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OHIO RAILROAD CROSSING LAW: THE SCOPE OF LIABILITY

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OHIO RAILROAD CROSSINGS have been and continue to be the scene of the death and maiming of motorists and their passengers. The state legislature has manifested its concern over the dangers that railroad crossings create by enacting several statutes for the purpose of avoiding or limiting crossing accidents.[1] The interpretation of these laws by the courts, however, has resulted in much confusion concerning a railroad's duties and the type of defenses permitted under the statutes.[2] As a practicing attorney involved in personal injury suits initiated as the result of railroad crossing accidents, the author of this article shares a sense of guilt with other trial attorneys for the unsettled and confusing legal ruins left by recent efforts to moderate the statutory interpretations applicable to railroad crossing accidents.

The history of the contradictions in the development of railroad crossing law and an alternative statutory interpretation to resolve the inconsistencies evidenced by the courts is the subject of this article.

I. THE HISTORY OF OHIO RAILROAD CROSSING LAW

A. *The* McCallie *Doctrine — Absolute Liability for Failure to Erect Crossing Signs*

A statute may impose an absolute liability with no recognized excuse for violation.[3] The legislature, within its constitutional powers, may see fit to place the burden of injuries "upon those who can measurably control their causes instead of upon those who are in the main helpless in that regard."[4]

In the 1969 case of *McCallie v. New York Central Railroad*,[5] the defendant railroad was held absolutely liable for damages resulting from injuries to

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[1] The safety statutes include OHIO REV. CODE ANN. §§ 4955.32, 4955.33, and 4955.34 (Page 1977). The legislative intent to prevent crossing accidents was recognized by the court in Norfolk & W. Ry. v. Gissuisne, 144 F. 56, 59 (6th Cir. 1906), which stated that "[s]uch statutes are obviously for the benefit of those using or about to use the crossing . . . ." This intent to protect travelers is also indicated in C.C. & I. Ry. v. Reiss, 13 Ohio C.C. 405, 407-08, 7 Ohio Cir. Dec. 450, 451-52 (1st Cir. 1889) where the court stated that a jury should be instructed that the purpose of requiring a sign at a railroad crossing is to warn travelers of that crossing.

[2] *Compare* McCallie v. N.Y. Cent. R.R., 23 Ohio App. 2d 152, 261 N.E.2d 179 (1969) *with* Glinsey v. Baltimore & O.R.R., 356 F. Supp. 984 (N.D. Ohio 1973), *rev'd*, 495 F.2d 565 (6th Cir.), *cert. denied*, 419 U.S. 968 (1974).

[3] W. PROSSER, LAW OF TORTS 197 (4th ed. 1971).

[4] St. Louis, I.M. & S. Ry. v. Taylor, 210 U.S. 281, 296 (1908).

[5] 23 Ohio App. 2d 152, 261 N.E.2d 179 (1969).

persons and property for failure to maintain a crossbuck sign at a railroad crossing. Contributory negligence was precluded as a defense in an action brought for violation of Ohio Revised Code section 4955.33 which reads as follows:

> § 4955.33 [Warning signs at highway grade crossings. . . .]
> At all points where its railroad crosses a public road at a common grade, each company shall erect a sign . . . to give notice of the proximity of the railroad and warn persons to be on the lookout for the locomotive. . . . A company which neglects or refuses to comply with this section *is liable* in damages for all injuries which occur to persons or property from such neglect or refusal.[6]

The trial tactics employed by the plaintiff in *McCallie* present an excellent example of the difference in a verdict which will result from complete as opposed to partial statutory interpretation. The fact that absolute liability was imposed was due, at least in part, to the plaintiff's argument that the last sentence of Ohio Revised Code section 4955.33 added a dimension to the statute which went beyond the liability for negligence imposed by Ohio Revised Code section 4955.32 for failure to comply with sound signal requirements.[7] The plaintiff argued that the last sentence of section 4955.33 made the company absolutely liable for all injuries caused by its non-compliance with the statute. The trial court, adopting the plaintiff's argument, instructed the jury that the words "is liable" contained in the last sentence of the crossbuck statute enlarged the railroad's duty to construct a crossbuck sign and imposed a further penalty for breach of this statute so that contributory negligence could not be a defense. The very real probability was that if *McCallie* had been tried simply as a negligence case, the trial judge would have directed a verdict for the defendant because of the defendant's compliance with the sound signal requirements and the plaintiff's failure to listen at a time and place where listening would have revealed the presence of the train.

The court of appeals affirmed *McCallie*, holding that section 4955.33 renders a railroad strictly liable for damages proximately caused by the railroad's failure to maintain a crossbuck sign at a railroad crossing. According to that court, where a statute directs the performance of a duty coupled with liability in damages for failure to perform, negligence is not a proper cause of action. It follows that "without an element of negligence or the opportunity to be negligent in performance, [the defense of] contributory negligence cannot exist."[8]

B. *The* Glinsey *Escape from Absolute Liability for Failure to Sound Train Signals*

Rather than actions for violation of the crossbuck statute, the majority of personal injury suits brought for railroad crossing accidents are causes of action for violation of Ohio Revised Code section 4955.32 which requires a

[6] OHIO REV. CODE ANN. § 4955.33 (Page 1977) (emphasis added).

[7] Ohio Revised Code section 4955.32 details the railroad's duties in the provision of audible warnings as its trains approach crossings. *See* note 9 *infra*.

[8] 23 Ohio App. 2d 152, 159, 261 N.E.2d 179, 184 (1969).

train approaching a crossing to give an audible warning to the traffic in the area.[9]

A warning case in which the plaintiff employed a statutory construction argument similar to *McCallie v. New York Central Railroad*[10] is *Glinsey v. Baltimore and Ohio Railroad.*[11] *Glinsey* arose as a consequence of a railroad-highway crossing accident in which Willie Glinsey was killed and James Glinsey was injured. The administratrix of the estate of the decedent, Willie Glinsey, and the party injured, James Glinsey, sued the Baltimore and Ohio Railroad in federal district court for the engineer's failure to blow the train's whistle and sound its bell in compliance with Ohio Revised Code section 4955.32.[12] Before the trial, the plaintiffs filed a motion *in limine* seeking to exclude evidence of contributory negligence, namely that Willie Glinsey may have been intoxicated at the time of the accident and that the Glinseys' car may have been stolen. The plaintiffs argued that such evidence was not relevant because Ohio Revised Code section 4955.34 imposed absolute liability for the violation of section 4955.32 and that therefore the defense of contributory negligence was unavailable. The statute invoked by the plaintiff states in part:

> 4955.34. Failure to erect warning signs; forfeiture.
>
> Every engineer . . . who fails to comply with section 4955.32 . . . is personally liable . . . .
>
> The company in whose employ such engineer or person in charge of an engine is [*sic*] as well as the person himself, is liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person.[13]

In its instructions to the jury, the district court interpreted section 4955.32 as a specific safety statute, the violation of which would be negligence per se but which would not necessarily foreclose the defense of contributory negligence. The court then gave another instruction similar in its temper to that given in *McCallie v. New York Central Railroad* which informed the jury that section 4955.34 provides strict liability for violation of section 4955.32 and that section 4955.32 could not be interpreted without making reference to section 4955.34. The court viewed the language of section 4955.34 as identical

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[9] OHIO REV. CODE ANN. § 4955.32 (Page 1977) reads in part:
Every company shall attach to each locomotive engine passing upon its railroad a bell of the ordinary size in use on such engine and a steam or compressed air whistle. When an engine [is] in motion and approaching a turnpike, highway, or street crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve, or other obstruction to view, upon the same line with the crossing, and in like manner where the railroad crosses any other traveled place, by bridge or otherwise, the engineer or person in charge of such engine shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing and ring such bell continuously until the engine passes the crossing.

[10] 23 Ohio App. 2d 152, 261 N.E.2d 179 (1969).

[11] 356 F. Supp. 984 (N.D. Ohio 1973), *rev'd*, 495 F.2d 565 (6th Cir.), *cert. denied*, 419 U.S. 968 (1974).

[12] *See* note 9 *supra.*

[13] OHIO REV. CODE ANN. § 4955.34 (Page 1977). The caption to this statute is obviously erroneous in its reference to the warning sign requirement. If the statute was truly one for violation of the warning sign requirement of section 4955.33, the reference within the text of the statute to section 4955.33 rather than section 4955.32.

to other strict liability statutes[14] and thus held that, taken together, the two statutes impose strict liability to which contributory negligence is not a defense.[15]

By arguing that section 4955.34 imposes strict liability, the plaintiffs in *Glinsey* were employing a legal theory that apparently had never been urged upon an Ohio court.[16] The district court did not consider itself bound by *stare decisis:*

> The courts of Ohio have not consistently treated sections 4955.32 and 4955.34. The first case to interpret section 4955.32 was Pennsylvania Co. v. Rathgeb, 32 Ohio St. 66 (1877). The Supreme Court of Ohio noted, in analyzing 4955.32, that proof of contributory negligence could negate the railroad's negligence. However no case has reached the Ohio Supreme Court since 1926 on this section. Additionally the argument presented by plaintiff combining as it does 4955.32 and 4955.34 has never been raised in any court of this state. The court is, therefore, faced with a matter of first impression.[17]

A comparison of section 4955.33,[18] held in *McCallie* to impose strict liability for failure to erect a sign, and section 4955.34, held by the lower court in *Glinsey* to impose strict liability for failure to properly warn, reveals a great similarity in their wording. Section 4955.33 states that the railroad company "is liable in damages" if it "neglects or refuses" to comply with the crossing sign requirement.[19] Section 4955.34 states that the railroad company "is liable in damages" to a person injured by the "neglect or act of such engineer" in failing to give the required whistle and bell signals.[20]

Unfortunately for the consistency of interpretation of Ohio railroad crossing law, the Sixth Circuit Court of Appeals reversed the holding of the trial court in *Glinsey v. Baltimore and Ohio Railroad*[21] by rejecting the strict liability argument of section 4955.34 for violation of section 4955.32. The court indicated that its decision reflected the application of Ohio law as the court believed it would be construed by the Ohio Supreme Court:

> Appellees' novel argument would have us discard a century of case law that has weaved contributory negligence into the tapestry of Ohio railroad accident law. We do not believe that the Ohio Supreme Court would do this, despite the force of Appellees' argument, and we may not do that which we believe Ohio's highest court would refuse to do.[22]

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[14] *See, e.g.*, OHIO REV. CODE ANN. §§ 955.28 (dog bite statute) and 3743.33 (use of fireworks) (Page 1977).

[15] 356 F. Supp. 984, 987 (N.D. Ohio 1973).

[16] 495 F.2d 565 (6th Cir.), *cert. denied*, 419 U.S. 968 (1974).

[17] 356 F. Supp. at 987.

[18] *See* text accompanying note 6 *supra*.

[19] OHIO REV. CODE ANN. § 4955.33 (Page 1977).

[20] OHIO REV. CODE ANN. § 4955.34 (Page 1977).

[21] 356 F. Supp. 984 (N.D. Ohio 1973), *rev'd*, 495 F.2d 565 (6th Cir.), *cert. denied*, 419 U.S. 968 (1974).

[22] 495 F.2d 565, 569 (6th Cir. 1974).

The court relied on Ohio case law which developed as a result of negligence actions brought as violations of section 4955.32.[23] Standing alone, section 4955.32 is obviously a specific safety statute and failure to comply with its requirements is negligence per se.[24] Prior to *Glinsey*, every action brought under section 4955.32 was a cause of action for negligence and the defendants were allowed to introduce evidence of contributory negligence.[25] For example, in *Pennsylvania Railroad v. Rusynick*,[26] the Ohio Supreme Court held that it is the duty of a traveler, before going over the railway, to look both ways and listen for the approaching trains. Imposing the duty to stop, look, and listen, the courts have found that omission of the duty to act, without a reasonable cause therefor, will defeat such party's action to which the party's negligence contributed.[27]

Although the Sixth Circuit refused to recognize a strict liability cause of action for railroad crossing injuries,[28] the court did find merit in the plaintiff-appellee's argument that the legislature, in enacting section 4955.34, intended to impose liability which extended beyond the negligence standard of section 4955.32:

> Were we sitting as a court with authority to interpret Ohio law, we might find Appellees' arguments persuasive. . . . [I]f contributory negligence is not precluded by the final sentence in section 4599.34 [*sic*] then it seems to be surplusage, since under ordinary negligence law a plaintiff's situation would be identical without the presence of that sentence. We are, however, limited to a best estimate of what the Ohio Supreme Court would do if it could consider Appellees' contentions. Our best estimate is that the Ohio Supreme Court would reaffirm its prior holdings rather than accept Appellees' point of view.[29]

In *Weimer v. Norfolk and Western Railroad*, [30] a case decided subsequent to *Glinsey*, the Ohio Eighth District Court of Appeals also rejected an interpretation of sections 4955.32 and 4955.34 which would have resulted in the imposition of strict liability. Like *Glinsey*, the court in *Weimer* stated that "a long line of cases in the Supreme Court of Ohio have interpreted these statutes (Ohio Revised Code sections 4955.32 and 4955.34), or comparable

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[23] Zuments v. Baltimore & O.R.R., 27 Ohio St. 2d 71, 271 N.E.2d 813 (1971); North v. Pennsylvania R.R., 9 Ohio St. 2d 169, 224 N.E.2d 757 (1967); Bales v. Baltimore & O.R.R., 168 Ohio St. 551, 156 N.E.2d 735 (1959); Cabb v. Bushy, 152 Ohio St. 336, 89 N.E.2d 466 (1949); Capelle v. Baltimore & O.R.R., 136 Ohio St. 203, 24 N.E.2d 822 (1940); Patton v. Pennsylvania R.R., 136 Ohio St. 159, 24 N.E.2d 597 (1939); Pennsylvania R.R. v. Rusynik, 117 Ohio St. 530, 159 N.E. 826 (1927); Pennsylvania Co. v. Rathgeb, 32 Ohio St. 66 (1877).

[24] *See* Pennsylvania R.R. v. Rusynik, 117 Ohio St. 530, 159 N.E. 826 (1927).

[25] *See, e.g.*, Bales v. Baltimore & O.R.R., 168 Ohio St. 551, 156 N.E. 2d 735 (1959); Cleveland C. & C. R.R. v. Crawford, 24 Ohio St. 631 (1874).

[26] 117 Ohio St. 530, 159 N.E. 826 (1927).

[27] *See* Pennsylvania R.R. v. Rathgeb, 32 Ohio St. 66 (1877).

[28] 495 F.2d 565 (6th Cir.), *cert. denied*, 419 U.S. 968 (1974).

[29] *Id.* at 569-70 n.5.

[30] No. 34519 (8th Dist. Ct. App. Ohio April 8, 1976), *cert. denied*, No. 76-650 (Sup. Ct. Ohio Sept. 24, 1976).

predecessors, as per se negligence statutes not precluding the defense of contributory negligence."[31] The *Weimer* court made the noteworthy observation that section 4955.34 is not a repetitious reenactment of the section 4955.32 negligence standard:

> [I]t is a tenable argument that strict liability is a consequence of violation and contributory negligence not a defense. If the statute is deemed nothing more than a negligence per se enactment, then the last paragraph of Ohio Revised Code §4955.34 is a redundancy. And one does not assume that the legislature acted to no purpose.
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> However, we are not approaching the problem afresh without the gloss of a higher court opinion.[32]

Weimer did recognize a distinction between causes of action under sections 4955.32 and 4955.34; however, the court felt constrained by the decisions of higher courts, notably the Sixth Circuit in *Glinsey*, and therefore held that contributory negligence is a defense in a section 4955.34 action. Thus, the weakness in both the *Glinsey* and *Weimer* decisions is that neither dealt with the statutory interpretation dilemma generated when sections 4955.32 and 4955.34 are considered in the same cause of action. By recognizing the propriety of the strict liability argument in an action under section 4955.34 and then dispensing with it on the basis of authority in which the cause of action was pleaded in negligence under section 4955.32, both courts bypassed the real issue of the meaning and legislative intent present in section 4955.34.

The conflict between the extent and manner of statutory interpretation presented in *McCallie v. New York Central Railroad*[33] and *Glinsey v. Baltimore and Ohio Railroad*[34] is typical of the confusion that has permeated Ohio railroad crossing law for years. Certainly at this time *McCallie* continues to be the law and in any case in which there is evidence of violation of section 4955.33, the plaintiff's theory ought to sound in statutory liability and not in negligence. On the other hand, it seems quite clear that sections 4955.32 and 4955.34 are being interpreted merely as negligence statutes, the violation of which may be defended on the basis of contributory negligence. It should be carefully noted, however, that the Supreme Court of Ohio has not yet ruled on this question. Trial courts, whether federal or state, almost certainly will, in fact, allow the defense of contributory negligence. The Supreme Court of Ohio should, and undoubtedly will, address directly the question of the scope of liability intended by section 4955.34.

II. Statutory Interpretation of Ohio Revised Code Section 4955.34

A. *The Ohio Rules of Statutory Construction*

A statute has been defined as "the written will of the legislature and as a rule of action prescribed by the supreme power of a state which all persons

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[31] *Id.*, slip op. at 6.

[32] *Id.*, slip op. at 5-6.

[33] 23 Ohio App. 2d 152, 261 N.E.2d 179 (1969).

[34] 356 F. Supp. 984 (N.D. Ohio 1973), *rev'd*, 495 F.2d 565 (6th Cir.), *cert. denied*, 419 U.S. 968 (1974).

within the sphere of its operation are compelled to obey."[35] It is the duty of the courts to give effect to the will of the legislature; therefore the process of statutory construction is undertaken by the courts only to the degree necessary to ascertain the legislative intent of an enactment.[36] As one Ohio court has stated, the construction of a statute is limited to the written word:

> The primary purpose of the judiciary in the interpretation or construction of statutes is to give effect to the intention of the Legislature, as gathered from the provisions enacted, by the application of well settled rules of interpretation. . . . The court must look to the statute itself to determine legislative intent, and if such intent is cearly [*sic*] expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged.[37]

It is the province of the courts to construe and interpret statutes only when the language employed is ambiguous and the meaning and application thereof uncertain.[38] Where a statute is plain and unequivocal, however, courts should not attempt to determine what the legislature should have enacted or even what it may have intended to enact.[39] The Supreme Court of Ohio has limited the process of statutory interpretation in the following syllabus:

> 1. [W]here [a statute's] provisions are ambiguous, and its meaning doubtful, the history of legislation on the subject, and the consequences of a literal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted.
> 2. But the intent of the law-makers is to be sought first of all in the language employed. . . .[40]

Judicial construction of statutes is to be used as a last resort after the courts have failed to discover the legislature's intent from the plain words of the statute. In addition, courts must give meaning to every word used in the statute. In *Carmean v. Board of Education*,[41] the Ohio Supreme Court stated that "[i]t is axiomatic in statutory construction that words are not inserted into an act without some purpose."[42]

In order to apply these rules of statutory construction to the second

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[35] 50 OHIO JUR, 2D *Statutes* § 2 (1961).

[36] Detzel v. Nieberding, 7 Ohio Misc. 262, 219 N.E.2d 327 (C.P. Hamilton County 1966).

[37] *Id.* at 265, 219 N.E.2d at 330-31 (citations omitted).

[38] Hadfield-Penfield Steel Co. v. Oberlander, 109 Ohio St. 592, 143 N.E. 191 (1924).

[39] *Id.* at 596-97, 143 N.E. at 193.

[40] Slingfull v. Weaver, 66 Ohio St. 621, 621, 64 N.E. 574, 574 (1902), involving a motion to dismiss for lack of jurisdiction. The court found that the statute in question was so clear on its face that the court should not attempt to construe it and certainly could not alter its wording or punctuation as requested by the appellants. The court felt that the intent and meaning of the act would be apparent to every intelligent reader and therefore granted the motion to dismiss.

[41] 170 Ohio St. 415, 165 N.E.2d 918 (1960).

[42] *Id.* at 422, 165 N.E.2d at 923. *See also* Bloom v. Richards, 2 Ohio St. 387 (1853) in which Judge Thurman expressed precisely the same view when he wrote, "[i]t is a general presumption that every word in a statute was inserted for some purpose. Mere idle and useless repetitions of [illegible] if it can be fairly avoided." *Id.* at 402.

paragraph of Ohio Revised Code section 4955.34,[43] analysis must first be made of Ohio Revised Code section 4955.32. Section 4955.32, requiring a crossing signal, is a safety statute.[44] Violation of this statute, standing alone, constitutes negligence per se, exposing the railroad to liability in negligence for the injury proximately caused by the act, subject, as are all negligence actions, to the defense of contributory negligence.

Since liability for the injury caused by violation of section 4955.32 is already imposed by that statute, the liability for injury established by section 4955.34 is either intended to be *identical* to that created by section 4955.32 or it is intended to be *different* from it. To hold that it is *identical* would violate the basic principle of statutory construction that requires meaning to be given to the enactments of the legislature and demands only that the words of the statute be applied. In order for the second paragraph of section 4955.34 to have *any* meaning, it must create some additional penalty for violating the statute requiring locomotive signals at a crossing. It is only after a determination that section 4955.34 establishes an additional penalty that the process of judicial construction can be employed. At that point, the court can construct and interpret section 4955.34 only to the extent of determining the type of penalty it imposes. In this process of statutory construction, every word in the statute must be recognized and compared in terms of its use and significance in similar statutes.

B. *The Specific Interpretation of Section 4955.34*

Section 4955.34 must add a dimension of liability different in kind and effect from that imposed by section 4955.32 in order for section 4955.34 to have any meaning.

Whether one characterizes section 4955.34 as creating an *additional obligation* or imposing an *additional penalty*, it obviously must be designed to inure to the benefit of someone — and by its terms the statute establishes the injured party as the beneficiary. Since the quantum or quality of the damage award would not be affected by the fact that the award was based on negligence per se under section 4955.32 or "liability" under section 4955.34, the benefit is not in the nature of damages. The only benefit proscribed by reason of the enactment of section 4955.34 to one injured by reason of violation of section 4955.32 must, therefore, relate to the defenses available. The benefit inuring from the enactment of section 4955.34 is a liability which attaches without regard to negligence and to which contributory negligence is not a defense.

If section 4955.34 is considered to be providing merely a remedy for an injury directly caused by the failure of the engineer to comply with the statute, it is a redundant waste and a useless enactment. Only if it is considered to be a

[43] OHIO REV. CODE ANN. § 4955.34 (Page 1977). The scope of this discussion is limited to the second paragraph of section 4955.34 since that is the statutory provision which appears to negate a contributory negligence defense. The paragraph reads as follows: "The company in whose employ such engineer or person in charge of an engine is [*sic*], as well as the person himself, is liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person."

[44] OHIO REV. CODE ANN. § 4955.32 (Page 1977). In addition to creating a cause of action for negligence, section 4955.32 sets forth the requirements for giving notice of an approaching train.

penalty statute for the failure of the engineer to perform the statutory requirements intended to provide notice of the train's approach does it have meaning and purpose. In *Weimer v. Norfolk and Western Railroad*[45] the Ohio court of appeals addressed this argument as follows:

> Because Ohio Revised Code §4955.34 posits precisely the same liability for a railroad when an employee responsible for warning signals fails to give them, it is a tenable argument that strict liability is a consequence of violation and contributory negligence not a defense. If the statute is deemed nothing more than a negligence per se enactment, then the last paragraph of Ohio Revised Code §4955.34 is a redundancy. And one does not assume that the legislature acted to no purpose.[46]

According to *McCallie v. New York Central Railroad*,[47] where a statute directs the performance of a duty coupled with a liability in damages for failure to perform, negligence is not a cause of action. It follows that "without an element of negligence or the opportunity to be negligent in performance, contributory negligence cannot exist."[48]

Prior to *McCallie*, Ohio courts engaged in a similar process of statutory interpretation for a case brought under the Ohio dog bite statute.[49] The Ohio Supreme Court construed the statute as imposing "an absolute liability on the owner of the dog, [finding that] the averment and proof of *scienter* are unnecessary. . . . Under the statute, the conduct of his property renders him liable, and his own negligence in the matter is wholly immaterial."[50]

In another dog bite case, *Bevin v. Griffiths*,[51] the court held that the imposition of strict liability for violation of the dog bite statute is based on the reasoning that: (a) imposing strict liability is a legislative and not a judicial determination; (b) the language is plain and simple and the intent of the legislature is first initially discerned from the language employed; (c) the province of construing a statute is to ascertain the meaning of that which the legislature enacted; (d) the plain and unambiguous language "shall be liable" imposes strict liability; (e) it is the duty of the courts to enforce a statute which is plain and unambiguous.[52]

Like the language of the crossbuck[53] and the dog bite[54] statutes, the language of section 4955.34 is plain and unambiguous and therefore the same strict liability interpretation applied to sections 4955.33 and 955.28 should be

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[45] No. 34519 (8th Dist. Ct. App. Ohio April 8, 1976), *cert. denied*, No. 76-650 (Sup. Ct. Ohio Sept. 24, 1976).

[46] *Id.*, slip op. at 5-6 (footnotes omitted).

[47] 23 Ohio App. 2d 152, 261 N.E.2d 179 (1969).

[48] *Id.* at 159, 261 N.E.2d at 184.

[49] OHIO REV. CODE ANN. § 955.28 (Page 1977). This statute provides in pertinent part: "The owner or keeper *shall be liable* for any damage or injuries caused by a dog . . ." (emphasis added). The statute was previously codified in OHIO GEN. CODE § 5938.

[50] Kleybolte v. Buffon, 89 Ohio St. 61, 66, 105 N.E. 192, 194 (1913).

[51] 44 Ohio App. 94, 184 N.E. 401 (1902).

[52] *Id.* at 98-100, 184 N.E. at 403.

[53] OHIO REV. CODE ANN. § 4955.33 (Page 1977).

[54] OHIO REV. CODE ANN. § 955. 28 (Page 1968).

applied by the courts when a cause of action is presented under section 4955.34. Where language is plain and unambiguous and contains no exceptions, the presumption is that the legislature intended that there be no exceptions and it is not the province of the court to create an exception by construction through the allowance of the defense of contributory negligence.[55] The imposition of strict liability in cases involving the violation of statutes with wording identical to the liability imposed by section 4955.34 proves that in Ohio, where a statute imposes a duty and liability in damages for failure to comply with the imposed duty, the legislative intent is to impose strict liability.[56] Other statutes using the language "is liable" or "shall be liable" have been held to impose strict liability.[57] Thus, based on the interpretation of similar statutes, the statutorily-imposed duty of section 4955.32 together with the "is liable" language of section 4955.34 requires the application of strict liability. Any other interpretation, including that of *Glinsey v. Baltimore and Ohio Railroad*,[58] and *Weimer v. Norfolk and Western Railroad*,[59] would be inconsistent with the meaning of the statute under Ohio's clearly defined limits of statutory interpretation.

III. Adding to the Confusion: Ohio Revised Code Section 4999.04

A. *The Duty of Adequate Warning*

The incongruity between statutory and judicial interpretations of Ohio railroad crossing laws does not end with a determination of the scope of liability imposed upon the railroad. Inconsistency extends into the limits of the duty that the engineer of a train has in terms of warning traffic at an approaching crossing.

In *Glinsey v. Baltimore and Ohio Railroad*,[60] the Sixth Circuit Court of Appeals commented on the "patent erroneousness [of an interpretation of Ohio law which] required that the train's whistle (or horn) be sounded *continously* for the entire distance of 1320 [feet] to the crossing."[61] *Weimer v. Norfolk and Western Railroad*,[62] in following *Glinsey*, articulated the warning requirement under Ohio Revised Code section 4955.32[63] as one which

[55] Siegfred v. Everhart, 55 Ohio App. 351, 353, 9 N.E.2d 891, 893 (1936).

[56] McCallie v. N.Y. Cent. R.R., 23 Ohio App. 2d 152, 261 N.E.2d 179 (1969).

[57] In Davis v. Atlas Ins. Co., 112 Ohio St. 543, 147 N.E. 913 (1925), the court held that section 8970 of the General Code, which provided that "[e]very company . . . operating a railroad . . . shall be liable for all loss or damage by fires originating upon land belonging to it caused by operating such road," imposed absolute liability on railroad companies that breached the statute. Also, in Bolton v. Barkhurst, 27 Ohio Misc. 105 (C.P. Wood County 1971), the court stated that Ohio Revised Code section 951.10 was a trespass statute imposing strict liability for damages to the premises of another. That statute reads in pertinent part: "The owner or keeper of an animal described in section 951.02 of the Revised Code, who permits it to run at large in violation of such section is liable for all damages caused by such animal . . . ."

[58] 356 F. Supp. 984 (N.D. Ohio 1973), *rev'd*, 495 F.2d 565 (6th Cir., *cert. denied*, 419 U.S. 968 (1974).

[59] No. 34519 (8th Dist. Ct. App. Ohio April 8, 1976), *cert. denied*, No. 76-650 (Sup. Ct. Ohio. Sept. 24, 1976).

[60] 356 F. Supp. 984 (N.D. Ohio 1973), *rev'd*, 495 F.2d 565 (6th Cir., *cert. denied*, 419 U.S. 968 (1974).

[61] 495 F.2d at 570.

[62] No. 34519 (8th Dist. Ct. App. Ohio April 8, 1976), *cert. denied*, No. 76-650 (Sup. Ct. Ohio Sept. 24, 1976).

[63] Ohio Rev. Code Ann. § 4955.32 (Page 1977).

required that the whistle be sounded once when the engine is between 1320 and 1650 feet from the crossing.[64]

If the *Weimer* and *Glinsey* interpretations are correct, they are in direct conflict with Ohio Revised Code section 4999.04[65] which reads in part:

> (A) No person in charge of a locomotive shall do the following:
>
> . . . .
>
> (2) When approaching a grade crossing, fail to sound the locomotive whistle at frequent intervals, beginning not less than fifteen hundred feet from such crossing and continuing until the locomotive has passed the crossing.[66]

The inconsistency in the warning requirement evidenced by sections 4955.32 and 4999.04 gives a trial judge an option in his jury instructions. He could either read section 4955.32 and tell the jury the law requires a single whistle warning or read section 4999.04 and tell the jury that the law requires a continuous whistle. Any legislative intent to have one of the two statutes control is, therefore, defeated by their contradiction.

B. *Evidence of the Legislative Intent of Section 4999.04*

In determining the type of warning signal the legislature intended a railroad engineer to use when approaching a crossing, a court should consider the purpose of such warnings and the history of conduct of the party the statute is intended to benefit. This, along with other statutes used to discern legislative intent, should provide the court with an adequate basis for statutory interpretation.

Ohio courts have determined the public to be the benefactor of railroad crossing law and have recognized the "substantial risk of danger" existing at all railroad crossings.[67] Prior to the appellate decision in *Glinsey*, *Carnahan v. Akron-Barberton Beltline Railroad*[68] indicated that it would not seem to be an unduly harsh policy to strictly require the continuous soundings of warnings by railroad companies because of the number of accidents occurring at railroad crossings.

It is, therefore, a reasonable argument based on public policy that Ohio Revised Code section 4999.04 defines the railroad's duty to blow its whistle upon approaching a crossing. Even without the public policy argument, the duty imposed by section 4999.04 can be the basis of conduct relied on in a negligence action. If section 4999.04 is not introduced in the action as the standard of conduct, the standard imposed by the court will be section 4955.32. The difference is drastic — when an engine whistle is sounded 1500 feet from the crossing there would be no civil liability under section 4955.32 but there would be a continuing civil and criminal liability under section 4999.04. Unless and until the Ohio Supreme Court reviews the *Weimer* interpretation of section 4955.32 as to the character of the whistle signal, a

[64] No. 34519, slip op. at 4 (8th Dist. Ct. App. Ohio April 8, 1976), *cert. denied*, No. 76-650 (Sup. Ct. Ohio Sept. 24, 1976).

[65] OHIO REV. CODE ANN. § 4999.04 (Page 1977).

[66] *Id.*

[67] Hood v. New York, Chicago & St. L. R.R., 166 Ohio St. 529, 536, 144 N.E.2d 104, 109 (1957).

[68] No. 288128 (C.P. Summit County, Ohio Dec. 10, 1973).

plaintiff would be ill advised to utilize violation of that statute as a basis of a motorist action. Reliance should rather be placed on section 4999.04, which imposes a more stringent warning requirement for the same action.

IV. Conclusion

The ambiguities expressed within Ohio Revised Code section 4955.32 are the sparks igniting the confusion in Ohio railroad crossing law. The engineer's duty can easily be established in a negligence action by ignoring the contradictory section 4955.32 and instead bringing the negligence action under section 4999.04. The contradiction in the scope of the railroad's liability evidenced in sections 4955.32 and 4955.34 is not reconcilable. Unless the Supreme Court of Ohio modifies the interpretation given to Ohio Revised Code sections 4955.32 and 4955.34 by the Sixth Circuit in *Glinsey v. Baltimore and Ohio Railroad*, contributory negligence will continue to be a valid defense when an action is brought against a railroad for breach of its statutory duty. This defense destroys the protection the Ohio legislature intended to give motorists against the hazard that a railroad crossing presents, in addition to making section 4955.34 unenforceable as to the imposition of liability upon railroad companies. Either section 4955.34 should be repealed or the courts should begin to follow the firmly established rules of statutory interpretation already utilized for crossbuck sign violations rather than slipping into the familiarity of a *stare decisis* doctrine which fails to consider the implication of section 4955.34.