

# THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 AND THE LAW OF TORTS

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## INTRODUCTION

Recognition of the significance of the Occupational Safety and Health Act of 1970<sup>1</sup> for the law of torts and of particular elements of the law of torts for the administration of the Act is emerging slowly in reference to two areas of inquiry. First, to what extent are persons charged with invocation and application of the Act's enforcement provisions required or permitted to read concepts of tort law into the duties imposed and the defenses allowed under the Act?<sup>2</sup> Second, are any new rights, remedies, or other substantive or procedural advantages added to the arsenals of plaintiffs' attorneys seeking redress for clients injured as a result of alleged violations of the Act?<sup>3</sup> Before discussing those two questions,<sup>4</sup> this article briefly explores the broader implications of the Act for the future of accident law in general.

## I

### THE IMPLICATIONS OF THE ACT FOR THE FUTURE OF ACCIDENT LAW

Reduced to its essentials, the Occupational Safety and Health Act of 1970 is a rather primitive system of social control designed to reduce or eliminate hazards to employees' safety and health in the workplace.<sup>5</sup> Rules are prescribed by government agencies and enforced by government officials using familiar coercive sanctions—monetary penalties, fines and, if necessary, jail

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<sup>1</sup> 29 U.S.C. §§ 651-78 (1970).

<sup>2</sup> See, e.g., *REA Express, Inc. v. Brennan*, 495 F.2d 822 (2d Cir. 1974); *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973); Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973) [hereinafter cited as Morey].

<sup>3</sup> See, e.g., *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670 (E.D. La.), *aff'd per curiam*, 483 F.2d 67 (5th Cir. 1973); Stramondo, *Litigation Impact*, 9 TRIAL, Jul.-Aug. 1973, at 29; Comment, *Federal Common Law Remedies Under the Occupational Safety and Health Act of 1970*, 47 WASH. L. REV. 629 (1972).

<sup>4</sup> With respect to the first question, I will treat mainly the federal Act rather than state plans. However, to the extent that the federal Act imposes obligations different from, and more stringent than, the common law would require the same reasoning ought to apply to state plans. See Occ. Safety & Health Act §§ 18(c) & (e), 29 U.S.C. §§ 667(c) & (e) (1970).

As to the second area, I will limit my discussion principally to the extent to which OSHA safety duties may be expected to create new standards for tort liability or new causes of action. Time and space limitations do not permit discussion in this article of other duties imposed by the Act. See, e.g., *id.* §§ 8(d), 11(c) & 15, 29 U.S.C. §§ 657(d), 660(c) & 664.

<sup>5</sup> This is intended to be descriptive. It is not intended to be critical of the Act, its important purposes, or its ability to achieve those purposes.

terms.<sup>6</sup> The principal significance of the utilization by Congress of such a primitive system of deterrence is that it constitutes another compelling piece of evidence of widespread recognition by public policy-makers that systems which were designed to provide compensation or individual justice for accident victims have not provided adequate deterrence against accidents. Such recognition tends to produce legislation,<sup>7</sup> like the Act, which relies upon direct regulation to change behavior as well as other legislation, such as no-fault schemes,<sup>8</sup> designed to achieve restoration of accident losses.<sup>9</sup> This tendency, in turn, substantially dilutes the importance of the accident reparations system as a special deterrent to accidents. It follows that the fault system, already under heavy attack for its high costs, delays, and unfairness,<sup>10</sup> will continue to lose the support it once had from those who believed its existence necessary to achieve such deterrence.<sup>11</sup> This withering of the fault system's *raison d'être*, coupled with a parallel trend to provide universal subsidized medical and health care, and likely to be followed by demands for and eventual enactment of universal protection of income loss caused by illness or accident-related disability,<sup>12</sup> may ultimately sound the death knell for the fault system of accident compensation as we now know it. Its future functions may be limited to providing optimum restoration in isolated cases where justice demands more than min-

<sup>6</sup> Occ. Safety & Health Act § 17, 29 U.S.C. § 666 (1970).

<sup>7</sup> See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051-81 (Supp. II, 1972); Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-431 (1970).

<sup>8</sup> Cf. O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973).

<sup>9</sup> Rather than refer to public policy goals and strategies in terms of economic theory, see G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970), I prefer for the purpose of this article to use the following terminology: (The reader should note that some of these terms are similar to but not the same as those used by Professor Calabresi.)

Prevention: the avoidance of situations or conditions which lead to accidents before such situations or conditions occur.

Mitigation: the creation of conditions which will tend to lessen the effect of accidents when they do occur.

Interdiction: the interposition of some instrumentality, human or otherwise, which brings to an end an unsafe condition already in existence.

Special deterrence: the encouragement of conduct conducive to safety by creating fear of the consequences which will follow from danger-creating acts or omissions.

General deterrence: the imposition of burdens and disadvantages on a dangerous activity, thus making that activity less desirable than other, safer substitutes.

Correction: the development of perspectives and operations for safety in people and institutions which would otherwise be non-safety oriented.

Restoration: the restoration of the values which are lost as a consequence of accidents which are not prevented, interdicted, or deterred.

Miller, *The Needs and Potential for Cooperation Between Human Factors Specialists and Lawyers in Research and Development of Automobile Accident Law*, 14 HUMAN FACTORS 25 (1972). The terms are, in part, adaptations from Calabresi's work and, in part, suggested by objectives of the sanctioning process enumerated in a rather different context. See M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 287-96 (1961).

<sup>10</sup> See, e.g., R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965).

<sup>11</sup> Proponents of the fault system have often emphasized its value as a deterrent to accidents. See, e.g., THE DEFENSE RESEARCH INST., INC., *FAULT: A DETERRENT TO HIGHWAY ACCIDENTS* (1969).

<sup>12</sup> Cf. Bernstein, *The Need for Reconsidering the Role of Workmen's Compensation*, 119 U. PA. L. REV. 992, 1001 (1971). But cf. O'Connell, *Elective No-Fault Liability Insurance for All Kinds of Accidents: A Proposal*, 1973 INS. L. J. 495, 503.

imum restoration<sup>13</sup> or in areas where direct regulation cannot provide adequate deterrence.<sup>14</sup>

What is curious about the trend toward direct regulation *cum* coercion, is that it comes during a period when the more sophisticated observers of the accident problem, recognizing that there are limits to the economic resources which can or ought to be devoted to the problem, have made powerful arguments in favor of an approach which would seek the most effective mix of strategies.<sup>15</sup> Nevertheless, Congress in developing the Act paid scant attention either to the potential deterrent effect of workmen's compensation and common law or statutory remedies or to the way in which such remedies might be integrated with the Act in order to maximize its stated objectives at minimum cost.<sup>16</sup> This narrow focus which led to the development of a massive regulatory scheme to operate parallel to workmen's compensation, may be fully justified by the failures of workmen's compensation to achieve adequate deterrence in the past.<sup>17</sup> However, there is less justification for Congress' failure—in the legislation requiring a study of workmen's compensation which accompanied the Act<sup>18</sup>—to call for examination of the potential safety and health effects of an expanded and improved workmen's compensation system and of whether such a system might in conjunction with a somewhat curtailed regulatory system achieve the goals of both systems more efficiently and cheaply.

The failure to consider such an approach also bears upon the remaining questions to be discussed in this article. Congress' treatment of the Act's effect on existing compensation systems can only be characterized as an amateurish attempt not to upset the status quo.<sup>19</sup> Careful analysis of the relevant provision in the Act and the legislative history does not lead to confident prediction about the specific effect of the Act on tort remedies. Similarly, Congress' preoccupation with prevention, interdiction, and special deterrence,<sup>20</sup> and its confused and ambiguous discussion of the extent to which the employer's "general duty" incorporates common law concepts,<sup>21</sup> suggests that those who interpret the Act should hesitate to import common law negligence standards

<sup>13</sup> As, for example, where defendant intentionally injures plaintiff. One possible difference between minimum restoration and optimum restoration is that the former might compensate only for economic losses while the latter might also compensate for intangible losses, such as pain and suffering.

<sup>14</sup> Cf. O'Connell, *supra* note 8.

<sup>15</sup> G. CALABRESI, *supra* note 9; Boodman, *Safety and Systems Analysis, With Application to Traffic Safety*, 33 LAW & CONTEMP. PROB. 488 (1968).

<sup>16</sup> In legislation appended to the Occupational Safety and Health Act of 1970, Congress did call for a study of workmen's compensation laws. Occ. Safety & Health Act § 27, 29 U.S.C. § 676 (1970). However, the avowed purpose was "to determine [whether] such laws provide an adequate, prompt, and equitable system of compensation." *Id.* Fortunately, however, the commission charged with implementing the study addressed itself to the relationship between workmen's compensation and "the safety objective." NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 87-98 (1972).

<sup>17</sup> Cf. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 287-93 (1973).

<sup>18</sup> Occ. Safety & Health Act § 27, 29 U.S.C. § 676 (1970).

<sup>19</sup> See text at pp. 628-30 *infra*.

<sup>20</sup> See note 9 *supra*.

<sup>21</sup> See text at pp. 621-22 *infra*.

or other potentially relevant common law principles into it. Instead, the Act should be interpreted primarily by reference to Congress' stated policies and objectives in relation to the nature and dimensions of the serious problems Congress intended to solve.<sup>22</sup> As will be seen, only in this manner will the Act fulfill its promise by becoming "a safety bill of rights for close to 60 million workers."<sup>23</sup>

## II

### THE RELEVANCE OF TORT CONCEPTS TO THE GENERAL DUTY CLAUSE OF THE ACT

The key operative provisions of the Act impose upon each employer two duties. The first, in the so-called "general duty" clause, requires that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."<sup>24</sup> The second requires that each employer "shall comply with occupational safety and health standards promulgated [by the Secretary of Labor] under this chapter."<sup>25</sup> A third provision applies to employees: "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct."<sup>26</sup> The Act, however, contains no provision for enforcing employees' duties and no sanctions for their breach.

The question arises whether, and to what extent, elements of tort-based duties, defenses, or other concepts may or should be referred to in applying these duties. Discussion will focus on the general duty clause since the duty to comply with promulgated standards, on its face and also by virtue of clear inferences to be drawn from other provisions of the Act,<sup>27</sup> is absolute and unqualified<sup>28</sup> and because the legislative intent to make the employer's duty

<sup>22</sup> See *REA Express, Inc. v. Brennan*, 495 F.2d 822 (2d Cir. 1974).

The generally accepted dimension of the occupational safety and health problem—about 14,000 workers killed each year, over 2 million disabled, and uncounted numbers affected by occupational disease—and its costs are discussed in Statement of George P. Schultz, Secretary of Labor, in *Hearings on S. 2193 and S. 2788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess., pt. 1, at 76, 77 (1970). The actual dimensions of the total occupational injury and disease problem may turn out to be much greater when the more accurate statistics required by the Act are tabulated. See Statement of Jacob Clayman, Administrative Director, Industrial Union Department, AFL-CIO, in *Hearings on the Occupational Safety and Health Act of 1970 (Oversight and Proposed Amendments) Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 178, 186 (1973) [hereinafter cited as *1973 Oversight Hearings*].

<sup>23</sup> SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at iii (Comm. Print 1971) [hereinafter cited as LEGISLATIVE HISTORY].

<sup>24</sup> Occ. Safety & Health Act § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970).

<sup>25</sup> *Id.* § 5(a)(2), 29 U.S.C. § 654(a)(2).

<sup>26</sup> *Id.* § 5(b), 29 U.S.C. § 654(b).

<sup>27</sup> Variances from standards, for example, are only permitted on the narrowest of grounds. *Id.* §§ 6(b)(6) & (d), 29 U.S.C. §§ 655(b)(6) & (d).

<sup>28</sup> *But cf. Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230 (5th Cir. 1974) ("reasonable man" test read into safety regulation requiring protective equipment where "necessary by reason of

“primary” seems rather clearly to foreclose an employer’s use of an employee’s violation of duty as a defense to citation for the employer’s breach of his own duties.<sup>29</sup>

### A. Comparison With Common Law Duties

On its face the general duty clause would seem to impose a duty on employers in some respects more stringent and in other respects less stringent than the common law duty to refrain from negligence. At common law the employer was obliged only to exercise ordinary care to make his workplace safe for his employees. He had, on the one hand, an affirmative obligation to eliminate unreasonable risks that were obvious and to make reasonable inspections in order to uncover and remove unreasonable hazards that were not.<sup>30</sup> On the other hand, as is true generally with respect to the negligence standard, a calculus was devised wherein the degree of care to be exercised was measured by balancing the magnitude of the risk and the likelihood that it would cause injury against the burden of avoiding the risk.<sup>31</sup> Thus, permitting a minor risk of relatively minor injury to exist might, in theory, be deemed negligent (if such injury actually ensued) if the burden of removing the risk was, on balance, less costly than the risk. (Subject, of course, to the possibility that a court or jury might find the risk so improbable that a reasonable person would not worry about it in any event.) In applying the calculus, it is likely that both economic and technical feasibility could and did play major roles in measuring the burden for the purpose of determining whether a particular employer was negligent in failing to discover or eliminate a particular risk.<sup>32</sup> Under the negligence standard a jury might be reluctant to find, and an appellate court reluctant to uphold the finding, that an employer was negligent for failing to eliminate a risk—even a very serious risk—if to do so would have brought financial calamity to the employer’s business or industry. This application of the negligence standard, absolving an employer from liability for injuries caused by hazards which were not economically feasible to eliminate, has been generally agreed to be the product of the public policy favoring the growth of industry during the industrial revolution and a resultant unwillingness to burden industry with the stricter duties applied in less dynamic eras.<sup>33</sup> The more recent trend, of course, has

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hazards”); *Secretary of Labor v. Standard Glass Co.*, 1 OCC. SAFETY & HEALTH REP. 1045 (OSHRC July 27, 1972).

<sup>29</sup> *Accord*, *REA Express, Inc. v. Brennan*, 495 F.2d 822, 825 (2d Cir. 1974); *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973).

<sup>30</sup> See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 525-30 (4th ed. 1971) [hereinafter cited as PROSSER]; *RESTATEMENT (SECOND) OF AGENCY* §§ 492-520 (1958); *RESTATEMENT (SECOND) OF TORTS* § 332, comment *j* at 181 (1965). Of course, the employee’s right to recover for breach of these duties was substantially limited by “the unholy trinity of common law defenses—contributory negligence, assumption of risk, and the fellow servant rule.” PROSSER 526-27.

<sup>31</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *Conway v. O’Brien*, 111 F.2d 611, 612 (2d Cir. 1940). See also PROSSER 145-49.

<sup>32</sup> See PROSSER 145-49. Thus, for example, one of the reasons that evidence of industry custom is admissible is to establish that a particular precaution is feasible. *Id.* at 167-68.

<sup>33</sup> See generally James, *Analysis of the Origin and Development of the Negligence Actions*, in *DEP’T OF TRANSPORTATION, THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION* 35-49 (1970).

been back toward stricter duties which impose the costs of accidents and other failures on industry, particularly manufacturers, without regard to the reasonableness of the defendant's actions.<sup>34</sup>

The general duty clause of the Occupational Safety and Health Act of 1970, on fair reading, seems to impose an absolute duty on the employer, albeit a duty to eliminate only some risks—those that constitute “recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>35</sup> The employer is under no obligation, in the absence of a specific standard, to eliminate nonrecognized hazards irrespective of the degree of risk they create, the degree of likelihood that they will cause or are causing death or serious physical harm, or the extent to which their nonelimination might be deemed unreasonable from the standpoint of negligence law. Further, the employer is under no duty to eliminate even recognized hazards if they are likely to cause only serious mental or emotional, rather than physical, harm, if they are less than “likely” to cause death or serious physical harm, or if they are only likely to cause nonserious physical harm, even though these situations may give rise to liability under the law of negligence.

On the other hand, the use of the word “free,” under any fair interpretation, does not seem to permit any negligence-type balancing of the degree and likelihood of risk against the cost or burden of removing it. Put another way, the balance seems to have been struck in advance by Congress when it decided which kinds of hazards must be eliminated.<sup>36</sup> It would seem to follow, therefore, at least from the application of the “plain meaning” test, that an employer has an absolute obligation either to eliminate “recognized hazards that are causing or likely to cause death or serious physical harm to his employees” even if this means closing his business or incurring a severe financial strain, or to pay the statutory penalty for failure to abate the violation.

### B. Contextual and Policy Analysis

However, the “plain meaning” test is only the starting point for a contextual analysis designed to shed further light on the interpretation of the statutory language.<sup>37</sup> It still remains to determine whether a meaning less absolute than the facial interpretation can be found by reference to the legislative intent either expressed or implied from Congress' objectives in relation to the nature and dimensions of the problem that Congress intended to solve.

It had been suggested by one commentator that “the general duty clause should not be read to impose liability on an employer for the existence of statutory hazards which he cannot reasonably eliminate” and that “employers should be allowed the defense to the *general* duty requirement that elimination of a particular hazard is physically or economically impossible unless the entire

<sup>34</sup> See generally Noel, *Comparison of Strict Liability in Products Area and Auto Accident Reparations*, in *id.* at 67-90.

<sup>35</sup> Occ. Safety & Health Act § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970).

<sup>36</sup> Cf. LEGISLATIVE HISTORY 393-94.

<sup>37</sup> Cf. M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 96-97 (1967).

employment activity is brought to a halt."<sup>38</sup> However, the Court of Appeals for the District of Columbia, in the first definitive judicial interpretation of the general duty clause, refused to impose a reasonableness requirement in *National Realty & Construction Co. v. Occupational Safety and Health Review Commission* (OSHRC).<sup>39</sup> Instead, the court imposed a requirement that the hazard be preventable by feasible means:

On the one hand, the adjective [free] is unqualified and absolute: A workplace cannot be just "reasonably free" of a hazard, or merely as free as the average workplace in the industry. On the other hand, Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one. Congress' language is consonant with its intent only where the "recognized" hazard in question *can be* totally eliminated from a workplace. . . . Congress intended to require elimination only of preventable hazards.<sup>40</sup>

Avoiding the anomaly that a workplace cannot be free from hazards when a hazard, though not preventable, is present, Judge J. Skelly Wright simply held that a non-preventable hazard is not "recognized."<sup>41</sup> The criterion to determine whether a hazard is preventable, he wrote, is to draw its "content from the informed judgment of safety experts."<sup>42</sup> And further:

Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program. Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods unfeasible.<sup>43</sup>

Both the "reasonableness" requirement and the requirement that hazards must be preventable to be recognized would require compliance officers to overlook some workplace hazards "causing or likely to cause death or serious physical harm." Judge Wright, however, recognized that enforcement of the general duty clause might in some cases "threaten the economic viability of the employer," but he recommended that, in such cases, "the Secretary should propose the precaution by way of promulgated regulations, subject to advance industry comment, rather than through adventurous enforcement of the general duty clause."<sup>44</sup> Thus, although the view taken by Judge Wright tends to be more protective of employees than does the imposition of a quasi-negligence test, it does introduce economic factors into the determination whether serious hazards are to be permitted to continue to exist in the workplace.

I suggest that there is no warrant in the Act, in its legislative history, or in its policy to support the importation of economic factors into the general

<sup>38</sup> Morey 993. Early decisions of the OSHRC have applied a "reasonableness" standard. *White & Carney, OSHA Comes of Age: The Law of Work Place Environment*, 28 *Bus. Law.* 1309, 1312-13 (1973).

<sup>39</sup> 489 F.2d 1257 (D.C. Cir. 1973).

<sup>40</sup> *Id.* at 1265-66. *Accord*, *Brennan v. OSHRC*, — F.2d — (7th Cir. 1974).

<sup>41</sup> 489 F.2d at 1266.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at n.37. The implication is that the Secretary has the power to enforce the precaution, but should not exercise it. It is arguable, however, that the failure of a compliance officer to bring such a hazard to the employer's attention, if not to recommend a citation, might constitute actionable negligence if the hazard subsequently caused injury to an employee. *See* text at pp. 637-39 *infra*.

duty equation. Congress declared that the purpose of the Act was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."<sup>45</sup> While the "so far as possible" language can fairly be read to admit of some qualifications in the assurance, there are but two indications in the Act itself which suggest that "possible" is to be interpreted under any circumstances to mean "by feasible means" or to be otherwise qualified by incorporating considerations of economic burden. The first is the statement of purpose calling for the provision of "medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience."<sup>46</sup> It is clear, however, from the legislative history, that the qualifying words were added only to recognize the inescapable reality that work, no matter how free from specific safety and health hazards, may, because of inherent emotional pressures and physical demands, nevertheless shorten life or diminish health,<sup>47</sup> and in addition, that it would be virtually impossible to eliminate the myriad of minor hazards which do not threaten serious harm. Most importantly, however, the limitation, insofar as it is one, is addressed to medical criteria—what constitutes "serious physical harm,"<sup>48</sup> not to the definition of a "recognized hazard."

Secondly, section 6(b)(5) provides, in part:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. . . . In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, *the feasibility of the standards*, and experience gained under this and other health and safety laws.<sup>49</sup>

Here, it is arguable, both from the language itself and the legislative history, that the explicit references to feasibility and to the best available evidence and latest available scientific data may permit standards to be set which fall short of providing all possible safety and health,<sup>50</sup> though it is by no means clear that the reference is to economic feasibility rather than technical feasibility.<sup>51</sup> On their face, however, such limitations are applicable only to standards for "toxic materials and harmful physical agents" and not to the general duty

<sup>45</sup> Occ. Safety & Health Act § 2, 29 U.S.C. § 651 (1970).

<sup>46</sup> *Id.* § 2(7), 29 U.S.C. § 651(7).

<sup>47</sup> See Remarks of Senator Dominick, in LEGISLATIVE HISTORY 423, 480.

<sup>48</sup> See OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, FIELD OPERATIONS MANUAL VIII B.I.C. (2) (1974) [hereinafter cited as FOM].

<sup>49</sup> Occ. Safety & Health Act § 6(b)(5), 29 U.S.C. § 655(b)(5) (1970) (emphasis added).

<sup>50</sup> See LEGISLATIVE HISTORY 1188.

<sup>51</sup> Questions of feasibility may arise with respect to a number of different standard setting problems, such as: (1) ability to determine whether a substance or physical agent constitutes a hazard, (2) ability to determine which levels of the substance or agent are safe and which are not, (3) ability to detect whether hazardous levels of the substance or agent are present or being used in the workplace, (4) ability to devise means to keep the workplace free of toxic substances or harmful physical agents, (5) ability to produce and deliver equipment which would enable an employer to detect and/or eliminate the hazard from the workplace, and (6) economic ability of particular employers or an entire industry to comply with proposed standards.



clause or to standards for other hazards.<sup>52</sup> Reference to the legislative history also suggests that the special limitations on the requirements for these standards arose out of recognition that the identification of which of the myriad of substances, chemicals, and physical agents already used in industry and being added each year are toxic and harmful to health presents intractable problems,<sup>53</sup> as does the ability of the National Institute of Occupational Safety and Health (NIOSH) to formulate standards calling for threshold limit values or other adequate protections.<sup>54</sup>

It must be conceded, however, that the toxic substances provision constitutes a crack in the dike of absolute protection which the Act otherwise seems to require. If Congress wanted protection "insofar as possible" it could have required industry to establish the safety of new substances and physical agents before introducing them into the workplace and to remove those whose safety has not been established.<sup>55</sup> It should be clear, however, that this crack permits only a leak and not a flood: not only is the provision limited in its terms to a particular class of cases, but it has no applicability once a standard has been set or a recognized hazard noted. Thus, for example, the Conference Report, in the same paragraph in which this provision is discussed, states that "[e]conomic hardship is not to be a consideration for the qualification for a temporary extension order."<sup>56</sup> Evidence could not be stronger that Congress foresaw and approved the requirement that safety and health be provided regardless of the economic hardship on a particular employer.<sup>57</sup>

It appears that, Judge Wright's interpretation of "recognized" aside, the absence of any other language in the Act qualifying or limiting the requirement that employment be free from certain recognized hazards is not merely a neutral

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Senator Dominick introduced the amendment containing the feasibility requirement with respect to toxic substances and harmful physical agents. See LEGISLATIVE HISTORY 502. It seems clear that Senator Dominick was concerned with (4), the ability to keep certain employments free of safety and health hazards, when the employment was "inherently dangerous," *id.*, or when the employee could not avoid being exposed to hazards such as those inevitably present for a bus driver or trolley car operator in traffic situations, *id.* at 423, 480.

In addition, the enormous concern for occupational diseases caused by toxic substances and harmful physical agents expressed in the hearings, see, e.g., Statement of Anthony Mazzocchi, Director, Citizenship-Legislative Department, Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO, in *Hearings on S. 2193 and S. 2788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess., pt. 2, at 1007 (1970), and echoed in LEGISLATIVE HISTORY 844-46, seem to lead to the conclusion that Congress' expressed policy to provide safe and healthful employment so far as possible would be disserved by providing economic hardship exceptions in cases where it is technically feasible both to detect hazardous levels of toxic substances and harmful physical agents in the environment and technically feasible to eliminate them.

Unfortunately, the Court of Appeals for the District of Columbia has determined, both as a matter of policy and by virtue of the limited scope of judicial review, that the Secretary may take economic factors into account under section 6(b)(5) of the Act. *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974). This decision deserves reconsideration.

<sup>52</sup> Occ. Safety & Health Act §§ 6(b)(5) & (7), 29 U.S.C. §§ 655(b)(5) & (7) (1970).

<sup>53</sup> Cf. LEGISLATIVE HISTORY 337-39, 1043-45.

<sup>54</sup> Cf. *id.* at 859.

<sup>55</sup> *Id.*

<sup>56</sup> See *id.* at 1188.

<sup>57</sup> The Court of Appeals for the District of Columbia, in *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F. 2d at 478 (dictum), and *National Realty & Constr. Co. v. OSHRC*, 489 F. 2d at 1266 n.37 (dictum), recognized that economic hardship might not provide a defense to a particular employer.

factor, which might permit free-wheeling judicial or administrative interpretation and qualification, but a positive indication that Congress confronted and resolved in the negative the issue of whether economic considerations were to be taken into account in applying and enforcing the general duty clause. Consider, for example, the ease with which Congress could have qualified the clause by using appropriate language drawn from negligence law and its ability to do so as demonstrated by the definition of a "serious violation"<sup>58</sup> and by the use of "reasonableness" language in other provisions of the Act<sup>59</sup> and in other regulatory laws which have been interpreted to permit consideration of economic factors.<sup>60</sup> Congress could have said "reasonably free from . . . hazards" or "free from recognized hazards that are causing or likely to cause an unreasonable risk of death or serious physical harm to employees." It did neither. Furthermore, in the debates individual senators and congressmen recognized the absolute nature of the Act's duties.<sup>61</sup> But most telling, perhaps, is the reference in both the Senate and House reports to an employer's general obligation under the Act "to bring *no* adverse effects to the life and health of [his] employees throughout the course of their employment."<sup>62</sup>

The puzzling inconsistency between the assertions in the committee reports of both houses<sup>63</sup> that the general duty clause imposes common law duties, not an absolute duty, and that it calls for "no adverse effects" may be explained most plausibly by attributing to the committees an ignorance of the requirements of the common law.<sup>64</sup> Alternatively, the committees may

<sup>58</sup> Occ. Safety & Health Act § 17(j), 29 U.S.C. § 666(j) (1970). A serious violation of the Act exists "if there is a substantial probability that death or serious physical harm could result" and the employer knew or by exercising reasonable diligence could have known of the violation. The difference between a serious and nonserious violation is that penalties "shall" be assessed for the former, *id.* § 17(b), 29 U.S.C. § 666(b), but "may" be assessed for the latter, *id.* § 17(c), 29 U.S.C. § 666(c). The *Field Operations Manual* states: "Citations based on the general duty clause should be limited to alleged serious violations." FOM VIII A.2.d. The reason given is that sections 17(k) and 5(a)(1) of the Act, describing serious and general duty clause violations, use "virtually identical language." *Id.* A comparison of the two sections will reveal that the description of a general duty violation and a serious violation differ substantially. Indeed, there is no basis in the Act or in its policy for holding that a citation may not be issued for a violation of section 5(a)(1) unless it is serious as defined under section 17(k).

<sup>59</sup> See, e.g., Occ. Safety & Health Act §§ 3(8), 8(a)(2), 10(a), 10(c), & 16, 29 U.S.C. §§ 652(8), 657(a)(2), 659(a), 659(c), & 665 (1970). Cf. *H.K. Porter Co. v. Secretary of Labor*, 1 Occ. SAFETY & HEALTH REP. 1600, 1605 (OSHR Mar. 22, 1974).

<sup>60</sup> See, e.g., 15 U.S.C. §§ 1392(a) & (f) (1970). See also Age Discrimination in Employment Act of 1967, 29 U.S.C. § 628 (1970); Consumer Product Safety Act, 15 U.S.C. § 2056(a) (Supp. 1, 1972). Former state occupational safety and health laws also limited employers' duties to the exercise of reasonable care. See, e.g., OHIO REV. CODE ANN. §§ 4101.01(k), 4101.11, 4101.12 (Page 1973).

There was a provision in the administration bill which would have permitted the standard setting board to "provide such reasonable limitations and . . . make . . . rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions under this Act as it may find advisable and proper in the public interest." LEGISLATIVE HISTORY 57, 705. However, in final passage this section was limited to "reasonable variations, tolerances, and exemptions . . . necessary and proper to avoid serious impairment of the national defense." Occ. Safety & Health Act § 16, 29 U.S.C. § 665 (1970) (emphasis added).

<sup>61</sup> See, e.g., Statement of Senator Saxbe, in LEGISLATIVE HISTORY 345.

<sup>62</sup> *Id.* at 149, 851 (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> For example, both reports contain the overbroad statement that "[u]nder principles of

have been referring either to the negligence standard as it has developed into virtually absolute liability under the F.E.L.A.,<sup>65</sup> or to more recent judge-made doctrines of liability developed in the products liability area, or, quite erroneously, to workmen's compensation. If the reference is to F.E.L.A. standards, it is at least arguable that a negligence-type calculus, albeit a very stringent one,<sup>66</sup> might be applied in determining whether a violation of the general duty clause has been made out. Under this calculus the economic burden on the employer might become relevant. Congress' view that the duty is not an absolute one, however, may also be explained by the fact that the duty is hedged with expressed limitations.<sup>67</sup> The better approach, I suggest, is to forego an attempt to fashion clarity from confusion and instead to recognize either that the language in the reports was deliberately fudged or that it was not written by a lawyer terribly conversant with tort law.

Finally, practical and policy considerations provide strong support for an interpretation which excludes relevance for considerations of feasibility or economic hardship with respect to a particular employer. In the first place, neither compliance officers nor their area directors are likely to be in a position to assess economic factors in order to determine whether removal of a particular hazard will cause an employer undue hardship. Secondly, the general duty clause is already limited to hazards which are causing or likely to cause serious physical consequences. It is inconsistent with the entire tenor of the Act and its history to permit hazards of such dimension to continue because their removal would cause economic harm to the employer. Thirdly, there is a policy favoring uniformity of application of the Act among all employers regardless of size.<sup>68</sup> Workplaces of large employers probably tend to be relatively less hazardous than workplaces of small employers performing the same or similar operations.<sup>69</sup> However, to permit recognized serious hazards to exist in small businesses because of economic considerations, but to require large firms in the same industry to abate the same hazards, would constitute an unfair advantage to the small firms, an advantage subsidized by the health and safety of their workers. While Congress recognized the problem of achieving uniform high standards of health and safety in small as well as large workplaces, it responded only by making loans available from the Small Business Administration to assist small employers<sup>70</sup> and by requiring the Secretary of Labor to consider the size of the employer's business in setting penalties

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common law, individuals are obliged to refrain from actions which cause harm to others." *Id.*

<sup>65</sup> The report of the Senate Committee refers expressly to F.E.L.A. *Id.* at 851. In addition, in describing to Senator Dominick how the Act would operate, Senator Saxbe used as his example a famous F.E.L.A. case, *Gallick v. Baltimore & O.R.R.*, 372 U.S. 108 (1963), involving liability for a "bug bite." LEGISLATIVE HISTORY 345.

<sup>66</sup> In damages actions under F.E.L.A., "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri P.R.R.*, 352 U.S. 500, 506 (1957).

<sup>67</sup> See text at p. 617 *supra*.

<sup>68</sup> See LEGISLATIVE HISTORY 144.

<sup>69</sup> See Statement of Jacob Clayman, Administrative Director, Industrial Union Department, AFL-CIO, in 1973 *Oversight Hearings* 183.

<sup>70</sup> 15 U.S.C. § 636(b)(5) (1970).

for violations of the Act.<sup>71</sup> Congress did not provide for exceptions or variances based on employer size.

If the foregoing analysis, rejecting a negligence-type calculus, is correct a further problem arises: how to deal with situations, not mentioned in the Act and not clearly recognized in the legislative history, in which it would be ludicrous, grossly unfair, or unwarranted by implied policy to penalize or even order abatement of certain hazards in particular industries or lines of employment. Such situations include employments of great public importance or which, as a class, have obvious and virtually universal public and congressional approbation but which cannot be carried on without the presence of some such hazards. Examples include professional athletics, police work, fire prevention, explosives manufacturing, and some kinds of scientific experimentation.<sup>72</sup> It is here<sup>73</sup> that the qualification "so far as possible," found in the Act's statement of purposes and policy, should be applied. In such employments, hazards should not be deemed violations of the general duty clause if such hazards are not preventable except by prohibiting the activity or by rendering the activity ineffective to serve its public purpose. On the other hand, the existence of hazards which could be mitigated or prevented by the enforcement of safety rules, by the use of protective devices, or by other means which permit the activity to be carried on effectively would still constitute general duty violations.

The rationale for this special class of exceptions is neither that the general duty clause applies only to hazards preventable by feasible means, as suggested by Judge Wright in *National Realty*,<sup>74</sup> nor that public interest and public utility may be fed into a negligence-type calculus to determine whether enforcement is "feasible." Rather, it is simply that Congress cannot be assumed to have intended to close such employments without substantial debate and without expressly so providing in the Act. However, it should never be lightly presumed that a particular employment falls within this class of "implied" exceptions, since the existence of such a class can only be justified as a necessary and limited exception to the general view that Congress only intended exemptions and variances which it expressly wrote into the Act.

### C. The Feasibility Criterion

Even if OSHA officers may not, by virtue of the foregoing analysis, take economic considerations into account or otherwise predicate their decision to issue a citation for a general duty violation on a determination of reasonableness, the question remains whether the court in *National Realty* was cor-

<sup>71</sup> Occ. Safety & Health Act § 17(i), 29 U.S.C. § 666(i) (1970).

<sup>72</sup> Employments which contain some inherent dangers from outside factors over which an employer has no control—such as traffic hazards to bus drivers—and which are therefore inherently dangerous, may also be included in this category. See LEGISLATIVE HISTORY 480. See also FOM VIII A.2.c.(2).

<sup>73</sup> And in the provision allowing exceptions for reasons of national security. Occ. Safety & Health Act § 16, 29 U.S.C. § 665 (1970).

<sup>74</sup> *National Realty & Constr. Co. v. OSHRC*, 489 F.2d at 1266. Cf. *Brennan v. OSHRC*, — F.2d — (3d Cir. 1974) ("so far as possible" language suggests that section 5(a)(1) duty must be achievable).

rect in limiting the general duty to those hazards which are recognized by safety experts as preventable by feasible means.<sup>75</sup>

Judge Wright's approach in *National Realty* does have several virtues absent in the "reasonableness" approach. (1) Presumably, compliance officers and others charged with the enforcement of the Act will find it easier to discover and apply safety experts' views of preventability and feasibility than to make an on-the-scene evaluation of reasonableness during each inspection. (2) To the extent that safety experts tend to develop industry-wide standards, rather than standards for particular businesses, there is little risk of preferential treatment for small businesses.<sup>76</sup> And (3), the approach appears consistent with a general legislative intent to draw heavily on the expertise of occupational safety and health experts.<sup>77</sup>

On the other hand, this approach raises significant practical and policy problems.<sup>78</sup> In the first place, the statutory language says "recognized" and not "recognized and feasibly preventable." While the legislative history reflected much confusion about the meaning of the word "recognized," including who would do the recognizing,<sup>79</sup> the question of preventability only arose with respect to assertions that it would be unfair to penalize an employer for failing to eliminate a hazard he did not or could not know existed.<sup>80</sup> Judge Wright's approach also suggests erroneously that safety experts would only give "recognition" to feasibly preventable hazards. While possibly true with respect to experts employed by management, there is nothing in the court's opinion or in the legislative history to suggest that the words "recognized hazard" constitute a term of art with such meaning among safety experts, and there is some more recent evidence that it does not.<sup>81</sup> Further, because of the broad coverage of the Act there may well be many types of employments and, indeed, industries in which safety standards have not been developed by experts. In such situations, serious hazards may develop which are recognized by the employer himself or by most of the employers in the industry. It was presumably one of the purposes of the general duty clause to reach and prevent such hazards.<sup>82</sup> To deny OSHA officials the power after an inspection to cite for hazards that are generally known to exist in the industry,

<sup>75</sup> *Id.*

<sup>76</sup> *But see id.* n.37.

<sup>77</sup> Various sections of the Act require the Secretary of Labor to draw advice from safety experts. *See, e.g.*, Occ. Safety & Health Act §§ 7(a)(1) & (b), 20, 29 U.S.C. §§ 656(a)(1) & (b), 669 (1970).

<sup>78</sup> The requirement that the Occupational Safety and Health Administration henceforth bear the burden of proving the feasible means by which the hazard could be prevented, *National Realty & Constr. Co. v. OSHRC*, 489 F.2d at 1266, would require compliance officers to be trained not only in how to recognize violations, a difficult enough task, but how to avoid them, a matter better left to experts familiar with the business or industry. *See, e.g.*, *Secretary of Labor v. Getter Trucking, Inc.*, 1 OCC. SAFETY & HEALTH REP. 1743 (OSHRC Apr. 30, 1974).

<sup>79</sup> *See* LEGISLATIVE HISTORY 346. *See also* Morey 995-96, 1001-02. *Cf.* *National Realty & Constr. Co. v. OSHRC*, 489 F.2d at 1265.

<sup>80</sup> *See* LEGISLATIVE HISTORY 877, 881. *See also id.* at 380.

<sup>81</sup> In *Industrial Union Dep't, AFL-CIO v. Hodgson*, for example, the recommendations of NIOSH, presumably based on expert determinations, for immediate implementation of standards for asbestos dust were delayed for two years by the Secretary of Labor in order to take into account problems of economic feasibility ignored by NIOSH experts. 499 F.2d at 479.

<sup>82</sup> *See, e.g.*, LEGISLATIVE HISTORY 149, 851-52.

that are obvious, or that are actually known by the employer<sup>83</sup> would be demoralizing to both compliance officers and to the employees whose safety and health the Act was designed to protect. Finally, there is nothing in the Act or its history to suggest that a statutory hazard, once recognized, should not be prevented by closing down the employments in which it exists in those rare cases when no more feasible means are available. To the extent that such power exists, all such hazards are preventable.<sup>84</sup> Indeed, the *National Realty* court's only relevant citations<sup>85</sup>—to the “so far as possible” language in the purposes clause, to language of the House committee report which asserts that (an earlier, though more expansive version of) the general duty clause protects workers from “preventable” dangers, and to the definition of “duty” in section 4 of the *Restatement of Torts*<sup>86</sup>—do indeed suggest that the general duty only applies to preventable hazards, but in no way support the view that preventability is limited by feasibility.<sup>87</sup>

#### D. The Meaning of “Recognized”

Although feasibility and other elements of the negligence calculus are thus not part of the determination, the proper definition of “recognized” and “likely” still requires clarification. However, the legislative history provides no clear-cut definition of what constitutes a “recognized” hazard.<sup>88</sup> What does seem clear is that Congress did not adopt the standard of knowledge and knowl-edgeability, including the duty to inspect for hazards, which would be required by common law of employer-invitors to employee-business visitors.<sup>89</sup> That standard, like other negligence concepts mentioned earlier, would be difficult to apply efficiently in the Act's administrative enforcement scheme.<sup>90</sup> On the other hand, requiring employers to know of and eliminate hazards

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<sup>83</sup> It is by no means clear that *National Realty* requires this result. The court merely held that a hazard which safety experts deemed feasibly preventable was “recognized.” It was not called upon to decide whether hazards generically recognized by most of the members of an industry or actually recognized by a particular employer, though not acknowledged by safety experts, would be deemed recognized. The thrust of the decision suggests they might be so recognized if, but only if, their prevention was feasible. 489 F.2d at 1265 n.32, 1265-67. However, the Court of Appeals for the Eighth Circuit has held that a hazard is recognized if personally known to the employer. *Brennan v. OSHRC*, — F.2d — (8th Cir. 1974).

<sup>84</sup> Morey 993.

<sup>85</sup> 489 F.2d at 1266 n.35.

<sup>86</sup> RESTATEMENT (SECOND) OF TORTS § 4 (1965).

<sup>87</sup> The *National Realty* court cites section 4 to support its view that “the very word duty implies an obligation capable of achievement.” 489 F.2d at 1266 n.35. That may be true, but refraining from an activity is one means of fulfilling an obligation. Furthermore, comment *b* to section 4 makes it clear that the section only defines “duty” in the context of the law of negligence, RESTATEMENT (SECOND) OF TORTS § 4, comment *b* (1965), as opposed to duties which may arise under other tort rules.

<sup>88</sup> Cf. Morey 995-96, 1001-03. See also FOM VIII A.2.b.(1).

<sup>89</sup> Senator Dominick offered an amendment to the Senate bill which would have substituted “readily apparent” for “recognized.” LEGISLATIVE HISTORY 380.

<sup>90</sup> Except, of course, in obvious cases. Such determinations are necessary in order to establish a serious violation, Occ. Safety & Health Act § 17(j), 29 U.S.C. § 666(j) (1970). However, there is no compelling reason for compliance officers to prove that a violation is serious rather than nonserious. Compare *id.* § 17(b), 29 U.S.C. § 666(b), with *id.* § 17(c), 29 U.S.C. § 666(c).

(1) generally understood by "conscientious" safety experts<sup>91</sup> or by members of the industry to exist in a particular industry or type of business,<sup>91a</sup> (2) obvious on visual inspection of the workplace, or (3) actually known by the employer,<sup>91b</sup> would be fairly easy to administer by compliance officers and would not impose an excessive burden on employers to expend large sums searching out risks not generally known to exist in the particular employment. It would, however, require them to keep abreast of safety developments in their industry.

This interpretation of the "recognized" requirement has the virtue of avoiding distortion of the plain meaning of words which, with increasing justification, is likely to irritate laymen, especially those whose safety and health are supposed to be protected by the Act. It is not unreasonable to infer that a serious hazard the existence of which is obvious to the senses or which has specifically been brought to the employer's attention has been "recognized." But most persuasive is the argument that the suggested interpretation is consistent with the underlying policy of the Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."

#### E. The Meaning of "Likely"

The requirement that the hazard be "causing or likely to cause" serious harm should in no event be equated with the preponderance of evidence requirement of the burden of proof in negligence cases, as seemed to be the case in the original *Compliance Operations Manual*.<sup>92</sup> To require that a compliance officer establish more likely than not that a serious injury will occur as the result of a particular hazard would all but eliminate the effectiveness of the general duty clause, particularly in industries where recognized hazards abound but few employees of any particular small employer have a better than 50 per cent chance of suffering harm from a particular hazard in any given period of time. Even if the general duty clause were held to impose a negligence-type standard of care on employers, the likelihood of harm under the negligence calculus would only have to be unreasonably great in view of the seriousness of the harm and the burden of avoiding it; even a slight possibility might suffice in some cases.<sup>93</sup> It is evident that the drafters of the Manual misapplied the burden required to establish a violation—a preponderance of the evidence<sup>94</sup>—to the question whether there is sufficient likelihood that the hazard will cause harm.

<sup>91</sup> *National Realty & Constr. Co. v. OSHRC*, 489 F.2d at 1266.

<sup>91a</sup> *American Smelting & Refining Co. v. OSHRC*, — F.2d — (8th Cir. 1974).

<sup>91b</sup> *Brennan v. OSHRC*, — F.2d — (8th Cir. 1974).

<sup>92</sup> See OSHA, U.S. DEP'T OF LABOR, COMPLIANCE OPERATIONS MANUAL VIII-2 (1972). The OSHRC, however, has held that the term "likely" denotes a higher degree of probability than a mere possibility." *Secretary of Labor v. Arizona Pub. Serv. Co.*, 1 OCC. SAFETY & HEALTH REP. 1369 (OSHRC Oct. 18, 1973). The relevant provision of the *Compliance Operations Manual* has been omitted from the *Field Operations Manual*, FOM VIII A.2.b.(2).

<sup>93</sup> PROSSER 145-49.

<sup>94</sup> See *Secretary of Labor v. Armor Elevator Co.*, 1 OCC. SAFETY & HEALTH REP. 1409 (OSHRC Nov. 20, 1973).

This still leaves open the question of how likely the advent of serious harm has to be in order to meet the statutory standard of likelihood. Richard Morey has suggested that the appropriate test is "plausibility, not probability" or "whether reasonably foreseeable circumstances could lead to the perceived hazards resulting in serious physical harm or death."<sup>95</sup> Judge Wright in *National Realty* accepted and embellished the plausibility test: "If evidence is presented that a practice could eventuate in serious physical harm upon other than a freakish or utterly implausible concurrence of circumstances, the Commission's expert determination of likelihood should be accorded considerable deference by the courts."<sup>96</sup> Since there is no indication of the required degree of likelihood, the word likely alone does not really provide much illumination. Therefore, Judge Wright's solution, to leave the matter, within limits, to the expert determination (more likely the informed discretion) of the OSHRC is a fair resolution of the issue.

#### F. Conclusion

It follows from the foregoing analysis that the general duty clause provides a qualified absolute standard for safety rather than a relative standard balanced by considerations of economic or other feasibility. In view of the dimensions of the safety problem, such a standard does not seem excessively harsh, particularly if the existing qualifications are considered. A hazard has to be recognized, not merely recognizable by a reasonably prudent man under the same or similar circumstances. The hazard has to be causing or threatening death or serious harm, thereby excluding risks of only minor harm which might be encompassed by a negligence standard. The threat has to be one of physical harm, not of emotional harm, which is increasingly becoming actionable under negligence law. And the hazard is only actionable if it is causing or likely to cause the statutory harm, thus possibly excluding some hazards which might have been actionable under negligence law if injury in fact ensued. With these significant qualifications it does not seem unreasonable for Congress to have decided to eliminate all such statutory hazards from the workplace. To say that an employer must eliminate such hazards from the workplace is not the same as saying that the employer's duty is absolute or that he is an insurer, as those terms are used in tort law or in the Act's legislative history. That the cost of eliminating the hazards might cause some marginal or unavoidably hazardous employments to shut down may be unfortunate, but no more unfortunate than forcing the closing of establishments that cannot afford to comply with tort duties or that are rendered bankrupt by tort judgments. To adopt an interpretation of the general duty clause more qualified than that offered here would deny to workers the "safety bill of rights" promised when the Act was passed, both by weakening their protection against serious injury-creating hazards and by imposing difficult decisions and evidentiary burdens on an inspection and enforcement staff already inadequate to achieve the Act's objectives with respect to all covered employments.

<sup>95</sup> Morey 997-98.

<sup>96</sup> 489 F.2d at 1265 n.33.



## III

## THE EFFECT OF THE ACT ON TORT REMEDIES

While administrative regulation of safety and health may and frequently does affect the rights of the class intended to be protected by the legislation and the corresponding liability of those subject to regulation, the Occupational Safety and Health Act of 1970 contains express language designed to minimize, if not to eliminate, such effect:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.<sup>97</sup>

Although this section on its face seems clearly to prohibit effects on common law and statutory rights, as well as on workmen's compensation, the legislative history reflects the same sort of confusion about what is meant by common law rights that was observed with respect to the nature of the duties imposed by the general duty clause. Thus, both Senate and House committee reports indicate an intention not to "affect any Federal or state workmen's compensation laws, or the rights, duties, or liabilities of employers and employees under *them*,"<sup>98</sup> but are silent as to intention with respect to other common law and statutory rights. That the language of the section prohibits affecting such rights only "with respect to injuries, diseases, or death of employees arising out of, or in the course of employment," and that the emphasized phrase constitutes a term of art under workmen's compensation law, hardly excludes the possibility that rights other than those provided under workmen's compensation acts might be created by such injury, disease, or death.

Whatever the intention, however, the Act will unavoidably have an effect on some common law rights and possibly on rights under workmen's compensation. This consequence flows from the fact that workmen in some states still retain the right to sue their employers at common law or by statute for damages for work-related injuries.<sup>99</sup> In addition, workmen's compensation benefits are increased in some states if the injured employee can prove that his injury was caused by his employer's violation of a safety statute or regulation.<sup>100</sup> Thus, to the extent that existing state safety statutes and administrative regulations are changed or eliminated as a result of the Act, either by replacement by federal standards<sup>101</sup> or by different state standards promulgated under a state plan, employees' rights and employers' obligations, either under

<sup>97</sup> Occ. Safety & Health Act § 4(b)(4), 29 U.S.C. § 653(b)(4) (1970).

<sup>98</sup> LEGISLATIVE HISTORY 162, 864 (emphasis added).

<sup>99</sup> See 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 67 (1974). In about two-thirds of the states, workmen or employees may elect to retain common law rights and duties.

<sup>100</sup> See *id.* § 69. See, e.g., OHIO CONST. art. 2, § 35.

<sup>101</sup> State occupational safety and health standards, whether statutory or promulgated by administrative regulation, are by clear implication preempted by the Act except in two situations. (1) Where no federal standard is in effect with respect to particular occupational safety or health issues, the state may continue to enforce state standards applicable to those issues, Occ. Safety & Health Act § 18(a), 29 U.S.C. § 667(a) (1970). (2) Where a state plan is approved, the state may enforce its own standard with respect to issues covered by the plan. Language in the administra-

doctrines such as negligence per se<sup>102</sup> or under the workmen's compensation surcharge, must likewise change.

A sensible reading of the section, therefore, would seem to bar the implication of new statutory causes of action for damages under the Act, at least in suits by employees against their employers,<sup>103</sup> but permit new or different safety and health regulations promulgated under the Act, or under state plans, to be used in other actions to the same extent non-OSHA safety and health regulations are permitted to be used.<sup>104</sup> While this interpretation is not without its difficulties, it has the virtue of keeping standards of care in negligence cases in conformity with standards required by the Act and of avoiding the confusion which might be caused by the existence of two divergent sets of regulations in states which permit a workmen's compensation surcharge. Most importantly, the broad safety and health objectives of the Act may be supported, and chance of their achievement enhanced, by permitting OSHA standards to be given effect in private actions. Even without Congress' expression of intention not to affect existing rights, the usual reasons advanced for implying a cause of action—that adequate state remedies are not available, that uniform effects are required nationwide, or that a statutory cause of action is necessary to support the legislative policy<sup>105</sup>—do not at this time seem to be very cogent here. It should be noted for future reference, however, that further deterioration of workmen's compensation benefits relative to workers' salaries and the inflated dollar could so cheapen the cost of workmen's compensation that employers might find it less expensive to avoid taking costly measures to come into compliance with the Act and risk OSHA penalties<sup>106</sup> than to prevent worker harm. In such event, incentives to employer self-enforcement would be diluted, justifying a re-examination of whether a statutory cause of action might be necessary to achieve the Act's policies.

Assuming some effect for OSHA standards in private damage actions, several questions remain. (1) Should violations of specific standards constitute conclusive evidence of negligence? (2) If not conclusive, what is the relevance of such a violation? (3) Should violation of the general duty clause be given the same effect as a violation of a specific standard? (4) To what extent should compliance with OSHA standards or the general duty clause constitute ev-

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tion bill which would have avoided preemption except in cases of actual conflict between state and federal standards was not included in the bill. See LEGISLATIVE HISTORY 27. Cf. *Columbus Coated Fabrics v. Industrial Comm'n of Ohio*, — F.2d — (6th Cir. 1974).

<sup>102</sup> See generally PROSSER 200-04.

<sup>103</sup> *Accord*, *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974); *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974); *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670 (E.D. La.), *aff'd per curiam*, 483 F.2d 67 (5th Cir. 1973); *Hare v. Federal Compress & Warehouse Co.*, 359 F. Supp. 214 (N.D. Miss. 1973). But see Comment, *Federal Common Law Remedies Under the Occupational Safety and Health Act of 1970*, 47 WASH. L. REV. 629 (1972). Unaccountably, this Comment does not take into consideration the prohibition of section 4(b)(4) of the Act, Occ. Safety & Health Act § 4(b)(4), 29 U.S.C. § 653(b)(4) (1970).

<sup>104</sup> See generally Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEXAS L. REV. 143 (1949) [hereinafter cited as Morris].

<sup>105</sup> See Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291-96 (1963).

<sup>106</sup> Penalties have tended to be low except for repeated or willful violations or continuing failures to abate a violation.

idence of due care? (5) What is the relevance of compliance or noncompliance with OSHA standards in employees' third party actions against (a) employers of persons other than the employee-plaintiff, (b) non-employers, and (c) fellow employees? (6) Will an employee's violation of his duties under the Act constitute a complete or partial defense, under contributory negligence or comparative negligence, in actions brought by the employee to recover damages for his injuries? And, (7) should failures by persons charged with enforcement of the Act, such as compliance officers, give rise to private damage actions by employees or employers?<sup>107</sup>

### A. Actions By an Employee Against His Employer

#### 1. *Using the Act Offensively*

In those situations where an employee retains a common law right of action for negligence against his employer, the effect of proof of the employer's violation of a specific standard or his general duty under the Act should turn on whether violation of such duty or standard is necessarily a failure to exercise due care or only constitutes evidence thereof.<sup>108</sup> The negligence calculus has already been shown to be irrelevant to whether an employer has violated the general duty clause.<sup>109</sup> Similarly, there is nothing in the Act or its legislative history which suggests that specific standards are to be developed on the basis of what safety and health precautions are "reasonable" either for an entire industry<sup>110</sup> or for specific employers.<sup>111</sup> It follows, then, that violation by an employer of his general duty or specific standards ought not to constitute conclusive evidence of negligence.

On the other hand, violations of duties under the Act should properly be admitted as evidence of negligence. In the first place, it can be argued that employers who fail to comply with mandatory safety regulations without justification are acting unreasonably.<sup>112</sup> Further, the existence of specific standards will generally constitute evidence that an employer knew or should

<sup>107</sup> Other questions relating to the effect of the Act in tort actions, such as the use of records kept by employers as evidence, the use of testimony by OSHA compliance officers, admissibility and other uses of medical records, and the extent to which breach of duties created by the Act but not directly related to safety, such as the prohibition against discrimination, Occ. Safety & Health Act § 11(c), 29 U.S.C. § 660(c) (1970), and the Secretary's duty to protect trade secrets, *id.* § 15, 29 U.S.C. § 664, give rise to possible tort actions, will not be discussed here. See generally Stramondo, *Litigation Impact*, 9 TRIAL, Jul.-Aug. 1973, at 29.

<sup>108</sup> See generally Morris.

<sup>109</sup> See text at pp. 616-27 *supra*. Negligence may be relevant, however, in determining whether a violation is "serious." See Occ. Safety & Health Act § 17(j), 29 U.S.C. § 666(j) (1970).

<sup>110</sup> But see Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d at 477-78 (Secretary of Labor may consider economic feasibility).

<sup>111</sup> In *Industrial Union Dep't, AFL-CIO v. Hodgson*, the court stated that "the concept of economic feasibility [does not] necessarily guarantee the continued existence of individual employers." *Id.* at 478. See also Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147, 1161-63 (1942).

<sup>112</sup> In such cases evidence of violation should be treated as negligence per se. See *Arthur v. Flota Mercante Gran Centro Americana S.A.*, 487 F.2d 561 (5th Cir. 1973) (violation of OSHA standard held negligence per se). See also Morris 147-48. The same reasoning applies to a failure to abate a hazard after a citation and abatement order have been issued, Occ. Safety & Health Act § 17(d), 29 U.S.C. § 666(d) (1970), and to a failure to comply with a posting requirement,

have known of the hazard the regulation was designed to eliminate,<sup>113</sup> although it should be open for an employer, particularly a small one, to show that because the Act's administrators failed to provide adequate notice or because of other special circumstances, it was not unreasonable for him or for employers in his business or industry to be unaware of the hazard.<sup>114</sup> An individual employer should also be permitted to offer evidence to show that it was not unreasonable for him to fail to comply with a particular standard either because the burden of compliance exceeded the risk and likelihood of injury or because, although not in compliance, his place of employment was, by virtue of other safety or health measures, as safe as it would have been if he had been in compliance.<sup>115</sup>

The general duty, too, may require more than reasonable conduct.<sup>116</sup> In addition, violations of the general duty are particularly inappropriate for negligence per se standards because their generality is almost equal to that of the negligence standard itself. However, because an employer only violates his general duty when the hazard is "recognized," proof of such violation should establish that the employer knew or should have known of the hazard because it was generally known in the industry, obvious or actually known to the employer, or because the Act creates a special duty to keep abreast of the opinions of safety experts. The employer has a heavy burden, indeed, if he tries to show that because of his special circumstances he reasonably failed to know of a widely recognized or obvious hazard. Further, proof of a general duty violation tends to show that the risk was of death or "serious physical harm," and that the hazard was "likely" to cause such harm, as those terms are defined under the Act.

While violations of the Act may constitute evidence of negligence, admission of specific determinations issuing or upholding citations or penalties under the Act should be viewed with caution. From a practical perspective, enforcement of the Act, particularly the work of the OSHRC, could be burdened and hampered if employers charged with injury-associated violations felt compelled to contest and perhaps appeal each citation or penalty issued for such violations in order to avoid the powerful effect of having such determinations introduced in evidence at trial of a negligence claim.<sup>117</sup> On the other hand, employers not aware of possible evidentiary uses are unlikely to contest even unwarranted citations as to which there are no penal-

*id.* § 17(h), 29 U.S.C. § 666(h). In the latter situation, however, plaintiff might still have difficulty proving that the failure to post a notice was a proximate cause of his injuries.

<sup>113</sup> See Morris 150-51. Moreover, violation of section 17(d), failure to abate after citation, would constitute evidence of actual knowledge. Occ. Safety & Health Act § 17(d), 29 U.S.C. § 666(d) (1970).

<sup>114</sup> Morris 158.

<sup>115</sup> This situation is similar to nonconformity to industry custom, as opposed to subconformity. See generally Morris, *supra* note 111.

<sup>116</sup> See National Realty & Constr. Co. v. OSHRC, 489 F.2d at 1265 n.34. Furthermore, the court stipulated that "employers have a general duty to do *virtually everything possible* to prevent and repress hazardous conduct by employees." *Id.* at 1268 (emphasis added).

<sup>117</sup> The Occupational Safety and Health Administration gives priority in determining which employers to inspect to employments where injuries have actually occurred. FOM IV-1 to -2. Most of the contested cases dealt with by the OSHRC involve actual injuries. See generally Decisions, 1 OCC. SAFETY & HEALTH REP. (1974).

ties assessed or, as is the usual case, as to which only light penalties are assessed. In such cases it would be unfair to give OSHA determinations evidentiary weight.

Where citations are contested and taken to the OSHRC there is somewhat greater justification for admitting the OSHRC finding into evidence. Hearing examiners use a "preponderance of the evidence" standard of proof in determining whether to affirm, modify, or set aside a citation or penalty.<sup>118</sup> An employer aggrieved by the hearing examiner's decision may seek discretionary review by the OSHRC itself.<sup>119</sup> If granted, the Commission will apply the same burden of proof. Thus, it can be argued that an employer who contests a violation and has a hearing before an examiner, and possibly the entire Commission, has actually had his day in court and, therefore, should not be permitted to contest the admissibility of the Commission's decision in a negligence action. However, there are countervailing considerations: the wide coverage of the Act which includes very small businesses and marginal employers, gives substance to the need for simple, informal, inexpensive, and lawyerless review procedures if such employers are to have a fair opportunity to contest citations and penalties. If OSHRC determinations become admissible in negligence actions, only uninformed employers will dare contest injury-associated citations and penalties without a lawyer. Moreover, if, as recommended above, uncontested citations and penalties are excluded from evidence in negligence actions, then it would be unwise to admit contested determinations, since to do so might discourage employers from contesting at all. In short, the "damages-action" tail should not be permitted to wag the OSHA dog; OSHA dispute-settlement machinery should not be encumbered with effects beyond those provided in the Act itself.

## 2. *Using the Act Defensively*

Violation of OSHA standards and rules is no more conclusive of an employer's negligence than is compliance conclusive of due care. The fact that an employer has complied with all promulgated standards does not speak to his negligence with respect to safety and health issues not covered by OSHA standards. And, as was clearly recognized in the legislative history, standards—particularly consensus standards adopted wholesale without opportunity for full hearing—may be obsolete or inadequate or even counterproductive of safety and health.<sup>120</sup> Further, even standards promulgated by the Secretary of Labor after the most ample section 6 hearing may, as Paul Brodeur's detailed and perceptive study suggests, emerge as less protective of employees than a jury might find to be reasonable care for an employer under all the circumstances.<sup>121</sup> It follows, therefore, that compliance

<sup>118</sup> See *Secretary of Labor v. Armor Elevator Co.*, 1 OCC. SAFETY & HEALTH REP. 1409 (OSHRC Nov. 20, 1973).

<sup>119</sup> Occ. Safety & Health Act § 12(i), 29 U.S.C. § 661(i) (1970); *Secretary of Labor v. Armor Elevator Co.*, 1 OCC. SAFETY & HEALTH REP. 1409 (OSHRC Nov. 20, 1973).

<sup>120</sup> LEGISLATIVE HISTORY 848.

<sup>121</sup> Brodeur, *Annals of Industry—Casualties of the Workplace*, NEW YORKER, Nov. 5, 1973, at 92.

evidence should at most be admitted as evidence of due care,<sup>122</sup> thus requiring the plaintiff to prove that the standard was inadequate and that defendant's reliance upon it did not constitute due care under the circumstances.

Normally, compliance with the general duty will as a practical matter absolve an employer from liability for negligence simply because the general duty clause usually requires more than merely reasonable precautions.<sup>123</sup> Practically, however, employers will rarely use compliance with the general duty clause as a defense since it will be easier for a defendant to show that he exercised reasonable care. Evidence of a practice of diligently searching out and eliminating hazards which might otherwise constitute general duty violations would, of course, constitute evidence of reasonable care. There are instances, however, when compliance with the general duty clause would not fulfill an employer's obligation to his employees as business visitors under the common law.<sup>124</sup> In such cases compliance with the employer's general duty is irrelevant to the issue of his liability at common law.

Determinations by the Secretary of Labor or the OSHRC that a violation does not exist should not be admissible in evidence by an employer to establish his compliance with the Act: while employees may become parties to OSHRC proceedings in cases where employers contest citations and penalties,<sup>125</sup> they may not themselves contest the Secretary's failure to issue citations or penalties.<sup>126</sup> For reasons similar to those which prohibit using collateral estoppel against those who were not parties to the first action, administrative determinations exonerating an employer in non-contested cases should not be permitted to be used defensively against an injured employee in a negligence action. But even in contested cases, where employees may become parties, OSHRC determinations should not be used defensively; if they were to become admissible, employers' and employees' attorneys might use the OSHRC forum to litigate their tort cases.

### B. The Effect of Violation of an Employee's Duties

While the Occupational Safety and Health Act of 1970 imposes a duty on each employee to abide by "occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct,"<sup>127</sup> Congress refrained from providing any sanctions or machinery to enforce the duty. Further, the intent is clear not to allow employee violations of their section 5(b) duties to constitute a defense or excuse for violations of the employer's own

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<sup>122</sup> Morris 159.

<sup>123</sup> See note 116 *supra*.

<sup>124</sup> See text at p. 617 *supra*.

<sup>125</sup> Occ. Safety & Health Act § 10(c), 29 U.S.C. § 659(c) (1970).

<sup>126</sup> The Act only provides for contest by an employer or employee representative on the ground that the time fixed for abatement of a violation by the Secretary is unreasonable. *Id.*

<sup>127</sup> *Id.* § 5(b), 29 U.S.C. § 654(b).

obligations under the Act.<sup>128</sup> Essentially, the determination of what sanctions might be imposed against violating employees was left to the process of bargaining between employers and employee representatives. Thus, except to the extent that such employee duties are enforceable in damages actions brought by or against employees, the clause has no operative effect other than, perhaps, to render unenforceable provisions in employer-employee agreements which call for violation of such duties.

Whether or not an employee violated his section 5(b) duty might become relevant in at least three situations: (1) where an employee is suing his employer or a third person for damages for employment-related injuries and the defendant pleads contributory or comparative negligence; (2) where an employee is sued for damages by another employee or third person for injuries caused by defendant's alleged failure to comply with such duty;<sup>129</sup> and (3) where an employer is sued by a third person to recover for injuries caused by an employee's negligence.

Whether an employee's violation is relevant to such situations ought not to turn on the presence or absence of sanctions against employees in the Act itself. Whatever the reasons may have been for omitting such sanctions, it is clear that there was no intent to absolve employees of their responsibilities with respect to occupational safety and health. On the contrary, there is recognition in the legislative history that, in order for the Act to succeed, cooperation and compliance by employees is essential.<sup>130</sup> That Congress in order to achieve its preventive objectives decided to lay the onus on employers should not, therefore, be taken as determining whether employee violations of their own duties should affect compensation policies applied in actions at law for damages.

Thus, in the relatively rare case where an employee retains the right to sue his own employer for negligence causing on-the-job injury, the employer ought generally be permitted to introduce evidence of the employee's violation of a safety or health rule applicable to his own conduct as evidence of the employee's contributory negligence; the rationale and analysis here is much the same as that suggested above with respect to employer violations of safety standards.<sup>131</sup>

However, a subsidiary question arises: do the rules, regulations, and orders issued pursuant to the Act—as contemplated by section 5(b)—include rules promulgated by the employer in fulfillment of the employer's own general or specific duties under the Act? For example, if an employer's general duty is to supervise his employees to insure that none ride on the running board of a front end loader, does compliance with a company rule prohibiting such riding rise to the level of an employee's section 5(b) duty? As to this question the Act and its legislative history are silent. The best response on policy grounds is also unclear because while an affirmative

<sup>128</sup> LEGISLATIVE HISTORY 150-51, 851.

<sup>129</sup> See, e.g., *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670 (E.D. La.), *aff'd per curiam*, 483 F.2d 67 (5th Cir. 1973).

<sup>130</sup> LEGISLATIVE HISTORY 150.

<sup>131</sup> See text at pp. 630-31 *supra*.

answer would further Congress' expressed interest in encouraging employee compliance, it would also lower the incentive for employer supervision while raising the incentive for an employer to issue clear-cut and detailed company safety rules.<sup>132</sup> A negative answer would have the opposite effect.

The answer to the question is important because violation of company rules is generally not held to be evidence of negligence.<sup>133</sup> While the policy usually offered to support this doctrine is to avoid discouraging industry from adopting company safety rules more stringent than due care would ordinarily require—by holding employers to the higher standard when they violate their own rules<sup>134</sup>—and while the result is just the opposite if the company can use its own rules defensively against an employee, nevertheless some courts might slavishly follow the doctrine even in the latter situation. By elevating such rules to statutory employee duties under section 5(b) the likelihood that those courts would properly treat violations of such rules as evidence of negligence would be enhanced. But, unfortunately, so would the chance that violations would erroneously be treated as conclusive of negligence, adding a significant barrier to employee recovery.

If a statutory claim or defense will not be implied against an employee for violations of his own section 5(b) duties,<sup>135</sup> then in suits by or against an employee, the effect of his violation of such duties will thus be the same whether the situation is covered by section 4(4) or not: the violation should only be deemed evidence of negligence.

### C. Actions By Employees Against Third Parties

Section 4(4) prohibits effect upon "rights, duties and liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment." The fact that Congress thought the section dealt mainly, perhaps exclusively, with workmen's compensation<sup>136</sup> suggests strongly that only employees and their own employers were covered. The use of the conjunctive in the section's language plus the language drawn from workmen's compensation provides support for an interpretation which would exclude employers other than those who employ the employee seeking to enforce his rights. This interpretation is also consistent with the general duty clause which explicitly limits the general duty to an employer's own employees.<sup>137</sup>

<sup>132</sup> Thus providing itself with a convenient defense if an employee's injury should be caused in part by the employee's failure to abide by the rule.

<sup>133</sup> See C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 153 (2d ed. 1969).

<sup>134</sup> See generally Winters, *The Evidentiary Value of Defendant's Safety Rules in a Negligence Action*, 38 NEB. L. REV. 906 (1959).

<sup>135</sup> See text at note 105 *supra*. The main reason would be that the state remedy is adequate. However, in this situation the argument against upsetting workmen's compensation by providing a duplicate remedy against the employer would not apply.

<sup>136</sup> See LEGISLATIVE HISTORY 162, 864.

<sup>137</sup> However, OSHRC Commissioner Cleary has argued convincingly that the definition of employer and employee under the Act should be expanded to cover an employer who has the ability to control the work environment with respect to hazards affecting other employers' employees. See *Secretary of Labor v. J.E. Roupp & Co.*, 1 OCC. SAFETY & HEALTH REP. 1680,



Yet the duty to comply with the Act's standards is imposed on employers and employees without limitation, and arguably that duty applies to all employers with respect to all employees—their own or another company's—who might suffer the injury or disease the Act was intended to prevent. Arguments that the general duty clause (which limits an employer's duty to his own employees) was intended also to limit the scope of the duty prescribed in section 5(a)(2) find no support in the Act or in its legislative history. Since virtually all suppliers of equipment, machinery, chemicals, and contract services to places of employment are themselves "employers," the next question is whether such employers' duties to obey specific standards protects all employees, wherever located or by whomever employed, who may be injured or suffer illness if such standards are not complied with or whether the duty only protects employees who are either working in a workplace over which the employer charged with the duty has some control or are under the control of the charged employer.

The short answer is that the Act seems intended to protect employees working in workplaces over which the charged employer has some control or who are under the control of the charged employer.<sup>138</sup> Thus, for example, one contractor constructing a scaffold has a duty to obey relevant OSHA standards which include within the umbrella of their intended protection the employees of another contractor who may use the scaffold. And landowners-employers who lease premises to other employers must obey OSHA standards with respect to portions of the premises over which they retain control, for the protection of their lessee's employees. On the other hand, manufacturers of machinery, equipment, and chemicals for sale to other employers for use off of the manufacturer's premises should not be deemed statutory "employers" under the Act with respect to employees of the vendee-employer. Support for this position is fairly substantial in both the Act and its legislative history: in general, the framers' focus of concern seemed rather clearly to be on the workplace,<sup>139</sup> the safety of which is normally under the control of employers. The definition of a safety or health standard suggests also that practices and conditions in the workplace were the exclusive target.<sup>140</sup>

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1681 (OSHR Apr. 15, 1974) (dissent). There is nothing in the Act which is inconsistent with that interpretation, *cf.* Occ. Safety & Health Act §§ 3(5), (6), 29 U.S.C. §§ 652(5), (6) (1970) (definitions of employer and employee), and the more expansive view would strengthen the Act in terms of its policy while bringing the scope of the general duty in line with the duty to obey specific standards.

<sup>138</sup> The OSHRC has held that there must be a relationship of employer and employee—meaning at least the right of the employer to control the employees, if not entirely the conventional definition—before the "employer" can be held in violation for exposing the "employees" to a hazard governed by a specific standard. *See* Secretary of Labor v. Humphreys & Harding, Inc., 1 OCC. SAFETY & HEALTH REP. 1700 (OSHR May 9, 1974). Further, it has held that an employer is not liable for exposing another's employees to a hazard *even if the employer has contracted to assume the obligation. Id.* There is no warrant in the Act or its policy for such a narrow reading of the scope of the protection to be provided by the duty to obey specific standards. *See id.* at 1702-03 (dissent by Commissioner Cleary). *See also* note 137 *supra*.

<sup>139</sup> *See generally* LEGISLATIVE HISTORY.

<sup>140</sup> "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Occ. Safety & Health Act § 3(8), 29 U.S.C. § 652(8) (1970). Although not conclusive, this definition more clearly addresses itself to steps within the control of an employer

Most importantly, the entire enforcement and standard setting mechanism established by the Act presupposes that the workplace is the relevant arena and that those employers in control of it are the relevant targets of enforcement.<sup>141</sup>

Furthermore, and not less persuasive, is the common sense interpretation of the word "employer" which in the context of the Act ought not to be stretched to include employers who do not at least exercise some control over a workplace in which the protected employees are working or over the employees themselves. Policy considerations might well justify imposing OSHA duties on manufacturers and suppliers of equipment, materials, and other substances used in the workplace. Such imposition would tend to require the manufacturer and supplier to internalize the costs of safety and health, thus increasing general deterrence. At the same time, dangerous things might be kept out of the workplace instead of being identified and rendered harmless after they come in or cause mischief. However, for reasons to be discussed shortly, OSHA will probably achieve the same result by means other than stretching the interpretation of the Act this far.

There is no basis consistent with this reasoning for implying statutory causes of action in favor of employees against those who are not their statutory "employers."<sup>142</sup> Further, even if the clause prohibiting the enlargement of employee rights is narrowly construed, and thus limited to rights against the employee's own employer, the reasons against implying a statutory cause of action to support suits against other employers in control of the workplace<sup>143</sup> would not seem to be overcome by the policies served by creating new causes of action; employees will generally be able to bring negligence actions against such third parties and benefit by asserting the violation as evidence of negligence.<sup>144</sup> Normally, this should be sufficient to get by a directed verdict.

But even if a statutory cause of action or negligence per se cannot be implied in favor of employees in suits against third parties such as manufacturers and suppliers of machinery, equipment, chemicals, and other substances, the Act is nevertheless likely to be of considerable assistance to employees and others who sue such manufacturers or suppliers based on negligence or strict liability for defective products. Whether or not such defendants owe a duty to plaintiff to comply with OSHA standards, failure to comply with applicable standards without sufficient justification—as where a manufacturer sells a machine knowing it is to be used in a workplace without providing or offering to provide a safety device required by the Act of statutory employers—should be held admissible in an action against a manufacturer or supplier for several purposes: (1) to establish defendant knew or should have known of the particular precaution

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who has responsibility for working conditions in the workplace, than to a manufacturer or supplier of equipment or chemical substances to a place of employment.

<sup>141</sup> *Id.* §§ 8-10, 29 U.S.C. §§ 657-59.

<sup>142</sup> *Accord*, *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974).

<sup>143</sup> *See* text at note 105 *supra*.

<sup>144</sup> The defendant employer, in such case, would be deemed an "employer" for purposes of the duty clause, Occ. Safety & Health Act § 5, 29 U.S.C. § 654 (1970), but not for purposes of the section prohibiting enlargement of common law rights, *id.* § 4(4), 29 U.S.C. § 653(4). This is not inconsistent since, as suggested earlier, Congress may only have intended in section 4(4) to avoid upsetting rights between employers and employees in situations normally covered by workmen's compensation. *See* text at p. 635 *supra*.

demanded by the Act; (2) to establish that defendant should have been aware of the hazard avoided by the standard; (3) as evidence that a product lacking the precaution is dangerous or defective; and, possibly (4) as evidence that the precaution is feasible. While such evidence might be rebutted in a negligence action by defendant's evidence that he nevertheless acted reasonably under the circumstances applicable to him, or by showing in a products liability case that the product, though dangerous, was not unreasonably so, or was not defective,<sup>145</sup> admission of the Act's standard should buttress the plaintiff's case.

#### D. Actions Against OSHA Personnel for Failure to Comply With Their Duties Under the Act

One of the versions of the Act, proposed in the House, provided that:

If the Secretary arbitrarily or capriciously issues or fails to issue an order under subsection (a) and any person is injured thereby either physically or financially by reason of such order or failure to issue such order, such person may bring an action against the United States in the Court of Claims in which he may recover the damages he has sustained, including reasonable court costs and attorneys' fees.<sup>146</sup>

In the final bill, this provision was left out in favor of a provision which provided employees with a mandamus action against the Secretary of Labor if he failed to seek an injunction against an imminent danger.<sup>147</sup>

The proposal and its final deletion, which followed a heated controversy over other sections of the imminent danger provision,<sup>148</sup> should for that reason not be taken to speak to the question whether compliance officers or other personnel charged with the enforcement of the Act should be held liable for negligent failures to perform their statutory duties if such negligence leads to employee or employer injury.

The Act is otherwise silent on the question. In general, however, principles developed in other analogous contexts, as where FAA inspectors negligently certify aircraft as airworthy,<sup>149</sup> would seem to apply here. Nevertheless, a few factors especially relevant to the Act deserve mention.

First, it is not clear that the "primary" duty of an employer to comply with the Act is analogous to, for example, the primary duty of a pilot, which has been held to insulate an FAA inspector from liability in suits arising out of aircraft accidents.<sup>150</sup> The legislative history indicates that the employer's duty under the Act was intended to be primary when compared with the employee's duty, not necessarily with that of third persons. It would seem preferable, therefore, to apply ordinary proximate cause concepts to situations

<sup>145</sup> See M. FRANKLIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 298-300 (1971).

<sup>146</sup> LEGISLATIVE HISTORY 838.

<sup>147</sup> Occ. Safety & Health Act § 13(d), 29 U.S.C. § 662(d) (1970). See also LEGISLATIVE HISTORY 1193 (Conference Report).

<sup>148</sup> See LEGISLATIVE HISTORY 885-87.

<sup>149</sup> Liability might accrue under the Federal Tort Claims Act, 28 U.S.C. § 2674 (1970). See Peters, *Legal Responsibility of Government for Commercial Air Safety*, 34 J. AIR L. & COM. 479 (1968). Cf. *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964); Annot., 6 A.L.R.2d 284 (1949).

<sup>150</sup> *United States v. Miller*, 303 F.2d 703 (9th Cir. 1962) (pilot operating under VFR conditions).

in which an inspector negligently fails to note a violation of OSHA standards or of the employer's general duty which subsequently results in an employee injury.<sup>151</sup> If the trier of fact finds that the employer's subsequent failure to discover and remove the hazard was a "superseding cause," then the inspector should not be held liable.<sup>152</sup>

Second, holding the government liable for the negligence of its employees in enforcing the Act is likely to enhance the effectiveness of the enforcement mechanism and thus serve Congress' objectives. Since the enforcement arm is under the Secretary of Labor—and in view of widespread industry pressure to provide more technical assistance to employers (and less enforcement)<sup>153</sup>—the negligence remedy might strengthen employees' ability to ensure effective enforcement under an administration less than enamored with the Act and its methods. Such employee self-help is entirely consistent with the congressional intent to provide employees effective participation in the Act's enforcement.<sup>154</sup>

#### CONCLUSION

In order to assure safe and healthful working conditions for American workers, the Occupational Safety and Health Act of 1970 established a comprehensive regulatory scheme using prevention, interdiction, and deterrence strategies to keep employment and the workplace free of safety and health hazards. The Act, however, was not designed to achieve restoration of losses for workers injured or made ill as a result of hazards in their employment; the restoration systems—workmen's compensation and common law actions for damages—were not to be affected. In construing the Act, therefore, the primary source should be the Act itself and its legislative history, not doctrines or policies drawn from tort law or the law of workmen's compensation. The latter can only become relevant if they are shown to further the policies of the Act better than other possible approaches.

An examination of the history of the Act reveals, however, that Congress intended to provide workers, insofar as possible, virtually absolute protection against serious work-related physical injuries and illnesses. To the extent that a balance was required between the safety and health of employees and the economic viability of employers, Congress came down heavily on the side of safety and health. In that context, rules of law which qualify employer duties by allowing serious dangers to exist if "reasonable under the circumstances," designed to do justice between individual litigants when one of them is suing for damages, cannot be permitted to qualify the stricter duties Congress imposed in order to serve its remedial purposes. Nor can the difficulties of administration associated with the application of those rules be permitted to interfere with the simple and effective administration of the Act.

<sup>151</sup> Cf. *Gibbs v. United States*, 251 F. Supp. 391 (E.D. Tenn. 1965). The court stated that the government's liability for the negligence of its inspectors "is subject to the same requirements of negligence and causation as would affect the liability of a private person in the same circumstances." *Id.* at 400.

<sup>152</sup> See RESTATEMENT (SECOND) OF TORTS §§ 440-52 (1965).

<sup>153</sup> See generally 1973 Oversight Hearings.

<sup>154</sup> See LEGISLATIVE HISTORY 150.

Conversely, rules adopted by Congress without regard to restoration policies ought not to distort the rules and undermine the operation of systems designed to restore losses and achieve justice between litigants. Therefore, until Congress decides that new reparation schemes are necessary in order to achieve better restoration, general deterrence, or both, new statutory causes of action should not be implied from the safety and health duties imposed by the Act. On the other hand, permitting new safety and health standards developed under the Act to be used as appropriate standards of conduct in common law damage actions will generally serve the Act's objectives and be consistent with policies traditionally applied in such cases.