created by the Federal Employers' Liability Act[10] (hereinafter FELA). All others must rely upon a common law action of tort generally described as negligence.[11] Under the FELA the employee need show only that the Safety Appliance Act has been violated and that the violation was a contributing cause of his injury.[12] The railroad's defenses of contributory negligence[13] and assumption of the risk[14] are abolished. In the common law action the employee of a

[8] Urie v. Thompson, 337 U. S. 163 (1949); Brady v. Terminal R. R. Ass'n, 303 U. S. 10 (1938); Fairport P. & E. R. R. v. Meredith, 292 U. S. 589 (1934); Rush v. Thompson, 356 Mo. 568, 202 S. W. 2d 800 (1947).

[9] The tendency of the courts to dwell upon technical distinctions rather than get to the heart of the matter is perhaps explained at least in part by the confusing use of varying expressions in different sections of the Act to express the same idea. Thus, in the Act of 1893, 27 STAT. 531 (1893), 45 U. S. C. §§1-7 (1946), the definitive words in Sec. 1 are "to use on its line"; Sec. 2, "to haul or permit to be hauled or used on its line"; Sec. 4, "to use any car"; Sec. 5, "used"; Sec. 6, "using . . . or hauling or permitting to be hauled or used on its line"; Sec. 8, "in use." In the amendatory Act of 1903, Sec. 1, 32 STAT. 943 (1903), 45 U. S. C. §8 (1946), the word is "used." There is similarly varying phraseology in the amendatory Act of 1910, 36 STAT. 298 (1911), 45 U. S. C. §§11-16 (1946). Perhaps the most satisfactory explanation for these varying terms is that they were not intended to be words of art but were chosen as expressions of a policy that the obligation to comply with the Act is not placed upon the owner of the equipment as such, but rather upon the one in the best position to detect and remedy the defects—the carrier that has most recently operated the equipment. Section 3 of the Act in authorizing a carrier to refuse to accept defective equipment seems to support this conclusion. There is a further complication in that the 1910 Act seems to incorporate by reference the above noted varying expressions of the two earlier acts, by providing that it shall be unlawful for any common carrier "subject to the provisions of" the earlier acts and the 1910 Act to do the things proscribed by the 1910 Act. This is all very confusing, but probably the more important explanation for the judicial quest for escape hatches by resort to technicalities, is the psychological difficulty for a profession inured to the concept of negligence to become acclimated to the concept of absolute liability. The difficulty seems enhanced when the new concept of substantive liability is invoked in the old form of remedy, a common law action, but is less when the new concept is applied in a new form, such as a workmen's compensation proceeding.

[10] 35 STAT. 65 (1908), as amended, 45 U. S. C. §§51-59 (1946).

[11] See note 5 *supra*.

[12] 35 STAT. 65 (1908), as amended, 45 U. S. C. §51 (1946).

[13] 35 STAT. 66 (1908), 45 U. S. C. §53 (1946).

[14] 35 STAT. 66 (1908), as amended, 45 U. S. C. §54 (1946).

shipper[15] or the highway traveler injured at a railroad crossing[16] has been required to demonstrate that his injury was proximately caused by the violation and then may be defeated by a showing that he was contributorily negligent or assumed the risk,[17] a problem discussed in III, *infra*.

Regardless of the source of the cause of action the consequences of a railroad's violation of the Safety Appliance Act ought to be the same. If the Act establishes an absolute standard from which the railroad is not permitted to deviate, then the care with which the railroad has tried to comply must be irrelevant. The Act has established the policy that the appliances must always be effective and whether the action arises under the FELA or at common law that policy should control. When the equipment has been out of the possession of the railroad, for example, on a shipper's siding, for an appreciable period of time, courts in non-FELA cases have been reluctant to find a violation of the statutory duty.[18] But too frequently the

[15] Patton v. Baltimore & O. R. R., 197 F. 2d 732 (3d Cir., 1952); Paul v. Duluth, Missabe & Iron Range Ry., 96 F. Supp. 578 (D. Minn. 1950); Floyd v. Thompson, 356 Mo. 250, 201 S. W. 2d 390 (1947).

[16] Fairport, P. & E. R. R. v. Meredith, 292 U. S. 589 (1934).

[17] It is interesting to compare the Safety Appliance Act, which can be invoked by both railroad and other employees, with the FELA, which is available only to railroad employees, as to their relative liberality from the viewpoint of the plaintiff. The former, by reason of a 1903 amendment, 32 STAT. 943 (1903), 45 U. S. C. §8 (1946), is applicable whenever the carrier is an interstate railroad regardless of whether the appliance or employee involved is engaged in interstate commerce at the time of injury, Southern Ry. v. United States, 222 U. S. 20 (1911); Great Northern Ry. v. Otos, 239 U. S. 349 (1915); Texas & Pacific Ry. v. Rigsby, 241 U. S. 33 (1916); San Antonio & A. P. Ry. v. Wagner, 241 U. S. 476 (1916). The FELA is nominally applicable only when the carrier is engaging in interstate commerce and the employee is employed in such commerce, but the latter restriction no longer presents a formidable barrier because of the 1939 amendment which provides in substance that an employee shall be considered as being employed by the carrier in interstate commerce if any part of his duties shall be the furtherance of such commerce or shall in any way directly or closely and substantially affect such commerce. 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946). As to causation, the FELA requires only that the injury or death result "in whole or in part" from the railroad's misconduct, 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946); hence it is enough if such misconduct is a contributing cause, Coray v. Southern Pacific Co., 335 U. S. 520 (1949); Carter v. Atlanta & St. A. B. R. R., 338 U. S. 430, 434-435 (1949). But the Safety Appliance Act, since it creates no cause of action for the injured worker, prescribes nothing in respect of causation, leaving to state law the definition of causation, which usually is proximate causation. The FELA abolishes for railroad employees the defenses of contributory negligence, 35 STAT. 66 (1908), 45 U. S. C. §53 (1946), and assumption of risk, 35 STAT. 66 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §54 (1946), in any case where the carrier's violation of the Safety Appliance Act or Boiler Inspection Act contributes to the injury or death of the employee. The Safety Appliance Act expressly abolishes for railroad employees (but for none other) only the defense of assumption of risk, 27 STAT. 532 (1893), 45 U. S. C. §7 (1946); whether by necessary implication it affects the defense of contributory negligence is the subject of Part III of this article. On the other hand, a violation of the Safety Appliance Act creates absolute liability, without regard to negligence; whereas an action brought only under the FELA requires a showing of negligence. Where a FELA action is predicated only on negligence (and not also on violation of the Safety Appliance Act or the Boiler Inspection Act) contributory negligence while not a bar is available to the railroad in diminution of damages, 35 STAT. 66 (1908), 45 U. S. C. §53 (1946), but assumption of risk (and implicitly, the fellow servant rule) are abolished as defenses, 53 STAT. 1404 (1939), amending 35 STAT. 66 (1908), 45 U. S. C. §54 (1946); 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946); Tiller v. Atlantic Coast Line R. R., 318 U. S. 54 (1943); see Owens v. Union Pacific R. R., 319 U. S. 715, 720 (1943). Obviously the plaintiff who can invoke in addition to the FELA either the Safety Appliance Act or the Boiler Inspection Act is in a highly favored position: he need prove no negligence but only statutory violation; his establishment of causal relation is eased; contributory negligence and assumption of risk are abolished.

[18] Risberg v. Duluth, Missabe & Iron Range Ry., 233 Minn. 396, 47 N. W. 2d 113 (1951),

courts have ignored the fact that unless the railroad supplies equipment without defective appliances no one else can be expected to remedy the defect. Recovery has been denied either because the railroad was not "using" the equipment or the equipment was not "on its line" when the injury occurred. If the statutory duty is the result of a congressional determination that the absence of effective safety appliances is so inherently dangerous that the railroads must be forced to provide them, then the delivery of defective equipment to a shipper would seem to be a tortious act for which the common law provides a remedy to those persons who are subjected to an unnecessary risk and thereby injured.

The most obvious case of this type occurs when a car without the required appliances is delivered. Here the railroad ought not be permitted to escape its responsibility merely by quitting itself of the possession of the equipment. More difficult is the situation where the appliance has been properly installed but is defective when used on the shipper's siding. If the shipper has damaged the appliance after delivery the railroad ought not be responsible. An illustration of this would be a shipper who, wholly without authority from the railroad, undertakes a general renovation or overhaul of a railroad car's brakes, with the net result of producing inefficient brakes in replacement of efficient ones. But since the common law action requires that the violation of the Act must have proximately caused the injury the question becomes whether the intervening conduct of another has caused the defect rather than whether the railroad was responsible for the car at the time the injury occurred.[19] Finally, if the appliance has become defective through the actions of the elements or from some other unknown cause the test of the railroad's liability on the private siding should be no different than if the car were being hauled on its main line. The issue seems properly to come down to the question of whether the injury was the result of a defect, whether patent or latent, in the equipment when it was delivered by the railroad. Only if it can be shown that the defect was caused by some kind of interference with the safety appliances after they passed from the railroad's possession should the railroad be released from its absolute duty.

A related question is the type of proof necessary to establish that the appliance was defective. Again the requirement should not vary depending upon the relationship between the plaintiff and the defendant railroad. At least when a railroad employee is the plaintiff, it is usually said that a showing that the appliance was operated in the usual manner and did not work effectively is sufficient to permit a jury to find that the appliance was defective.[20] There seems to be no valid reason

cert. denied, 342 U. S. 832, 895 (1951); Weeks v. Pollard, 65 Ga. App. 377, 16 S. E. 2d 225 (1941); Stoutimore v. Atchison, T. & S. F. Ry., 338 Mo. 463, 92 S. W. 2d 658 (1936); and cases cited at notes 15 and 16, *supra.*

[19] Even when the equipment is being operated on the main line of the carrier, liability may be negated if the appliance becomes defective as the result of interference by persons for whom the carrier is not responsible. *See,* O'Donnell v. Elgin, J. & E. R. R., 338 U. S. 384, 394 n. 7 (1949); Dominices v. Monongahela Connecting R. R., 328 Pa. 203, 204, 195 Atl. 747, 749 (1937).

[20] Affolder v. New York, C. & St. L. R. R., 339 U. S. 96 (1950); Myers v. Reading Co., 331 U. S. 477 (1947); Didinger v. Pennsylvania R. R., 39 F. 2d 798 (6th Cir. 1930); Spotts v. Baltimore & O. R. R., 102 F. 2d 160 (7th Cir. 1938); *cert. denied,* 307 U. S. 641 (1939).

for requiring a stronger showing from any other group entitled to the protections of the Act. Accepting this proposition does not mean that railroad employees and other persons are in the same position recovery-wise. The FELA by denying the defenses of contributory negligence and assumption of the risk as well as by reducing the causative relationship to one of "contributing cause" entitles the employee to recovery even though he knew of the defective appliance and was negligent in the way he used it. A non-employee may find his action barred by the fact that something other than the defect in the appliance when delivered by the railroad was the proximate cause of his injury.[21] By concentrating upon the causative relationship between the defect and the injury the courts should be able to make the burden of proving a violation of the Act the same for all rightful claimants of the protections of the Act.

II

The duty imposed upon a carrier by the Safety Appliance Act is an absolute one that cannot be satisfied by any degree of diligence in attempting to search out defects in the required appliances or by any program of maintenance no matter how carefully designed or pursued.[22] Proof that the equipment was inspected and found to be in perfect condition immediately prior to the accident is not a defense if it failed to operate at the critical time. Indeed, proof of violation of the Act leaves only the question of causal connection between the violation and the injury to be established. This doctrine of absolute liability has been vigorously proclaimed and re-emphasized by the Supreme Court in three recent cases, *O'Donnell v. Elgin, J. & E. R. R.*,[23] *Carter v. Atlanta & St. A. B. R. R.*,[24] and *Affolder v. New York C. & St. L. R. R.*[25]

But these three cases were suits by railroad employees who could and did invoke not only the Safety Appliance Act but also the FELA. When the plaintiff is not a railroad worker and therefore cannot invoke the FELA, it seems accurate to say that the courts literally struggle to evade the rule of absolute liability.[26] In *Patton v. Baltimore & O. R. R.*,[27] an employee of a quarry was injured when the hand brake on a car delivered to the quarry failed to operate. After determining that the car involved was not "in use" by the railroad at the time of injury, a new trial was ordered on the question of whether the railroad was negligent in delivering a defective car to the quarry. However, it was said,[28]

> . . . the delivering railroad will not be held liable, although the cars be not reasonably safe, if the defect is not shown to be one which can be discovered by a reasonably

[21] See the discussion *infra* section III with respect to the extent to which the policy of the Safety Appliance Act may control the nature of a state-created action for violation of a penal statute.

[22] Brady v. Terminal R. R. Ass'n, 303 U. S. 10 (1938); Delk v. St. Louis & San Francisco R. R., 220 U. S. 580 (1911); St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281 (1908); Byler v. Wabash R. R., 196 F. 2d 9 (8th Cir. 1952), *cert. denied*, 344 U. S. 826 (1952); Long v. Union R. R., 175 F. 2d 198 (3d Cir. 1949).

[23] 338 U. S. 384 (1949).

[24] 338 U. S. 430 (1949).

[25] 339 U. S. 96 (1950).

[26] See cases cited in notes 15 and 18 *supra*.

[27] 197 F. 2d 732 (3d Cir. 1952).

[28] *Id.* at 741-742.

thorough inspection. . . . Whether . . . its inspector . . . conducted an inspection reasonably adequate under all the circumstances was a question for the jury.

If the carrier in the *Patton* case has violated the Safety Appliance Act by delivering a defective car, there is no logical reason that its care in attempting to comply with the Act should be any more relevant than in the *O'Donnell* case. In both cases the liability of the carrier is founded in the causal connection between an injury and a violation of the Act.

The *Patton* case poses another, and perhaps more serious problem for the injured plaintiff who cannot avail himself of the FELA. By holding that a carrier that has delivered a car to a shipper for loading is not "using" the car "on its line," and therefore does not violate the Act when the required appliances fail to operate on the shipper's loading tracks, non-railroad employees whose duties require them to work on or around railroad equipment are deprived of the protection Congress considered essential. The harshness of this result is alleviated by the common law cause of action for delivering defective cars but the alleviation is only partial because the courts have tended to relieve the carrier on the ground that the equipment has not been in its exclusive control.[29]

If for no other reason than to avoid the pitfalls of control and due care connected with determining the carrier's negligence in delivering defective equipment the questions of when a car is "in use" on a carrier's "line" ought to be re-examined. If the injured plaintiff can avail himself of the FELA, there has been no hesitancy in finding the necessary relationship between the carrier and the defective equipment on a shipper's private track.[30] And in FELA cases apparently no attention is given to the fact that the car has been out of the control of the carrier for an appreciable period of time. Only when the equipment has been withdrawn from service is the Act said not to impose an absolute duty toward employees.[31] Even with respect to known defects the equipment is not withdrawn from service until it reaches the place where repairs are to be made.[32]

The theory of these cases has been that the shipper's private trackage is really just an extension of the carrier's trackage and therefore a part of its line. The carrier has express or implied authority to use the private trackage to deliver and pick up equipment and therefore is as responsible as if the equipment were on its main line. This theory has been applied in cases where the plaintiff although a railroad employee has not been an employee of defendant railroad, and is equally applicable to non-railroad employees such as shippers' employees.

[29] Paul v. Duluth, Missabe & Iron Range Ry., 96 F. Supp. 578 (D. Minn. 1950); Risberg v. Duluth, Missabe & Iron Range Ry., 233 Minn. 396, 47 N. W. 2d 113 (1951), *cert. denied*, 342 U. S. 832, 895 (1951); Floyd v. Thompson, 356 Mo. 250, 201 S. W. 2d 390 (1947).

[30] Gray v. Louisville & N. R. R., 197 Fed. 874 (C. C. E. D. Tenn. 1912); Lovett v. Kansas City Terminal Ry., 316 Mo. 1246, 295 S. W. 89 (1927); Sprankle v. Thompson, 243 S. W. 2d 510 (Mo. 1951).

[31] Sherry v. Baltimore & O. R. R., 30 F. 2d 487 (6th Cir. 1929), *cert. denied*, 280 U. S. 555 (1929); Baltimore & O. R. R. v. Hooven, 297 Fed. 919 (6th Cir. 1924); Compton v. Southern Pac. Co., 70 Cal. App. 2d 267, 161 P. 2d 40 (1st Dist. 1945); Atlantic Coast Line R. R. v. Edge, 81 Ga. App. 606, 59 S. E. 2d 533 (1950).

[32] Chicago & G. W. R. R. v. Schendel, 267 U. S. 287 (1925).

In *Brady v. Terminal R. R. Ass'n*,[33] defendant carrier was held liable for injuries to an employee of a connecting carrier to which the defective equipment had been delivered. The defective car was still in use by the defendant, though not on its line, since the receiving carrier had not had an opportunity to inspect and accept it. Control of the car had not passed to the connecting carrier at the time of the accident and regardless of its physical location the defendant retained control. The control of the equipment carries with it the obligation imposed by the Act.

In *Rush v. Thompson*[34] a carrier was again held liable for injuries caused by defective appliances although the equipment had passed from the possession of the carrier to that of the consignee. The Federal Government had granted the carrier operating rights over about twenty miles of government-owned trackage that provided access to Fort Leonard Wood. The car in question had been delivered by the carrier and was being moved to a place of unloading by government employees. The hand brakes failed to operate and plaintiff, a government employee, was injured as a result. The car was found to be "in use" on the carrier's "line" by virtue of its operating rights even though the operating rights did not include an obligation for the carrier to spot cars for unloading. Once the cars had been hauled over the twenty miles of government trackage and placed on a siding there appears to be no basis for distinguishing the relationship between the carrier and these cars and that of any carrier depositing its equipment upon the private siding of a shipper.

Yet in *Risberg v. Duluth, Missabe & Iron Range Ry.*,[35] and *Patton v. Baltimore & O. R. R.*[36] where the injured plaintiffs were employees of shippers who had received the allegedly defective equipment for loading, rather than of the carrier, the *Brady* case was distinguished on the ground that there connecting carriers were involved and that certainly one of them must be responsible for the equipment all the time. If the shipper were a receiving carrier, responsibility for the equipment would have passed on to the receiving carrier. Hence the delivering carrier is absolved from all liability even though the receiver is not subject to the Safety Appliance Act and is not required or equipped to repair defective appliances while in its possession.

But the *Brady* case seems clearly to indicate that once a carrier has assumed responsibility for a piece of railroad equipment, its responsibility continues until the equipment has been accepted by another carrier. Certainly a car being loaded on the private trackage of a shipper is as much "in use" by the delivering carrier as was the car in the *Brady* case.

The *Risberg* and *Patton* cases also distinguish the *Rush* case on the even more tenuous ground that there the carrier operated over the government trackage under an express operating contract which had the effect of making the government trackage a part of the carrier's line. But this ignores the fact that the carrier always

[33] 303 U. S. 10 (1938).
[34] 356 Mo. 568, 202 S. W. 2d 800 (1947).
[35] 233 Minn. 396, 47 N. W. 2d 113 (1951), *cert. denied*, 342 U. S. 832, 895 (1951). Professor Louisell was of counsel for the employee during the appellate stages of this case.
[36] 197 F. 2d 732 (3d Cir. 1952).

has at least an implied operating contract to deliver equipment to and pick it up from the private shipper's siding. Furthermore, in the *Rush* case the injury occurred, not while the carrier was exercising its operating rights, but when the car was being spotted by the consignee's employees preparatory to unloading.

Surprisingly, the decisions permitting recovery by railroad employees injured on a shipper's siding were not discussed.

III

There remains for consideration the status of contributory negligence as a defense when plaintiff's cause of action invokes the Safety Appliance Act but cannot invoke the FELA because the plaintiff is not an employee of a railroad.[37] The problem is beset with difficulties which, so far as we can find, have never been satisfactorily analyzed or even adequately recognized by the courts or writers, certainly not by the United States Supreme Court. Some of these difficulties inhere in a statutory provision for a standard of conduct, with sanctions to compel observance, but without concomitant express creation of private civil causes of action for violations of the standard.[38] Other difficulties seem to arise from the intermingling in one suit of causes of action which do, with those which do not, depend under the Safety Appliance Act.[39] Still others may be caused by the piece-meal evolutionary development of the Safety Appliance Act and the FELA vis-a-vis each other, the similarity of certain issues in cases under the two Acts which are often said to be *in pari materia,* and the failure to delineate the provisions of each Act when one but not the other is applicable.[40] Whatever the reasons, there exists a degree of uncertainty respecting the status of contributory negligence in a non-FELA action invoking the Safety Appliance Act, not hard to understand but hard to justify after so many years under these Acts.

The problem is brought into focus by a group of recent decisions, already men-

[37] The same problem also remains in respect of other defenses recognized by the common law, *e.g.,* assumption of risk, to the extent that such defenses are still available under the law of a given state. The only defense expressly abolished by the Safety Appliance Act, 27 STAT. 532 (1893), 45 U. S. C. §7 (1946), is assumption of risk, and that only in suits brought by railroad employees. The problem is essentially the same whether the defense be contributory negligence or the other similar common law defenses, and only contributory negligence will be expressly considered here.

[38] See Lowndes, *Civil Liability Created by Criminal Legislation,* 16 MINN. L. REV. 361 (1932); Prosser, *Contributory Negligence as Defense to Violation of Statute,* 32 MINN. L. REV. 105 (1948); PROSSER ON TORTS §39 (1941); Thayer, *Public Wrong and Private Action,* 27 HARV. L. REV. 317 (1914); Morris, *The Relation of Criminal Statutes to Tort Liability,* 46 HARV. L. REV. 453 (1933).

[39] See O'Donnell v. Elgin, J. & E. R. R., 338 U. S. 384, 391 (1949).

[40] See O'Donnell v. Elgin, J. & E. R. R., 338 U. S. 384, 391 (1949). Issues of causation are common to suits under both acts, although under the FELA, 35 STAT. 65 (1908), as amended, 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946), it is sufficient if the injury results "in whole or in part" from the railroad's negligence, that is, if the negligence is a "contributing cause," whereas in a suit grounded only on the Safety Appliance Act, the railroad's violation of the Act must be the "proximate cause" of the injury. See note 17 *supra,* note 73 *infra,* and accompanying text. There is tautology in abolition of assumption of risk, both the Safety Appliance Act as originally enacted in 1893, 27 STAT. 532 (1893), 45 U. S. C. §7 (1946), and the FELA, 35 STAT. 66 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §54 (1946), effecting such abolition where the railroad has violated the Safety Appliance Act. The FELA also has the effect of abolishing the fellow servant rule, but the Safety Appliance Act does not abolish it. 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946).

tioned, which emphasize that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong—in no way dependent upon negligence—for the proximate results of which there is liability that cannot be escaped by any showing of diligence. While all of these cases were brought under the FELA that fact does not seem to delimit—certainly not necessarily to delimit—the scope of the language or intendment of the decisions so as to preclude applicability of their rationale to non-FELA Safety Appliance Act cases. In *O'Donnell v. Elgin, J. & E. R. R.*[41] plaintiff's complaint mingled in a single cause of action charges of general negligence and a specific charge that defendant "carelessly and negligently" violated the Safety Appliance Act by operating a car not equipped with the prescribed coupler. Mr. Justice Jackson for the Court deplored this intermingling as unnecessarily and inevitably conducing to confusion between a negligence claim and a claim founded upon violation of the Safety Appliance Act: ". . . [I]t will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking."[42] Why the importance of the separation? Simply because a negligence cause, and a Safety Appliance Act cause, while involving issues in common such as causation and extent of injury, are nevertheless wholly different causes of action.[43] Mr. Justice Jackson said:[44]

> But this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. . . .[45] These

[41] 338 U. S. 384 (1949).

[42] *Id.* at 392.

[43] The Supreme Court in the *O'Donnell* case criticizes counsel for combining in "a single count or cause of action" charges of general negligence and a specific charge that the railroad "carelessly and negligently" violated the Safety Appliance Act. Yet it is technically arguable that counsel was proceeding with precision, for the very section of the FELA that creates for railroad employees a cause of action for negligence not involving the Safety Appliance Act, also creates for them a cause of action for violating the Act "due to its [the carrier's] negligence." 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946); see Urie v. Thompson, 337 U. S. 163, 188-189 (1949). Thus it is arguable that the injured railroad employee has three possibilities: a suit for negligence not involving the Safety Appliance Act, a suit for negligent violation of that Act, and a suit for violation of that Act without regard to negligence. Obviously it would be a foolish plaintiff who would assume the burden of showing negligent violation of the Act when mere violation suffices; yet according to the literal phraseology of the FELA the only federal cause of action for violation of the Act is for negligent violation, and the railroad employee, in common with non-railroad employees, has only a state-created cause of action for violation of the Act not grounded on negligence. See note 55 *infra*, and accompanying text. However, fortunately, so far as we have found, no Supreme Court decision introduces this additional complexity! It is assumed that a cause of action by a railroad employee grounded on the Safety Appliance Act invokes absolute liability without regard to negligence and is a FELA-created cause of action. Thus it is clearly wise—and in fact, required by F.R.C.P. 10(b)—for the injured railroad employee whose suit relies upon both general negligence and violation of the Safety Appliance Act, to set forth these two distinct claims for relief separately, in order to facilitate delineation of the distinct issues.

[44] 338 U. S. at 390-391. The quotation from Chief Justice Hughes is from Brady v. Terminal Railroad Ass'n, 303 U. S. 10, 15 (1938).

[45] The cases cited by Mr. Justice Jackson are St. Louis, I. M. & S. R. R. v. Taylor, 210 U. S. 281, 294 (1908); Chicago, B. &. Q. R. R. v. United States, 220 U. S. 559, 575-577 (1911); Delk v. St. Louis & S. F. R. R., 220 U. S. 580 (1911). Another he might have cited is Texas & Pacific Ry. v.

rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous."

These observations followed Mr. Justice Jackson's brief résumé of the varying rules as to the significance, in civil litigation, of defendants' violations of statutes. He concluded his résumé with the observation that "usually, unless the statute sets up a special cause of action for its breach, a violation becomes an ingredient, of greater or lesser weight, in determining the ultimate question of negligence."[46] The relative weight of the factor of statutory violation may run the gamut from "some evidence of negligence" to "negligence *per se*."

But for the Court in the *O'Donnell* case the concept of negligence is wholly irrelevant to a Safety Appliance Act cause of action. The liability for violation of the Act is absolute. No showing of care can exculpate.[47] This reasoning quite clearly assimilates the Safety Appliance Act to that class of statutes which are construed to place the entire responsibility upon the violators of the statutes, and hence to abolish contributory negligence as a defense. Typical of this class are the child labor acts. As has been pointed out by Professor Prosser, statutes of this class are treated as analogous to those fixing the age of consent to intercourse.[48] They are the product of deliberate social policy which, for one reason or another, puts the entire burden of protecting against the specified risk on the shoulders of only one party to the transaction. Thus, to state that a statute of this type abolishes the defense of contributory negligence, is but to state the obverse of the proposition that it places absolute liability—the entire burden—upon the violator.

From the political and sociological viewpoint, it is hardly surprising that an era which provided widespread workmen's compensation coverage for most industrial employees, with its total abolition of negligence and contributory negligence and its acceptance of the philosophy that "the cost of the product shall bear the blood of the workmen," would also provide for workers on railroad equipment, injured by specifically prohibited defects in appliances, protection against their own contributory negligence.

While in the *O'Donnell* case the judgment of the Court was supported by only

Rigsby, 241 U. S. 33 (1916). The same absoluteness of duty is imposed on railroads by the Boiler Inspection Acts, Baltimore & O. R. R. v. Groeger, 266 U. S. 521 (1925); Southern Ry. v. Lunsford, 297 U. S. 398, 401-402 (1936); Lilly v. Grand Trunk R. R., 317 U. S. 481, 485-486 (1943); Urie v. Thompson, 337 U. S. 163 (1949).

[46] 338 U. S. at 390.

[47] However, it is noteworthy that despite the strong language of absolute duty, Mr. Justice Jackson felt impelled to interject a caveat by way of footnote 7 to his opinion, where he said: "We do not say that a railroad may never effectively defend under the Act by showing that an adequate coupler failed to hold because it was broken or released through intervening and independent causes other than its inadequacy or defectiveness; such, for example, as the work of a saboteur. And we do not find it necessary to consider a situation where an adequate coupler failed to hold because it was improperly set, since such facts are not before us" (338 U. S. at 394). It is perhaps equally noteworthy that his caveat concerns the extreme case—the work of a saboteur.

[48] Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105, 118 (1948).

four votes, three justices not participating and two dissenting, a week after that decision in *Carter v. Atlanta & St. A. B. R.*,[49] Mr. Justice Clark writing for the Court was able to speak for at least six Justices in saying:[50]

> This was a two-pronged complaint, alleging the right to recover under the Safety Appliance Act and the Federal Employers' Liability Act. In this situation the test of causal relation stated in the Employers' Liability Act is applicable, the violation of the Appliance Act supplying the wrongful act necessary to ground liability under the F.E.L.A. . . . Sometimes that violation is described as "negligence per se," . . . but we have made clear in the *O'Donnell* case that that term is a confusing label for what is simply a violation of an absolute duty.
>
> Once the violation is established, only causal relation is in issue.

And at the next term of the Court in *Affolder v. New York C. & St. L. R. R.*[51] the Court expressly approved the *O'Donnell* holding that the duty under the Safety Appliance Act "is not based on the negligence of the carrier but is an absolute one. . . ."[52]

Thus the *O'Donnell, Carter,* and *Affolder* cases, the most recent Supreme Court cases which analyze the nature of a Safety Appliance Act cause of action, are at least implicit authority for the proposition that the contributory negligence of the injured person is no defense to an action under this Act. Since the Act constitutes permissible congressional regulation of interstate commerce,[53] the absolute standards which it prescribes, and the consequences of those standards including the inadmissibility of contributory negligence as a defense to violation of the standards, are applicable wherever the Act itself is applicable. Thus there is imposed by the Act, as the obverse of the coin of absolute federal standards, the obliteration of contributory negligence as a defense to violation of the Act. This is not to say that the Act creates a federal cause of action independently of the FELA. Despite earlier indication that it did,[54] it seems settled that it does not.[55] A suit by a non-railroad employee invoking the Safety Appliance Act to establish the railroad's liability, remains a common law cause of action created by the state to be enforced only in state court, absent a basis for federal diversity jurisdiction. But the Act does something more than impose federal standards on the railroad; it imposes on the state court the federal obligation of selecting, from among the various doctrines available to that court under state law as to the civil consequences of violation of statutory standards, the doctrine consistent with an absolute standard. And there seems to be but one doctrine known to the common law which fits such a standard—the doctrine which, by putting all the risk on the standard's violator, implicitly obliterates the defense

[49] 338 U. S. 430 (1949). [50] *Id.* at 434. [51] 339 U. S. 96 (1950).

[52] *Id.* at 98. Mr. Justice Reed dissented; Mr. Justice Frankfurter wished to dismiss certiorari as improvidently granted; Mr. Justice Douglas did not participate; and Mr. Justice Jackson dissented but on an issue involving no repudiation of his position as writer for the Court in the *O'Donnell* case.

[53] Texas & Pacific Ry. v. Rigsby, 241 U. S. 33 (1916).

[54] *Ibid.*

[55] Fairport, P. & E. R. R. v. Meredith, 292 U. S. 589, 598 (1934); Gilvary v. Cuyahoga Valley R. R., 292 U. S. 57 (1934); Tipton v. Atchison Ry., 298 U. S. 141, 146 (1936); see Urie v. Thompson, 337 U. S. 163, 188 (1949).

of contributory negligence. Hence from the *O'Donnell, Carter,* and *Affolder* cases it seems accurate to say that while the Safety Appliance Act of itself does not create a federal cause of action, it does make of the problem of contributory negligence *vel non* in any case under the Act, a federal question.

If this spelling out of the logical implications of the *O'Donnell, Carter,* and *Affolder* cases seems unnecessarily involved, it is to be remembered that the rule that the Safety Appliance Act does not itself create a federal cause of action is so well entrenched that it seems unlikely that the Supreme Court would recede from this rule at this date. Moreover, if the question were open, a construction of the Act as creating a cause of action simply flies in the face of the fact that the Act does not purport to create any cause of action except one in the Government for penalties. It is true that the Act since its original enactment in 1893[56] has abolished the defense of assumption of risk by railroad employees of any defect prohibited by the Act, and that the obvious purpose of such abolition was to facilitate causes of action for injuries resulting from violation of the Act.[57] But this is a long way from creating a cause of action, even for railroad employees, as to whom alone the provision is applicable. It thus seems that the abolition of the defense of contributory negligence, which abolition inheres in the absoluteness of the Act's standards as set forth in these three recent cases, is most rationally explained in terms of federal imposition of restrictions on state causes of action.

It is perhaps no more surprising to observe such federal restrictions imposed by reason of judicial construction of a statute regulating interstate commerce, than to discover them imposed directly by the terms of the statute itself. The former no less than the latter seems free of constitutional difficulties, assuming a permissible congressional exercise of the commerce power, as is the Safety Appliance Act, and rational judicial construction. In *Mondou v. New York, N. H. & H. R. R.*[58] the Court, in rejecting the contention that a state could decline to entertain FELA causes of action as not harmonious with the state's policy, said:[59]

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. . . .

Similarly if Congress by the Safety Appliance Act imposed, as held by the *O'Donnell, Carter* and *Affolder* cases, standards of absolute liability, and there inheres in such

[56] 27 STAT. 532 (1893), 45 U. S. C. §7 (1946).
[57] Texas & Pacific Ry. v. Rigsby, 241 U. S. 33, 40 (1916).
[58] 223 U. S. 1 (1912).
[59] *Id.* at 57. See also Testa v. Katt, 330 U. S. 386, 392 (1947); Dice v. Akron, C. &. Y. R. R., 342 U. S. 359, 361 (1952) and the dissenting opinion therein of Justices Frankfurter, Reed, Jackson, and Burton, where it is stated: "If the States afford courts for enforcing the Federal Act [FELA] they must enforce the substance of the right given by Congress." (*Id.* at 369.)

standards the abolition of contributory negligence in civil suits for violation of the standards, that policy binds states courts in fashioning their own causes of action for such violations, even though the abolition of contributory negligence is not directly spelled out in the statute but is reached by judicial construction.

While the foregoing conclusions seem amply justified by the three recent cases discussed, it cannot be maintained that there is certainty that the Court will carry these cases to their logical conclusions. We have found no opinion of the Court which evidences a careful thinking through of the whole problem of contributory negligence as a defense to actions for violation of the Safety Appliance Act. Therefore a number of caveats are in order. If the Supreme Court wishes to escape the logical implications of the *O'Donnell, Carter,* and *Affolder* cases respecting the defense of contributory negligence, escape hatches are available. Among them are:

(1) As already noted, the *O'Donnell, Carter,* and *Affolder* cases were based on both the FELA and the Safety Appliance Act. The plaintiffs in all three cases were railroad employees. Therefore there is always the possibility that the Court more or less dogmatically will delimit the language of these cases as to consequences of the absoluteness of the Safety Appliance Act's standards, to cases where the FELA is also involved.

(2) At earlier times the Supreme Court clearly had held that contributory negligence of the plaintiff is a defense to an action grounded upon violation of the Safety Appliance Act. Although the Act as passed in 1893 abolished the defense of assumption of risk in situations where the railroad violated the Act, there is to this day no express provision in the Act itself which concerns contributory negligence. It was not until 1908 that the FELA[60] abolished contributory negligence of railroad employees as a defense in cases where the railroads violate the Safety Appliance Act. Thus, even where the plaintiff was a railroad employee, prior to 1908 contributory negligence barred recovery in a suit under the Safety Appliance Act, as expressly held in *Schlemmer v. Buffalo &c. Ry.*[61] In that case the Court distinguished assumption of risk from contributory negligence, noting of course that the former but not the latter was abolished by the Safety Appliance Act.[62]

In *San Antonio Ry. v. Wagner*[63] the Court, in refusing to consider a contention that plaintiff was not employed in interstate commerce and hence not entitled to rely upon the FELA, had occasion to remark:[64]

> Since the Safety Appliance Acts are in any event applicable—defendant's railroad being admittedly a highway of interstate commerce—whether plaintiff was employed in such commerce or not . . . the only materiality of the question whether the Employers' Liability Act also applies is in its bearing upon the defense of contributory negligence; the former act leaving that defense untouched . . . while the latter . . . abolishes it in any case where the violation by the carrier of a statute enacted for the safety of employees may contribute to the injury or death of an employee. . . .

It would be difficult to state more directly that the Safety Appliance Act standing

[60] 35 STAT. 66 (1908), 45 U. S. C. §53 (1946).
[61] 220 U. S. 590 (1911).
[62] 27 STAT. 532 (1893), 45 U. S. C. §7 (1946).
[63] 241 U. S. 476 (1916).
[64] *Id.* at 480-481.

alone does not abolish the defense of contributory negligence. But it must be remembered that the foregoing language was used at a time when the Court, despite earlier statements that the Safety Appliance Act created absolute standards in replacement of common law negligence,[65] still reverted on occasion to negligence terminology when considering violations of the Act. In fact, in the *San Antonio Ry.* case itself, the Court said:[66]

> But the two statutes [FELA and Safety Appliance Act] are *in pari materia,* and where the Employers' Liability Act refers to "any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances," etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as "negligence"—what is sometimes called negligence *per se.*

But it must be conceded that the final repudiation of the negligence terminology in favor of absolute liability of the *O'Donnell, Carter,* and *Affolder* cases—if it be final—did not involve overruling previous decisions to the same degree as does an interpretation of those cases which holds them implicitly to overrule previous holdings that contributory negligence is a defense. Moreover, in *Fairport R. R. v. Meredith*[67] the Court, while holding that travelers on the highways at railway crossings are within the class intended to be protected by the Safety Appliance Act's provisions for properly maintained brakes, nevertheless refused to review the state court's action respecting contributory negligence and the last clear chance doctrine, for the reason that "The act does not affect the defense of contributory negligence, and, since the case comes here from a state court, the validity of that defense must be determined in accordance with applicable state law. . . ." And, as recently as 1936 Mr. Justice Roberts in *Tipton v. Atchison T., & S. F. Ry.*[68] was able to write for an unanimous Court[69] (none of whose members, however, remain):

> The Safety Appliance Acts modify the enforcement, by civil action, of the employee's common law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act.

There seems little doubt, therefore, that if the Supreme Court wishes to escape the logical implications of its recent emphasis on the absoluteness of the Act's standards—including the abolition of the defense of contributory negligence—there is much language from the past to facilitate the escape.

(3) Arguments based on statutory construction could provide an escape hatch. Thus, it can be argued that if the Safety Appliance Act had abolished the defense of contributory negligence, why the necessity for its express abolition by the FELA in 1908?[70] And, does not the Safety Appliance Act's express abolition of assumption

[65] See note 45, *supra.*

[66] 241 U. S. at 484. This language was quoted with approval the very year the *O'Donnell* case was decided, in Urie v. Thompson, 337 U. S. 163, 189 (1949). In Minneapolis, & St. Louis R. R. v. Gotschall, 244 U. S. 66 (1917), the trial court's instruction that the jury might "infer" negligence from violation of the Safety Appliance Act was upheld.

[67] 292 U. S. 589, 598 (1934). [68] 298 U. S. 141 (1936).

[69] *Id.* at 146. There is, however, a notation that Mr. Justice Cardozo concurred in the result upon the authority of Gilvary v. Cuyahoga Valley Ry., 292 U. S. 57 (1934).

[70] 35 STAT. 66 (1908), 45 U. S. C. §53 (1946).

of risk[71] imply no effect on contributory negligence because of *expressio unius est exlusio alterius?* But these arguments are obviously formalistic; they ignore the historical realities that construction of the Safety Appliance Act has been an evolutionary process not unlike the growth of the interstate commerce concept. Certainly in 1908 it was not considered that the Act abolished the defense of contributory negligence, and there was good reason for its express abolition by the FELA. In fact assumption of the risk was also abolished despite its abolition in the Safety Appliance Act.

(4) As already noted, under the FELA there is sufficient causation to hold the railroad if the injury results "in whole or in part" from its conduct.[72] In other words, it is sufficient if the railroad's conduct was a "contributing cause" of the injury.[73] But there is nothing in the Safety Appliance Act which precludes a court from applying the orthodox standard of "proximate cause." Hence, even if the Supreme Court is committed by the *O'Donnell, Carter,* and *Affolder* cases to the abolition of contributory negligence as a defense in a suit grounded on the Safety Appliance Act, it would always be possible for the Court in a hard case, while disclaiming the terminology of contributory negligence, to permit its substance to be a good defense by speaking in terms of plaintiff's conduct as preventing the railroad's violation of the Act from being the "proximate cause" of the injury.

CONCLUSION

The Safety Appliance Act does not create a federal cause of action, but it does superimpose on state-created causes certain federal requirements, and thus makes federal questions of issues often determinative of the outcome of litigation which invokes the Act. One federal requirement is that violation of the Act creates absolute liability without regard to negligence. This the Supreme Court has made clear. Another federal requirement is that not only railroad employees but other employees and travelers at railroad crossings are within the Act's scope of intended protection. But often the courts avoid this federal requirement to the prejudice of the consignor's and consignee's employees who load and unload railroad cars by formalistic construction of the Act which exalts finical analysis of such terms as "using," "on its line," etc., over realistic appraisal of the purpose of the Act. The Court in the first appropriate case presented should exercise its jurisdiction to make clear that application of the Act's absolute standards cannot be evaded by such formalistic construction. When the plaintiff is a railroad employee the courts do not indulge in such formalistic construction to the sacrifice of the Act's purpose; neither should they when the plaintiff is not a railroad employee. The Act's purpose is to protect alike all who are subject to the risks of its violations. Lastly, the Court should make clear whether contributory negligence is or is not a valid defense to an action for violation of the Act. We submit that the logical implication of the *O'Donnell, Carter,* and *Affolder* opinions is that contributory negligence is no longer a defense.

[71] 27 STAT. 532 (1893), 45 U. S. C. §7 (1946).

[72] 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946).

[73] Coray v. Southern Pacific Co., 335 U. S. 520 (1949); Carter v. Atlanta & St. A. B. R. R., 338 U. S. 430, 434-435 (1949).