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THE EVIDENTIARY VALUE OF DEFENDANT'S SAFETY RULES IN A NEGLIGENCE ACTION

John M. Winters *

I. INTRODUCTION

One facet of the oft-mentioned complexity of modern industrial society is the ever-increasing number of safety rules and regulations whereby Congress and state legislatures, federal and state administrative agencies, the various trade associations, and individual private companies seek to provide for safer handling of the dangerous instrumentalities with which the employees of industry must work. It is this latter group of safety regulations, namely those adopted by the individual companies with which this article is primarily concerned, although the other types of rules will be used for comparison purposes.[1]

As the cases cited throughout this article will indicate, both plaintiffs and defendants have attempted to introduce safety rules into evidence, each at times seeking to use them to prove his own due care, while at other times each tries to use them to show the negligence of the other. With the general acceptance of the principle of multiple admissibility whereby courts will admit evi-

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[1] The leading cases favoring admissibility of company rules are Dublin, Wicklow & Wexford Ry. v. Slattery, L.R. 3 App. Cas. 1155 H.L. (1878); Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955); Diester v. Atchison, T. & S. F. Ry., 99 Kan. 525, 162 P. 282 (1917); Stevens v. Boston Elevated Ry., 184 Mass. 476, 69 N.E. 338 (1904); Cincinnati St. Ry. v. Altemeier, 60 Ohio St. 10, 53 N.E. 300 (1899). Contra: Hoffman v. Cedar Rapids & M. C. Ry., 157 Iowa 655, 139 N.W. 165 (1912); Fonda v. St. Paul City Ry., 71 Minn. 438, 74 N.W. 166 (1898); Fries v. Goldsby, 163 Neb. 424, 80 N.W.2d 171 (1956). See the annotations to the Bryan case, supra, 50 A.L.R. 2d 16 (1956) and to the Deister case, supra. L.R.A. 1917c 793. See also BALDWIN, PERSONAL INJURIES § 258 (2d ed. 1909); 2 HARPER AND JAMES, TORTS § 17.3, at 981 (1956); MORRIS, TORTS 119 (1953); 3 SHERMAN AND REDFIELD, NEGLIGENCE § 506 (Rev. ed. Zipp, 1941); 6 THOMPSON, NEGLIGENCE § 7829 (2d ed. 1905); 2 WIGMORE, EVIDENCE § 282, § 461, at 501 (3d ed. 1940); [Morris, Admissions and the Negligence Issue,] 29 Texas L. Rev. 407, 412, 432 (1951); 38 Am. Jur. Negligence § 3121 (Supp. 1958).

dence for one purpose even if it is not admissible for another,[2] it is possible to discuss separately the various considerations given the rules at different times for different purposes. However, before any detailed analysis can be undertaken, certain general comments are appropriate.

As used herein, "safety rules" may be defined as those written rules and regulations adopted by management with the intention of governing its subordinates so as to minimize the chances of harm resulting from the otherwise possible choice of less safe methods of operation. Most of the case law and prior writing involving safety rules concerns common carriers, especially railroads and streetcar companies. The obviously greater contact these companies have with the general public and the resulting larger volume of litigation involving them accounts for such emphasis, although cases cited later in this paper will include among others those involving department stores, independent contractors, airlines, and municipalities. It is hoped that the coverage of this article will make it applicable to all safety rules as well as to those of the mentioned groups.

A preliminary distinction must be recognized between the employee who is liable himself, the employer who is liable under the doctrine of the *respondeat superior,* and the employer who is directly liable. The employer is the defendant in the typical case, presumably because of its greater ability to pay and the consequently unsympathetic attitude of the jury. However, it will be necessary to keep in mind the dictinction between the servant or employee on the one hand, and the master, employer, or company on the other; and the distinction between the two bases of the latters' liability. It will become apparent that under any particular theory of the admissibility of company rules as evidence, the proper persons must be made parties and there must be appropriate allegations in the pleadings to support the theory.[3]

Another distinction which must be emphasized can be understood by considering the company rule at two different times. At sometime prior to the controversy in question, the company, through whatever process it may have adopted, makes the managerial determination that a given rule or group of rules should be in force, and causes this information to be disseminated. In

[2] Standard Oil Co. v. Allen, 121 N.E. 329 (Ind. App. 1918); McCORMICK, EVIDENCE § 59 (1954); 1 WIGMORE, EVIDENCE § 13 (3d ed. 1940).

[3] But see Gulf C. & S.F. Ry. v. Bell, 24 Tex.Civ. App. 579, 58 S.W. 614 (1900) to the effect that the rules themselves need not be pleaded.

a large company this determination may involve a number of steps, but they will have been completed before the accident creating the cause of action.

Next the rule must be examined at the time of the accident. While the printed copy of the rule does represent some proof of a prior managerial determination, in a certain sense the rule is more than the printed paper. An accidental destruction of the paper upon which the rule is written might affect knowledge or dissemination of the rule, yet the rule could continue to be operative. Possibly the rules could be looked upon as being a part of the contractual relationship between the company and its employee, in that, as will be mentioned later,[4] the employment contract creates a contractual duty of the employee to obey reasonable rules. The obedience to the rules is a part of the consideration for the contract. This duty is more personal to the parties than the duty created by a statute, but it is a legal duty nonetheless. Moreover, while the rules cannot govern the employees' actions entirely, there is a certain ordering of the employees' action as a result. The employee who violates them may be subject to disciplinary action, including loss of employment.[5] Therefore, his actions and those of his fellow employees will, within the scope of the rules, tend to conform to the pattern the rules seek to establish.

Whether the rules as thus analyzed can be said to "exist" or not is the problem of the philosopher, but existence can be assumed for present purposes. The rules in question will have some status following their adoption which will continue at least until the controversy arises. This distinction between the adoption of a rule and its continuing existence will have a bearing on much of the remaining discussion.

It will now be possible to discuss each of the various bases upon which the admission of safety rules has been attempted. While the emphasis will be upon the direct relationship between rules and the general standard of care, consideration will also be given to related problems such as showing knowledge of danger, feasibility of safeguards, contributory negligence, and reliance. In addition, the duty to make rules under certain circumstances will be noted and the use of rules to prove what happened will be considered. It should be emphasized at this point that the major

[4] See note 139 infra.

[5] See generally CCH Lab. L. Rep. 4095.10 on the effect of a rule violation under a union contract. See also United Fireworks Mfg. Co. v. NLRB, 252 F.2d 428 (6 Cir. 1958).

part of this article concerns controversies between third persons as plaintiffs and the employee or employer, or both, as defendants. Those cases involving suits by employees against employers or against fellow employees are reserved for brief consideration in a separate section because of the peculiar considerations which differentiate them.

II. SPECIAL PURPOSES FOR ADMISSION

A. To Prove Knowledge of Danger

This element of the substantive law of negligence concerns those dangerous situations in which a defendant knows, or should know, of the danger and is bound to govern his actions accordingly.[6] The theory is that a person who knows or should know of a danger is under a duty to be more careful than the one who, through no fault of his own, lacks such knowledge. Generally, a plaintiff may prove actual knowledge by affirmative evidence that the defendant actually knew of prior accidents,[7] had been warned by someone of the danger,[8] or had made a prior effort to correct the situation.[9] Where offered to show prior effort and, therefore, knowledge, company safety rules have been usually held to be admissible.[10]

[6] On knowledge of danger generally see Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955); 2 HARPER AND JAMES, TORTS § 16.15, 907-18 (1956); MORRIS, TORTS 95 (1953); PROSSER, TORTS 129-35 (2d ed. 1955).

[7] 1 SHERMAN AND REDFIELD, NEGLIGENCE § 59 (Rev. ed. Zipp, 1941); 2 WIGMORE, EVIDENCE §§ 252, 254, at 70 (3d ed. 1940); [Morris, Proof of Safety History in Negligence Cases], 61 Harv. L. Rev. 205 (1948).

[8] Ft. Worth & Denver City Ry. v. Looney, 241 S.W.2d 322 (Tex. Civ. App. 1951).

[9] 2 WIGMORE, EVIDENCE §§ 282, 283 (3d ed. 1940). This section mentions company rules as an example of taking precautions.

[10] Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955); Atlantic Consol. St. Ry. v. Bates, 103 Ga. 333, 30 S.E. 41 (1898); Chicago, St. P. & K. C. Ry. v. Ryan, 165 Ill 88, 46 N.E. 208 (1896); Dunham v. Des Moines Ry., 240 Iowa 421, 35 N.W.2d 578 (1949); Hines v. Chicago, M., & St. P. Ry., 196 Iowa 109, 194 N.W. 188 (1923); Derosier v. New England Telephone & Telegraph Co., 81 N.H. 451, 130 A. 145 (1925) (dictum); Texas Traction Co. v. Hanson, 143 S.W. 214 (Tex.Civ.App. 1911). in Chicago, B. & Q. R.R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N.W. 880 (1902) a ruling requiring the locking of turntables was used "to bring home to the defendant knowledge" of the danger in leaving them unlocked, but in Fries v. Goldsby, 163 Neb. 424, 80 N.W.2d 171 (1956) rules were kept out without discussion of knowledge of danger.

Of course, notice of danger must be in issue and must either be specified in the plaintiff's offer of proof or the court must assume that this was the purpose of offering the evidence. The safety rule would be admissible against the employee and, vicariously, against his employer to show that the employee knew of the danger, or, if he has failed in his duty of knowing promulgated rules, that he should have known of the danger. When lack of knowledge of the rules is not the fault of the employee, they are not admissible against him, although as we shall see later,[11] they may be admissible against the employer to prove the employer's own negligence in failing to promulgate proper safety rules.

While the courts have failed to specify any special types of rules which may be admitted for this purpose, an analysis of the cases indicates what general types are admissible. The rule under consideration should single out a specific physical location, or at least a type of situation, sufficiently unique to indicate that the company requires special precautions under certain circumstances or in certain places. These rules may fix a degree of care varying from the normal or they may call for particular action. The former type is exemplified by a rule stating that engineers should use extreme caution at a designated curve on the tracks. As will be discussed later, the standard of care in a negligence action is "ordinary care",[12] not extreme caution; yet when a situation is known to be fraught with dangers, a greater degree of care is called for than in the normal, less dangerous situations.[13] The company in singling out this location tells the employees to notice the danger, so the employee is required to be more careful. Thus, in the example concerning the care required at a particular curve, the mere knowledge of this rule imparts to the engineer a knowledge that the named curve is dangerous.

The other type of rule used to show knowledge sets out a particular mode of action for a particular location or situation. In *Bryan v. Southern Pacific Company*,[14] the defendant's rule provided that where public crossings were not protected by a watchman or gates, a member of the crew had to go into the crossing before dropping or kicking cars across such crossings. A railroad car running in this manner without an engine hit the automobile

[11] See note 36 infra.

[12] See note 39 infra.

[13] See PROSSER, TORTS 147 (2d ed. 1955); 2 HARPER AND JAMES, TORTS § 16.5 at 915 (1956).

[14] Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955).

that plaintiff was in, causing the injury complained of. The court admitted the company rule on the ground that it indicated defendant "realized or should have realized" its conduct involved unreasonable risk.

In these dangerous situation cases, two things must be proven: that the situation is dangerous, and that the defendant knows of the danger. Proof of the danger by the company rule is possible under the theory of its being an admission of the company, a concept considered later.[15] The company rule also can be used to show that the defendant employee knew of the danger. This is not the inference upon an inference problem which causes concern in some areas,[16] since, in reality, two equally reasonable inferences are drawn from the promulgation of the rule. After all, the company would not single out a situation for special safety precautions unless it felt the situation was extra dangerous. Thus the company admits it is dangerous, and the employee discovers the danger when he learns of the rule, if not before.

Note that evidence of a violation of the rule need not be introduced for the rule to be admissible for this purpose, since the mere existence and promulgation of the rule gives the required proof of notice of danger. Of course, whichever type of rule is introduced to show notice of danger, proper instructions may be necessary to insure that the jury's application of the rule is proper. The court will have to be particularly careful when a rule speaks of degree of care, but the need for caution should not keep the rule out of evidence.

B. To Show Feasibility of Safeguards

The courts recognize several methods of proving that a defendant could have prevented the injury in question by using a particular safeguard.[17] Obviously such evidence is admissible only when the issue has been raised and requires a showing that the proportionate advantage to be gained by using the safeguard in question outweighs the disadvantages in cost and operating efficiency. One method of showing this is to have an expert give his opinion about what could have been done to prevent the ac-

[15] See note 43 infra.

[16] See 1 WIGMORE, EVIDENCE, § 41 (3d ed. 1940); Jennings, Probative Value of an Inference Drawn Upon Another Inference, 22 U. Cin. L. Rev. 39 (1953).

[17] See MORRIS, TORTS 103 (1953).

cident.[18] Another method is to show the customary method of operation used by others similarly situated, the presumption being that the competitors have weighed the pros and cons and, since they have remained in competition, the safeguards they chose are practical.[19] The rules of other companies similarly situated would likewise seem to be admissible for this purpose.[20] In like manner, a company's rules, apparently made after some deliberation, indicate that the company has decided such rules can be carried out.[21] In actual practice, rules are attempted which are not practical so they have to be abandoned and new ones substituted. However, until they are abandoned, or unless the company can show that they are impractical in fact, their mere existence is some evidence of their feasibility. Of course, to be admissible for this purpose, a rule must specify a particular mode of conduct as opposed to a degree of care, and the evidence must show a failure to follow the rule.

C. By Plaintiff to Show Absence of Contributory Negligence

A company rule may be introduced on both sides of the contributory negligence issue. Plaintiff can introduce a rule to show his own due care, and the defendant can use it to show that plaintiff was guilty of contributory negligence. In the former situation, the defendant has attempted to prove that the conduct of the plaintiff was contributorily negligent. The plaintiff can then introduce a company rule, after first proving his knowledge thereof, to show his conduct was justified because he relied upon the assumption that the defendant would comply with the rule. The courts have no difficulty in comparing this situation with those concerning reliance upon habit or custom and, in a few instances, reliance upon compliance with a statute. Thus, once knowledge

[18] See Morris, The Role of Expert Testimony in the Trial of Negligence Issues, 26 Texas L. Rev. 1 (1947).

[19] See note 75 infra.

[20] See note 76 infra.

[21] See generally the discussion in admissions infra note 42. Feasibility as such is considered in Derosier v. New England Tel. and Tel. Co., 81 N. H. 451, 130 A. 145 (1925) and Smith v. Boston & M. R.R., 87 N. H. 246, 177 A. 729 (1937), although on subsequent appeal the rules were kept out as being inapplicable to the fact situation involved. 88 N. H. 430, 190 A. 697, 191 A. 833 (1937).

is shown the rule is usually admitted for this purpose.[22] Of course the number of persons knowing the rules would be far less than the number who would know of an habitual manner of operating. Off-duty employees would know of them,[23] as would persons having particularly close contact with the company. For example, in a number of cases where firemen have sued streetcar companies, the various rules of the streetcar companies pertaining to the right of way to be given to emergency vehicles have been introduced to show the fireman was justified in assuming that the street-

[22] Where deceased was warned of an approaching train, held there was no contributory negligence as a matter of law since the train was traveling twice the speed set by the rules in Fannin v. Baltimore & O. R. R., 253 F.2d 173 (6th Cir. 1958); where plaintiff knew of previous repeated conduct, which conduct was in fact in conformance with a rule, the rule's admission was allowed in Sexton v. Key System Transit Lines, 144 Cal. App.2d 719, 301 P.2d 612 (1956); where plaintiff knew of a rule requiring trains to stop before passing other trains receiving or discharging passengers and he passed behind such a train without looking and was hit by a train violating the rule, the rule was admitted in Yates v. Philadelphia, B. & W. R.R., 23 Del. (7 Penn.) 472, 82 A. 27 (1906); a passenger who used a railroad for five years was presumed to know a similar rule in Chicago & E. I. R.R. v. Jennings, 89 Ill. App. 335 (1899), rev'd on other grounds in 190 Ill. 478, 60 N.E. 818 (1911) but see dissent in 190 Ill. 492; admissibility is based upon reliance by the public in general in Baltimore & O. Ry. v. State, 81 Md. 371, 32 A. 201 (1895); plaintiff listened for bell to be rung per the defendant's rule and stepped behind a stopped train without looking to be hit in Emery v. Boston Elevated Ry., 218 Mass. 255, 105 N.E. 889 (1914); the plaintiff's lack of knowledge of a rule kept it out on the issue of contributory negligence in Corney v. Boston Elevated Ry., 219 Mass. 552, 107 N.E. 411 (1914); but where plaintiff said he did not know of a rule, the court held the jury could have found that plaintiff relied on the custom in Lipski v. Boston Elevated Ry., 248 Mass. 508, 143 N.E. 335 (1924); and where train was in plain sight, the rules were held not to relieve the deceased in West v. Detroit United Ry., 159 Mich. 269, 123 N.W. 1101 (1909). See also Perrone v. Pennsylvania R.R., 136 F.2d 941 (2d Cir. 1943); Galveston, H. & S. A. Ry. v. Pingenot, 142 S.W. 93 (Tex. Civ. App. 1911); Southern Traction Co. v. Wilson, 187 S.W. 536 (Tex. Civ. App. 1916); Wichita Falls R. & F. W. Ry. v. Crawford, 19 S.W.2d 166 (Tex. Civ. App. 1929). Compare Universe Tankships v. Pyrate Tank Cleaners, 152 F. Supp. 903 (S.D.N.Y. 1957) where plaintiff's own rules were held not to be admissible to show violation was contributory negligence. See also Streeter v. Humrichouse, 357 Ill. 234, 191 N.E. 684 (1934) where an employee's violation of rule prohibiting riding in front of engine was held to be not a cause, but a circumstance of injury caused when he was hit by defendant's car. See also note 75 infra.

[23] State, Use of Pachmayer v. Baltimore & O. R.R., 157 Md. 256, 145 A. 611 (1929).

car would stop.[24] As another example, in *Chicago and A. R. Co. v. Kelly*,[25] plaintiff's deceased was a transfer mail clerk employed by the government to transfer mail between the various trains. A railroad rule prohibited a train from passing a stopped train while it was loading or unloading passengers.[26] Deceased was passing behind a stopped train as his work normally required him to do, when he was struck by a train violating this rule by speeding at twenty-five miles an hour through the station. The rule of the defendant company was admitted by the trial court and its admissibility was approved on appeal because the deceased had worked on his job for one year and it was reasonable to assume that he knew of this rule and thus acted reasonably when he stepped from behind the stopped train without looking.

In many cases the plaintiff's only knowledge of a rule will be acquired through watching its effect, i.e., by watching how an operation is habitually performed. Thus the courts are disposed to speak of habit and rules jointly in this area, without making any distinction.[27] In any event, while it is ordinarily not true that the uncontroverted fact of reliance upon a rule or a habit should free a plaintiff from contributory negligence as a matter of law, it is certainly reasonable to consider such reliance in determining that issue.

There are a number of cases, particularly in jurisdictions where prior cases have based admissibility upon the plaintiff's knowledge of a rule, which have refused to admit rules because the plaintiff did not know of them.[28] There is often no indication that these rules were offered specifically upon the issue of plaintiff's con-

[24] Chicago City Ry. v. McDonough, 221 Ill. 69, 77 N.E. 577 (1906); Dole v. New Orleans Ry. & Light Co., 121 La. 945, 46 So. 929 (1908); McKernan v. Detroit Citizens St. Ry., 138 Mich. 519, 101 N.W. 812 (1904); Toledo Ry. & Light Co. v. Ward, 2 Ohio CC NS 256, 25 Ohio CC 399, aff'd per curiam, 71 Ohio St. 492, 74 N.E. 1142 (1904).

[25] Chicago & A. R.R. v. Kelly, 75 Ill. App. 490 (1897), 80 Ill. App. 675 (1898), aff'd 182 Ill. 267, 54 N.E. 979 (1899).

[26] See cases supra note 22 for cases involving similar rules.

[27] Chicago City Ry. v. Lowitz, 218 Ill. 24, 75 N.E. 755 (1905).

[28] Smellie v. Southern Pac. Ry., 128 Cal. App. 56E, 18 P.2d 97 (1933), aff'd with reservation as to company rules in 128 Cal. App. 583, 19 P.2d 981 [later California cases contrary, see Powell v. Pacific Electric Ry., 35 Cal. 2d 40, 216 P.2d 448 (1950)]; Merritt v. Michigan Central R.R., 158 Ill. App. 38 (1910); Lake Shore & M. S.R. Co. v. Brown, 123 Ill. 162, 14 N.E. 197 (1887); Louisville Ry. v. Gaugh, 133 Ky. 467, 118 S.W. 276 (1909); Isackson v. Duluth St. Ry., 75 Minn. 27, 77 N.W. 433 (1898); Fonda v. St. Paul City Ry., 71 Minn. 438, 74 N.W. 166 (1898); Lawson v. Union P. R.R., 113 Neb. 745, 204 N.W. 791

tributory negligence. Rather, the courts have assumed that this is the only basis upon which admission is possible.[29] In the jurisdictions so holding, the knowledge of the plaintiff is an absolute prerequisite for the admissibility of any company rule. This article, of course, discusses other bases of admissibility which do not require such knowledge.

D. By Defendant to Show Plaintiff's Contributory Negligence

The other instance wherein safety rules are admitted on the issue of plaintiff's contributory negligence is quite different from any other considered in this paper. This is the situation where the defendant has promulgated rules for persons to follow and the plaintiff is injured while violating them. For example, a street-car company posts an easily readable sign prohibiting passengers from standing upon open platforms while the car is in motion, yet plaintiff stands thereon and is injured when the defendant performs some negligent act. The rule is usually admitted in such cases on the issue of contributory negligence.[30]

Unquestionably when the plaintiff has knowledge of the rule, or where the circumstances are such that he should know of it, a jury is justified in considering his failure to comply with the rules as some evidence of his lack of proper care.[31] The decisions support this view as long as the defendant company has posted the rules where the plaintiff could reasonably be expected to see them,[32]

(1925); Chabott v. Grand Trunk Ry., 77 N.H. 133, 88 A. 995 (1913); Walker v. Silvio, 5 N.J. Misc. 833, 138 A. 510 (1927); Taddeo v. Tilton, 248 App. Div. 290, 289 N.Y.S. 427 (1936); Virginia Ry. & Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1072 (1915). Contra: Boldt v. San Antonio Traction Co., 148 S.W. 831 (Tex. Civ. App. 1912), where court specifically says knowledge of plaintiff is immaterial.

[29] It would probably be arguable that cases so holding are proper authority for admitting such rules, where known, to free plaintiff of contributory negligence.

[30] Pruitt v. San Pedro L.A. & S.L. R.R., 161 Cal. 29, 118 P. 223 (1911) (statute required compliance); Baltimore & Y. Turnpike Road v. Cason, 72 Md. 377, 20 A. 113 (1890) ("assumed risk"); Renaud v. New York, M.H. & H. R.R., 210 Mass. 553, 97 N.E. 98 (1912); McDonough v. Boston Elevated Ry., 191 Mass. 509, 78 N.E. 141 (1906).

[31] See BEACH, CONTRIBUTORY NEGLIGENCE §§ 151-52 (3d ed. 1899); PROSSER, TORTS 286 (2d ed. 1955); 3 MOORE, CARRIERS § 1571 (2d ed. 1914).

[32] In Cutts v. Boston Elevated Ry., 202 Mass. 450, 89 N.E. 21 (1909) rules intended for the public were held inadmissible because they were so placed on the side of the car that they were behind a gate when the train stopped.

and as long as the conduct called for is not unreasonable as a matter of law.[33] Rules would not be admissible for this purpose when compliance is impractical or impossible, as when the number of streetcars is inadequate to carry all passengers during the rush hour so that passengers must ride on the platform contrary to a posted rule. Also the rules have been excluded where the defendant has allowed habitual non-compliance without making any attempt to enforce the rules, thus causing plaintiff to be lulled into disobedience.[34]

In a few instances, failure to obey rules has been held to be contributory negligence as a matter of law,[35] but it would seem that unless the conduct itself was negligent regardless of the rule violation it would normally be a jury question, especially since the reasonableness of the rule itself and any justification for non-compliance will be of prime importance in most cases.

E. Duty to Make Rules and Enforce Them

Interestingly enough, when the courts have been presented with an allegation that a defendant company has failed to make, promulgate, or enforce safety rules, they have allowed the plaintiff to show such failure on the issue of the defendant company's

[33] Florida Ry. v. Dorsey, 59 Fla. 260, 52 So. 963 (1910).

[34] In Garcia v. San Diego Electric Ry., 75 Cal. App. 2d 729, 170 P.2d 957 (1946) whether violation was habitually allowed held to be question of fact for jury; in O'Day v. Boston Elevated Ry., 218 Mass. 515, 106 N.E. 144 (1914) held for jury to decide whether defendant had made any effort to enforce the rules.

[35] Where violation of statute is negligence per se and a statute requires compliance with posted rules, violation of rule was held to be negligence per se. Pruitt v. San Pedro, L.A. & S.L. R.R., 161 Cal. 29, 118 P. 223 (1911). Where a rule prohibited riding on steps of moving streetcar and deceased violated it, the court held that such violation would be negligence per se, partly because statute allowed such rules, but there was dictum to the effect that violation with knowledge precludes recovery where contributory negligence is an issue. The court also noted that similar conduct had been held to be negligence per se without rules. However recovery was allowed under Massachusetts law despite deceased's contributory negligence because widow and next of kin were suing and deceased was a "passenger" within the statute. Note that the rule affected the conductor's duty, however, since he could assume reliance. Renaud v. New York, N.H. & H. R.R., 210 Mass. 553, 97 N.E. 98 (1912). Cf. Jackson v. Grand Avenue Ry., 118 Mo. 199, 24 S.W. 192 (1893) where a rule which was the same as a statute was held to be only some evidence of contributory negligence.

own negligence.[36] The theory relied upon is that where a complex situation is fraught with dangers,[37] the company has a duty to the general public within the area of possible harm to take positive steps to prevent the happening of such foreseeable dangers, even to the extent of making a scientific study to discover dangers not obvious to the average person. While the courts have not pointed up such a distinction, it would seem proper to show this non-feasance only when the company's own negligence is an issue, since this is not a duty of the employee. Appropriate allegations against the company would also be necessary.

It must be recognized that drawing such a distinction would allow a jury to find that an employee, in the absence of warning and lacking the technical talents of the entire company, was not negligent, while the company could be held liable because of its superior knowledge and its greater duty.[38]

III. RELATION OF THE RULES TO THE STANDARD OF CARE IN NEGLIGENCE ACTIONS

A. In General

By far the greaest number of cases concerning safety rules involve the relationship which these rules bear to the standard of

[36] Yeats v. Illinois Cent. R.R., 241 Ill. 205, 89 N.E. 338 (1909) (dictum); Eichorn v. New Orleans & C. R. Light and Power Co., 112 La. 236, 36 So. 335 (1904); Sundmaker v. Yazoo & Miss. Valley R.R., 106 La. 111, 30 So. 285 (1901); Baltimore & O. R.R. v. State, 81 Md. 371, 32 A. 201 (1895) (dictum); O'Day v. Boston Elevated Ry., 218 Mass. 515, 106 N.E. 144 (1914) (on failure to enforce); McKernan v. Detroit Citizens' St. Ry., 138 Mich. 519, 101 N.W. 812 (1904) (concurring); King v. Interborough Rapid Transit Co., 233 N.Y. 330, 135 N.E. 519 (1922) (on failure to enforce); Cincinnati St. Ry. v. Altemeir, 60 Ohio St. 10, 53 N.E. 300 (1899) (dictum); McCormick v. Columbia Electric St. Ry. L. & P. Co., 85 S.C. 455, 67 S.E. 562 (1910) (dictum). Contra Harrison v Mobile Light & R. Co., 233 Ala. 393, 171 So. 742 (1937)

[37] See generally the discussion on knowledge of danger supra note 6 et seq.

[38] Shawnee-Tecumseh Traction Co. v. Wollard, 54 Okla. 432, 153 P. 1189 (1915). Plaintiff's petition in that case alleged negligent rules, and the court admitted the rules, predicating negligence on the company in making them, and on the employee in obeying them. Quaere. Under our theory could the employee have been held not liable? See 2 RESTATEMENT, TORTS § 317, commented (1934) on the duty of a master to control his employees with the result that if he has a superior knowledge he may be liable for failure to warn even though the employee may not be liable if his ignorance is excusable. See also note 114 infra and the Dougherty case.

care found in the substantive law of negligence. This standard makes an act or omission negligent if it falls below what an ordinary, reasonable, and prudent man would do under the circumstances.[39] This standard is primarily negative in nature in that it forbids a general type of conduct, but does not command any specific action. In applying it to a case, the court or jury usually need not decide what should have been done but must merely determine whether what was done was or was not reasonable. There are, however, a few instances where a positive and absolute standard of conduct is applied as where, in some jurisdictions, the violation of a statute is negligence *per se*.[40] In other jurisdictions statutes are admitted only to show evidence of negligence, in much the same way as the customs of others similarly situated or the opinions of experts.[41] How can we distinguish between the positive standard which is binding on the parties and that which is merely some evidence to be used in applying the standard?

Consider the statement: "Trucks should not exceed fifteen miles per hour on Main Street between Tenth and Twentieth Streets." Suppose a truck drives through this area at twenty-two miles per hour causing the injuries which are the subject of litigation. Now the jury, or the judge in a non-jury case, must be swayed from its originally impartial position to be able to hold for the plaintiff. All relevant facts and circumstances surrounding the accident and pertaining to the issues are presented to the jury. Once it determines what actually happened and knows all the circumstances which bear upon the propriety of the conduct in question, the jury must decide if what was done was proper by applying the standards of negligence as instructed. If the statement concerning the speed limit were given to the jury without explanation, it would probably be taken by them to mean that proof of violation would prove liability; but if the jury were told that an expert made the statement, or that it is a custom, or that it is an ordinance, and if they were told further that it is not to

[39] 2 HARPER AND JAMES, TORTS, § 16.1 (1956); MORRIS, TORTS, 47 (1953); and PROSSER, TORTS, (2d ed. 1955); SHERMAN AND REDFIELD, NEGLIGENCE, § 1 (Rev. Ed., Zipp, 1941); 2 RESTATEMENT, TORTS, § 282 (1934).

[40] See note 63 infra.

[41] For a general analysis of the various uses of specific standards which can be applied in negligence actions see James and Siegerson, Particularizing Standards of Conduct in Negligence Trials, 5 Vand. L. Rev. 697 (1952). Included are standards set by the courts (704), by habit and custom (709), very briefly by company rules (712) and by expert opinion. (714).

be considered an absolute standard, then it is reasonable for the jury to consider the statement as having a bearing upon their decision, but not as compelling any particular verdict.

After all, the jurymen often lack the expertness to say what is or is not due care so that they must be given the benefit of anything reasonably calculated to help them. Great weight may be given to the above-quoted statement by the jury, but usually comparatively greater weight than this should be accorded it. The difficulty is, of course, that the statement is couched in imperative terms, i.e., the speed limit "must" or "should" be observed, so the mere fact that the court admits it into evidence may seem to be an approval of such an interpretation of these terms. Nevertheless it is possible for the court to so phrase its instructions as to minimize the chances of misinterpretation. This distinction between an absolute standard and evidence to be applied to the standard of negligence is extremely important in our further consideration of the proper use of company rules and will be referred to from time to time.

B. As Admissions or Declarations Against Interest

One line of cases has based the admissibility of safety rules in whole or in part upon the theory that they are admissions or declarations against interest.[42] An admission is sometimes termed an exception to the hearsay rule whereby the extra-judicial declara-

[42] Powell v. Pacific Electric Ry. 35 Cal.2d 40, 216 P.2d 448 (1950), Palmer v. City of Long Beach, 189 P.2d 62, Cal App. (1948); Hurley v. Connecticut Co., 118 Conn. 276, 172 A. 86 (1934); Southern Ry. v. Tudor, 46 Ga. App. 563, 168 S.E. 98 (1933); Atlantic Consol. St. Ry. v. Bates, 103 Ga. 333, 30 S.E. 41 (1898); Georgia R.R. v. Williams, 74 Ga. 723 (1885); Chicago City Ry. v. Lowitz, 218 Ill. 24, 75 N.E. 755 (1905); Lake Shore & M.S. R.R. v. Ward, 135 Ill. 511, 26 N.E. 520 (1891); Standard Oil Co. v. Allen, 121 N.E. 329 (Ind.App. 1918), rev-d on other grounds 189 Ind. 398, 126 N.E. 674; Smith v. Cleveland, C.,C., & St. L. Ry., 67 Ind. App. 397, 117 N.E. 534 (1917); Louisville & N. R.R. v. Gregory, 279 Ky. 295, 130 S.W.2d 745 (1939) [despite efforts to distinguish, this case seems contrary to prior Kentucky cases. See Louisville Ry. v. Gaugh, 133 Ky. 467, 118 S.W. 276 (1909)]; Patapsco R.R. v. Bowers, 213 Md. 78, 129 A.2d 802 (1957); Pennsylvania R.R. v. State, 188 Md. 646, 53 A.2d 562 (1947), 190 Md. 586, 59 A.2d 190 (1948); Stevens v. Boston Elevated Ry., 184 Mass. 476, 69 N.E. 338 (1904); Derosier v. New England Tel. and Tel. Co., 81 N.H. 451, 130 A. 145 (1925); Canham v. Rhode Island Co., 35 R. I. 177, 85 A. 1050 (1913); Wichita Falls, R. and F. W. Ry. v. Crawford, 19 S.W.2d 166 Tex. Civ App. (1929); Galveston, H. & S.A. Ry. v Pingenot, 142 SW. 93 (Tex.Civ.App. 1911); but see Cincinnati St. Ry. v. Altemeier, 60 Ohio St. 10, 53 N.E. 300 (1899) admitting rules but specifically denying that they are admis-

tions of a party become admissible into evidence.[43] A declaration against interest, although used by some courts to include admissions, is more properly limited to an extra-judicial declaration made by a non-party at a time when it is contrary to his financial interest to make such a statement.[44] Peculiarly enough, despite the courts' use of such terminology as "admissions," "declarations against interest" and, as will be later discussed, "*res gestae*," no case has been found which discusses safety rules as being hearsay. However, our previous distinction between management's determination that a particular safety rule should be adopted, as opposed to the continuing "existence" of the rules at the time of the accident, points out why the problem arises. When plaintiff's counsel seeks to use the company rules as an admission, he is referring to the earlier extra-judicial determination by management to adopt the rules.[45] To this extent a copy of the rules introduced at the trial is evidence of this extra-judicial declaration and is hearsay, but being admissions of a party the rules are admissible if they are relevant.

Whether the rules are relevant as admissions will depend upon whether the adoption of a safety rule is in fact a determination by

sions. Wigmore seems to take the view that rules are admissions. "The regulations adopted by an employer for the conduct of a factory or transportation system, may be some evidence of his belief as to the standard of care required, and thus of the negligent nature of an act violating these rules." 2 WIGMORE, EVIDENCE, § 282 at 132 (3d ed. 1940). The best analysis of company rules to date also considers the rules as admissions. Morris, Admissions and the Negligence Issue, 29 Texas L. Rev. 407 at 412 and 432 (1951).

[43] McCORMICK, EVIDENCE, § 239 (1954); 4 WIGMORE, EVIDENCE, § 1048 (3d ed. 1940); Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L. J. 355 (1921); but for view that admissions are not heresay see Strahorn, The Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484, 564 at 573 (1937). Taking sides on controversey is unnecessary for this article, although the theory that they are an exception to the hearsay rule is assumed for the remainder of the paragraph.

[44] Cases calling company rules "declarations against interest" include Barron v. Houston, E. & W. T. Ry., 249 S.W. 825 (Tex.Civ.App. 1923); Gillium v. Pacific Coast R.R., 152 Wash. 657, 279 P 114 (1929). The fallacy of such terminology can be seen from any discussion on this exception. See 4 WIGMORE, EVIDENCE, § 1456 et seq. (3d ed. 1940); Morgan, Declarations Against Interest, 5 Vand. L. Rev. 451 (1952).

[45] Such "admission" may be looked upon as a declaration (by promulgating written rules) or as an act (by permitting the continued observance and enforcement of them). For examples of other admissions by conduct see 4 WIGMORE, EVIDENCE, § 1060-62 (3d ed. 1940).

the company of what it actually considers to be a proper standard of conduct. Now, as has been assumed elsewhere in this paper, a company has a duty to adopt *reasonable* rules to insure safe operations.[46] Moreover, the rules which it adopts can be assumed to be feasible.[47] Thus, the rules under consideration are reasonably calculated to prevent injury and are, from a practical point of view, likely to be capable of being carried out. The company then has admitted by the very adoption of the rules that it considers the prescribed conduct proper under the circumstances. Note that this is not the establishment of a negligence standard *per se,* but is an admission which can be used to persuade the jury that, despite the company's present contention that what was done was reasonable, the company has at one time taken a contrary position. The company can seek to refute the validity of the rule by showing that it is not feasible in fact, or that it is unreasonable or unnecessary, but the rule itself will still stand for reasonableness and feasibility at least to some extent.

Since by definition an admission is evidence only against the person who has made it, and since the company rule is only an admission of the company, it would seem to be admissible only against the company and not the employee insofar as it is considered as an admission.[48] Thus where both the master and the servant are defendants, the rule is an admission of the master only. While the court would have at least discretionary power to admit it against the master, subsequent discussion will indicate that no harm is done in admitting the rule for general purposes.

C. As a Circumstance Under Which the Employee Acts

Suppose however that plaintiff, apart from any offer of proof that the rule is an admission of the company, seeks to introduce it into evidence under a general allegation of negligence, claiming that its violation was some evidence of the employee's negligence. Here no distinction between a defendant who is master or a servant need be drawn, since it is the servant's own negligence which is the issue and the rule is considered as something which existed at the time the employee acted.

[46] Supra note 36.

[47] Supra note 21.

[48] In Streeter v. Humrichhouse, 357 Ill. 234, 191 N.E. 684 (1934) the court denied admissibility because the railroad was not a party. See also Carter v. Sioux City Serv. Co., 160 Iowa 78, 141 N.W. 26 (1913) where one of the reasons given for not admitting a rule was the fact that the railroad was not a defendant.

In admitting rules under this theory, the courts repeatedly tend to use the same trite phrases to indicate that the rules have some evidentiary value. A court may say a rule is "evidence of negligence,"[49] "some evidence,"[50] a "circumstance,"[51] or a "circumstance proper to be considered by the jury."[52] In other cases the rules are said to have value as "illustrating negligence,"[53] as "bearing upon the care required,"[54] or as "tending to prove negligence,"[55] as well as in other ways.[56] Our problem is to understand the underlying rationale of such terminology and to test its validity.[57]

In the definition of negligence, the reasonable man test is applied to the circumstances surrounding the accident. Thus any

[49] McNiel v. New York, N. H. & H. R.R., 282 Mass. 575, 185 N.E. 471 (1933).

[50] Hurley v. Connecticut Co., 118 Conn. 276, 172 A. 86 (1934); Mascoela v. Wise, Smith & Co., 120 Conn. 699, 181 A. 629 (1935); Deister v. Atchison, T. & S.F. Ry., 99 Kan. 525, 162 P. 282 (1917); Chadbourne v. Springfield St. Ry., 199 Mass. 574, 85 N.E. 737 (1908); McCormick v. Columbia Electric St. Ry. L. & P. Co., 85 S. C. 455, 67 S.E. 562 (1910). See also (2 WIGMORE, EVIDENCE, § 283 at 123 (3d ed. 1940).

[51] Southern Pac. R.R. v. Haight, 126 F.2d 900 (8th Cir. 1942), Cert. denied 63 S.Ct. 154.

[52] Simon v. City and County of San Francisco, 79 Cal. App. 2d 590, 180 P.2d 393 (1947); Gett v. Pacific Gas and Elec. Co., 192 Cal. 621, 221 P. 376 (1923).

[53] Southern Ry. v. Allen, 88 Ga. App. 435, 77 S.E.2d 277 (1953); Callaway v. Pickard, 68 Ga. App. 637, 23 S.E.2d 564 (1942); Foster v. Southern Ry., 42 Ga. App. 830, 157 S.E. 371 (1931); Southern Ry. v. Tiller, 20 Ga. App. 251, 92 S.E. 1011 (1917). The Georgia cases are particularly difficult to analyze since it seems that the only basis for admission considered by the court is that the rules "illustrate" negligence, a concept very difficult to understand.

[54] Chicago City Ry. v. McDonough, 221 Ill. 69, 77 N.E. 577 (1906); Meyers v. San Pedro, L.A. & S.L. R.R., 36 Utah 307, 104 P. 736 (1909)

[55] Frizzell v. Omaha St. Ry., 124 F. 176 (8th Cir. 1903); Foster v. Kansas City Ry., 315 Mo. 1004, 235 S.W. 1070 (1921).

[56] See Toner v. Pennsylvania R.R., 239 Pa. 438, 106 A. 797 (1919); Texas & Pacific Ry. v. Hastings, 282 S.W.2d 758. (Tex.Civ.App. 1953); [citing 35 Tex.Jur. 434-5 (35 Tex.Jur., Railroads §§ 289-290 hold rules are admissible as some evidence)]; Johns v. Baltimore & Ohio Rairoad Company, 143 F.Supp. 15 (W.D. Penn. 1956) aff'd 239 F.2d 385 (3 Cir. 1956) without discussion.

[57] Th best case discussion in this area is Cincinnati St. Ry. v. Altemeier, 60 Ohio St. 10, 53 N.E. 300 (1899) stating the rule is "inseparably connected with the accident as one of the circumstances surrounding the case."

circumstance existing at the time and place of an accident should be admitted into evidence if it is such that the actions of a reasonable man would be influenced by it. Now, as has been mentioned, a company rule can be considered as having some sort of continuing existence. It existed prior to, during, and after the accident. Some courts speak of the rules in terms of *res gestae*,[58] a poor choice of words, perhaps, but serving to indicate the contemporaneous nature of the rule and the accident. The rules in question are a circumstance under which the defendant employee was acting.

Now for these rules to be relevant as a circumstance and thus admissible in a negigence action, they must have some logical connection in the mind of a reasonable man with the manner in which he should act. In other words, a company rule is admissible as a circumstance of the accident if a reasonable man would consider the rule before acting. Since the rule in question is a safety rule,[59] since its nature as a safety rule is properly limited to what a reasonable man could consider to be a safety rule, and since the rule must require conduct somewhere between what is required as a matter of law and what is unreasonable as a matter of law,[60] it would seem to follow that a reasonable man would consider a rule, known to him, before acting. While the underlying rationale for all this appears to require a rather tedious reasoning process to expect of an employee in order to determine what he should do to act reasonably, this conclusion actually would probably follow as a snap judgment. After all, the employee knows that he may be disciplined or lose his job if he fails to obey the rules. But more in point he knows, or at least should realize, tthat the company for which he works is in a better position to see the over-all picture and is thus more likely to develop safer methods. Moreover, the employee, as a reasonable man, realizes

[58] Chicago City Ry. v. Lowitz, 218 Ill. 24, 75 N.E. 755 (1905); Cincinnati St. Ry. v. Altemeier, 60 Ohio St. 10, 53 N.E. 300 (1899). This particular use, or perhaps misuse, of the term "res gestae" indicates the practically meaningless nature of the word. Obviously this use is not the "spontaneous exclamation" spoken of by Wigmore (6 WIGMORE, EVIDENCE, § 1745 et seq.) nor does it seem to fit his "verbal act" (§ 1766 et seq.) although it probably is covered by the concept of "part of the transaction" (§ 1757 at p. 168) as one way of saying it is relevant. Even then it is difficult to say the rule is an "utterance". Nor does it fit into Morgan's definition unless as an operational fact [Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L. J. 229 (1922)] if, again, the rule can even be considered as an "utterance".

[59] Infra note 96.

[60] Infra note 99.

that the purpose of the rules is safety and that his failure to obey them may result in harm. He also realizes that others rely on the safety pattern set by the rules. The jury should at least be told that the rule existed at the time of the accident, that the employee knew or should have known of it, and that he violated it.

It would be well to note at this time the erroneous exclusion of company rules by several courts for the reason that they invade the province of the jury. This idea is often expressed by the simple statement that "the standard is set by the law, not by the defendant."[61] To quarrel with this statement would be foolish, but to say that it applies as a reason for keeping rules out of evidence is to misunderstand the distinction which this article draws between the negligence standard of care and what is meant by the "circumstance" portion of that standard. The error lies in assuming that the company rule is an absolute standard so that the jury must find for plaintiff if it finds that the defendant employee violated the rule. The rule is admitted not as an absolute standard, but as evidence of a "circumstance" under which the accident

[61] This statement sometimes with slight variations, is found in Smellie v. Southern Pac. R.R., 128 Cal. App. 567, 18 P.2d 97 (1933) aff'd with reservation as to company rules in 128 Cal.App. 583, 19 P.2d 982; [but see Powell v. Pacific Electric Ry., 35 Cal. 2d 40, 216 P.2d 448 (1950) admitting rules as admissions (note 42 supra)]; Merchants Transfer Storage Co. v. Chicago R. I. & P. Ry., 170 Iowa 378, 150 N.W. 720 (1915); Caster v. Sioux City Service Co., 160 Iowa 78, 141 N.W. 26 (1913); Hoffman v. Cedar Rapids & M. C. Ry., 157 Iowa 655, 139 N.W. 165 (1912) (including five and one-half pages on company rules); Louisville & N. R.R. v. Stidham's Adm'r, 187 Ky. 139, 218 S.W. 460 (1920); Louisville & N. R.R. v. Vaughn's Adm'r, 183 Ky. 829, 210 S.W. 938 (1919); Isackson v. Duluth St. Ry., 75 Minn. 27, 77 N.W. 433 (1898); Fonda v. St. Paul City Ry., 71 Minn. 438, 74 N.W. 166 (1898); Fries v. Goldsby, 163 Neb. 424, 80 N.W.2d 171 (1956); De Ryss v. New York Cent. R.R., 275 N.Y. 85, 9 N.E.2d 788 (1937); Epstein, Henning & Co. v. Nashville, C & St. L. Ry., 4 Tenn. App. 412 (1926); Southern Traction Co. v. Wilson, 187 S.W. 536 (Tex. Civ. App. 1916) may be contra other Texas cases. See not 56 supra); Virginia Ry. & Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1072 (1915). But see the discussion on this point in the leading case favoring admissibility. Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955). Cf. Sullivan v. Richmond Light & R.R., 128 App. Div. 175, 112, N.Y.S. 648 (1908) where the court, after setting out the usual negligence standard, says: "That the defendant . . . has adopted . . . a higher standard is material . . . for the motorman's violation of the rule showed . . . a negligent disregard of the duty under which he rested." The court cited Stevens v. Boston Elevated Ry., 184 Mass. 476, 69 N.E. 338 (1904) (supra notes 1 and 42) but the Stevens case does not seem to go to that extent.

occurred. In fact, the proper application of the standard set by law requires the disclosure of all the circumstances relevant to the accident. The law then demands that the circumstance of the violation of the rule be shown. The jury can consider the rule, and ignore it if it finds that a reasonable man would have ignored it under the other circumstances. The decision as to what was negligent is still the jury's and it need not accept the rule as the standard.

Since the courts have frequently drawn specific analogies between the admissibility of safety rules as evidence in negligence cases and two other areas of admissibility, it is proper that they be singled out for separate comparison to better explain the use of the rules. The reference is to the admissibility of statutes, municipal ordinances, and administrative orders; and to the admissibility of custom and habit.

D. Comparison with Statutes, Ordinances, and Administrative Regulations

Within the well defined and generally accepted limitations which are discussed at greater length in another section,[62] statutes are usually admitted on the issue of negligence, either as an absolute standard whereby violation is negligence *per se*, or as some evidence which the jury can consider but need not use absolutely as a standard.[63] Without indulging in the dispute about why statutes and ordinances have a relationship to negligence, it is possible to take two common reasons advanced for their application and see how they apply to safety rules.[64] These reasons are:

[62] Infra note 105.

[63] James, Statutory Standards and Negligence in Accident Cases, 11 La. L. Rev. 95 (1950); Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361 (1932); Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 453 (1933); Morris, The Role of Criminal Statutes in Negligence Actions, 49 Col. L. Rev. 21 (1949); Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914).

[64] Rules are distinguished from statutes in Davis v. Johnson, 128 Cal. App.2d 466, 275 P.2d 563 (1954); they are "somewhat analagous to proof of the violation of an ordinance or statute" in Stevans v. Boston Elevated Ry., 184 Mass. 476, 69 N.E. 338 (1904); the two were distinguished and the rules not admitted in Fonda v. St. Paul City Ry., 71 Minn. 438, 74 N.W. 166 (1898); the rules were distinguished and seemingly kept out of evidence solely because of the distinction in Boston & M. R.R. v. Daniel, 290 F. 916 (2d Cir. 1923); and the two were "somewhat analagous" in Sullivan v. Richmond Light & R. Co., 128 App. Div. 175, 112 N.Y.S. 648 (1908).

(1) that the legislature intended to make the violation of a statute negligence; and (2) that a reasonable man would obey a statute.

As regards the legislature's intention to set a standard, a much discussed and often criticized reason why statutes are admitted, any very exacting analogy with safety rules is obviously impossible because the legislature, as the governing body, has the power to set standards which are binding on the parties if it so desires, a power private companies obviously lack. Note, however, that the legislature, as the representative of the public, has a duty to exercise its police powers to insure the safety of the public by passing statutes aimed at safety, and the governed individual has a duty to the government to obey them. Likewise note that a private company has a duty to make safety rules to protect the general public,[65] and the individual employee has a contractual duty to obey them.[66] Thus in both the company rule situation and the statute situation, the rule maker owes a duty to the protected person and the person subject to the rule owes a duty to the rule maker.[67] While the respective duties have apparent differences, some basis for comparison does exist.

The criticism that the legislature did not intend to create civil liability by criminal statute can also be applied to the use of the admission theory for the admissibility of safety rules. It can be argued that the company did not intend to admit that any violation of a rule would be evidence of negligence in an action by a third party. Yet both the legislature and the company are presumed to have deliberated and exercised some mature judgment in establishing a regulation to prevent harm, which harm has in fact occurred after a violation of the rule.

The other reason advanced for admitting statutes—that a reasonable man will obey a statute—has been discussed in the comments concerning the effect which a company rule would have

[65] Supra note 36.

[66] Infra note 139.

[67] This comparison between the respective duties of the two rule making bodies to the general public is also made in the leading case of Stevens v. Boston Elevated Ry., 184 Mass. 476, 69 N.E. 338 (1904). The leading case contra [Fonda v. St. Paul City Ry., 71 Minn. 438, 74 N.W. 166 (1898)] goes out of its way to distinguish the two. Perhaps the reason for this is that in Minnesota, violation of a statute is negligence per se, something that would normally never hold for company rules, while in Massachusetts violation is only evidence of negligence as are company rule violations where admissible. See also Boston & M. R.R. v. Daniel, 290 F. 916 (2d Cir. 1923).

upon a reasonable man as a circumstance of the accident.[68] It was then argued that in order to decide if the defendant's conduct was reasonable, the jury should be fully apprised of the fact that the defendant violated a safety rule which he either knew or should have known. Such arguments are the same for statutes.

While many jurisdictions have decided that the violation of a statute is negligence *per se*, it is obvious that the same could not be said of company rules because of the differing positions of the legislature and the company, a proposition which is mentioned in a later section.[69] Municipal ordinances lacking some of the force and, perhaps, the dignity of statutes are more likely to be put into evidence only as some evidence of negligence. Likewise, administrative rules and regulations and specific administrative orders are usually admissible, although, unless promulgated under a statute prescribing them in some detail, they are also more likely to be some evidence of negligence rather than an absolute standard.[70] It would seem that these latter types of commands lie somewhere between statutes and company rules, and the analysis pertaining to statutes and company rules is to some degree applicable to them.

1. *A City's Violation of Its Own Ordinances*

One series of cases based upon the violation of municipal ordinances often uses company rule cases for its authority.[71] Involved

[68] Supra note 49 et seq.

[69] Infra note 118.

[70] Morris, The Role of Administrative Safety Measures in Negligence Actions, 28 Texas L. Rev. 143 (1949).

[71] In Palmer v. City of Long Beach, 189 P.2d 62 (Cal.App. 1948) an ordinance was admitted on the basis of 2 WIGMORE, EVIDENCE, § 282 (3d ed. 1940), the section including company rules, but on appeal the rules were not admitted because of the invalidity of a stipulation, with a strong dissent giving an excellent analysis of company rule cases. 33 Cal.2d 134, 199 P.2d 952 (1948). Cases allowing admission on this theory are Shumway v. City of Burlington, 108 Iowa 424, 79 N.W. 123 (1899); Smith v. City of Pella, 86 Iowa 236, 53 N.W. 226 (1892) (violation as prima facie evidence) but see note 80 infra for Iowa cases on company rules being kept out of evidence; Hebenheimer v. City of St. Louis, 269 Mo. 92, 189 S.W. 1180 (1916). Cf. Wenzel v. State, 178 Misc. 932, 36 N.Y.S.2d 943 (1942) where the state was held liable for failure to comply with the Manual of Uniform Control Devices which had been adopted by a state-appointed commission; and Curray v. United States, 129 F. Supp. 38 (W.D. S.C. 1954) where instructions given to service men about putting out flares on highway

is the situation where the courts have admitted into evidence city ordinances with which the city's employees have failed to comply, thus injuring the plaintiff. Examples include: the failure of the city to enforce an ordinance which requires all openings in the sidewalk to be protected, as a result of which the plaintiff fell and was injured;[72] or the failure of the city to provide sidewalks which were four feet wide, as required by ordinance, with the result that plaintiff was injured when he stepped off the sidewalk at a place where it suddenly became narrower than four feet.[73]

In each of these situations the city fathers met and by the exercise of their own judgment, often on the basis of expert advice, decided that a particular safeguard or precaution is advisable. Then a city employee, or city employees, fails to enforce the ordinance and the plaintiff's injury is caused by the non-enforcement. This line of cases seems to substantiate the discussion throughout the first part of this article since the action of the city fathers in passing an ordinance is comparable with the action of the company's management in adopting safety rules, each rule maker being motivated by the desire and the duty so to govern its employees as to protect the public. Likewise an ordinance gives rise to a duty on the part of an employee to obey it. When he fails to do so and the plaintiff is injured thereby, the jury should be apprised of this circumstance of the accident.

E. Comparison with Custom or Habit

Safety rules have in some places been compared to, in others contrasted with, custom and habit.[74] As noted earlier, the admis-

held to be admissions of defendant. But in Davis v. Manchester, 62 N.H. 422 (1882) an ordinance was not admissible where a statute specifically limited the city's liability. Nor are ordinances admissible if passed after the accident. McCartney v. City of Washington, 124 Iowa 382, 100 N.W. 80 (1904).

[72] McNerney v. City of Reading, 15 Pa. 611, 25 A. 57 (1892); McLeod v. City of Spokane, 26 Wash. 346, 67 P. 74 (1901).

[73] Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758 (1923).

[74] In Cros v. Boston & M. R.R., 223 Mass. 144, 111 N.E. 676 (1916) the court cited a leading company rule case [Stevens v. Boston Elevated Ry., 184 Mass. 476, 69 N.E. 338 (1904)] as authority for admitting custom. In Fries v. Goldsby, 163 Neb. 424, 80 N.W.2d 171 (1956) customs cases are used as authority for refusing to admit rules. In Canham v. Rhode Island Co., 39 R.I. 177, 85 A. 1050 (1913) company rules admissibility was supported by cases holding habits to be admissions of what precautions the actor considered necessary. In Blerens v. Houston Elec. Co., 235 S.W. 987 (Tex. Civ. App. 1921) numerous habit cases

sibility of safety rules where the plaintiff has relied upon the defendant complying with them is usually considered as involving an analysis identical to the use of custom for the same purpose.[75] Authorities likewise recognize that the rules of numerous other companies similarly situated are admissible on the negligence issue under the same theory as are the customs and usages of others similarly situated.[76]

The important question in making comparisons involves the relationship between habit, safety rules, and due care. Under consideration is the relationship which the habit or rule bears to the reasonable man test, and whether either or both should be allowed in evidence for the jury to consider. Harper and James specifically include company rules in their section on custom and habit. In arguing for the admission of both habit and company rules, they say:

> But where a party has habitually or frequently taken certain precautions on prior occasions which were omitted on the occasion in question, this fact should be received against him as an admission that he perceived the risk and deemed the precaution appropriate and feasible. On such basis company rules should be and are by many courts admitted.[77]

Harper and James consider both safety rules and safety habits to be properly admissible on the theory that they are admissions of the defendant.

were cited as authority for not admitting rules. In Phillips v. Montgomery Ward & Co., 125 F.2d 248 (5th Cir. 1942) rule and custom were not distinguished. Cf. Yeates v. Illinois Cent. R.R., 241 Ill. 205, 89 N.E. 338 (1909) where a duty to promulgate rules was not complied with so a custom was admitted in lieu thereof.

[75] See note 19 supra. The following cases compare reliance upon company rules with reliance on customs or habit: Chicago City Ry. v. Lowitz, 218 Ill. 24, 75 N.E. 755 (1905); Pennsylvania R.R. v. State, 188 Md. 646, 53 A.2d 562 (1947); Baltimore & O. R.R. v. State, 81 Md. 371, 32 A. 201 (1895); Lipski v. Boston Elevated Ry., 248 Mass. 508, 143 N.E. 335 (1924); Davis v. Concord & M. R.R., 68 N.H. 247, 44 A. 388 (1894).

[76] See note, Evidence, Negligence, Admissibility of Safety Rules of Other Railroads, 23 U. of Cin. L. Rev. 506-8 (1954). Cf. Reed v. Missouri-Kansas-Texas R.R., 362 Mo. 1, 239 S.W.2d 328 (1951) where rules of association of american railroads were held admissible when the defendant railroad company was a member and knew of them. Contra: Epstein, Henning & Co. v. Nashville, C. & St. L. Ry., 4 Tenn. App. 412 (1926). On custom generally see Morris, Custom and Negligence, 42 Cal. L. Rev. 1147 (1942); PROSSER, TORTS, § 32 at 135 (2d ed. 1955); 2 WIGMORE, EVIDENCE, § 461 (3d ed. 1940).

[77] 2 HARPER AND JAMES, TORTS, § 17.3 at 981 (1956).

It would seem that such a conclusion would have to be based upon the assumption that the course of conduct chosen either through habit or as a formal rule was the result of an actual decision that it was reasonably safer so to act. Such a viewpoint was taken earlier in this article when company rules were considered as admissions of the company making them.[78] Habit, on the other hand, would be an admission of the individual who formed it and would relate to what the actor considered to be due care only if safety were a prime factor in the repetitious performance of the conduct in question. The habit must have been formed because the individual thought it to be more safe than other possible conduct. It seems that problems would often arise in determining just how important the safety considerations were, especially since mere chance without much thought can form a habit through repetition. Suffice it for our purposes to say that stronger reasons exist for company rules being considered as admissions since by definition they will be admitted into evidence only when by their terms they can be interpreted as being designed with safety in mind. The company would ordinarily not pass such safety regulations without considering whether or not they actually would promote safe operations, the choice of a particular mode of operation by chance being unlikely.

Also to be considered is the substantially greater ease with which written safety rules can be proved as compared with the various collateral issues likely to arise in attempting to prove uniform prior conduct. Moreover the rules impose at least a contractual duty of obedience which is lacking where a habit is self-imposed. Thus without necessarily deciding whether evidence of a habit should be admissible on the issue of due care, it can be said, that while habit and safety rules are comparable, the reasons for admitting the latter are decidedly more cogent.

IV. POLICY ARGUMENTS AGAINST ADMISSIBILITY

Those jurisdictions opposing admissibility of safety rules do so on the basis of two principal objections: namely, the previously discussed argument that the standard is set by the law, not by the defendant;[79] and the claim, now to be considered, that if rules are admissible, potential defendants will be encouraged to "water

[78] Supra note 42.

[79] Supra note 61.

down" or eliminate desirable rules.[80] This latter reason is often tersely stated as meaning that the more careful a man is, the more likely he will be held liable. One underlying fallacy of such reasoning is the assumption that liability will follow automatically from any violation of a rule. Technically, at least, such rules are only evidence to be considered by the jury with all other evidence, and they are not absolute standards. The defendant can argue against them and even introduce evidence to show that a violation of the rule was not negligence. Rules calling for more than is reasonably necessary as a matter of law will be excluded by the court.[81]

Underlying this objection is the feeling that admitting the rule is similar to admitting evidence of repairs after an accident,[82] because defendant is given an apparent advantage if he is less careful so that his subsequent exercise of greater care will not be used against him. Public policy is said to favor not only the rectification of dangerous conditions, but also the taking of every conceivable precaution to prevent any and all damage to person and property.[83] However, the difference in the time of making the

[80] Southern Ry. v. Allen, 88 Ga. App. 435, 77 S.E.2d 277 (1953) (The rules were admitted on basis of stare decisis but the opinion writer disagreed); Carter v. Sioux City Serv. Co., 160 Iowa 78, 141 N.W. 26 (1913); Hoffman v. Cedar Rapids & M.C. Ry., 157 Iowa 655, 139 N.E. 165 (1912) (a leading case); Louisville Ry. v. Gaugh, 133 Ky. 467, 118 S.W. 276 (1909); McKernan v. Detroit Citizen St. Ry., 138 Mich. 519, 101 N.W. 812 (1904); Isackson v. Duluth St. Ry., 75 Minn. 27, 27 N.W. 433 (1898); Fonda v. St. Paul City Ry., 71 Minn. 438, 74 N.W. 166 (1898) ("falliciousness and unfairness. The more careful a man, the worse off he is.") Taddeo v. Tilton, 248 App. Div. 290, 289 N.Y.S. 427 (1936); Epstein, Henning & Co. v. Nashville, C & St. L. Ry., 14 Tenn. App. 412 (1926) [but see N.C. & St. Ry. v. Mayo, 14 Tenn. App. 28 (1931) basing negligence on violation of a rule without discussing admissibility]; Virginia Ry. & Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1072 (1915). See note: Torts-Company Rules as Evidence of Negligence, 14 U. Pitt. L. Rev. 621, supporting this public policy argument while criticizing Hamilton v. City of Cleveland, 93 Ohio App. 93, 110 N.E. 2d 50 (1952). Infra note 109.

[81] Infra note 99.

[82] Rules are the same as repairs, Fonda v. St. Paul City Ry., 71 Minn. 438, 74 N.W. 166 (1898); they are analagous, Virginia Ry. Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1072 (1915). Contra, they are distinguishable with subsequent safety changes possibly protecting from accidents which before were unforeseen. Steven v. Boston Elevated Ry., 184 Mass. 476, 69 N.E. 338 (1904).

[83] On repairs generally see McCORMICK, EVIDENCE, §§ 77, 252 (1954); 1 SHEARMAN AND REDFIELD, NEGLIGENCE, § 60 (Rev. Ed. Zipp, 1941); 2 WIGMORE, EVIDENCE, § 283 (3d ed. 1940).

decision about being more careful readily distinguishes the repair situation from the company rule situation. In the repair case an injury has taken place. Liability is possible, and if evidence of the repairs after the accident are admissible the potential defendant hesitates to take any further precautions, not because this may be used against him *if* another accident happens, but because he would then be sure that this evidence could be used against him in a case involving the accident which has already taken place and which he can no longer prevent. Accordingly the courts refuse to admit evidence of the repairs lest the potential defendant be discouraged from greater care, possibly resulting in more injuries.

On the other hand, the company while considering the advisability of adopting a safety rule has before it many different considerations. No accident which has already happened will be affected by the rule. Where danger exists and the company knows or should know of it, the company must reckon with the possibility that the very failure to make rules may be used against it.[84] Moreover, it feels (whether justifiably so is immaterial since this feeling appears to be prevalent) that as a large, impersonal "big business" defendant, it is very likely to be held liable by the jury for most accidents in any event. As a matter of fact in the area of workmen's compensation law in which strict liability is imposed for accidents happening within the scope of employment,[85] the defendant knows he will be liable if an accident happens at all. Thus the advantages to a company in making safety rules to prevent as many accidents as possible will outweigh the possible disadvantages arising from the potential admission of the same rules against them. This is especially true because the company should realize there will not be many cases in which the verdict will actually be decided solely on the basis of those rules.

Also, while the effect is uncertain, it seems logical that insurance carriers, as they become more mindful of the increasing size of verdicts, should bring much pressure to bear upon insured companies to encourage safer operations through better rules and better rule enforcement. Since the insurance business includes accident litigation, it will be in a position to make the detailed analysis necessary to determine the relative advantages and disadvantages of adopting safety rules and will realize that its insureds should adopt stringent rules and enforce them, thus tending to offset any company reluctance to do so.

[84] Supra note 36.
[85] Infra note 137.

Nor can it be assumed that management will be unaffected by humanitarian principles dictating that it exercise its authority to minimize the possibilities of harm. Despite the impersonal sound of the words "company" and "management," these entities represent groups of individuals whose social values probably will lead them to adopt rules with greater emphasis on the good that can certainly be done rather than on some speculative harm which might befall.

It would seem logical to believe that the admission of rules in evidence will encourage their enforcement,[86] and that the companies' recognition of the necessities of self-preservation[87] and their concepts of their social obligations will prevent them from downgrading their safety rules merely because of a fear that in some future accident litigation they may be used against them. The company too wishes to prevent accident and injury.

V. COMPLIANCE AS EVIDENCE OF DUE CARE

Very little authority can be found which indicates whether or not a safety rule may be introduced by the defendant, upon a showing that the rule was followed, as some evidence that the defendant was acting reasonably.[88] The very same rule which

[86] Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955).

[87] Cincinnati St. Ry. v. Altemeier, 60 Ohio St. 10, 53 N.E. 300 (1899).

[88] In Fitzpatrick v. Bloomington City Ry., 73 Ill. App. 516 (1897), the defendant's introduction of his own rules with evidence of compliance therewith was held to be harmless error. But in Schmidt v. Chicago City R.R., 239 Ill. 494, 88 N.E. 275 (1909) one of defendants railroads was allowed to use the rules of both defendant railroads to show that it had the right of way and the other defendant railroad did not. In Standard Oil Co. v. Allen, 121 N.E. 329 (Ind. App. 1918), 189 Ind. 398, 126 N.E. 674 (1920) the appeal court only considered rules as tending "to show the degree of care recognized by the one in charge as necessary to render the particular place, appliance, or operation safe," and they are 'competent evidence either for or against the railroad company" (dictum). In Baltimore & Yorktown Turnpike Road v. Leonhardt, 66 Md. 70, 5 A. 346 (1886) defendant was not allowed to introduce his own rules. But in Hotenbrink v. Boston Elevated Ry., 211 Mass. 77, 97 N.E. 624 (1912) the court seems to argue that the absence of a rule indicated the absence of a duty. Admissibility of a rule by defendant was denied in Eudy v. Atlantic Greyhound Lines, 183 S.C. 306, 191 S.E. 85 (1937); and there is dictum that compliance will not absolve a defendant in Anastasio v. Hedges, 207 App. Div. 406, 202 N.Y.S. 109 (1923). St. Louis, S. F. & T. Ry. v. Wiggens, 48 Tex. Civ. App. 449, 107 S.W. 899 (1908) indicates defendant could have introduced his rules, but there was no prejudice in this case. In Virginia Ry. & Power Co. v. Godsey, 117 Va. 167,

was admissible against the defendant in another case because he failed to comply with it, or at least one potentially so admissible, is involved; and the defendant naturally feels that if evidence of breaking the rule is to be used against him, he should be given the advantage of any favorable inference which may be drawn from his not breaking it.[89]

Under one theory advanced for admissibility against the defendant, namely that the rule is an admission by the company,[90] the rules would not be properly admissible on its behalf since a party cannot properly introduce his own prior statements to bolster his present claim that he acted with due care. These prior declarations are self-serving and of questionable logical value. It adds little or nothing to the defendant's claim of due care at the trial to say that at a prior time he also took such a viewpoint.

It was assumed above that any probable disadvantage to the company defendant which might accrue from admitting its rules in evidence against it would be offset by the humanitarian and practical business reasons for making adequate safety rules.[91] However, if the defendant could aid its own cause by making less adequate rules and introducing them as some evidence of what is due care, the possible reasons for "toning down" the rules become more apparent, and the practical reasons previously discussed for encouraging adequate rules become less compelling.[92] I would

83 S.E. 1072 (1915) dictum to the effect that defendants cannot introduce rules is given as one reason why plaintiff could not. Cf. Pullman Co. v. Waln, 4 F.2d 1 (3rd Cir. 1925) (cert. denied 269 U.S. 557) where a rule is used to show who is liable as between defendant Pullman and defendant railroad. And in Chesapeake & O. Ry. v. Ringstaff, 67 F.2d 482 (6th Cir. 1933) a rule is used to show a station agent lacked authority to invite plaintiff to ride, so plaintiff was a trespasser and thus was owed a much lesser duty by defendant.

89 It is interesting to note that in the report by the Real Estate Committee on Uniform Practices of the State Bar Association [Real Estate title Standards, 12 Conn. B.J. 100 (1938)], the case of Hurley v. Connecticut Co., 118 Conn. 276, 172 A. 86 (1934) is cited as authority for the proposition that, on the assumption that the committee involved are all reasonable men, the acceptance and adoption by their section of the annual meeting will make the title standards admissible into evidence on the issue of what is reasonableness in examining abstracts. The suggestion advanced is that any member could come forward as an expert and testify that compliance is reasonable.

90 Supra note 42.

91 Supra notes 79-87.

92 Ibid.

still hesitate to say that admissibility on behalf of the defendant would actually cause less care and greater harm, but if there is any merit in the argument which says that this will happen if the rules can be used against defendants, the reasons for saying it apply with even greater force if the rules could be used to help escape liability.

As far as the employee defendant himself is concerned, the rules can still be considered as a circumstance under which he acts, since he would, as a reasonable man, consider them before acting. Such rules, unless obviously inadequate, would tend to indicate what is a reasonable way for the employee to act, especially where the rules involve technical considerations not known to the employee so that he must rely on his employer. However, the company has known all along that, as a practical consideration, it will usually be the defendant in these cases because of its greater resources and the consequently less sympathetic attitude of the jury. Our policy discussion of the preceding paragraph is again applicable, and policy seems to favor not admitting the rules.

Of course, where an employer is alleged to have been negligent in failing to adopt adequate rules, the rules which he has adopted should be admissible by him to show to what extent his rules actually go, violation or compliance not being relevant for this purpose.[93] However, suppose that because of this allegation of inadequacy the employee and his employer acquire different interests in the rules. Once plaintiff has pleaded and attempted to prove that the rules are inadequate, the employer is forced to argue that the rules are in fact adequate. Should the employee be allowed to argue that even if the jury finds the rules to be inadequate for the company, it was still not negligent for him to act under the rule in reliance upon the greater technical facilities of his employer? An employer could have greater knowledge of danger, either because of its greater all-around "know-how," or because of its information about prior accidents, or because it has a duty to know. In these limited situations it would seem reasonable to allow the employee to use the rule as some evidence of his own due care if the danger is such that he might not have recognized it, even if the adequacy of the rules has been questioned by the plaintiff.

[93] Supra note 36.

VI. IRRELEVANT RULES

A. Written Rule Limitation

So far the types of safety rules which can be introduced into evidence have been discussed in general terms. However, even in jurisdictions permitting their use, well-defined limitations have been placed upon the types of rules which are properly admissible and the conditions under which they are admissible. The definition of "safety rules," as used in this paper, was specifically limited to "written rules." There is case law so limiting them,[94] and this can be inferred from the fact that almost all cases concern only those rules which were in writing. One reason for this is the inherent difficulty of proving oral regulations, especially where the correct interpretation of a given rule may hinge upon one or two words which may be lost through less reliable parol evidence. The formality of putting rules into writing is also some assurance that management has given them the due consideration which is implied by the use of rules as admissions.[95] Likewise, where relevant, the adequacy of notice to the employee is more readily provable if it is in writing.

B. Purpose Limitation

Another limitation which is a part of the definition of safety rules is that their purpose be, at least to some extent, the prevention of accidents as opposed to mere operating advantage or convenience.[96] Consider the case where the defendant's rule set a twenty-five mile per hour speed limit for freight trains. Plaintiff's automobile was struck by one of defendant's trains which was exceeding this speed, but the defendant argued that the purpose of the speed limit was not the prevention of accidents at crossings. In such circumstances, the Massachusetts court held that it is not to be presumed that the purpose of the rule was to protect crossings, since it is common knowledge that other trains go faster and

[94] St. Louis A. & T. H. R.R. v. Bauer, 156 Ill. 106, 40 N.E. 448 (1895); Gerry v. Worchester Consol. St. Ry., 248 Mass. 559, 143 N.E. 694 (1924). Contra, Garcia v. San Diego Elec. Ry., 75 Cal. App. 2d 729, 170 P.2d 957 (1946) where oral regulations considered upon the issue of contributory negligence.

[95] Supra note 42.

[96] In actual effect this may be the same as the later discussed limitation that the rule be designed to protect this person from this harm. Infra note 106. However, the safety rule limitation would be more broad, leaving many rules which would in fact be inadmissible for other reasons.

thus reasonable to assume the rule was intended to protect freight trains or for other operating purposes.[97] Such reasoning seems to be somewhat tenuous under the circumstances, and is about as far as a court can go in excluding rules for this reason.[98]

C. Conflict Limitation

Where a particular jurisdiction has once decided that certain conduct is or is not reasonable as a matter of law, rules controverting such standards would ordinarily not be admissible since they are unreasonable as a matter of law.[99] For example: a rule

[97] Peterson v. Boston & M. R.R., 310 Mass. 45, 36 N.E.2d 701 (1941). But see Campagna v. Market Street Ry., 143 P.2d 43 (Cal. App. 1943) aff'd without mentioning rules in 24 Cal.2d 304, 149 P.2d 281 where the defendant unsuccessfully argued that its own speed limits were designed to save wear and tear on the tracks, a view accepted by the dissent however.

[98] Other cases refusing to admit particular rules as not being safety rules include Nelson v. Southern Pac. Co., 8 Cal.2d 648, 67 P.2d 682 (1937); Deister v. Atcheson, T. & S.F. Ry., 99 Kan. 525, 162 P. 282 (1917); Derosier v. New Eng. Tel. and Tel. Co., 81 N.H. 451, 130 A. 145 (1925); Chabott v. Grand Trunk Ry., 77 N.H. 133, 88 A. 995; Krasnow v. National Airlines, 228 F.2d 326 (2d Cir. 1955). The Derosier case supra extends this concept to the limit.

[99] In Chicago, St. P. & K.C. Ry. v. Ryan, 165 Ill. 88, 46 N.E. 208 (1896) a rule forbidding passing stopped trains while they are unloading passengers was held to be immaterial since the fact that the train passed at twenty-five miles per hour was negligent of itself [to same effect on passing stopped trains at high speeds see Baltimore & O. R.R. v. State, 81 Md. 371, 32 A. 201 (1895)]. In Southern Ry. v. Adkins Adm'r, 133 Ky. 219, 117 S.W. 321 (1909) a rule pertaining to the handling of nitroglycerne was held admissible, but the case appears to be one of negligence per se. In Bilodeau v. Fitchberg & L. St. Ry., 236 Mass. 526, 128 N.E. 872 (1920) a rule saying, "No excuse will be received for rear end collisions" was held inadmissible. In Gagnon v. Boston Elevated Ry., 205 Mass. 483, 91 N.E. 875 (1910) a rule requiring conductors to stand on back steps to keep people from boarding moving trains was held inadmissible since the railroad has no duty to protect the public from such obvious risks. In Crowley v. Boston Elevated Ry., 204 Mass. 241, 90 N.E. 532 (1910) a rule requiring keeping chains fastened across open platforms held not to apply to trains coming to a stop, citing prior cases holding it was not negligent to go through and unfasten all the chains just before stopping. In Barney v. Hannibal & St. J. Ry., 126 Mo. 372, 28 S.W. 1069 (1894) held railroad had no duty to trespassing children beyond what it did, so rule requiring employees to keep them off the premise was inadmissible. A rule in Anstine v. Pennsylvania R.R., 342 Pa. 423, 20 A.2d 774 (1941) requiring ability to stop to avoid anything held to set too high a standard. And in Chicago B. & Q. R.R. v. Lampman, 18 Wyo. 106, 104 P. 533 (1912)

will sometimes cover the same conduct as a statute, with each prescribing a different course of conduct.[100] In a jurisdiction where the violation of a statute is negligence *per se,* any rule requiring less care than the statute would be inadmissible since the statute sets the minimum standard.[101] However, even in these jurisdictions compliance with a statute is not due care as a matter of law, so the jury could in all jurisdictions properly consider rules which require more care than the statute.[102] It follows that compliance with a statute coupled with violation of a rule could be negligent. This is a reasonable result since statutes do not cover every detail of every operation. Of course, where any type of governmental regulation is considered only as some evidence of due care, it is not a contradiction to allow the fact finder to consider both the regulation and the rule.

Next consider the rule which is couched in terms of a degree of care which is higher than that set by the legal standard, e.g., a rule requiring a man to be as careful as possible or to exercise extreme care.[103] The only time such a rule should be introduced

the court says that if a prior case indicates as a matter of law that certain conduct is not negligent, then a rule forbidding that conduct is inadmissible; the rule in question requiring going through trains to see to it that all passengers were off, while cases indicate stopping for a sufficient length of time was enough.

100 A statute specifically allowing buses to stop upon highway when there was a view of three hundred feet in each direction makes inadmissible a rule requiring buses to pull off the highway. Waddell v. Crescent Motors, Inc., 260 Ala. 124, 69 So.2d 414 (1953). In Folsom Morris Coal Mining Co. v. Scott, 107 Okla. 178, 231 P. 512 (1924) a rule contrary to one statute was excluded, while one following another was admitted. See Hubb Diggs Co. v. Bell, 297 S.W. 682 (Tex.Civ.App. 1926) where one reason given for keeping out of evidence a speed limit imposed by the chief of police upon motorcycle police was the execption to speed limits granted by statute to emergency vehicles. The court also indicated that exceeding thirty-five miles was reasonable as a matter of law anyway.

101 See generally note 63 supra.

102 When defendant sought to exclude rule as requiring more cars than statute, the rule was held inadmissible in Campagna v. Market Street Ry., 143 P.2d 43 (Cal.App. 1934), aff'd without discussion of rules in 24 Cal.2d 304, 149 P.2d 281. A later California case also indicates a jury question remains despite compliance with a statute, since statutes set only minimum standards. Pennington v. Southern Pac. Co., 146 Cal.App.2d 605, 304 P.2d 22 (1956).

103 Rules requiring "every precaution" held inadmissible in Alabama Great Southern Ry. v. Clark, 136 Ala. 450, 34 So. 917 (1903); and "highest degree of control" held inadmissible in Otto v. Milwaukee

is when it singles out a particular location or situation and the rule is introduced solely to show notice of knowledge of danger. Even then great care must be used properly to limit its use.[104] The reasons for this are the same as those discussed in the preceding paragraph. These rules also call for conduct which the jury could not consider to be necessary under the circumstances.

D. Interpretation Limitation

Another generally recognized limitation placed upon safety rules is the same as that applied to statutes,[105] namely, that the regulation must be intended to protect a group of persons, of which plaintiff is a member, from the type of accident or injury which happened.[106] Reasons for such limitations are found in the negligence law concerning foreseeability and causation. Under the general test of foreseeability, while it varies somewhat in different jurisdictions, a person must be able to reasonably foresee the harm-

Northern Ry., 148 Wis. 54, 134 N.W. 157 (1912). See the rule in Isackson v. Duluth St. Ry., 75 Minn. 27, 77 N.W. 433 (1898) in which a rule which made motorman responsible for any damage would be inadmissible under this theory. Contra, Larsen v. Boston Elevated Ry., 212 Mass. 262, 87 N.E. 1048 (1912) although the rule probably was not considered from this point of view.

104 Supra note 10.

105 Supra note 62, 63.

106 In Burg v. Chicago, R.I. & P. Ry., 90 Iowa 106, 57 N.W. 680 (1894) rules pertaining to the lookout required by extra trains to avoid hitting "work trains, section men and others who may be obstructing the track" held to pertain to the protection of passengers and trains, not trespassers such as plaintiff's deceased. The rule in Louisville & M. R.R. v. Howards Adm'r, 82 Ky. 212 (1884) was also held to be intended to protect passengers, not trespassers. Plaintiff did not belong to the class sought to be protected in Ouelette v. Bethlehem-Hingham Shipyard, 321 Mass. 390, 73 N.E.2d 592 (1947). In Binder v. Boston Elevated Ry., 265 Mass. 589, 164 N.E. 441 (1929) a rule requiring the sound of a gong before starting was held to be for the protection of others than passengers fully on car, it not being negligent to start before the passengers fully seated. The rule requiring the closing of the door between the car and the front platform was held in Longacre v. Yonkers R.R., 236 N.Y. 119, 140 N.E. 215 (1923) to be intended to keep the motorman from being bothered, not to keep children like plaintiff from falling off. In Anstine v. Pennsylvania R.R., 342 Pa. 423, 20 A.2d 774 (1941), a rule pertaining to stopping distances was held to be designed to prevent running into other trains, not to cars at crossings. See also Universe Tankship v. Pyrate Tank Cleaners, 152 F.Supp. 903 (S.D.N.Y. 1957). See also the cases cited in note 97 supra and notes 110-113 infra since many cases could fit into anyone of these notes.

ful consequences of his action before the act can be considered as being negligent.[107] Unless at the time when the safety rule was adopted it was reasonably calculated to protect the type of person who was injured from the type of injury he received, it would be difficult to say that the rule indicated that the rule maker foresaw possibly harmful results of a violation. Such a rule would be irrelevant and not an admission of the company defendant. A rule may well have other purposes, but unless this particular protection is inherent in the rule, foreseeability is lacking.[108] It is the same for the person who actually violates the rule. Unless it is reasonably understandable that the results which did occur could have been prevented or made less likely by obeying the rule, there is no negligence in violating it insofar as the consequences under consideration are concerned. Where the employees themselves are concerned, the rules serve as notice of danger in many situations and will thus tend to make unfortunate consequences more foreseeable.

Closely related to the just mentioned problem are the cases in which the courts have held a particular rule inadmissible because the violation of it did not *cause* the injury. Even if the rule had been obeyed, the accident still would have happened.[109] In

[107] MORRIS, TORTS 179 (1953); PROSSER, TORTS 259 (2d ed. 1955).

[108] Consider Tall v. Baltimore Steam-Packet Co., 90 Mo. 248, 44 A. 1007 (1899). A rule forbade card playing, it was violated, an argument issued, a gun was pulled, the captain sought to take the gun away, the gun went off and plaintiff, a bystander, was injured. Held, the rule was inadmissible since the sequence of events was not forseeable. Quaere: Was this a safety rule at all? See note 96 supra.

[109] In Krasnow v. National Airlines, 228 F.2d 326 (2d Cir. 1955) the violation of a rule prohibiting passengers from drinking from their own bottle was held not to have caused plaintiffs injury from flying glass since there was other glass thrown about when the winds tossed the airplane. In Hamilton v. City of Cleveland, 93 Ohio App. 93, 110 N.E.2d (1952) a rule forbidding passengers talking to operators was violated by a person showing the operator a gun, which accidently discharged hitting a passenger. The majority held the rule admissible since if the rule were obeyed the accident would not have happened, with a strong dissent to the effect that violation of the rule did not cause the misfiring of the gun. This holding and admissibility in general are severely criticized in the note: Torts—Company Rules as Evidence of Negligence, 14 U. Pitt. L. Rev. 621 (1953). The failure to announce a station was held not to have caused the injury in Chicago B. & Q. R.R. v. Lampman, 18 Wyo. 106, 104 P. 533 (1912) since plaintiff admitted knowing she had arrived at her destination. On the issue of whether speed alone would cause an accident, the court in Smellie v. Southern Pac. Co., 128 Cal. App.

these circumstances, violation of the rule neither caused the accident nor was the accident foreseeable. The rule violation was merely an accidental circumstance which should be excluded as irrelevant.

The factual situation in which a rule will become operative must be substantially the same as the circumstances to which the rule by its terms applies.[110] This limitation applies generally regardless of the theory of admissibility since an admission is limited by the terms of the declaration, and a reasonable man would only follow a rule bearing on the circumstances under which he acts. This question as to whether a particular rule applies to the circumstances as they existed at the time of the accident becomes quite involved in a number of cases and has caused some courts much trouble. The court has to decide that the rule applies to the person who is alleged to have violated it and that it purports to govern conduct in a situation existing at the time of the accident.[111] As the cases cited indicate, this involves many of the same prob-

567, 18 P.2d 97 (1933) said that if the train had obeyed the speed limit that it was not reasonable to assume the accident would not have happened. Plaintiff's deceased had been killed when the truck in which he was riding went behind one train and was hit by another going somewhere between twenty-five and sixty miles per hour. But in Davis v. Concord & M. R.R., 68 N.H. 247, 44 A. 388 (1894) where a train was going forty to fifty miles an hour when the limit was fifteen, the rule was held admissible since if the rule was obeyed there was reason to believe the accident would not have happened. See generally PROSSER, TORTS, Ch. 9 (2d ed. 1955).

110 Carter v. Pennsylvania R.R., 172 F.2d 521 (6th Cir. 1949); Wabash R.R. v. Keller, 127 Ill. App. 265 (1906); Wabash R.R. v. Humphrey, 127 Ill. App. 334 (1906); Poole v. Boston & M. R.R., 216 Mass. 12, 102 N.E. 918 (1913); Smith v. Boston & M. R.R., 88 N.H. 430, 190 A. 697, 191 A. 833 (1937). See also Tefft v. New York, N. H. & H. Ry., 116 Conn. 127, 163 A. 762 (1933); Clevland, C., C. & St. L. Ry. v. Davis, 56 Ill. App. 41 (1894); Blevins v. Houston Electric Co., 235 S.W. 987 (Tex. Civ. App. 1921); St. Louis, S.F., & T. Ry. v. Armstrong, 166 S.W. 366 (Tex. Civ. App. 1914); Laeve v. Missouri K. & T. Ry., 136 S.W. 1129 (Tex. Civ. App. 1911); and the dissent in Airline Motor Coaches v. Caver, 148 Tex. 521, 226 S.W.2d 830 (1950). But see Kirkdoffer v. St. Louis, San Francisco Ry., 327 Mo. 166, 37 S.W.2d 569 (1931) for a strained case of inapplicability to aid a defendant against an obviously careless plaintiff.

111 While admissibility as such is properly the function of the judge even when fact determination is necessary (9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940)] applicability of a rule to the set of facts was left to the jury in Georgia N. Ry. v. Hathcock, 93 Ga. App. 72, 91 S.E.2d 145 (1945).

lems considered in interpreting statutes. No general rules can be stated. It is primarily a question of logic[112] and semantics.[113]

E. TIME LIMITATION

Some courts have excluded rules upon the grounds that they were not in force at the time of the accident.[114] If considered as

[112] Despite the obvious difficulty in any attempt to catagorize the different reasons particular rules do not apply, consider the simple logical analysis necessary in this note and the following one to determine whether a rule is applicable to the situation. In Sinopoli v. Chicago Ry., 316 Ill. 609, 147 N.E. 487 (1925) defendant sought to introduce a rule requiring keeping doors closed but the court held it did not apply since plaintiff had alleged injury from the starting up of the car while she was outside the doors and stepping off the bottom step. In Illinois Cent. R.R. v. Procter, 122 Ky. 92, 89 S.W. 714 (1906) a rule requiring that trains keep five minutes apart was held to apply only to trains on the same track, not to where one train was on the siding. And in Horye v. Boston Elevated Ry., 256 Mass. 493, 152 N.E. 738 (1926) the rule giving fire apparatus the right of way was held inapplicable to trucks returning from a fire. Quaere: where a rule requires an engineer to sound a whistle when he sees a car approaching, could it be admissible when the plaintiff has alleged he could not see the train, since the engineer could then not logically have seen the plaintiff? The rule was held admissible under these circumstances, however, in Callaway v. Pickard, 68 Ga. App. 637, 23 S.E.2d 564 (1942).

[113] McGinnes v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933) limits rules to their "clear meaning." A rule pertaining to "picking cars" is inapplicable to where engine and tender crossed tracks. Central of Georgia Ry. v. Coper, 45 Ga. App. 806, 165 S.E. 858 (1932). A train was not being "unloaded" or "pushed" in Nadeau v. Trustees of New York. N.H. & H. R.R., 310 Mass, 717, 39 N.E.2d 669 (1942). A rule forbidding the passing of standing cars would not apply once train has started. Mercier v. Union St. Ry., 230 Mass. 397, 119 N.E. 764 (1918). The rule was to be admissible on a new trial if the combination involved proved to be a "train" in Minot v. Boston & M. R.R., 73 N.H. 317, 61 A. 509 (1905). A rule pertaining to "switching" does not apply when switching completed and train returing to barn. Burroughs v. Southern Pac. Co., 153 Ore. 431, 56 P.2d 1145 (1936). A rule requiring the conductor to help "elderly and feeble" people to board defendant's train does not pertain to a plaintiff who denies being either. Shepman v. United Electric Ry., 70 R. I. 454, 40 A.2d 730 (1944). And a rule pertaining to "shifting cars" is inapplicable to entire unit being pushed some distance. Waid v. Chesapeake & O. Ry., 14 F.2d 90 (4th Cir. 1926).

[114] McCartney v. City of Washington, 124 Iowa 382, 100 N.W. 80 (1904); St. Louis, S.F. & T. Ry. v. Andrews, 44 Tex. Civ. App. 426, 99 S.W. 871 (1906). Whether they are in force is not a jury question according to Holder v. Key System, 88 Cal. App. 2d 925, 200 P.2d 98 (1948) and Yost v. Union Pac. R.R., 245 Mo. 246, 149 S.W. 577 (1912). In

admissions the rules adopted after the accident would seem to be a recognition that such rules are feasible and are necessary to prevent similar accidents from recurring. However, our earlier distinction between the evidence of subsequent repairs and rules, and our discussion of the policy reasons for keeping only the fact of repairs out of evidence are not applicable here.[115] The accident has happened, and admissibility of a rule in pending litigation may affect the decision of whether to adopt a new or better rule. Moreover, the knowledge acquired from the accident may give rise to a greater duty in the future. Thus, the rules may be relevant in future accidents, but not to this one. When a rule was adopted and then rejected before the accident, the company should not be held to have made an admission because, without regard to the pending suit, the company has rejected the rule as being undesirable. Nor should any rule not in effect at the time of the accident be admissible against the employee since it was not a circumstance which a reasonable man would normally consider.

There is one exception to the requirement of contemporaneous existence between the rule and the accident. That is the case where the plaintiff knew of the prior rule and relied upon its being carried out.[116] However, the change must have been comparatively recent and the plaintiff's lack of knowledge must be without any fault of his own.

VII. INSTRUCTIONS, WEIGHT, AND EFFECT UPON JURY IN GENERAL

The procedural matters covered in this section depend upon general considerations too lengthy and complicated for any complete analysis of their relation to company rules. The rules of law pertaining to instructions (when they should be given and when a party must specifically request them) and to weight (when to direct a verdict and when the jury's verdict is properly supported) are laws unto themselves. It is sufficient for purposes of this

Paquin v. St. Louis & Sub. Ry., 90 Mo. App. 118 (1901) rules in force prior to the accident were presumed to still be in force since defendant had peculiar knowledge if they were not And see Dougherty v. Philadelphia R.R., 171 Pa. 457, 33 A. 340 (1895) when rules in force by their terms but not yet distributed were held inadmissible. Quaere: is there a possibility here that defendant was negligent in failing to promulgate safety rules. See note 36 supra.

115 Supra notes 82 and 83.

116 Supra note 22 on reliance in general and note 75 on a similar law as to prior custom.

article to note that the conclusions about admissibility reached herein should be applied to the particular procedural rules of individual jurisdictions. A few general comments may, however, be appropriate.

Any instruction making a rule an absolute standard is reversible error[117] unless considerations other than the mere existence of the rule indicate that a violation of the rule is negligence.[118] Instructions limiting the jury's consideration of the rules would normally be appropriate,[119] although the defendant may have a burden of making a request to that effect.[120] Even rules improperly admitted, perhaps because part of the foundation for admissibility is not subsequently proven, can be the subject of an instruction which will cure any error.[121] However, where the rules are not admitted for a particular purpose, e.g., to show knowledge of danger or feasibility of safeguards, but are merely some evidence of negligence, there is authority holding that no special instruction on the effect of the rules is necessary nor can one be obtained by asking.[122] It seems that this gives plaintiff's counsel a rather strong advantage in arguing the rules to the jury, even though defense counsel does have a limited opportunity to object to errors in argument.

Where weight of evidence is the problem, a violation of the rules alone has been held to be insufficient to serve as the basis

[117] Southern Ry. v. Allen, 88 Ga. App. 435, 77 S.E.2d 277 (1953); Anstine v. Pennsylvania R.R., 342 Pa. 423, 20 A.2d 774 (1941). Cf. Phillips v. Montgomery Ward Co., 125 F.2d 248 (5th Cir. 1942) for comments close to an absolute standard.

[118] Texas & P. Ry. v. Hilgartner, 149 S.W. 1091 (Tex.Civ.App. 1912) when violation of rules plus all other competent evidence entitled plaintiff to a binding instruction on the rules. Cf. Couthern Traction Co. v. Wilson, 187 S.W. 536 (Tex.Civ.App. 1916).

[119] Southern Pac. Co .v. Haight, 126 F.2d 900 (8th Cir. 1942) Cert. denied 317 U.S. 676; Standard Oil Co. v. Allen, 121 N.E. 329, rehearing denied 123 N.E. 693 (Ind.App. 1918). See also Hobbs v. Eastern R.R., 66 Me. 572 (1876).

[120] Bond v. St. Louis-San Francisco Ry., 315 Mo. 987, 288 S.W. 777 (1926).

[121] Pennsylvania Co. v. Reidy, 198 Ill. 9, 64 N.E. 698 (1902).

[122] Davis v. Johnson, 128 Cal. App.2d 466, 275 P.2d 563 (1954); Chicago City Ry. v. Lowitz, 218 Ill. 24, 75 N.E. 755 (1905); Pennsylvania R.R. v. State, 188 Md. 646, 53 A.2d 562 (1947), 190 Md. 586, 59 A.2d 190 (1948).

of a verdict against the defendant.[123] It is difficult to understand how rules, if properly admitted, would be the only evidence of negligence. It was stated earlier that before a rule is admissible, it must be such as is reasonably calculated to prevent harm.[124] Harm has resulted from a violation, and the rules are admitted as an admission, as a circumstance of the accident, or more likely as both. If the rule is such that it could be considered reasonable, then a violation thereof must be such that it *could* be considered unreasonable. If reasonable men could so decide, then it is a fact question for the fact finder. If the court should have directed a verdict, it was not because the violation of the rule by itself was insufficient, but because the conduct involved was not negligent as a matter of law. The rule requiring other conduct was improperly admitted in the first place since it called for conduct which was unreasonable or unnecessary as a matter of law. This situation may not become known until all the plaintiff's evidence or, possibly, the evidence of both parties is in. There will, however, always be evidence other than the rules since the facts which constituted the violation of the rules will be shown, the issue being whether these facts show negligence. The rules are an aid in determining this.

There are a few cases (some in jurisdictions not allowing admission of rules) which have held that under the circumstances, although it was error to have allowed the introduction of the rules, the error was not prejudicial.[125] Unquestionably some of these cases involved situations where the court would have been willing

[123] Foster v. Southern Ry., 42 Ga. App. 830, 157 S.E. 371 (1931); Lake Shore & M.S. R.R. v. Ward, 135 Ill. 511, 26 N.E. 520 (1891); Gagnon v. Boston Elevated Ry., 205 Mass. 483, 91 N.E. 875 (1910); Hoops v. Thompson, 357 Mo. 1160, 212 S.E.2d 730 (1948); Foster v. Kansas City Ry., 235 S.W. 1070 (1921). Cf. Baily v. Worcester Consol. St. Ry., 228 Mass. 477, 117 N.E. 824 (1917); Pierce v. Worcester Consol. St. Ry., 233 Mass. 310, 123 N.E. 773 (1919). Possibly contra Leavitt v. Boston Elevated Ry., 222 Mass. 346, 110 N.E. 961 (1916); Delaware, L. & W. R.R. v. Ashley, 67 F. 209 (3d Div. 1895).

[124] Supra note 96.

[125] Bailey v. Market St. Ry., 3 Cal. App.2d 525, 40 P.2d 281 (1935); Hart v. Cedar Rapids, & M.C. Ry., 109 Iowa 631, 80 N.W. 662 (1899) (that defendants mentioned them first); Louisville & N. R.R. v. Vaughn's Adm'r, 183 Ky. 829, 210 S.W. 938 (1919); Brown v. Detroit United Ry., 179 Mich. 404, 146 N.W. 278 (1914); Blevins v. Houston Elec. Co., 235 S.W. 987 (Tex. Civ. App. 1921). See note 27 supra for possible changes in California and Kentucky law. Contra Isackson v. Duluth St. Ry., 75 Minn. 27, 77 N.W. 433 (1898) (reversed on rules alone); Gillespie v. Great Northern Ry., 127 Minn. 234, 149 N.W. 302 (1914).

to direct the verdict for the plaintiff anyway, at least on the issue of liability.[126] Typically the court notes all that the defendant did which it should not have done or all that it did not do which it should have done, and then decides that the violation of the rule adds nothing. Yet some courts have argued against admissibility on the ground that once the jury decides that a rule was not complied with, the defendant will be held liable, i.e., these courts feel that undue weight will be placed upon any violation. The fact that other courts disallow the rules but say in the same breath that admission is not prejudicial indicates either that they feel such weight will not be given, or else they may even favor admissibility.[127]

Moreover, if the jury does give rather great weight to a violation, can the court say that as a matter of law an admission of a party should not weigh heavily or that a jury should not feel that an employee who violates a rule designed to protect himself and those with whom he comes in contact is in all likelihood acting negligently? There is at least reason for saying that at this point the defendant had better "start talking" if he wants to avoid liability. The arguments the defendant can use to show that violation of the rule is not negligence are discussed elsewhere in this article.[128]

[126] Compare Southern Ry. v. Adkins Adm'r, 133 Ky. 219, 117 S.W. 321 (1909) and Southern Ry. v. Stewart, 141 Ky. 270, 132 S.W. 435 (1910). Both involve the same accident in which explosives aboard defendant's trains caused the injuries complained of. Defendants detailed rules as to inspecting and safeguarding explosives were apparently completely disregarded. In the Adkins case, the rules were held admissible but without citing authority. In the Stewart case they were held inadmissible, but the court said there was no prejudicial error. In both cases, the court was obviously impressed with the total lack of safeguadrs. See also Cincinnati, N. O. & T.P. Ry. v. Ackerman, 148 Ky. 435, 146 S.W. 1113 (1912) where the court held there was no prejudicial error since the negligence was so gross and apparent.

[127] California cases after the Bailey case (supra note 126) indicate rules are admissible. See Powell v. Pacific Electric Ry., 35 Cal.2d 40, 216 P.2d 448 (1950). In Kentucky after the cases cited supra in notes 125 and 126, a case was dismissed partly because rules were admitted. Louisville v. N. R.R. v. Stidham's Adm'r, 187 Ky. 139, 218 S.W. 460 (1920). But in Louisville R.R. v. Whitaker, 222 Ky. 302, 300 SW. 912 (1927) rules were admitted for questionable reasons and by Louisville & N. R.R. v. Gregory, 279 Ky. 295, 130 S.W.2d 745 (1939) a speed limit was distinguished from the types of rules in prior cases and held admissible as an admission.

[128] Defendant can argue a rule is unreasonable (supra note 99), inapplicable [supra notes 110 to 113], and so on.

VIII. RULES TO PROVE AN ACT

Suppose that what the defendant was actually doing at the time of the accident is in question, and the defendant seeks to introduce his own rule—either a safety rule or an operating rule—to aid in proving what he did. Presumably the plaintiff or some other witness has testified that the conduct was something other than that which the rule prescribes. Obviously comparisons could be made with the habit area of the law. However, it is not my purpose, at least at this time, to discuss the probative value of a habit to show the happening of an event. Thus, it is sufficient for present considerations to point out that, where prior acts repeatedly done in compliance with the rule are introduced as evidence tending to show what was done at the time in question, the reasoning applied to rules in this area is identical to that used in the habit area. The usual habit rule is that general habits, such as always being careful or of always being a good driver, are not normally admissible,[129] but as a habit becomes more narrow, pertaining to a single place and circumstance in issue, there is a tendency to recognize a greater probative value and to admit evidence of the habit into evidence.[130] As applied to company rules, this means that if prior repeated obedience to all rules is shown, this general habit of following rules would not be admissible, but that as the observance of a single rule with a great degree of regularity is shown, the probative value increases, or at least so the law of habit would seem to indicate.

There has been little analysis and little agreement by the courts in the few cases involving rules as proof of an act. A rule setting a speed limit has been held inadmissible as evidence of the speed at which defendant's train was traveling.[131] Yet when the issue was where the defendant's train actually stopped, rules pertaining to where they were supposed to stop have been admitted.[132]

[129] McCORMICK, EVIDENCE, § 153 et seq. (1954); 1 WIGMORE, EVIDENCE, § 65 (3d ed. 1940). Both writers prefer the term "character" for these general habits.

[130] McCORMICK, EVIDENCE, § 162 (1954); 1 WIGMORE, EVIDENCE, § 92 et seq. (3d ed. 1940).

[131] Anastasio v. Hedges, 207 App. Div. 406, 202 N.Y.S. 109 (1923).

[132] Bailey v. Market St. Ry., 3 Cal. App.2d 525, 40 P.2d 281 (1935); Moffitt v. Connecticut Co., 86 Conn. 527, 86 A. 16 (1913); Jackson v. Grand Ave. Ry., 118 Mo. 199, 24 S.W. 192 (1893); contra West Chicago St. R.R. v. Brown, 112 Ill. App. 351 (1904). See also Sinopoli v. Chicago Ry., 316 Ill. 609, 147 N.E. 487 (1925); Moore v. Woonsocket St. Ry., 27 R.I. 450, 63 A. 313 (1906). Plaintiff introduced rules to show where the train stopped to prove he had gotten off a stopped train in Nassau Electric Ry. v. Corliss, 126 F. 355 (2d Cir. 1903).

Likewise where the issue was how defendant's car was parked, a rule requiring parallel parking was held to have been properly introduced.[133] But where defendant has denied there was any accident, a rule requiring an accident report has been held inadmissible.[134] There is seldom any reference in these cases to an analogy with the law of habit, yet the basis for comparison seems quite clear.

Apart from any attempt to establish habit by proof that a particular rule has been complied with on numerous occasions, the rule should be considered by itself and a determination made of whether the fact that a rule was known to the employee has sufficient relation to proof of what did in fact happen to be admissible to prove that issue. There are numerous reasons for arguing that an employee will usually obey the rules of his employer: he has a contractual duty to do so; he wants to be on good terms with his boss; he wants to keep his job; he does not want to risk injury to himself; he does not want to harm his fellow employees or third persons; and he might just as well follow the prescribed course as to arbitrarily adopt some other. With these sound reasons for obedience, it can be argued that, in the absence of specific proof to the contrary, there is a strong presumption that a rule was followed on any given occasion.

Assume for purposes of further discussion that it can be shown that rules are obeyed ninety-nine per cent of the time in applicable situations. Exact figures are not necessary for present purposes unless obedience would be so likely that proof of the rule could be considered as absolute proof of the act. The cases throughout this article indicate that rules are disobeyed, but a visit to any railroad yard will indicate that they are obeyed enough to show that safety rules do have a tremendous effect on the way employees act. It is possible to assume that rules are followed in ninety-nine per cent of the situations to which they are applicable.

Next, suppose an accident is witnessed by three persons: the plaintiff who describes conduct in violation of a rule, the defendant who claims he obeyed it, and a disinterested third person who agrees with plaintiff. The rule has not yet been introduced, but defendant seeks to do so to bolster his case. Even assuming that rules are complied with in almost all cases, can it be said that

133 Keohn v. City of Hastings, 114 Neb. 106, 206 N.W. 19 (1925).

134 Becker v. Buffalo L. E. Traction Co., 52 Pa. Super, Ct. 93 (1812); Hardin v. Ft. Worth & D. C. Ry., 49 Tex. Civ. App 184, 108 S.W. 490 (1908).

the likelihood of obedience in this case bears any close relationship to the statistical likelihood of obedience? Although disobedience was assumed to occur in only one per cent of the appropriate situations, the fact that this disinterested person has said he "knows" that the rule was not obeyed would tend to show that this was that one time. After all, it cannot properly be argued that in this case there is a ninety-nine to one chance that this disinterested person is lying. In other words, once there is positive proof that the rule was not complied with, our assumed odds lose much of their meaning, especially when a disinterested person is contradicting the inference of obedience.

Remember also that if the rule is a safety rule, it has been partially designed to prevent accidents such as the one which has in fact taken place, so that if the rule had been complied with there would have been less chance for the accident to happen. The mere happening of the accident now becomes an indication that the rule was disobeyed, and the chances are no longer ninety-nine to one that there was obedience. This is particularly true when a rule by its nature is such that compliance would tend to prevent accidents regardless of the negligence of others. For example, if a streetcar company had a rule requiring the conductor to precede his car into a blind intersection to make sure that it was clear before signaling the motorman to proceed, and if a streetcar hit an automobile at this place, violation of the rule would seem likely unless the conductor himself acted unwisely.

Nevertheless, it is still sufficiently difficult to analyze the probability that the rule was disobeyed on this one occasion to be able to say that the possibilities have been so diminished as to eliminate all probative value which might obtain from admitting the rule. The adoption of a "no eye witness rule" in this area would be a solution. To a certain extent the same could be said when only the plaintiff and the defendant testify. But the value of the rule in proving what actually happened remains highly questionable since there is available other competent evidence based upon the happening of an accident which obedience to the rule would have tended to prevent.

An interesting problem could arise, and has in fact been noted in one jurisdiction, when the defendant first seeks to prove what happened by the use of a rule and then seeks to use the same rule as evidence of due care. The court noted that such a course would allow a defendant to use the rule to relieve himself completely of liability by thus offering two possible inferences: that he obeyed the rule, and that obedience was reasonable. The court

then rejected this as an attempt by the defendant to pull himself up by his own "bootstraps."[135]

IX. THE SERVANT V. MASTER CASES

While the case law concerning applicability of company rules in actions by employees against their employers may be more voluminous than that involving third persons, such cases may safely be relegated to a relatively unimportant position in this article because much of what has already been said is equally applicable to them, because workmen's compensation and fellow servant rules minimize the aspect of negligence and because the various courts are in much greater accord in this area.[136] Needless to say, workmen's compensation is excluded from our consideration because negligence of either the claimant or his employer is usually not in issue.[137]

In a typical case the employee who is seeking to recover from his employer for injuries suffered while at work has himself violated a company rule, and this violation has in some way contributed to the injury. Where contributory negligence is in issue, the federal rule under the Federal Employees Liability Act and the Safety Appliance Act,[138] and the nearly unanimous rule in the state courts, relieve the employer in whole or in part from liability. The prior discussion of the effect of violating a known rule when contributory negligence is in issue is equally applicable here, with the added reason that the employee has violated his contractual duty to his employer.[139] The duty is absent when the employee does not know of the rules through no fault of his own.

[135] Anastasio v. Hedges, 207 App. Div. 106, 202 N.Y.S. 109 (1923).

[136] Because of the greater harmony in this area, no attempt has been made to exhaust the authorities. However, the general statements in this section of the article can be found historically supported in the following. BAILEY, MASTER'S LIABILITY FOR INJURY TO SERVANT, 71 (1894); DRESSER, THE EMPLOYER'S LIABILITY ACTS, 310, 316, 521, 522 (1903); ELLIOTT, RAILROADS, §§ 1280, 1282, 1643, 1696 (2d ed. 1907); 3 LABOTT'S MASTER AND SERVANT, §§ 909, 1114, 1115, 1119, 1120, 1268, 1281-84 (2d ed. 1913); 4 THOMPSON, NEGLIGENCE, § 4135 et seq. (1904).

[137] 1 LARSON, WORKMEN'S COMPENSATION, § 2 (1952).

[138] See 45 U.S.C.A. § 51, notes 469-70, 1038; 45 U.S.C.A. 53 note 62, 45 F.C.A. § 51 notes 173, 259 & 284; 45 F.C.A. § 53 notes 14 to 17.

[139] This proposition can be found supported in any of the articles in note 136 supra.

When a particular rule is unreasonable as a matter of law, the rule and its violation are irrelevant to the issue of contributory negligence. This often is the holding when compliance would be an unreasonable obstacle to the performance of normal duties. However, when a rule is shown to be habitually breached and the employer knows it, or the breach is so notorious that he should know of it, acquiescence in the breach is considered as amounting to a waiver by the employer or an admission that compliance with the rule was not feasible. Again this makes the rule irrelevant to the contributory negligence issue. In addition, when a rule is known by the employee, such knowledge can be considered as knowledge of danger so that any violation of the rule amounts to an assumption of the risks incidental thereto, a theory which is no different in its ultimate effect from that of contributory negligence.

Whenever an employee is injured by reason of his employer's direct or indirect violation of a rule, the rule is usually considered admissible with the same general limitations as have been discussed elsewhere, unless the fellow-servant rule is applicable. Here, too, the analysis is the same as that which has been applied to third-party cases, with the added argument that the employer has a contractual duty to make and enforce adequate rules for the protection of his employees. The use of the rule as evidence by the employee is also even more appropriate since it is reasonable to assume in most cases, especially where the employee has been on the job for some time, that he either knows of the rule itself, or is aware of its results. It would thus seem that reliance upon the rule can be assumed.

X. CONCLUSION

Obviously any necessity that a court analyze every attempt to introduce company rules in all the circumstances considered by this article would place a heavy burden on that court when taken together with the numerous other more difficult, and perhaps more important, problems which the litigation may involve. The distinctions between the employee and the employer defendant, between an admission and a circumstance, and between the adoption of a rule and its continuing existence, could easily be lost by the court and the jury among the multitude of other problems involved, especially if specific instructions were necessary to point up such distinctions. Yet a consideration of all these factors has led to a general value judgment that the rules are, within prescribed limits, of material evidentiary value in most cases. For this reason it is appropriate to adopt a few general rules, limited only where ab-

solutely necessary, to encompass the entire area insofar as possible. Such an attempt follows:

I. On the issue of the negligence of the defendant employee or the employer's liability therefor, a written safety rule in existence at the time of the accident should be admitted into evidence without binding effect as a fact for the consideration of the jury provided that the following conditions are satisfied: the rule pertains to the situation in which the accident happened; the rule was intended to protect the injured person from the harm which he suffered; the rule was violated; and the violation contributed to the injury. If the rule involves a course of conduct which falls above or below that which a reasonable man would consider proper under the circumstances, it would be irrelevant.

II. On the issue of plaintiff's contributory negligence, the same type of rule is admissible as evidence for a defendant if: the plaintiff knew or should have known of the rule; the plaintiff violated it; and the violation contributed to the injury, unless the defendant has so habitually permitted the violation of the rule as to have waived it.

III. The plaintiff can introduce the same kind of rule as evidence that he was justified in relying upon it and was thus free of contributory negligence by showing that he knew of it.

IV. A rule is not admissible on behalf of the defendant or the plaintiff to show what actually was done on the occasion in question, although either may do so when there is no eyewitness.

V. A rule may not be introduced by the defendant as evidence that acts in compliance with the rule were reasonable.

VI. When knowledge of danger and feasibility of safeguards are in issue, they may be evidenced by the same type of rule as in paragraph I. above.

We may conclude that although the evidentiary value of company safety rules has not received as much attention as statutes, custom or habit, there is ever increasing likelihood that they may be involved in a tort action. The increasing size and complexity of our industrial institutions demands that safety rules be seen by counsel in their proper perspective as evidence. If the admissibility of such rules is limited in the manner suggested by this article, they may serve as useful tools for the resolution of legal controversy.