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Occupational Safety and Health Act of 1970: Its Role in Civil Litigation

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Because it vests the federal government with broad powers to regulate American working conditions, the Occupational Safety and Health Act of 1970 (OSHA)\(^1\) has the potential for having a great impact on civil suits for personal injuries. Injured persons will most likely seek to fasten civil liability on the violation of an OSHA provision, and given the breadth of OSHA regulations, it is reasonable to assume that in the vast majority of accidents at least one OSHA standard has been violated.\(^2\) Because of the likely utilization of the statute in civil suits, OSHA provides an appropriate vehicle for an examination of the traditional tort treatment of violated statutes and administrative regulations.

The purpose of this Comment is to examine OSHA with particularity, to analyze and to criticize the ways in which statutes and regulations have shifted burdens and presumptions in civil suits, and finally, to determine the propriety of applying the various forms of tort analysis to cases in which an OSHA violation is a factor. Part I is a treatment of the Occupational Safety and Health Act. First, those provisions of the Act which are essential to an evaluation of OSHA for purposes of civil litigation are discussed. Second, OSHA is criticized and evaluated from a constitutional law framework. If the constitutional problems are serious, the Act's subsequent civil effect should be diminished or nullified. Third, OSHA is analyzed in terms of its legislative history and intended effect. In part II the traditional tort treatment of statutory and regulatory violations, through negligence per se, implied right of action, and strict liability, is discussed. Part III draws together the particular aspects of OSHA and the traditional tort framework and analyzes the proper treatment which should be accorded to OSHA in civil litigation. Finally, part IV concludes with an evaluation of the various rules applied to statutory violations considered in civil suits and discusses the specific viability of each in cases dealing with OSHA violations.

I. OCCUPATIONAL SAFETY AND HEALTH ACT

A. Statutory Provisions

Drawing from other statutes which had affected minor portions of the American work force,\(^8\) the Occupational Safety and Health Act of 1970

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\(^2\) During 1972, of businesses inspected, only 25% were found to be in compliance with OSHA standards. Williams, *Be Prepared*, TRIAL, July/Aug. 1973, at 14, 15.

granted authority to the Secretary of Labor (hereinafter referred to as the Secretary) to regulate the working conditions of every man, woman, and child in the United States. Although its purpose was to prevent on-the-job injuries, rather than to provide tangible benefits for compliance, OSHA focuses on negative incentives by imposing stiff penalties for noncompliance.

To fulfill its purpose of encouraging job safety and health, OSHA requires each employer to: (1) "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," and (2) comply with occupational safety and health standards promulgated under the Act. The standards referred to in the employer’s second duty are to be promulgated under the authority of the Administrative Procedure Act, so that there is some opportunity for public discussion before the regulatory standard becomes effective. These standards are enforced to a lim-

4. "[T]he Act is applicable to each and every business that has employees." Secretary of Labor v. J.A. Walder, Inc., 1 O.S.H.C. 3047, 3048 (1973). Though the scope of the Act is phrased in terms of employers engaged in businesses affecting commerce, it can be persuasively argued that any business conducted so as to allow the occurrence of avoidable accidents has a potentially damaging effect on interstate commerce which would justify its regulation. See 29 C.F.R. § 1975.3 (1973). The relative insignificance of a particular accident is immaterial. Cf. Wickard v. Filburn, 317 U.S. 111 (1942). Only government employees are specifically excluded from coverage, to the extent that they are covered by other federal agencies exercising statutory authority affecting occupational safety and health, or to the extent that they are covered by the safety and health regulations of state agencies acting under the authority of the Atomic Energy Act, 42 U.S.C. § 2021 (1970). 29 U.S.C. § 653(b)(1) (1970). As a matter of policy, the Act is deemed inapplicable to the performance of religious services, and to individuals employing household domestics. 29 C.F.R. §§ 1975.4(c), (i), 1975.6 (1973).

5. Penalties range from simple notice to a $10,000 fine and up to six months imprisonment for a violation which results in the death of an employee. See note 21 infra.


7. Id. § 654(a)(2).

8. The Act provided for the issuance within two years of "interim standards," composed of national consensus and established federal standards. Id. § 655(a). The "national consensus standard" is one which "has been issued by a nationally recognized standards-producing organization under procedures whereby it can be determined that interested and affected persons have reached substantial agreement on its adoption; it was formulated in a manner that afforded an opportunity for diverse views to be considered; and it has been designated as such a standard by the Secretary after consultation with appropriate federal agencies." BNA, JOB SAFETY AND HEALTH ACT OF 1970, at 2 (1971). These standards, which included those of the American National Standards Institute and the National Fire Protection Association, remained in effect only until April 28, 1973, unless particular provisions were specifically promulgated under the rules of the Administrative Procedure Act. The federal standards, which also remained effective until April 28, 1973, unless promulgated according to the Administrative Procedure Act, were composed of occupational safety and health standards included in existing federal laws, including the 1973 amendments to the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333 (Supp. 1973), and those at note 3 supra.

The Act also permits the Secretary to promulgate emergency temporary standards, without regard to the Administrative Procedure provisions, "if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1) (1970). Within six months of the promulgation of an emergency standard, the Secretary must complete regular standard-setting procedures for the particular danger. Id. § 655(c)(3).

Finally, the Secretary may promulgate permanent standards. See note 10 infra. The permanent standards are divided into three major categories—General Industry, Maritime, and Construction.


10. "An interested person," including a union, national standard-setting group,
ited extent through on-the-job inspections which are initiated by employee complaints, by random selection, or by the Department of Labor in accordance with its special emphasis programs targeting certain industries and health hazards. These inspections occur without prior warning, though they must be conducted reasonably and during regular working hours. The employer, or his representative, and a representative of the employees are authorized to accompany the inspector (Compliance Officer) on his walk around the establishment, and the inspector may question the employer and employees privately. If the inspector finds that a standard has been violated, he must issue a de minimis notice or citation, depending on the implicated extent through on-the-job inspections which are initiated by employee complaints, by random selection, or by the Department of Labor in accordance with its special emphasis programs targeting certain industries and health hazards. These inspections occur without prior warning, though they must be conducted reasonably and during regular working hours. The employer, or his representative, and a representative of the employees are authorized to accompany the inspector (Compliance Officer) on his walk around the establishment, and the inspector may question the employer and employees privately. If the inspector finds that a standard has been violated, he must issue a de minimis notice or citation, depending on the implicated extent.
mediacy of the possible adverse effects on job safety and health resulting from the violation. If a citation is issued, the inspector must specify a time period for the abatement of the violation, and, if it is serious, he must impose a statutory penalty. If within fifteen working days following notification of the citation and penalty the employer does not notify the Secretary of his intent to contest the citation or proposed penalty, the Secretary's citation and assessment "shall be deemed a final order of the [Occupational Safety and Health Review] Commission and not subject to review by any court or agency."24 If the employer elects to appeal, he must notify the Secretary, and must also post the citation and notice of contest for the information of his employees.25 The abatement order is then automatically stayed, unless the Area Director determines that the employer's appeal is not in good faith or is solely for delay or avoidance of penalties.26 The Secretary is responsible for notifying the Commission (OSHRC) of the appeal, and the OSHRC grants an appeal before one of its administrative judges.27 The judge issues findings and an order affirming, modifying, or vacating the Secretary's citation and/or proposed penalty. That order becomes a final order of the Commission within thirty days unless a member of the Commission calls it for review.28 A final order of the OSHRC may be appealed to the appropriate United States Court of Appeals by "any person adversely affected," but a stay must be specifically ordered by the circuit court in order to postpone the enforcement of the OSHRC's abatement order.29

up to $1,000, the amount depending upon the considerations discussed above, is mandatory for a serious violation. Finally, citations also may be given in cases of imminent danger, "where there is reasonable certainty that a hazard exists that can be expected to cause death or serious physical harm immediately or before the hazard can be eliminated through regular procedures." All About OSHA, supra note 14, at 14. If the employer does not abate the condition immediately, the OSHA Area Director may seek injunctive relief in a federal district court. Citations may be given for various other violations of the Act, such as for failure to post a citation for the perusal of employees or for failure to maintain records. All citations must state "with particularity" the nature of the violation and the section of the law or regulation violated. 29 U.S.C. § 658a (1970). 22. For 23,230 citations issued to employers during the first year after OSHA became effective, proposed penalties totaled $2,291,000, or approximately $98 per citation. Carter, supra note 11, at 31. In terms of actual penalties, however, for the first six months of OSHA activities, the average final assessments were only $18 per penalty. Note, The Occupational Safety and Health Act of 1970: Some Unresolved Issues and Potential Problems, 41 Geo. Wash. L. Rev. 304, 321 n.11 (1972). 23. The Commission recently ruled that even if the penalty is not disputed by the Secretary or the employer, it is still subject to modification by the Review Commission while it is hearing an appeal as to the citation. Secretary of Labor v. Thorlief Larsen & Son, 1 O.S.H.C. 1095 (1973). Employees are also permitted to contest the abatement period through similar channels. 29 U.S.C. § 660 (1970). 24. 29 U.S.C. § 659(b) (1970). 25. 29 C.F.R. § 1903.16(a) (1973). 26. 29 U.S.C. § 659(b) (1970). 27. Id. § 661(i). 28. Id. In its first year of existence, the OSHRC exercised its power to review the findings of its administrative judges in only 6% of all cases heard. Cohen, The Occupational Safety and Health Act: A Labor Lawyer's Overview, 33 Ohio St. L.J. 788, 797 (1972), citing Address by Chairman Robert D. Moran, ABA Labor Law Section Meeting, Aug. 15, 1972. 29. 29 U.S.C. § 660(a) (1970). 30. Additionally, no objection that was not urged before the OSHRC may be considered by the court, unless it can be established that the failure to raise the point earlier should be excused because of extraordinary circumstances. If the court deter-
It is clear that under the authority of the commerce clause of the United States Constitution, OSHA preempts all conflicting state health and safety plans. OSHA does provide, however, that a state may assume the responsibility for the development and enforcement of occupational safety and health standards in its jurisdiction, by submitting a plan to be approved by the Secretary of Labor.

OSHA has several other provisions which are relevant to a discussion of the effect which an OSHA violation and possible administrative adjudication of guilt should have in a subsequent civil suit. Employees are granted certain rights under the Act, in addition to those previously alluded to. They may appeal the abatement order of the Secretary to the OSHRC, testify at a hearing to discuss an employer's request for a variance, bring an action for a writ of mandamus if the Secretary refuses to seek appropriate relief under the Act, and file complaints with the Secretary if they are discriminated against by their employers for pursuing any of these rights. Employers are charged with the responsibility of keeping employees informed of developments under OSHA, as well as with keeping records of accidents and injuries. Failure to keep such records can result in a penalty of up to $1,000.

B. Constitutional Aspects

OSHA presents some serious constitutional problems which should carry significant weight in determining the effect which an administrative adjudication should have in a later civil action. The constitutional uncertainties are concentrated in two areas: the invasion of fourth amendment rights because of the Compliance Officer's purported ability to search an employer's premises without a warrant, and the invasion of fifth and sixth amendment rights.
rights since the Act is essentially penal in character, but does not provide the right to face one's accusers, or the right to jury trial, which are essential elements of due process.

OSHA seems to indicate that the Compliance Officer may search the employer's place of business without a warrant, but it is quite clear that the employer may refuse to permit the search in the absence of a warrant. In the companion cases of Camara v. Municipal Court and See v. City of Seattle the United States Supreme Court indicated that fourth amendment protection extends to administrative searches which have the character of a criminal investigation. In Camara this reasoning was applied to a housing inspection, while in See a fire inspection search was at issue. Though these cases indicated that a warrant was required in the non-emergency situation, both made it clear that a warrantless search in an emergency situation would be permissible and that area enforcement inspections without particular probable cause would be upheld on the basis of the reasonableness of the searches in areas where violations were generally probable. Obviously, this approach diminishes the meaningfulness of the constitutional objection in OSHA cases, for since inspections are generally based upon either employee complaints or upon the probable occurrence of violations in special emphasis areas, the somewhat watered-down probable cause requirement for administrative searches will be relatively easy to satisfy.

The second major constitutional problem involves the denial of fifth and sixth amendment protections, such as due process—the right to face one's accusers, and the right to jury trial, both of which should be granted since OSHA

40. See One 1958 Plymouth Sedan v. Commissioner of Pa., 380 U.S. 693 (1965), a forfeiture case, which was characterized as quasi-criminal by the Supreme Court, and thus constitutional guarantees were ruled applicable. The constitutional objections to OSHA were raised in Lance Roofing Co. v. Hodgson, 343 F. Supp. 685 (N.D. Ga.), aff'd mem., 409 U.S. 1070 (1972), but the court refused to hear them because the appellant had not exhausted its administrative remedies.


42. In fact, the Secretary's regulations indicate that the Compliance Officer is to terminate his inspection if an employer refuses him permission to enter. The Compliance Officer is then to report the refusal to the Area Director, who will secure compulsory process if necessary. 29 C.F.R. § 1903.4 (1973).

43. 387 U.S. 523 (1967).

44. 387 U.S. 541 (1967).

45. 387 U.S. at 539; 387 U.S. at 545.

46. In contrast to Camara and See is Wyman v. James, 400 U.S. 309 (1971), where the Court held that New York's home visitation program for welfare recipients was not a search in the criminal law context of the fourth amendment as it was in no sense a criminal investigation. The Supreme Court concluded that termination of relief benefits, rather than a forcible entry, was the proper consequence of the refusal to permit the search. Cf. United States v. Biswell, 406 U.S. 311 (1972), in which the Supreme Court upheld the legality of a warrantless search under the Gun Control Act of 1968. The Court stressed the need for frequent, unannounced inspections to prevent violent crime, and distinguished See because periodic inspections for fire hazards were sufficient. The Court also emphasized that the negligible protection which would be afforded by a warrant was outweighed by the frustration of legislative purpose which the securing of a warrant would cause. The law enforcement characteristics of OSHA are obviously more similar to those of the statutes involved in Camara and See than to that in Wyman, but if the Court rules that the Biswell analysis is applicable to occupational safety searches, perhaps a warrant will not be required. On balance, however, it appears that the Camara-See approach will be followed in OSHA cases, for in cases of urgency, either analysis would allow a warrantless search, while in nonemergencies the Biswell reasoning does not seem apt.
has several penal characteristics. For example, although it is designed to protect the public, the penalties exacted under OSHA do not compensate parties wronged by a violation, but instead are earmarked for the United States Treasury. Furthermore, the relatively severe fines, discretionary increased penalties based primarily on the gravity of the offense and the culpability of the employer, and variances in penalty according to the extent of the injury, all tend to indicate that OSHA is essentially penal. Even so, the Act is self-executing, forcing the employer to go on the offensive if he does not accept the Compliance Officer's assessment. Unlike other acts, where before a penalty is inflicted the individual receives a hearing unless he waives it, OSHA reverses the procedure and presumes a waiver unless the employer establishes otherwise. Further, OSHA denies the employer the right to face the party who filed the complaint against him, and denies him the right to a jury trial.

Subsidiary problems of a constitutional nature include the judicial character of the administrative proceedings under OSHA; the possibility of increased or continued penalties if the employer appeals, which produces a chilling effect on the pursuit of appellate review; and, finally the vagueness and ambiguity of the general duty clause which arguably gives inadequate notice of an employer's obligations under the Act.

C. Purpose and Intended Effect of OSHA

In response to grim statistics in the fields of occupational safety and health, OSHA was designed to encourage better protection of employees by eliminating the inadequacies which had plagued state regulation of occupational safety and health. It is clear that employees were within the scope of OSHA's protection, for the hearings before both the House and Senate

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47. To determine if a law is penal, it is necessary to consider "the wrong to be redressed, and whether the proscribed act injures the public as opposed to the individual." Comment, supra note 39, at 437.
49. Consideration is to be given to the size of the business, the gravity of the violation, the employer's good faith, and any history of previous violations. Id. § 666(i). See also note 20 supra.
52. This effect is highlighted by the possibility that a penalty may be increased even if only the citation is appealed. See note 23 supra.
54. During the congressional hearings on OSHA, state laws on occupational safety and health were repeatedly criticized for the differences among them and consequent lack of any national program in this area, the lack of vigor in their enforcement, and the general inadequacy of their standards. The states' expenditures on job safety in 1967 averaged forty cents per worker. Hearings on S. 2864 Before the Subcomm. on Labor of the Sen. Comm. on Labor & Pub. Welfare, 90th Cong., 2d Sess. 894 (1968).
Committees evidenced an overwhelming concern with three things: the potentially damaging effects of certain chemicals utilized in various facets of production and manufacturing, the tragic social and economic effects of employment accidents, and the proposed administrative structure of OSHA. The clear emphasis, however, was upon decreasing the amount of danger to which employees were subject. While, like the employer, the employee has duties of compliance with standards, rules, and regulations applicable to his conduct, OSHA is silent as to penalties for violations of these duties. In fact, the legislative history of the employee duty clause, which only appeared in the Senate version of the Act, reveals that it was not meant "to diminish in any way the employer's compliance responsibilities or his responsibility to assure compliance by his own employees." Final responsibility for compliance with the requirements of the Act remains with the employer.

Having established a congressional intent to protect employees by OSHA, it is still unclear whether third parties not directly involved in the employment relationship, but subject to the same dangers of hazardous safety and health conditions, were intended to fall within the protective scope of OSHA. The statute itself is silent on this point, as is the legislative history, although it would seem that the number and severity of work related injuries and illnesses, which were highlighted in committee hearings, would be decreased by extending the protection of the Act to all parties subject to the harmful results of avoidable accidents. In promulgating the OSHA regulations, the Secretary has apparently not concurred in this approach to fulfilling the legislative purpose. The regulations indicate that "[i]n the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their employment and places of employment." One commentator has interpreted this regulation to mean that the interests of third parties are not protected by OSHA itself, and that they are, therefore, to be vindicated in private actions. The view that third parties are not directly protected by OSHA seems to be an eminently reasonable one, but it is not nearly so clear that a private action using the OSHA violation as evidence of negligence was intended to serve as the substitute

55. The Nixon Administration and management supported a bill which would have completely separated the powers of rule-making and enforcement. Most Democrats and the labor movement favored the resting of complete authority in the Secretary of Labor. The OSHRC, a three-man appellate review board, was a compromise between these two positions. See BNA, JOB SAFETY & HEALTH ACT OF 1970, at 16-21 (1971).


57. See notes 145-51 infra, and accompanying text regarding the effect of an employee's assumption of the risk or contributory negligence in OSHA cases.


59. Id. at 1.

60. 29 C.F.R. § 1910.5(d) (1973). Similarly, at least one commentator believes that since the thrust of the Act was to protect employees, Congress had no intention of extending the scope of OSHA's protection to reach third parties. See Address by James Mehaffy, Texas Association of Defense Counsel Meeting, in Guadalajara, Mexico, Apr. 19, 1974, in which the speaker took the position that legislative silence on this point indicated an intent to exclude coverage. Perhaps an analysis of the policies to be served by extending coverage would be more appropriate. See note 144 infra and accompanying text.

II. TRADITIONAL TREATMENT OF STATUTORY VIOLATIONS FOR TORT LIABILITY

A. Violation as Negligence Per Se

The question of what effect the violation of a statute should have in a subsequent civil action is one about which authors have debated for the past sixty years. The general theory upon which admissibility of the violation has been based can appropriately be termed "statutory concretisation." The legislature, through a statute, fixes a standard of care, anticipating potential problems which even the reasonable man might have ignored. In effect, the legislature has foreseen the probable injuries to be caused by non-adherence to the standard, so a subsequent jury evaluation of the foreseeability of the harm would be redundant and illogical. This approach necessarily culminates in the view that violation of the statute is negligence in itself. Of course, proximate cause must still be established and excuses for the violation would probably be heard, but it is obvious that the plaintiff's burden of proof is greatly eased. Many courts which have applied this doctrine have done so in fairly limited terms, focusing their analysis on two points: the risk against which the act in question was designed to protect, and the class of persons which was to be protected. If the risk which culminated in the injury were not that to be guarded against, or if the plaintiff were not in the protected class, then the statutory violation would not constitute negligence per se, but only evidence of negligence or no evidence at all.

To its credit, the negligence per se approach has two reasonable characteristics. Since the defendant has violated a statute enacted for the benefit of OSHA's lack of direct benefit to third persons.

62. See notes 60 supra and 144 infra and accompanying texts.


66. This analysis originated in Gorris v. Scott, [1874] L.R. 9 Ex. 125, where the defendant violated a law requiring carriers by water to provide separate pens for transported animals. As a result of the violation, the plaintiff's sheep were washed overboard in a storm. The court held that the statute was designed to provide for proper sanitation, and not to prevent the type of accident which occurred, and consequently held that the violation did not constitute negligence per se. But see Marshall v. Isthmian Lines, Inc., 334 F.2d 131 (5th Cir. 1964), where the court held that although the statute was not designed to prevent the specific accident which occurred, it would still be admissible as evidence for the jury to consider in evaluating the reasonableness of the defendants' conduct.

67. See, e.g., Opple v. Ray, 208 Ind. 450, 195 N.E. 81 (1935); cf. Butler v. L. Sonneborn Sons, Inc., 296 F.2d 623 (2d Cir. 1961), where the court held that the violation of the statute was admissible as some evidence of negligence although the injured plaintiff was not in the precise class to be protected.
others and thus has committed an antisocial act, it is reasonable that community opprobrium should be automatically attached to his act. Furthermore, as was argued by Dean Thayer in his classic article on this subject, the reasonable man would never violate the law, so all statutory violations would naturally be negligent and unreasonable in themselves. Thayer opposed the commonly accepted approach to negligence per se of attempting to determine the intent of the legislature, because, in his view, it was impossible to determine such intent, and, in all likelihood, the legislators never considered the problem.

Despite this persuasive reasoning, the negligence per se approach has several major flaws. One potential hazard is that the jury is likely to confuse the unreasonableness of the violation with the cause of the accident, and hence may base its decision upon the violation of the law, rather than upon an application of the reasonable man standard to the acts leading to the injury. Furthermore, the application of the doctrine may be overly harsh in a given case. For example, a violation of one of the multitude of automobile regulations, such as that requiring a brightly illuminated headlight, may in effect be the cause of an accident, yet to treat such a violation as negligence in itself without considering the actor's knowledge and opportunity to correct the defect before the accident would be effectively adopting strict liability and thus stepping far beyond the reasonable man standard.

Many courts, concerned that the determination of what is reasonable in a given case should be left to the exclusive province of the jury, have admitted the standard as some evidence of negligence. In other words, the jury would weigh the fact that the legislature had passed upon this type of activity and had determined that it was dangerous, and would consider this determination in arriving at the prototype of a reasonable man. The difficulty in

68. See Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361, 376 (1932). In Clinkscale v. Carver, 22 Cal. 2d 72, 136 P.2d 777 (1943), the court applied the antisocial act reasoning by considering the violation of a traffic ordinance to constitute negligence per se although it was established that the regulation was irregularly authorized.

69. See Thayer, supra note 63. Thayer argued that only an affirmative act, as opposed to an act of omission, could give rise to a duty answerable in tort.

70. It could even be argued that the violation of a statutory prohibition constitutes an intentional tort, for each individual is deemed to know the law, and therefore could not attribute his noncompliance to mere negligence in learning of the prohibition.

71. Thayer would not consider this a flaw, for he would argue that it is the violation of the law which should be weighed most heavily by the jury in determining the reasonableness of the defendant's conduct. See Thayer, supra note 63.

72. Cf. Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814, 816 (1920). In Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), the court's application of the negligence per se rule may appear harsh, although it represents a correct use of the rule. There the defendant's agent violated a traffic ordinance which prohibited drivers from leaving keys in their vehicles. The automobile was stolen, and ran over the plaintiff. Since the statute's design was to prevent auto theft by reckless or inexperienced drivers and because the violation led to a foreseeable result, the case was appropriate for an application of the negligence per se rule.

73. Two commentators have argued that "neither in fact nor in law do others have the right under all circumstances to rely on the actor's obedience to statutes." F. Har- per & F. James, supra note 63, at 1000.


76. Wigmore argues that the statute or ordinance "is virtually a custom or usage
this approach, as was previously alluded to,\textsuperscript{77} is that the violation of the law, as opposed to variance from a custom, would be likely to have a much more detrimental and prejudicial effect on the defendant's case.

Finally, some courts have ignored the statutory violation, allowing it to have no influence in determining what behavior is negligent. Traffic violations have often been treated in this manner, primarily because of the "recognition that people plead guilty to traffic charges for reasons of convenience and without much regard to guilt and collateral consequences."\textsuperscript{78} The facts that the procedural safeguards in traffic courts may be perfunctory, especially because of the less formal structure of the proceedings and infrequent use of jury trials, and that the plea may be given undue weight in large civil suits should also be stressed.\textsuperscript{79} A number of states have resolved this problem through legislation.\textsuperscript{80}

In any case, if the statutory standard is admissible, the court usually takes judicial notice of it.\textsuperscript{81} So long as the court deems it relevant to the standard of care issue, there seems to be no evidentiary problem in having the statute, or administrative regulation, brought before the court.\textsuperscript{82}

**B. Implying a Right of Action from the Statute\textsuperscript{83}**

A statute may be utilized in a more indirect fashion in a civil suit, by serving as a basis for implying a separate civil liability.\textsuperscript{84} Under this approach, having orthodox status\textsuperscript{85} and that it should constitute either negligence per se or be no evidence of negligence. 2 J. Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 416(6) (3d ed. 1940).

77. See note 71 supra and accompanying text.
79. See Annot., supra note 78, at 1290.
80. See, e.g., Ohio REV. CODE ANN. § 1.16 (Page 1969) (forbidding the use of a conviction record in a civil suit unless the conviction was by confession in open court); Tex. CODE CRIM. PROC. ANN. art. 27.14 (Supp. 1973) (establishing that payment of a fine for a moving traffic violation will be treated as a plea of nolo contendere, and consequently will not constitute an admission of guilt usable elsewhere). Guilty pleas in criminal cases are generally admissible, but not conclusive, in subsequent civil actions. See, e.g., State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683 (8th Cir. 1968); Johnson v. Tucker, 383 S.W.2d 325 (Ky. Ct. App. 1964).
81. See C. McCormick, supra note 78, § 335, at 777; Uniform Rule of Evidence 9.
82. For a discussion of the admissibility of safety codes and industry practices which have not been enacted into law, see Philo, Use of Safety Standards, Codes and Practices in Tort Litigation, 41 NOTRE DAME LAW. 1 (1965); Comment, Admissibility of Safety Codes, Rules and Standards in Negligence Cases, 37 TENN. L. REV. 581 (1970).
83. For the purposes of this Comment, the effects of statutory and regulatory violations shall be discussed together, but it is noteworthy that Professor Morris, supra note 63, considered administrative regulations separately because they were not promulgated directly by the legislature.
which in its practical effect closely resembles that of negligence per se, the statute is deemed to imply that a violation will make the actor subject to additional civil liability. This approach shares the same fallacy which Thayer criticized in the negligence per se area. There is generally no intent to be construed, for the legislators never considered the subject of the statute's civil effect. One author who advocated the implication of private civil remedies from violations of statutes realized, as Thayer did, the meaninglessness of the examination of non-existent legislative intent, and instead based his support for the doctrine on policy grounds. In other words, when the policy of the act in question would be served by implying a private civil remedy, the courts should be encouraged to do so.

The implied right of action approach apparently originated in the English case of Couch v. Steel, where a statute requiring a shipowner to have certain medicines on board was violated. Although the statute imposed a penalty payable to the informer, but was silent as to further civil liability, the court allowed the injured sailors to sue for damages. In this country the doctrine received its major impetus from the case of Texas & Pacific Railway v. Rigsby, where the United States Supreme Court determined that the violation of the Safety Appliance Act was wrongful in itself, and when injury to an individual member of the protected class resulted, then the right to recover damages from the violator would be implied. The question of what defenses would be available was not discussed by the court, for the Act stated specifically that an employee could not be said to have assumed the risk of a violation, and contributory negligence was not an issue.

The courts have applied various forms of reasoning in determining when it is appropriate to imply a private civil remedy. If the legislative intent is available to be construed, then the courts will do so. If it is unclear or non-existent, however, the courts find themselves in the policy making arena and have taken various approaches. Some courts have taken the position that


85. "Holding that the violation of a criminal statute is negligence per se does not differ substantially from holding that the violation of a criminal statute creates a direct civil liability." Lowndes, supra note 68, at 366.

86. See Morris, supra note 63. For an exhaustive discussion of the absurdity of attempting to divine a nonexistent congressional intent, see Justice Frankfurter's dissent in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 460 (1957).


90. The application of the negligence per se approach would most likely have led to a similar result.


92. For a discussion of these approaches, with an emphasis on the implication of private remedies from federal common law, see Comment, supra note 61.
a private right of action should be implied unless a contrary intention is clearly evidenced by the legislature. In other cases, the courts have held that no private remedy will be implied unless the act itself provides grossly inadequate or nonexistent remedies. In *Breitwieser v. KMS Industries, Inc.*, for example, no private right of action was implied from the oppressive child labor provisions of the Fair Labor Standards Act, since criminal penalties were available within the Act and workmen's compensation was available to supplement it. Finally, some courts have taken the approach that legislative silence evidences an intent not to provide for a private remedy, so in the absence of clear legislative intent otherwise, no private right will be implied.

The courts generally do not separate into the three concise categories discussed above. Usually, the analysis of the implied right of action is based on a case-by-case approach, which tries to reason from the legislative history, to weigh competing interests and to balance the various policies which might best be served by action or inaction. As a general rule, courts have been most willing to recognize private rights of action based on regulatory statutes providing for no direct remedial relief to the injured party, partly because of the "realization that agencies cannot investigate and prosecute every violation within their respective areas of expertise," and partly because the agency may be unable to rectify a particular type of injury. Finally, the courts should consider the relative merits of implying a federal remedy as opposed to relegating the plaintiff to a remedy under state law.

In short, the "case for implication" of a private right of action is strongest where state remedies are unavailable, inadequate, or ineffective and where the public policy of the act would be obviously furthered by individual enforcement. Of course, the fairness of implication in each case is an important consideration, as it is when a statutory violation is considered to constitute negligence per se.

94. 467 F.2d 1391 (5th Cir. 1972); accord, *Square v. Model Farm Dairies*, [1939] All E.R. 259 (Ct. App.).
96. 467 F.2d at 1394. The remedies available to supplement this Act are very similar to those available to supplement OSHA.
97. *See*, e.g., *Wynn v. Sullivan*, 294 Mass. 562, 3 N.E.2d 236 (1936). In the "snowshovel" cases, courts have held that the breach of a statutory duty to keep sidewalks in safe condition does not constitute negligence per se. *See*, e.g., *Western Auto Supply v. Phelan*, 104 F.2d 85 (9th Cir. 1939); *Clark v. Stoudt*, 73 N.D. 165, 12 N.W.2d 708 (1944). Both cases stressed the lack of a common law duty to keep the sidewalks clean for the benefit of third persons.
99. *Id.*
101. *See* *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947), where a private right of action was implied from the Federal Communications Act, 47 U.S.C. § 151 (1970).
102. The implication of these remedies and the consequent federal judicial lawmaking creates some intriguing *Erie* problems which are discussed in Comment, *supra* note 61.
C. Strict Liability and Defenses to Violation of a Statute

Once it is determined that a statutory or regulatory violation constitutes negligence per se or implies a private remedy, it is necessary to determine what effect those approaches will have on defenses which would normally be available to the plaintiff. In other words, it must be determined whether the violation should be treated as strict liability in a civil suit, so that the defendant will not be able to argue that the plaintiff assumed the risk or was contributorily negligent, or whether these defenses should be available as in a normal tort action.

As a general rule, the courts have barred the assumption of risk defense in statutory negligence cases. In Jones v. Ross, for example, the Texas Supreme Court held that where certain design requirements were specified by law for the protection of employees, noncompliance would operate to deprive the employer of the opportunity to establish assumption of the risk. The contributory negligence defense, on the other hand, has been generally permitted by the courts even in negligence per se cases. In Phipps v. S.S. Santa Maria, for example, the court considered the plaintiff's negligence in a case regarding the unseaworthiness of a vessel in violation of the longshoremen's safety and health regulations. At least one court, however, has ruled that the contributory negligence defense is available only where the plaintiff was grossly negligent, while the Restatement of Torts takes the position that both defenses are available unless the statute's intent is to place the total responsibility for the risk upon the defendant.

The final consideration for the use of a statute in a related civil suit involves the effect of compliance with a statutory standard of care. The judi-

103. Contributory negligence has been replaced in Texas by modified comparative negligence. Tex. Rev. Civ. Stat. Ann. art. 2212a (Supp. 1974). A third defense which has been available in Texas negligence cases is the Delhi-Taylor defense, which insulates a landowner or employer from liability if he warns a contractor or the contractor's employees of the danger. See Gulf Oil Corp. v. Bivins, 276 F.2d 753 (5th Cir. 1960); Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390 (Tex. 1967). However, in Armstrong v. Chambers & Kennedy, 340 F. Supp. 1220 (S.D. Tex. 1972), the court held that this defense was unavailable in a case which involved a statutory duty to comply with safety regulations.

104. 141 Tex. 415, 173 S.W.2d 1022 (1943). The negligence per se rule would not, however, support the imposition of exemplary damages. Id. at 419-20, 173 S.W.2d at 1024.

105. Accord, Hewitt v. Safeway Stores, Inc., 404 F.2d 1247 (D.C. Cir. 1968) (assumption of risk barred under a statute which required an employer to furnish and maintain a reasonably safe place of employment); Osborne v. Salvation Army, 107 F.2d 929 (2d Cir. 1939) (window washer without safety belt, both assumption of risk and contributory negligence defenses barred). But see Rittenberry v. McKee, 337 S.W.2d 197 (Tex. Civ. App.—Dallas 1960), error ref. n. e., where the court held that where an employee knew of the dangers of an unguarded elevator shaft that the defense of volenti non fit injuria was available. Since Rittenberry also involved the employee of an independent contractor, and since by the rule of Adam Dante v. Sharp, 483 S.W.2d 452 (Tex. 1972), the distinction between volenti (contract) and assumption of the risk (tort) is no longer accepted in Texas, the case is of doubtful authority.


107. 418 F.2d 615 (5th Cir. 1969).


110. RESTATEMENT (SECOND) OF TORTS §§ 483, 496f (1965).
cial approach has generally been to consider the statute or regulation as representing a minimum standard, so that compliance would not necessarily satisfy the reasonable man standard. It can be argued that compliance should be at least some evidence for the jury since the defendant complied with the standard of a reasonable legislator or administrator. If the standard is higher than the reasonable man standard, however, the reasoning of the negligence per se rule would apply in urging that the jury should not have the option to pass independently on the actor’s reasonableness.

III. EFFECT OF OSHA IN A CIVIL SUIT

The particular characteristics of the Occupational Safety and Health Act establish it as an interesting model to explore the various effects which the violation of a statute or regulation can and should have in a related civil case. In determining whether an OSHA violation should constitute negligence per se, evidence of negligence, or no negligence, certain factors must be highlighted. First, the manner in which "guilt" under OSHA was adjudicated in a particular case should be a major factor in making subsequent use of the violation. Because the citation is similar to a traffic summons and because ninety-five percent of the employers cited pay without protest to avoid dangerous publicity and a costly administrative battle, it is submitted that bare payment should be of little or no effect. In fact, a primary motivation of an employer in paying the fine may be to prevent the creation of a record from which civil liability may be adduced. Just as traffic offenders who enter a plea of nolo contendere are not treated as having made admissions for purposes of subsequent civil actions, so should those employers who pay fines not have to fear that such payment will be taken as evidence of negligence. A ruling that payment is an admission of negligence would encourage more contests of citations. Given the manpower shortages plaguing the administrative apparatus of the Act even when the vast majority of the citations are paid immediately, it is not highly speculative to assume that such a change in rules would tax the system beyond capacity.

If the employer contests the citation and receives an administrative hear-

112. See Morris, supra note 63, at 157.
113. The Secretary apparently anticipated that the reports of investigations would be of some interest in civil litigation, for he promulgated an entire series of regulations which deals with the subject of "Administration Witnesses and Documents in Private Litigation." See 29 C.F.R. §§ 1906.1-7 (1973). Records of the Occupational Safety and Health Administration are available for public inspection. Id. § 1906.7. The general rule of evidence is that all records prepared by a public officer pursuant to a legal duty are admissible insofar as they are relevant, as an exception to the hearsay rule. See 30 Am. Jur. 2d Evidence §§ 991, 1002 (1967).
115. Id.
117. C. McCormick, supra note 78, at 636.
118. As of Jan. 1, 1974, 800 Compliance Officers were employed by OSHA. See 3 BNA Occup. Safety & Health Rep. 1279 (1974).
ing, and possibly judicial review, there would be more justification for admitting the results of these hearings, either as evidence for or against negligence, than if the employer merely paid the fine. Since the employer took the opportunity to marshal his case and to prove his innocence, it would not be unfair for the results of those efforts to be used in subsequent civil litigation involving the employer. There are two problems with making this distinction based upon the extent of the appeal taken. First, this rule would discourage employers from appealing, for by doing so they would risk making a record which could be used against them in subsequent civil litigation. The effect would be to contribute to the previously criticized chilling effect of the present OSHA appeal system. Secondly, the employer might not be pursuing his remedies as forcefully against the citation, when, for example, a $1,000 claim is involved, as he might were he to know that the outcome could be determinative in a subsequent civil suit for a much greater amount.

Another factor, along with the manner of guilt determination, which is important in analyzing the proper effect of an OSHA violation in a civil suit is the type of provision violated. Totally different forms of analysis would be appropriate for a violation of the general duty clause and for a violation of a specific regulation. As to the general duty clause, it is first necessary to analyze the effect of the clause on the common law duty to which the employer would be subject without it. In fact, the general duty clause is virtually a restatement of the employer's common law duty to provide a reasonably safe working place for his employees. The Senate Committee on Labor and Public Welfare concluded that the general duty clause "merely restates that each employer shall bring no adverse effects to the life and health of their employees throughout the course of their employment." In one respect, the general duty clause can be said to be more lenient than the common law duty, since the employer is seemingly charged with protecting his employees only from recognized, rather than from merely foreseeable, hazards. In fact, however, the statute has been interpreted by the Department of Labor as embodying the reasonable man standard. A recognized hazard is a condition "of common knowledge or general recognition in the particular industry in which it occurs and is detectable (1) by means of the senses . . . or (2) is of such wide, general recognition as a hazard in the industry that even if it is not detectable by means of the senses, there are generally known and accepted tests for its existence which should make it known to the employer." One might argue that OSHA requires slightly

119. See note 23 supra, and note 52 supra and accompanying text.
121. See Mather v. Rillston, 156 U.S. 391 (1895); Great Atl. & Pac. Tea Co. v. Jones, 294 F.2d 495 (5th Cir. 1961); Hornberger, supra note 32, at 5.
123. OCCUPATIONAL SAFETY AND HEALTH REPORTER REFERENCE FILE, supra note 21, at 3102; see Secretary of Labor v. Vy Lactos Laboratories, Inc., 1 O.S.H.C. 1141 (1973). In Secretary of Labor v. American Smelting & Ref. Co., 1 O.S.H.C. 1256 (1973), the Commission ruled that "recognized hazards" included those discoverable by instruments. The modification of the general duty clause in terms of recognized hazards
more than the common law duty since the employer must furnish a working environment that is free from future, as well as present hazards, but it is obvious that in a civil suit the clause could be invoked only by one who could establish an actual present injury. In effect, OSHA simply restates the employer's common law duty, even going so far as to make it applicable only in cases where a specific standard does not apply.  

The criticism which has been levied against it for its vagueness is equally applicable to the elusive reasonable man standard, so that the Act cannot be criticized for being unfairly ambiguous when it merely restates a commonly accepted, though admittedly ambiguous, test applicable to all negligence cases. Since the general duty clause embodies the reasonable man standard, however, a violation of it should not be admitted in a civil suit, for by admitting it, the court would be allowing the Compliance Officer, and perhaps the OSHRC, to determine what conduct is reasonable. In cases where the general duty clause applies, the legislature did not fix the standard of care for a particular type of activity, so it would be an invasion of the trier of fact's role to make the general duty clause binding in a civil suit. 

As to the proper effect which a violation of a specific standard should have in a civil suit, this is another instance where the standard has been legislatively fixed and unreasonable activities have been anticipated. Employers have the opportunity to challenge each regulation before it is promulgated, and once it is published in the Federal Register, employers are charged with constructive notice of its existence and terms. An employer might argue that a given regulation either goes beyond or is totally unrelated to a reasonable standard of care, but if this problem arises in a civil suit, it would be after an injury occurred, and hence the employer would be placed in the unenviable position of arguing that the deviation which caused the plaintiff's injury was more reasonable than obedience to the rule which might have prevented it. There will, however, be a substantial causation problem in this area. Many of the regulations are rather trivial and it would not only be harsh, but also absurd to base liability on the violation of the statute. Furthermore, the extreme breadth of the Act makes it likely that a violation could occur and lead to an accident before a reasonably prudent employer could correct it. Finally, OSHA is often technical and confusing, but the employer is unable to secure an advisory investigation to assure that he is in compliance with the regulations. 

Balancing these factors leads to the conclusion that

reflected a compromise between the administration version of OSHA, which was phrased in terms of "readily apparent hazards," and the version authored by Congressman Daniels, Chairman of the House Labor Subcommittee, which covered all hazards. See 3 U.S. CODE CONG. & ADMIN. NEWS 5177, 5222 (1970).

124. 29 C.F.R. § 1910.5(c) (1973).

125. Rep. Steiger, co-author of OSHA, criticized the breadth and vagueness of the general duty clause contained in the compromise version of the Act, arguing that it gave insufficient notice to employers and that since it imposed penalties before injuries occurred, it was not analogous to the tort duty. 116 CONG. REC. 38371 (1970).

126. See Morris, supra note 63, at 152.

127. See, e.g., 29 C.F.R. § 1910.141(c)(3)(ii) (1973), which requires toilets to have hinged seats made of material with a nonabsorbent finish.

128. A bill to authorize such advisory investigations was presented to the Congress by Rep. Steiger, but it apparently died in the Education and Labor Committee. H.R. 16508, 92d Cong., 2d Sess. (1972).
the violation of a specific standard of OSHA should be some evidence of negligence for the jury to consider,129 but it should not constitute negligence per se. By the same logic, compliance with the specific regulations of OSHA should be a factor for the jury to consider, but it should by no means be conclusive on the issue of reasonable conduct.130

The constitutional problems of OSHA131 must also be considered in determining what effect, if any, the evidence that an OSHA standard was violated should have. As OSHA's penalties bring it within the category "quasi-criminal"132 for purposes of the exclusionary rule, any materials seized unconstitutionally, such as during a search without a warrant to which the employer does not consent, would be excluded in an OSHA hearing. The problem of concern here is what effect that exclusion should have in a civil action. Though there has not been much litigation on this point, the better reasoned cases hold that in order to further the policies underlying the exclusion of unconstitutionally seized evidence, this material will not be admissible in a subsequent civil suit.133

As to the other constitutional problems of OSHA, those dealing with the lack of due process and the chilling effect on appeals are crucial to an analysis of the proper weight to be accorded an OSHA "conviction." When the system prevents the employer from pursuing his rights to the fullest possible extent, and does not accord him due process protections, the further effect of its adjudication should be diminished accordingly.

Next is the question of whether a private right of action should be implied under the statute. Before applying the specific tests discussed above,134 it is necessary to indicate that the statute itself appears to be determinative of at least part of this question. Section 4(b)(4) of the Act states that:

Nothing in this Act 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.135

Legislative history on this provision is virtually non-existent, but the provision apparently denies a private right of action if it is barred by workmen's com-

129. This approach unfortunately does not eliminate the very real possibility that the jury will base its decision on the violation of the regulation, rather than on the unreasonableness of the action. See text accompanying note 71 supra.
131. See notes 39-52 supra and accompanying text.
134. See text accompanying notes 92-97 supra.
compensation, but if such an action is not barred by workmen's compensation, or where a third party is injured, the limiting language of section 4(b)(4) as to employer-employee actions under a law should be irrelevant to the implication of a private action.

Thus far, three federal courts of appeals have held that OSHA does not imply a private cause of action. In *Byrd v. Fieldcrest Mills, Inc.* the Fourth Circuit pursued reasoning similar to that used by the Fifth Circuit in *Breitwieser v. KMS Industries, Inc.* The availability of workmen's compensation would preclude a private remedy, at least as to employees. In *Skidmore v. Travelers Insurance Co.* the Fifth Circuit alluded to the silence of the statute in the area of private relief, but based its refusal to impose civil liability on the fact that the suit sought to fasten liability on executive officers of a corporation, who, as employees themselves, were not responsible for enforcing the provisions of OSHA. Finally, in *Russell v. Bartley* the Sixth Circuit adhered to a rather conservative view in refusing to imply a private remedy because of the Congress' failure to mention civil liability and because of the availability of workmen's compensation. Also present in *Russell* was the executive officer problem focused upon in *Skidmore*. If this factor was actually central to the decisions, the cases are of less precedential value as to the implied private action than might otherwise be assumed, for they might be unique to their own fact situations. Even if the cases cannot be so distinguished, they say nothing new or unexpected, but simply follow the traditional tort analysis in construing intent and analyzing available remedies to deny a private remedy. At least as to employees whose employers subscribe to workmen's compensation, the conclusions of these cases seem appropriate.

Though the implication of a private right of action for employees lies on rather tenuous ground because of section 4(b)(4), the reasoning generally applied to determine the appropriateness of such a remedy is applicable, for it can support an implied right of action for injured third parties and in those

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*Editor's Note: Since this Comment went to press, the Fifth Circuit decided in *Jeter v. St. Regis Paper Co.*, No. 73-3470 (5th Cir., Feb. 6, 1975), that OSHA provides no federal cause of action to an employee of an independent contractor to whom the contractor's employer owed no duty.

137. 496 F.2d 1323 (4th Cir. 1974).

138. 467 F.2d 1391 (5th Cir. 1972); see text accompanying note 94 supra.

139. 483 F.2d 67 (5th Cir. 1973).

140. One commentator suggests that *Skidmore* should be limited to its facts, for it simply held that OSHA does not create a private cause of action against executive officers when the failure to comply was the employer's and not the officers'. See Stra mondo, *Civil Litigation Potential of the Occupational Safety and Health Act of 1970*, in PLI, *OCCUPATIONAL SAFETY AND HEALTH ACT—TRENDS AND DEVELOPMENTS* 211, 218 (1974).

141. 494 F.2d 334 (6th Cir. 1974).


143. See also *Hare v. Federal Compress & Warehouse Co.*, 359 F. Supp. 214 (N.D. Miss. 1973), where the court refused to base civil liability on the Act. The case involved some special problems regarding the liability of the employer of an independent contractor, so it is probably a limited precedent.
cases section 4(b)(4) would appear to be irrelevant. These individuals are not covered by workmen’s compensation, yet their injuries are caused by disobedience to a legislative mandate which was designed to prevent such injuries. Giving them a private remedy would further the policies of the Act by providing another incentive for employers to comply. Furthermore, the agency charged with enforcement in this area is unable to provide relief for the injured third party, and if his injury is caused by the violation of a particular standard which sets a higher duty of care, then the reasonable man standard, relegating him to his common law or state remedies, would in effect leave him without relief. For these reasons, OSHA should be interpreted to provide an implied right of action for third parties against employers.\(^\text{144}\)

Finally, in the area of strict liability for a violation of OSHA and more particularly, the denial of the defenses of assumption of the risk and contributory negligence, there appears to be no reason why this Act should be treated any differently from the general pattern of disallowing the assumption of risk defense but permitting that of contributory negligence. Were the assumption of risk defense available, an employer could avoid his obligations to increase safety on the job simply by making his employees aware of the dangers. As was stated by the Senate Committee, the employer has full responsibility for job safety\(^\text{145}\) and consequently should not be able contractually to avoid his duty to provide safe working conditions for his employees.\(^\text{146}\) As a practical matter, however, this is probably a relatively unimportant issue, for because of the coverage of workmen’s compensation, it is in only rare cases, usually where gross negligence is involved, that an employee will be able to sue his employer,\(^\text{147}\) and in those cases assumption of the risk should not be a significant issue.

The contributory negligence defense, on the other hand, seems justified by the terms of OSHA. As was stated recently by the OSHRC,\(^\text{148}\) OSHA does not make the employer “a virtual insurer of the conduct of his employees” nor is he “absolutely liable for all their acts of commission and omission.”\(^\text{149}\) The employees are charged with specific duties under OSHA and the mere fact that they are not subject to penalties for noncompliance does not indicate that their negligence should be disregarded in a civil action. Once the employer “has established an effective safety program and has taken reasonable steps to inform his employees of their obligations to comply with OSHA safety standards and plant safety rules,”\(^\text{150}\) he should be able to utilize comparative negligence or the contributory negligence defense to diminish or deny his liability for unauthorized actions of his employees, both in administrative pro-

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144. The Act might even be interpreted to provide a right of action by third parties against employees who violate their duties under OSHA.
145. See note 58 supra and accompanying text.
146. The employer would still be liable for penalties levied directly under the Act.
150. Lemert & Sours, supra note 36, at 31.
ceedings under OSHA and in related civil matters. Such an approach would encourage the employer to fulfill his obligations under the Act, but would not place upon him the unfair burden of going beyond the reasonable man standard in assuring that his employees comply.  

IV. Conclusion

OSHA provides a striking means to determine the approach which should be taken in all civil cases in which a party seeks to introduce evidence of a statutory violation. That approach calls for the pursuit of a case-by-case analysis which will further the interests expressed in the statute without unfairly burdening a defendant. In order to determine whether the violation should constitute negligence per se, some evidence of negligence, or no evidence of negligence, the specific provisions of the Act, possible constitutional or other objections to it, and its legislative history should be analyzed. The intended protection of the statute, in terms of the risk against which it was designed and the class which it was to protect, should also be determined. In cases where the plaintiff did not have an opportunity to discover his non-compliance, the fairness of applying the negligence per se rule should be considered.

Further, as was exemplified by the above analysis of OSHA, the type of adjudication which led to the defendant's being found liable under the statute should be explored. If the "adjudication" was merely payment of a fine without an adversarial determination of the issues, the violation of the statute should probably be of no effect. If, on the other hand, the defendant exercised full rights of appeal, complete with constitutional guarantees, a much stronger case for negligence per se is presented. Along with this consideration, however, the court should weigh the fact that by determining the subsequent effect according to the extent of appeal, it will be discouraging employers from exercising their rights to appeal.

The type of provision which is violated should also be analyzed. If it is simply a restatement of the common law duty, as is the general duty clause in OSHA, it should be of no effect in a civil suit. To allow such to be considered would be to take from the fact finder the right to determine the reasonable man standard. If the statute goes beyond the reasonable man standard, as do the specific standards in OSHA, and if causation is not a problem, then the statute should be at least some evidence for the jury to consider. Under OSHA, since the employer might be genuinely unaware of a violation and since he cannot secure an advisory opinion, it is submitted that the violation should constitute evidence of negligence, rather than negligence per se.

In determining if a private right of action should be implied, the legislative history, intended effect, and policies of the Act must be studied. Given the difficulty in deriving legislative intent, the courts should emphasize the policy

151. The court applied comparative negligence in Arthur v. Flota Mercante Gran Centro Americana, S.A., 487 F.2d 561 (5th Cir. 1973), a case involving safety and health regulations under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) (1970). The court also applied the classic risk and protected class analysis to conclude that the violation constituted negligence per se.
approach. When by implying a private remedy, the court would further the goals of the statute without denying clear legislative intent to the contrary, it should do so. Under OSHA, the legislative intent against establishing a private remedy for employees seems clear, but as to third parties the Act and legislative history are silent. To further the stated goals of diminishing the number of job-related injuries, it would be appropriate for the court to imply a private right of action for third parties.

Finally, in determining if strict liability or a presumption of guilt with available defenses should be the rule, the courts should consider the effect which each defense would have on the goals of the Act. In OSHA, assumption of the risk would allow the employer to evade his responsibilities, but contributory negligence would be an appropriate defense if the employee failed to observe his duty of compliance. By pursuing this specific yet flexible approach, courts may give violations of statutes like OSHA an important and logical effect in civil litigation.