Supreme Court of the United States

In the Matter of:

Ronald L. Crane

Petitioner

vs.

Cedar Rapids and Iowa City Railway Company,

Respondent.

Docket No. 791

Place Washington, D. C.

Date April 24, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Ronald L. Crane

Petitioner,

v. No. 791

Cedar Rapids and Iowa City Railway Company,

Respondent.

Washington, D. C.
Thursday, April 24, 1969.

The above-entitled matter came on for argument at 11:23 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 791, Ronald L. Crane, Petitioner, versus Cedar Rapids and Iowa City Railway Company.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Prettyman.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.

ON BEHALF OF PETITIONER

MR. PRETTYMAN: Mr. Chief Justice and may it please the Court.

This case involves only a single question, but one of great importance in the administration of the Federal Safety Appliance Act.

The question is whether in a suit under that Act brought by a nonrailroad employee, the railroad can assert the defense of contributory negligence.

Everyone concedes that the petitioner in this case is covered by the Act. Everyone concedes that if this same suit were brought by a railroad employee, contributory negligence -- could not be asserted as a defense even though all the facts -- were precisely the same and the violation of the Act was precisely the same as in the case of the nonrailroad employee.

Here petitioner Ronald Crane was employed as a meal-house helper by Cargill, inc. His job was to spot, weigh and help load railroad cars which were delivered empty by the respondent railroad to Cargill and after loading were picked

up again by the respondent railroad for delivery in Interstate Commerce.

The trial court properly instructed the jury, and this court can assume that "For the purpose of this case the railway cars on which plaintiff was working were being used by the defendant as part of its system."

Now on the night of the accident, 1963, petitioner Crane and his co-worker, Harris, were handling a string of six railroad cars. Harris detached or uncoupled the two most northerly cars in the string and moved them along the tracks for weighing by means of an electric winch and cable.

When these cars were returned to the string, impact was made with the remaining four cars with sufficient force to move those cars some five feet, even though the brake was on.

Now at that point the two cars clearly should have recoupled automatically to the string of four cars. This court undoubtedly knows from prior cases the Federal Safety Appliance Act as interpreted by this Court provides that railroad cars must be equipped with couplers which couple automatically by impact and when set in the proper position, of course, and which will thereafte remain coupled until set free by some purposeful act of control.

Now, in this case the knuckles were in proper position, the cars collided with sufficient impact. Both Crane and Harris, who looked at the mechanism thought and testified

that the knuckles were closed and that the couplers appeared to be locked. But in fact they were not locked.

Hours later, Harris began to move the entire string of cars forward by attaching the winch to the second car with Crane on the third car ready to put the brakes on, and the first cars, two cars, began to move out on their own, run-away cars, uncoupled to the rest of the string.

Crane thought that these run-away cars were going to ram into an empty car which he thought he had seen down the track and in which he thought men were working and consequently he quickly put the brake on the third car, he jumped down and he ran along the tracks and he climbed up a ladder on the back of the second car and began to turn the brake to stop these two run-away cars and he fell to the tracks to a cement pavement.

The bones in his feet were jammed up into his legs and he was permanently injured.

Now, before proceeding further, I want to say just a word about the statement of facts given by the respondent. We have answered each of these statements with citations to the record in our reply brief, but the most direct answer to it is that precisely the same argument on the facts was made twice below to the trial court in an effort to keep this case from going to the jury.

Once at the conclusion of our evidence, once at the conclusion of all the evidence, twice the trial judge rejected

that version of facts, twice the trial judge said, "This case can go to the jury."

Consequently, we submit that the respondent railroad is not free again here to reargue these facts which properly were for the jury and which went to the jury.

Crane brought his case in an Iowa State Court, alleging violation of the Federal Safety Appliance Act in that the railroad had provided cars with defective couplers.

From the outset of this case Crane argued that contributory negligence was not a defense, was not a defense where there was a violation of the Federal Safety Appliance Act, that liability was absolute once a violation was shown to be approximate cause of his injury.

The railroad argued otherwise and the trial judge adopted the railroad's argument and allowed the defense of contributory negligence to go to the jury and as a matter of fact put the burden on Crane to prove, absence of contributory negligence, rather than on the railroad to prove the presence of contributory negligence.

Q I suppose that is the usual rule of Iowa law?

A No, sir. As a matter of fact that is the minority rule.

Q Of Iowa law.

A Oh, I am sorry. I misunderstood you. It is a rule under Iowa law, yes, sir.

Now the jury decided for the railroad and denied all recovery to Crane. The Iowa Supreme Court affirmed with two justices dissenting, although it recognized that recent opinions of this court put the matter in some doubt.

It did not feel free to depart from what it considered older case law indicating that all common law defenses except assumption of risk are applicable to nonrailroad employees. That now is the issue before the court.

Now the problem arises because the Federal Safety Appliance Act was passed in 1893 without any specific reference to a remedy other than a suit for penalties by the United States.

Consequently, suits for violation of this Act were brought in State courts and the earliest case on contributory negligence from this court, the Schlemmer case, held that in the absence of legislation at the time of the injury in that case, taking away the defense, the common law controlled.

We show in our brief how we think Schlemmer was misinterpreted in later decisions but in any event it certainly is true that between 1911 and 1935 this court did state in dicta in several opinions that State law controlled as to the defense of contributory negligence. That certainly is true.

Q Excuse me, may I interrupt just for a moment.

I think I know the answer to this but was it your submission that, I know it was, that contributory negligence

should not provide an absolute defense to the defendant in this case, was it your submission that the rule of comparative negligence should apply or that no matter how great the plaintiff negligence may be there was still absolute liability on the part of the defendant?

It was the latter wasn't it?

A Yes, dimunition of damages under comparative negligence would come into play only in a case under FELA only and not in violation of the Federal Safety Appliance Act.

Q No.

A But you will recall that in FELA as soon as there is a violation of the Federal Safety Act the Congress made it very clear that contributory negligence went out the window altogether.

Q It was absolutely irrelevant no matter how great.

A Now FELA, of course, was passed in 1908 and by itself it covered only railroad employees. This act did set out a specific cause of action, Federal cause of action. It provided that in a suit under FELA alone as we have just pointed out the contributory negligence of the employee would diminish damages if it was only under FELA and would do away with contributory negligence if a violation of the Federal Safety Act did apply.

In those early cases under both FELA and the Safety

Act liability in those days was thought of in traditional negligence terms.

The charges to the juries in those days and even language in this court's opinions in those early days talk in terms of negligence and terms of due care and I think it is hardly surprising that this court in those early cases accepted the general doctrine that contributory negligence would be applicable.

But beginning in the late 1930's a change began to take place in the reading of the Safety Act. Commentators have pointed out that the change was comparable to the development or the evolution of the law in regard to Interstate Commerce. The court in the late 1930's sensing that the restrictions which the State courts were placing on recovering in these cases was not the will of Congress, began requiring stricter standards of liability by the railroads for violating this Safety Act.

The court finally said that liability under the Act had nothing whatever to do with negligence. Negligence was completely out of the matter and that the railroad owed an absolute duty to those properly upon its lines to maintain its equipment in efficient condition.

Then in due course the court came to the terms absolute liability and absolute prohibition in interpreting the Safety Act.

Now the use of these terms could hardly have been inadvertent or imprecise as suggested by the Iowa Supreme Court. The Shields case, for example, involved the employ of an independent contractor and, therefore, it had nothing to do with FELA, it was not brought under FELA at all and contributory negligence was specifically treated as a defense in that case.

The trial court instructed the contributory negligence was not a defense, the railroad made this a point on appeal to the Fifth Circuit, the Fifth Circuit specifically said that the plaintiff was invoking absolute liability.

This court in its opinion mentioned that plaintiff was invoking absolute liability, and then it went on to say that violation of the act did result in absolute liability. Now in the light of the record of a case like that to say that this court had merely used the term absolute liability loosely or inadvertently, of course, we say simply makes no sense.

What we are asking here is that this Safety Act be interpreted in the light of the overall intent of Congress, which was to impose upon the railroads whatever liability was necessary to make them maintain their equipment in proper condition.

Yet, look what happens now if the court adopts the reasoning of the respondent in this case. The railroad is able to turn over a car, a defective car to an independent third

party such as Cargill. The railroad knows that it is not going to receive that car back on its tracks for a period of time.

Now, if contributory negligence can be asserted by an employee of that third party it is very much to the advantage of the railroad to leave that car defective, leave it defective, wait until it gets back on its line because if the injury occurs in the interim they are going to have a lot easier time of it.

How could that possible have been the intent of Congress. Congress' intent must have been to require the railroad to fix this equipment at the earliest possible time and to impose whatever liability that it required them to do it.

And look at what other results have followed here. In this case the trial court not only placed the burden upon Mr. Crane to prove by a preponderance or a greater weight of the evidence that he was not guilty of contributory negligence, but listen to this, it instructed that if his contributory negligence contributed in any way or in any degree directly to the injury he could not recover at all.

What happened?

Mr. Crane thus winds up with less chance of recovery even though the railroad violated the Safety Act than if one of the railroad's own employees had been injured and the railroad had been guilty only of simple negligence, not even of a violation of the Safety Act, because in that case the employee

could recover diminished damages but at least damages of some kind, whereas in this case the employee of the third party can't recover at all.

Now, we just submit that that could not possibly have been the intent of Congress, that the intent was entirely the other way, because if it is one thing these two acts show when read together it is that Congress was concerned primarily about violations of the Safety Act.

That is what it was concerned about. If you compare the statutes every time the Safety Act is mentioned liability grows greater, the standards become stricter. That is what they were concerned about.

The thousands of deaths and injuries that were occurring because equipment was improper.

Now the type of interpretation that we seek here is certainly nothing new to the statute. Time and again this court has read the literal language of the Act in the light of the overall riding intent of Congress.

In one case, for example, although the Act only refers to couplers coupling automatically by impact and uncoupling without the necessity of going between cars, this court required in addition that the couplers remain coupled until set free by some purposeful act or control. That wasn't in the statute.

But this court added it because it thought that that

was the plain meaning of Congress in passing the statute. In another case the court struck the fellow servant defense from Safety Act cases, even though the Act itself made no reference w-atever to the Fellow Servant rule and the court said the obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.

In still another case it was argued that the Safety Act made clear by its various provisions that it applied only to railroad workers. And this court held it applicable to motorists on the highways as well that came across the tracks and anyone else as a matter of fact who were properly on the railroad's property.

Still again the court ruled that an assumption of risk was just as applicable to employees of a connecting carrier as it was to the defendant railroad, even though the assumption of risk provision would seem to have been applicable only to employees of the guilty carrier.

And in that case it is interesting that the court relied on both FELA and the Safety Act even though the case was brought only under the Safety Act.

This brings me to the point that has been emphasized by the court so strongly many times. That is, that the Safety Act and FELA are really correlative, interdependent, inter-related statutes. Each gained sustenance from the other. Each

must be read in the light of the other.

And we say that the specific abolition of the defense of contributory negligence in FELA permeates the entire Safety Act.

In other words, so long as the injured party is one who is covered by the Safety Act which is clearly the case, concededly the case, the railroads should not be able to use contributory negligence to defeathim any more than it can now use assumption of risk to defeat him or the Fellow Servant doctrine to defeat him.

Q Mr. Prettyman, this action was not brought under the Federal Employers' Liability Act?

A Correct.

Q It was brought only under the Federal Safety Appliance Act. So I suppose we don't have before us a question whether Mr. Crane could be considered as if he were an employee under the Federal Employers' Liability Act.

I remember vaguely that in some of the Maritime tort cases there are maybe one or two decisions in which somebody not an employee conventionally consider was held to be doing or performing the duties of an employee and therefore would come within relevant laws.

But that is not involved here because you didn't bring the action under the Federal Employers' Liability Act. So that what you are asking us to do is specifically and perhaps

solely to read the Federal Safety Appliance Act as if it contained the contributory negligence and absolute liability provisions, whatever they may be, of the Federal Employees' Liability Act. Is that right?

A Let me put it this way, Mr. Justice.

I am not urging the construction that you mentioned simply because I don't think it is necessary.

Q What construction?

A Well, you say to treat him as if he was in fact a railroad employee.

Q Well, I don't care whether you think it is necessary or not. The suit was not brought under the Employer's Liability Act.

A Well, the reason it wasn't is that FELA on its face applies only to railroad workers.

Q I understand that. So that possibility would be out, anyway?

A Yes, sir.

Q All right, now, am I right in saying that what you are asking us to do is to read the Federal Safety Appliance Act as if it contained a contributory negligence language of FELA and the glass that has accumulated with respect to FELA?

A Yes, although I might put it a little bit differently. I would say that I am asking you to realize that Congress could not possibly have meant to discriminate against

nonrailway employees reading these two statutes together. It could not possibly have meant to allow a railroad employee to recover and a nonrailroad employee properly upon the property, properly working on these cars, not to recover under precisely the same circumstances.

I think Congress' intent if you read these two statutes together as the court has said you must do is clearly to impose, as the court itself has said, absolute liability in either instance.

In the Shields case it was not under FELA either, your Honor, and yet the court said there was absolute liability.

Q It is not inconceivable to me that Congress might establish one set of rules as to negligence for employees and another for nonemployees.

A I agree that it is not inconceivable but if your Honor will look at the legislative history you will find that Congress clearly recognized right from the beginning that others other than railroad employees were going to be clearly affected.

It provided in the preamble to the Act, for example, that this was Act was an Act to promote the safety of employees and travelers upon railroads by compelling ---

Q That is the Safety Act.

A That is correct, sir.

And I am saying that the Safety Act provision in FELA, that is the provision that once the Safety Act is violated in FELA you have a higher standard. It clearly implies that the ---

Q I think in a logic course that I took in college would have styled that as running into the fallacy of the undistributed ---

Because it is true that Congress talked about the Safety Appliance Act as having a bearing upon employees but it did not talk about or did it talk about the Federal Employers' Liability Act as having an applicability to nonemployees?

A Well, the FELA, of course, was passed later, in 1908, and that statute provides as you know simply that once the Safety Appliance Act is violated, the contributory negligence goes out.

This court has gone on in later cases to make clear the class of people who were covered by the Safety Appliance Act, greatly broadening it and we simply say that this court has recognized that you are not going to discriminate when you raise these two Acts together unless you find specific Congressional intent to rule out this kind of interpretation.

And we certainly find no legislative history of any kind indicating any attempt to discriminate against or make the burden greater for the nonrailroad employee.

I grant, your Honor, that perhaps it would not be

beyond the power of Congress to do so. But the point of it is that we can't find any indication that they did intend to do so.

Now we pointed in our brief to all kinds of defenses that the States could use and they are presently using in their State cases in ordinary negligence actions to defeat claims by plaintiffs.

And if all these are applicable in the respective States under the Federal statute we say it is going to encourage exactly what Congress was attempting to frustrate, namely a spotty and differing recovery in each State under the Federal statute depending upon whether the local rule happens to be stringent or liber in the particular case.

So in summary we say that absent the specific intent to discriminate that the court's use of the term absolute liability in recent years in these cases was purposeful, and that so long as there is a defect, as clearly there was here, so long as there is a causal relationship between the defect and the injury that liability automatically follows.

We submit that we are long past the day when an employee merely because of some negligent act, no matter how slight, thereby excludes himself from all recovery under remedial legislation of this kind.

I will save the rest of my time for rebuttal, if I may.

MR. CHIEF JUSTICE WARREN: Mr. Dallas.

ORAL ARGUMENT OF WILLIAM M. DALLAS, ESQ.

ON BEHALF OF RESPONDENT

MR. DALLAS: Mr. Chief Justice.

Your Honor put the finger on the very pulse of this problem here and the question is when the Iowa court decided it on the basis that this was an action brought by a non-employee of the railroad and that only in those instances where the action was brought by a railroad employee was the plaintiff entitled to claim the benefits of the Federal Employers' Liability Act.

The court cited the many, many cases which had been decided by this court which held that contributory negligence was a defense in all those actions except where the Federal Employers' Liability Act was involved.

What we in effect have here is an endeavor to reverse a construction of the Federal Employers' Liability Act that has been in existence for almost 60 years.

The very first case that this court had occasion to pass on the Federal Safety Appliance Act was the Schlemmer case. It was decided in 220 U.S. That was an action that involved an injury to a railroad employee in a situation where the injury occurred prior to the time of the adoption of the Federal Employers' Liability Act.

The case was tried with a jury in the State court and the jury returned a verdict in favor of the plaintiff under

instructions with respect to contributory negligence. The State trial court granted a judgment notwithstanding the verdict on the theory that the plaintiff was guilty of contributory negligence as a matter of law.

It was then appealed to the Supreme Court of Pennsylvania and they held that the decedent in that case under the facts of that particular case was guilty of contributory negligence as a matter of lawand said -- and then the case came here and this court said that contributory negligence continues as a defense unless it is taken away by statute.

There was no statute at the time this action occurred which took it away. Therefore it continued to be a defense.

Now I want to just say a word or two about that Schlemmer case because of the contentions that are made with respect to it in petitioner's brief. They say that this court has misinterpreted over the many years the true import of the Schlemmer opinion.

Now, the Schlemmer case very definitely discusses what is contributory negligence, namely, the failure of a party to take those precautions for his own safety that another reasonably prudent person would under the same or similar circumstances.

Now, they say applying that rule to the facts of that case the State court was correct in concluding that the decedent failed to take those precautions and he was not

entitled to recovery because contributory negligence continued to be a defense.

Now the next case that we have after that arose under the Act of 1893, which was the original Federal Safety Appliance Act, then in 1908 we had the Federal Employers' Liability Act.

But as you recall under the Federal Employers' Liability Act as it was first enacted it only covered those employees who were actually engaged in Interstate Commerce.

So that a person could be a railroad employee and if his activities at the time of his injury were intra-state activities then he was not entitled to the benefits of the Federal Employers' Liability Act.

So he stood in the same posture with respect to his claim that the ordinary individual who was not a railroad employee was.

We had a series of case that articulated the import of the Schlemmer case, applied that rule, carried it on, and held that insofar as the Federal Safety Appliance Act was concerned, of course, a Federal question was presented as to what its proper construction was.

What they said that "An injured party who is not entitled to the benefits of the Federal Employers' Liability Act did not have a Federally creative cause of action. That this duty to have cars equipped with those appliances which

were in conformity with the Safety Appliance Act was an absolute duty. The only effect of the Federal Safety Appliance Act was to substitute a strict and absolute obligation specified by statute in lieu of the ordinary common-law obligation to maintain your cars in a reasonably safe condition.

Now, true, and from the very beginning this Court has held that that is an absolute requirement, imposed an absolute duty to comply with those strict requirements of the Federal Safety Appliance Act, and it is an obligation that cannot be avoided by any degree of care no matter however acidulous, as Mr. Chief Justice Hughes said in the Brady case.

So we come in to a situation here where we start out any person injured as a result of a defective Federal appliance; it doesn't make any difference who that person is. He is entitled to the benefits of that Federal Safety Appliance Act.

He may a person approaching a railroad crossing, he may be a man climbing on a car, any person, as you very, very distinctly said who needs the protection of that Federal Safety Appliance Act is entitled to it.

And that duty is an absolute duty and one that can result in a situation where a person injured can impose liability upon a railroad without fault. You can have a situation here where you, as we say under the facts of this very case, if liability were to be imposed here it would be without fault on the part of the Cedar Rapids and Iowa City Railroad, because

at the time these cars were delivered, they were firmly coupled together, at the time they were uncoupled by these men who were employees of Cargill for the purpose of waighing, the couplers were functioning in perfect order.

It was no dispute but what these cars at the time they were delivered were in absolute perfect condition. Now, we have a situation here where this case was brought as it could be in three counts.

1. Ordinary common-law negligence for delivering a car that was not equipped with proper couplers.

2. Failure to deliver the car that was in conformity with the Federal Safety Appliance Act.

3. Res ipsa loquitur.

At the conclusion of plaintiff's case the court directed a verdict against the plaintiff on all claims that were based on common-law negligence because viewing the evidence from the light most favorable to the plaintiff the jury would have found that there had been any negligence on the part of the railroad company in delivering those cars that verdict would not have had any support in the evidence.

So the case proceeded to trial on this single count before the jury. Now in connection with the situation as it is presented there it was urged throughout the trial that contributory negligence was not a defense.

When the District Court or the trial court held that

contributory negligence was available to the defense then the petitioner requested a so-called emergency instruction which told the jury that if they found that the plaintiff was confronted with a sudden emergency, so that he was required to act under circumstances, well he didn't have time for adequate deliberation, then he would not be held to that degree of care that a person would be who was not confronted with such an emergency but he would only be required to use that care for his own safety, that a reasonably prudent person would be required to use under the same or similar circumstances.

So we have a fair, fair submission. It is not any lopsided submission at all. The Iowa court said that the instructions with respect to contributory negligence were in full conformity with the Iowa law.

Now you are not going to find that instruction in there, your Honor. You will find it set out in our brief in the statement of facts here.

They did not set it out here and the reason that I set it out here, you will find on page 4 of the brief for respondent this is the instruction that they requested and this is what was given.

"When one is confronted with a sudden emergency not brought about by his own fault and because thereof is required to act upon the impulse of the moment without sufficient time to determine with certainty the best course to pursue, he is

not held to the same accuracy of judgment as would be required of him if he had time for deliberation. Under such circumstances he is required to act only as an ordinarily, careful and prudent person would act when suddenly placed in a similar position, and if he so acts he is not liable for injury or damage resulting from his conduct."

Q Didn't the trial court give the instruction with respect to the burden of proof?

A That is right, your Honor. That is in accordance with the Iowa law and the Iowa Supreme Court said that it was a correct statement of the Iowa law on contributory negligence.

Q And your position is that action brought under the Safety Appliance Act does not carry with it an overriding of the State rule as to contributory negligence?

A That is right.

Now that gets to the very pith of our problem. If you were to say that you had a Federally created cause of action here then you would have a situation where you could not deviate from those Federal rules. That is where you get into these lines of cases, some of them you have here, where the action was brought under the Federal Safety Appliance Act and then the court endeavored to inject into that case some local rule that was common to the local jurisdiction.

Q I think you mean action was brought under the Federal Employers' Liability Act.

A That is right. Excuse me.

Q You used the wrong standard.

A That is right. Excuse me for correcting my misapplication of the work.

In other words, you have those situations then you have no right, of course, to inject some local rule that may result in a lack of uniformity in the procedure. But here the court has always held that you have no Federally created cause of faction.

And as the cases have said so frequently the breach of this duty, the violation of the Federal Safety Appliance Act merely gives rise to a situation where an injured person must look to the applicable State law for the remedy to recover damages for that breach.

And that is precisely what the Iowa court said in applying these earlier cases and said that there had been -- those cases had never been overruled.

Now just one ---

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 12 o'clock noon the Court recessed, to reconvene at 12:30 p.m. the same day.)

AFTERNOON SESSION

(The oral argument in the above-entitled matter was resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: Mr. Dallas, you may continue your argument.

ORAL ARGUMENT OF WILLIAM M. DALLAS, ESQ. (continued)

ON BEHALF OF RESPONDENT

MR. DALLAS: Before the luncheon I had mentioned these previous cases that have been decided by this court and the instruction which this court had given to the Federal Safety Appliance Act, and I feel in reading those cases does not permit any other conclusion other than the fact that in the instances where a person who is injured has the right to the benefits of the Federal Employers' Liability Act that all the common-law defenses are available.

That is the situation that there can be no escape from that conclusion.

Now, true, if you have a situation here where this court is the final harbinger of what the Federal Employers' Liability Act should be properly construed.

Q You mean the Safety Appliance Act?

A Federal Safety Appliance Act. Excuse me, your Honor, if it wasn't for you gentlemen keeping me in line here I would be making some serious mistakes.

Q Just some new laws.

A That is right. I don't want to engender any confusion.

In other words, that brings us down to three of the more recent cases, the O'Donnell case, the Carter case and the Affolder case. They were all automatic coupler cases that were decided within a period of a very few months of each other.

Those are all instances where the court had an instance of injury to a railroad employee; his action was brought under the Employers' Liability Act, and in those cases the court made pronouncements as to the fact that negligence on the part of the railroad, the failure to comply with the requirements of the Federal Safety Appliance Act, those requirements were absolute and negligence was not an issue with respect to such compliance.

Mr. Justice Jackson when he wrote the opinion in the O'Donnell case cited cases that were decided long prior to the cases to which I have made reference here in support of this conclusion, that negligence was not an issue.

Legal excuse would not be available to a defense to a railroad. Like you would have in the ordinary State statute where you have a violation, a technical violation, but if the party was able to show that he had used every precaution that was humanly possible to avoid a violation why then it would be up to the jury to say, "Well, he has a legal excuse," if he finds that he did everything reasonably possible to avoid

compliance. But that defense is not available to a violation of the Federal Safety Appliance Act.

Q Let me ask you a non-railroad employee sues in a State court over an automatic coupling and claims a violation of the Safety Appliance Act and the defendant says, "Well, that is true, there was a defect here, but it wasn't a negligent defect."

And before you can have a cause of action under State law you have to prove negligence.

Now, do you say that the plaintiff wouldn't have to prove negligence?

A He wouldn't have to prove negligence.

Q Why not?

A Well, because the Federal statute -- perhaps the best illustration that I can give is ---

Q The short answer is the Federal law controls?

A In other words, if the ---

Q The Federal law means absolute liability and the Federal law pre-empts State law in this State cause of action. Is that right?

A I think you have pointed up where our line of demarcation is. A violation of the Federal statute constitutes a violation of an absolute duty and we cannot escape the conformity with that duty by showing any degree of care. But that is only one of the ingredients of a cause of action.

In other words, looking to the Federal Safety Appliance Act alone it doesn't create any cause of action. That is what has been so many times held. In other words, it is as Justice Clark said in the Affolder case ---

Q Well, what is the cause of action that a plaintiff asserts when he sues in a State court?

A He sues on the violation of the Federal Safety Appliance Act as creating the wrong or the breach of duty that is owed to him.

Q So it isn't a cause of action for negligence?

A Not a complete cause of action.

Q And it isn't a cause of action the State law gives him either, is it?

A No, but he must look to the State law for causation, for approximate cause and the other elements that ---

Q He just has to look at the State law for a remedy?

A That is what has been said many times.

Q Just as a form?

A Well, in other words, he must look to those requirements of the State law for what is an actionable wrong. In other words, the wrong that breach of duty occurs ---

Q Well, I know but the State law says there isn't any actionable wrong unless there is negligence.

A But the State is not permitted to say that, your Honor.

Q Well, then why is it permitted to say that contributory negligence bars?

A Well, because the violation of the Safety Appliance Act does not create a cause of action.

Q It is only because of the construction of the Safety Appliance Act.

A In other words, the Safety Appliance Act is just a statute, that is all it amounts to and the court has given it a construction that says that that imposes absolute duties to comply.

Q Well, it isn't much of an absolute duty is it if it can be avoided by showing contributory negligence or just by showing negligence, not contributory negligence, negligence.

If the employee has been negligent, the absolute liability goes out the window.

A Well, in other words, that is where we get into this confusion when we talk about absolute liability and absolute duty. And that is where I think we get into the problems that I am going to avert to that aspect of the case in a moment.

But here, to put it this way, in the Fairport case which is the first case where a person approached a railroad crossing and was struck by a train that didn't have the proper power brakes as required by Section 1 of the Federal Safety

Appliance Act. Then the question got into the case as to whether contributory negligence of this person approaching the railroad crossing would be a defense or more properly speaking in that case whether last clear chance was available to avoid the consequences of failure to use proper precautions when approaching a crossing.

And this is what Justice Sullivan said in the Fairport case. He said, "The effect of the Federal Safety Appliance Act is to transform a common law duty to use ordinary care into an absolute duty which is imposed by statute. And that absolute duty cannot be escaped by showing of care on the part of the railroad.

But that is only one side of the aspect. He has to look further to the State law to the right, as they say, springs from the State law to recover. So he must look to the State law to see whether the State law permits whether he has got approximate causation or whether he has ---

Q Yes, but you also have to look to the Federal law to see whether or not the Safety Appliance Act itself bars the defense of contributory negligence, just like it bars or just like it precludes the State conditioning recovery on negligence.

A That is right.

In other words, and that is why I have been endeavoring to say, your Honor, that your earlier cases have held that there

is nothing in the Federal Safety Appliance Act which took away the defense of contributory negligence. That is the exact language of Schlemmer.

In the absence of something taking it away why it continues to exist. And that is where you are asked to depart from those earlier cases and now take on a different view on the theory that there has been a change of philosophy with respect to that.

And that is what I want to get into in a minute.

Q May I ask you one question?

A Yes, sir, your Honor.

Q Suppose the Securities and Exchange Act has made it illegal to trade in a certain fashion and a suit is filed in violation of that where a man suffered. Would that be governed State or Federal law?

A Well, there are a number of those cases, your Honor, where they have said that -- it would constitute I assume that you would not have any elements of contributory negligence.

Q Well, why if the State had contributory negligence about that couldn't it put it in? Under your argument.

A Well, in other words ---

Q Maybe the State has a different rule about it.

A What I am endeavoring to say is this: That the way the statute has been construed up to now they have said

that it did not provide a complete cause of action and you had to look beyond the Safety Appliance Act for certain other elements that were essential to a complete cause of action.

And in the case of the injured employee he looked to the Federal Employers' Liability Act, and as you have said in the Carter case the wrong that resulted from a violation of the Safety Appliance Act provided the element that gave him the cause of action under the Federal Employers' Liability Act.

Now we have no counterpart of that unless you are going to say that all people, whether they be employees or not should be treated on a same basis.

Q Well, the substance of your argument then is as I understand it is that the Federal Employee -- the Safety Appliance Act was not intended to afford protection to anybody in the world except employees.

A No, that is not, your Honor.

In other words, in fact, I realize that has been quite the contrary in your holding here. You had Coray versus Southern Pacific Railroad case and in that case you held it quite to the contrary.

Q Did I hold it?

A You spoke for the court. Let me put it that way. And you said that Federal Safety Appliance Act provided a protection to whoever got hurt as a result of it. And that has

been the whole import of the Federal Safety Appliance Act. It was not a statute. It was enacted for the benefit of any railraod employees alone or any particular person who might be doing any particular thing at the time he was injured.

In other words, it was a broad thing to protect the public generally against injuries as the court said in that case from any defective appliance that was used.

So we start out here that every member of thepublic, it is not a statute of the type that you have in many cases where you have a statute enacted for the benefit of miners, for example, and there you say well you can't plead contributory negligence in that because this is a statute as they say it is enacted for the benefit of those people who are unable to protect themselves. That is the general type.

Now this statute has never been protected, has never been construed in that aspect at all. So that you have a situation where you must look further. Now, I see my time is past, passing and I just wanted to say a word in concluding about the Shields case here, which is a case to which Mr. Prettyman has referred.

Now that is a case and I have read with very great interest the official transcript in that case which sets out all the instructions of the trial court and so forth. And I think that if you will follow that case down you will find that everything that he says is true with respect to it,

except there was no instruction given in that case by the trial court either oral or written. At least it is not set out in the record, with respect to the question of the plaintiff's contributory negligence.

And he tried his case both on two counts, one on common law negligence and the other on the violation of the Federal Safety Appliance Act. And there was no instruction on either and the reason is rather obvious because the railroad was endeavoring to make a defense in that case on the theory that the defect in that so-called running board had been painted over so that their inspector as wellas the plaintiff couldn't determine whether there was any defect in it.

Therefore, they were trying to make a defense on the theory that they couldn't know about it and the plaintiff couldn't either. So the case went to the jury and the jury returned a verdict for the plaintiff on both counts and then when it got to the Court of Appeals, and you will notice in the Fifth Circuit, they discussed only the question and they defeated the plaintiffs solely on the grounds that this so-called running board was not a safety appliance within the meaning of the Federal Safety Appliance Act.

They dismissed his case and then it came here to review and the single question for decision here was whether this so-called dome step or running board was a safety appliance within the meaning of the Act. That plus the further

problem as to whether he had to be a member of the general public or whether he had to be a railroad employee to claim the benefits of the Act.

The court said that this was a safety appliance and that ended that.

Then the next they said well he was a member who was entitled to the protection of the Act and here is where we get the language that has been the subject matter of our haggling; therefore, the liability is absolute.

Now there wasn't any intention we say, in that case to reverse these earlier cases at all. In fact, the court is one of the cases cited is the Fairport case which very definitely and specifically held that the last clear chance was available, it was a local problem, it didn't present a Federal question at all and therefore you have a situation where we say that that case is not, there was no issue of contributory negligence in that case at all when it reached this court and there wasn't any in it when it reached the Fifth Circuit.

Because when you read over the instructions you will find that the court never gave an instruction on contributory negligence.

True, as Mr. Prettyman says, the railroad accepted to the court instructing that contributory negligence would not constitute defense. But there wasn't any such instruction

given there and if it was it never got into the printed record.

So, your Honor, we submit that the Iowa court was correct in concluding that contributory negligence was available and a defense to an action by a nonrailroad employee and that these cases were correctly decided and that there has been no reason why the rules should not be followed as it was before.

And to ask the court to remedy a situation now that has existed for 60 years we say is a matter for Congress rather than for the court.

MR. CHIEF JUSTICE WARREN: Mr. Prettyman.

REBUTTAL ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR.

ON BEHALF OF PETITIONER

MR. PRETTYMAN: Mr. Justice White, you put your finger exactly on the point here.

Of course, there is a cause of action. This court has said so in unmistakable language. It said "A failure of equipment to perform as required by the Federal Safety Appliance Act is in itself an actionable wrong." That is what you said in O'Donnell.

Is in itself an actionable wrong, in no way dependent upon negligence.

Q But you cannot bring it into Federal court without adversity can you?

A That is the point.

What Mr. Dallas is really arguing about is whether there is a Federal cause of action. And I think myself that is questionable. I don't think that has been finally decided.

Q But there is a cause of action under Federal law?

A There is clearly a cause of action under Federal law which can be brought in the State courts and even Schlemmer said that it is a Federal question whether a particular defense could be asserted under the Federal Safety Appliance Act.

Q And if it weren't, the case wouldn't be here.

A Exactly.

So what do you have? You have this court saying that under these Federal statutes brought in State courts we must look to Federal standards to see defenses and other matters which go directly to the question of liability.

All right.

Now what is this court going to say the Federal standard is?

Q It has said. It has said before in construing this Act.

A I am sorry, sir.

Q It really has said before. It has already answered that question.

A Yes, that is my feeling. It said he talks about a rule ---

Q So his answer is against you?

A No, sir. No, sir.

Q You don't think we have to overrule any case?

A Well, unless with the possible exception of Schlemmer, I think that Schlemmer doesn't stand for the outright proposition of contributory negligence as a defense but if you disagree with me then, yes, you have to overrule Schlemmer.

Q The court has already construed the Safety Appliance Act as not, as not preventing or as not eliminating contributory negligence as a defense. It has already done that.

A In Schlemmer if you interpret it that way, it did. In other cases, following Schlemmer it is entirely different because the jury verdicts were always for the plaintiff.

Q Have there been any attempts to amend the Safety Appliance Act? To eliminate contributory negligence?

A No, and I think the reason is and this is the point I wanted to make is that I think this doctrine is dead anyway. It isn't a doctrine of 60 years that hasn't been overruled. If you go to these cases like Shields and Affolder, Carter and O'Donnell and Brady and Myers, what does it mean if they are not talking in terms of absolute liability and absolute prohibition? They are not just talking about absolute duty as Mr. Dallas would have you believe. They talk about

absolute liability.

Q Yes, but you haven't got any cases of contributory negligence was offered as a defense and the defense has been stricken in name of the Safety Appliance Act.

A I can give you a case, your Honor, where assumption of risk ---

Q I didn't ask about that. Because assumption of risk was eliminated by the Safety Appliance Act.

A Yes, but only it would seem as to railroad employees.

Q Well, anyway you haven't any cases on contributory negligence where the defense was stricken in the name of the Safety Appliance Act?

A Yes, it is my position that it was in Shield. It was pleased in Shield. It was clearly presented I contend in the instructions to Shield, at least they objected to the instruction that the contributory negligence was deemed not to be a defense in that case and Shield was solely under the Safety Appliance Act, not under FELA.

Now it is my position that FELA shows the way only in terms of the legislative intent to make this act one of absolute liability and tat in no other way can you possibly carry out the intent of Congress.

If you are going to say that it is a Federal standard that contributory negligence applies if the State says so you

end up with a case like this one where a jury was allowed to conclude that if there was contributory negligence in any way or in any degree this man gets nothing.

I say that could not conceivably have been the intent of Congress.

Your Honor, the only thing I would note in addition to that is that there was a mention of this emergency instruction and an attempt to show that really what went to the jury was fair. I need only to say that we clearly told the court that that instruction was given solely because of our contributory negligence argument had been rejected and if you are going to talk about unfairness, let us look at this man who had been employed for six months, who admittedly was not a railroad worker, who did not know anything about couplers, and yet he is being contributory negligent because he didn't see the pin drop or he didn't stretch the car. That is where the unfairness comes in these cases and that clearly is not what Congress intended when it said that the railroads had to keep this equipment in good condition.

Thank you.

(Whereupon, at 12:55 p.m. the oral argument in the above-entitled matter was concluded.)