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Evidence—Admission Into Evidence Of Company's Operating Rule Proper On Question of Negligence

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EVIDENCE

ADMISSION INTO EVIDENCE OF COMPANY'S OPERATING RULE PROPER ON QUESTION OF NEGLIGENCE

Defendant's (the New York Central Railroad Company) train was performing a switching or shifting operation which necessitated crossing over a country road many times during a forty-five minute interval. The crossing was unmarked and was not protected by a watchman or gates to warn approaching traffic and prevent collision with defendant's trains. Plaintiff was proceeding along the highway on a stormy night. Due to poor visibility he was not aware of the activity on the tracks until he was thirty-five or forty feet from the point of impact. Because of the road conditions, he was unable to avoid striking the train as it crossed the highway. The Railroad Company has an operating rule requiring a crew member to protect such a crossing when there is neither a watchman nor manually operated gates or flashlight signals. No member of the crew served in such a capacity. The trial term of the Jefferson County Supreme Court entered judgment for plaintiff in accordance with a jury verdict which was affirmed by the Appellate Division. The Court of Appeals, in deciding whether the trial term properly allowed the operating rule of the Railroad to be introduced as some evidence of a proper index of care, *held*, affirmed:

> In case of a complexly integrated organization like a railroad, affected with public interest, which, like other large industry, adopts company rules which closely touch the lives of employees as between themselves and in their relations to the public, these should be treated as having some of the characteristics of municipal ordinances or other public regulations. Violation of them . . . is not negligence in itself but under certain circumstances may be regarded by the trier of the fact as some evidence of negligence. *Danbois v. New York Cent. R.R.*, 12 N.Y.2d 234, 189 N.E.2d 468, 238 N.Y.S.2d 921 (1963).

The standard of care required of a railroad in its general dealings with the public other than its passengers is no different than that required of any other person. It must act in a manner which would be consistent with the actions of a reasonably prudent man in the same situation.[1] Any evidence which is not privileged reasonably calculated to prove the breach of such a duty is admissible. An employer often adopts, in some form or other, regulations prescribing the duties of his employees and the manner in which they are to be carried out. The reasons for such rules are many and varied. One who employs a large number of individuals cannot hope to be able to supervise their activities personally. Thus he will establish standards of operation.

1. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); Prosser, Torts (2d ed. 1955).

These may be for the convenience and efficiency of the operation conducted by the employer or for the safety of the employees and those who come in contact with the employees.

Such private rules, although they may be designed for the protection of others are not equivalent to ordinances and statutes, passed by representatives of the public solely for their protection.[2] It is impossible for a person, by adopting their own rules and regulations, to establish a standard of care which will be required of them in their relations with others.[3] In addition, the law does not require individuals to adopt such rules and it is clear that if the rules are voluntarily set up, they may also be voluntarily abandoned.[4] A troublesome question is, once such rules are adopted, are they any indication of the way in which society has obligated the interested parties to act? If such rules are indicative, they are relevant in an action claiming negligence and should be introduced into evidence. Three-fourths of the states do accept such an approach. Although the rules are not accepted as conclusive, they do constitute some indication of the care required and are always material and should be considered so by the jury.[5] If an employee disobeys a rule, and injuriously affects a third person, it cannot be assumed that there was not a breach of duty to the third person as well as his employer by such action.[6] Wigmore states that:

> The *regulations* adopted by an *employer* for the conduct of a factory or a transportation system, may be some evidence of his belief as to the standard of care required, and thus of the negligent nature of an act violating those rules.[7]

Of course, this does not refer to the adoption of additional precautions for safety by a defendant after an accident has occurred. These are not admissible as tending to prove liability for the method used at the time of accident.[8] Even in the minority jurisdictions, who have not to date allowed rules established prior to the accident in evidence, the implication from the courts' reasoning is that they may have been admissable in another fact situation, since their denial was predicated on their requiring an excess of duty or their being irrelevant.[9]

Judge Van Voorhis, in the instant case, followed the majority justification in sanctioning the use of such rules as constituting "an index of the care which is to be required under the circumstances,"[10] and held they "may properly be considered by the triers of the fact in determining the general issue of whether reasonable care has been taken." Pointing out the degree to which

2. Fonda v. Saint Paul Ry. Co., 71 Minn. 438, 74 N.W. 166 (1898).
3. *Ibid.*
4. McGrath v. New York Cent. & Hudson River R.R., 59 N.Y. 468 (1875).
5. Annot., 50 A.L.R.2d 16 (1956).
6. Stevens v. Boston Elevated Ry., 184 Mass. 476, 69 N.E. 338 (1904).
7. 2 Wigmore, Evidence § 282 (3d ed. 1940).
8. Stevens v. Boston Elevated Ry. Co., 184 Mass. 476, 69 N.E. 338 (1904).
9. *Ibid.*
10. Instant case at 238, 189 N.E.2d at 470, 238 N.Y.S.2d at 925.

the Railroad holds itself out to the public and that frequently the absence of such rules has constituted some evidence of negligence,[11] the Court, after determining the regulation in point did not exceed what should be required by a reasonable man, closed the issue as to whether they should be accepted in evidence by allowing the rules to remain in the record. A portion of the opinion is dedicated to elucidating on cases when the rules have not been admitted. On close scrutiny of these opinions it would appear that in each an independant reason could be attributed to the denial of their admission. In *Taddeo v. Tilton*,[12] the Court recognized the danger of allowing such rules to constitute a basis of care. However, they were not considering a formalized written regulation. The plaintiff's contention was simply that the trolley usually came to a complete stop at the intersection in question which in this instance it did not. In *Longacre v. Yonkers R.R.*,[13] the rule was declared irrelevant to the issue since it was designed to prevent interference with the duties of the employee and not for the protection of the public. Similiarly in a matter involving the operating rule of the instant case, the court looked at the substance of the regulation and decided as a matter of law that the road was not in violation of it, and, therefore, it was not relevant.[14] Therefore, even in the cases the Court cites as being adverse to their decision, each can be sufficiently distinguished so as not to apply to a formalized rule which had been violated causing injury to a third person.

In arguing against a result reached in *Danbois* it may be stated that the more cautious the author-employer may be, and the more carefully he may regulate the conduct of his men, under this holding, the more subject he may become to liability because some employee failed to observe the rule, even though the requirement far exceeded the employer's legal obligation.[15] However, this consideration does not outweigh the fact that the purpose of this rule, in essence, was to insure the safety in the operation of the train so that those passing through the intersection may not be injured. Surely posting a member of the crew with a lantern at the intersection could be of no aid to the switching operation. The regulation was adopted to avoid the exact result found in the present case. As was stated in *Sullivan v. Richmond Light & R.R.*,[16] the violation of the rule shows negligence by the employee as between the employer and employee actually. The employee's negligence is what is at issue, since holding the employer liable can only be accomplished by proving his servant negligent. Whether the employee observed his master's instructions, as well as whether he observed his legal obligation toward pedestrians is relevant. Is it not material to a law suit to inquire how the defendant performed

11. See Berrigan v. New York, Lake Erie, & W.R.R., 131 N.Y. 582, 30 N.E. 57 (1892).
12. 248 App. Div. 290, 289 N.Y. Supp. 427 (4th Dep't 1936).
13. 236 N.Y. 119, 140 N.E. 215 (1923).
14. Bertrand v. Delaware & Hudson R.R., 267 App. Div. 228, 46 N.Y.S.2d 78 (3d Dep't 1943).
15. Taddeo v. Tilton, 248 App. Div. 290, 289 N.Y. Supp. 427 (4th Dep't 1936).
16. 128 App. Div. 175, 112 N.Y. Supp. 648 (2d Dep't 1908).

the procedure in the past and how his performance on the date of the accident differed from his past performance? Is it also permissible to introduce rules and operating procedures of other railroads in the same situation. By introducing the regulation of the defendant, the same result occurs. The written rule is just another evidentiary tool to prove the way in which the defendant treated the situation in the past and has the same probative value as the customs and procedures of defendant's competitors.

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FAMILY LAW

REFORMATION OF VOID PROVISIONS OF SUPPORT AGREEMENTS NOT GRANTED—ISSUE OF SEVERABILITY TO BE DETERMINED AT TRIAL

An extended period of marital discord between the plaintiff wife, and defendant husband, culminated in an action for separation initiated by the wife based on her husband's cruel and inhuman treatment. By assuring his wife of his intention to alter his conduct and provide adequate support for her and their children the husband induced his wife to discontinue the pending separation action. Shortly thereafter and while living together, the parties entered a written agreement providing in the Fourth Clause for payments of $30,000 per year from the husband to the wife for her personal use and maintenance. It also stated that if and when the wife should bring an action to alter or dissolve the marriage, the husband would be relieved of his obligations under the contract and the wife would be free to assert in court, all her marital rights against her husband for support and maintenance. By a supplemental agreement the stipulated sum was amended to provide the wife $37,500 annually. Presently, the wife seeks to reform these agreements in several respects, including reformation of the Fourth Clause. At Special-Term[1] the husband's motion to dismiss for insufficiency was denied and the Appellate Division[2] affirmed, certifying this question on appeal: "Whether the lower court erred as a matter of law in denying the husband's motion?" *Held*, affirmed two judges concurring, the certified question being answered in the negative. By the instant holding the Fourth Clause was summarily declared invalid. A cause of action to reform a contract would be insufficient at law if it merely concerned reformation of a void clause providing for payment of annual sums by the husband to his wife for her personal use and maintenance while living with the husband. However, where the proceedings are to reform valid clauses in the agreement also, the issue of

1. Lacks v. Lacks, 30 Misc. 2d 398, 217 N.Y.S.2d 655 (Sup. Ct. 1961), *aff'd mem.*, 16 A.D.2d 646, 227 N.Y.S.2d 895 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963).

2. Lacks v. Lacks, 16 A.D.2d 646, 227 N.Y.S.2d 895 (1st Dep't 1962), *affirming*, 30 Misc. 2d 398, 217 N.Y.S.2d 655 (Sup. Ct. 1961), *aff'd*, 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963).