1 STANDARD OF CARE

2 “Life of the Community
Defines Legal Standard
for Negligence Liability

3 **The standard of conduct of a reasonable person may be established by legislative enactment, administrative regulation, or judicial decision.**

4 **In the absence of such legislation, regulation, or judicial decision, the trial judge or jury will apply this "reasonable person under the circumstances" concept to determine the applicable legal standard of care in a particular case (Restatement § 285).**

5 **In determining whether conduct is negligent, the customs of the community, or others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable person would not follow them.**

6 **For a custom or such common practices to be relevant on the issue of negligence, they must reasonably be brought home to the actor's locality, and must be so general, or so well known, that the actor must be charged with knowledge of them, or with negligence in remaining ignorant (Restatement § 295).**

7 WAGONER v. WATERSLIDE, INC.
(Utah App. 1987)
Unreasonable Risk?
- Jury Issue

8 P injured riding down D's waterslide;
foot hanging over side
cut toe on unfinished edge of slide.

Jury Verdict for D.

9 Whether waterslide unreasonable risk of harm to D's patrons.

Jury issue whether exposed edge on slide unreasonable or reasonable.

10 Standards to determine unreasonable risks
in the life of community.

11 Unreasonable risks, those which society consider sufficiently great
to demand preventive measures.

12 Reasonable care:
repair or warning of actual condition and risk involved.

13 Duty only if unreasonable risk.
Jury found no unreasonable risk, no duty. AFFIRMED.

14 Ortego
v.
Jefferson Davis Parish School Board
La.App. 1995

CPSC
Playground Safety
Standards or Guidelines?

15 P alleged slide unreasonable
violated design and safety standards

16 Consumer Product Safety Commission (CPSC)

D: CPSC merely suggested guidelines

represented ideal,

rather than norm

17 D: should not be used to determine whether unreasonably dangerous
jury found slide NOT unreasonably dangerous

18 McCarthy v. State
N.Y. A.D. 1990
Legislated Standards
vs.
Agency Rules?

19 P fall from playground horizontal ladder
alleged negligence in design and/or maintenance of ladder
State claims court dismissed claim

20 Appeals: P's expert's testimony
clearly inadequate

21 Consumer Product Safety Commission (CPSC) Public Playground Safety Guidelines
not mandatory or meant to be the exclusive standards for playground safety

22 **STANDARD OF CARE EVIDENCE IN PLAYGROUND SAFETY GUIDELINES**

ELLEDGE

23 **representative, who was not trained or licensed as an engineer, eventually modified the monkey bars by removing the bench and lowering the bars.**

24 **thin side bars were not intended as a walking surface,**

neither handrails nor a non-slip surface was added to the "new" monkey bars.

25 **foot slipped on a narrow bar, causing her to fall, and her right leg became trapped between the bars.**

26 **testimony and/or documentary evidence" relating to the Consumer Products Safety Commission's (CPSC) guidelines for playground safety**

or the American Society for Testing and Materials' (ASTM) standards for playground equipment.

27 **CPSC guidelines and ASTM standards, evidence was relevant to establish the appropriate standard of care.**

We agree.

28 **Evidence of industry standards, customs, and practices is "often highly probative when defining a standard of care."**

29 **Safety standards promulgated by government or industry organizations in**

particular are relevant to the standard of care for negligence.

30 **Evidence of custom within a particular industry, group, or organization is admissible as bearing on the standard of care in determining negligence...**

31 **Courts have become increasingly appreciative of the value of national safety codes and other guidelines issued by governmental and voluntary associations**

32 **to assist the trier of fact in applying the standard of due care in negligence cases.**

33 **A safety code ordinarily represents a consensus of opinion carrying the approval of a significant segment of an industry,**

34 **not introduced as substantive law but most often as illustrative evidence of safety practices or rules generally prevailing in the industry**

35 **provides support for expert testimony concerning the proper standard of care.**

36 **[E]vidence of standards promulgated by industry, trade, or regulatory groups or agencies may be relevant and admissible to aid the trier of fact in determining the standard of care in a negligence action**

37 **even though the standards have not been imposed by statute or promulgated by a regulatory body**

and therefore do not have the force of law.

38 **Violation of standards in such private safety codes is evidence on the issue of negligence**

but not negligence per se [i.e., in and of itself; conclusive proof]...

39 ☐ City of Miami v. Ameller
Fla. 1985
Violate Agency's Own Standards?

40 ☐ P alleged City negligent in placing monkey bars in public park over hard-packed ground surface

failed to use one of recommended standard cushioning materials under monkey bars

41 ☐ P charged city violated playground industry,
as well as own, standards
for proper cushioning ground surface under monkey bars

42 ☐ City has duty to maintain parks in condition reasonably safe for public use

43 ☐ not insurer of safety of all those who use free public parks
standard is negligence,
not strict liability

44 ☐ Rosario v. New York City
N.Y.A.D. 1990
Asphalt Dangerous Condition?
Playground Surfacing Regulation

45 ☐ 7/85, P, 7 yrs, fell 5-7.5ft from slide on asphalt surface

P broke arm; alleged D negligent in failing to provide cushioned surface beneath slide

46 ISSUE: whether D breached standard of care to protect children from injury due to falls

by failing to install cushioned surface around playground equipment

47 No authority in jurisdiction for liability
based on existence of hard, artificial surface beneath playground equipment

48 Traditional rule: properly constructed & maintained asphalt surface
does not constitute an unsafe & dangerous condition
so as to subject the owner of a playground to liability

49 P's experts cited D's specifications for 1.5" padding under playground equipment
date, scope, & application to existing City playgrounds not disclosed

50 Questions as to existence of standard from which City duty might be derived and whether City complied with standard
precludes dismissal

51 On alleged facts, if proven, rational jury could find applicable standard in effect at time of injury
and City failed to comply with its own standard
reversed, new trial ordered

52 Blankenship v.

Peoria Park District

Ill.App. 1995

Statutory Immunity Defines Legal Duty Over Internal Rules

53 Park District rules & regulations
required lifeguard to be present at all times during posted swim hours
to direct & safeguard swimmers

54 Violation of a statute or ordinance designed to protect human life or property is prima facie (on its face, in and of itself) evidence of negligence

55 Legal duty normally not established through rules or internal guidelines
failure to comply with self-imposed regulations
does not impose on municipal bodies & employees a legal duty

56 Issue: whether Park District immune under Tort Immunity Act
Act grants general immunity from liability arising from a failure to supervise

57 Here, complete absence of supervision, not mere inattention or lack of supervision
Court: conclude no supervision within meaning of Tort Immunity Act

58 BRADEN v. WORKMAN
Mich.App. 1985
Custom - Certain, Uniform, & Notorious?

59 P, age 18, broke neck head-long dive into D's manmade lake.
P: negligence no lifeguard, no backboard.
Verdict for D.

60 P's expert: lifeguard or trained person for less than 25 & backboard required, admitted not universally implemented.

D: expert's recommendations seldom used at Mich lakes.

61 Despite Red Cross & other guidelines, standards
majority state park swimming facilities, no lifeguards or backboards.

62 Absent expressed requirement in law or regulation
jury determines what, if any, lifesaving persons & equipment necessary.

63 Industry custom
admissible to prove negligence

if custom certain, uniform, & notorious.

64 1975 standards not notorious
limited distribution no campgrounds.

AFFIRMED.

65 Hames

v.

State of Tennessee

Tenn. 1991

Industry Standard Requiring Weather Warnings?

66 P's husband, 36, struck by lightning on state park golf course

No effort made to clear course, no warnings.

67 ☐ Course operated under USGA rules

USGA makes suggestions to warn golfers
of lightning danger

68 ☐ USGA recommends posting notices
outlining dangers & precautions to minimize danger

69 ☐ Expert testimony: no recognized standard existed
that golf courses be equipped with lightning proof shelters, or with warning devices

70 ☐ Although some golf courses in state parks are equipped with shelters
few had warning devices.

71 ☐ 8 courses operated by State
3 have weather shelters, not lightning proof.

72 ☐ Golf Pro testified had not played or practiced where warning sirens in place
such devices are used only to stop tournaments

73 ☐ Claims Com:
no industry standard requiring storm shelters
or warning devices

74 ☐ Common knowledge tells one that lightning is dangerous
the absence of a horn is not concurrent negligence

75 ☐ No evidence industry standard required a policy to clear course

76 absence of policy did not create dangerous condition on course

77 No signs, but common knowledge tells one that lightning is dangerous

78 Customary conduct, while not conclusive,
can gauge whether ordinary care exercised by D & P

79 USGA rules are applicable to tournament play; do not apply here

80 D's conduct did not fall below applicable standard of reasonable care
thus no negligence.

REVERSED & DISMISSED

81 Maussner v. Atlantic City Country Club
New Jersey, 1997
Chosen Lightning Protection Must be Properly Utilized

82 Signs posted re "our golf course evacuation plan" implemented
"our weather monitoring system"

83 Act of God - unusual, extra ordinary & unexpected
not prevented by any amount of foresight

84 Whether D's negligence coincides with
an Act of God
modern technology rendered lightning storms more predictable

85 Issue: Whether D properly implemented its own safety procedures

86 where D has taken steps to protect patrons against lightning
duty of reasonable care to take steps correctly

87 Duty to post sign detailing what, if any, safety procedures utilized
if none, posted so, use at own risk
if evacuation plan, must be reasonable & posted

88 Bier
v.
City of New Philadelphia

89 Death & injuries resulting from lightning strike on rented picnic shelter with metal roof

Summary judgment to City; no liability for "Act of God"

90 P's expert affidavit: outdoor shelters not protected by a lightning protection system are attractors to lightning strikes

91 reasonable person aware of need for lightning protection systems to be installed on metal-roofed outdoor bldgs used by public

92 Proximate Cause could include defendant negligence concurrent with Act of God

93 not Act of God if proper care & diligence on defendant's part would have avoided act

94 Reasonable Minds
Could Differ.

Jury could reasonably find negligence in not installing lightning protection on metal-roofed shelter was concurrent cause

95 If duty & breach, Defendants may show that injuries would still have occurred in spite of any preventive measures taken

If so, negligence not proximate cause of injury.

96 Lightning interceding superseding cause, relieving D of liability for negligence.

REVERSED & REMANDED

97 Sallis
v.
Bossier City
slide over steel shaft in basepath

98 Whether unreasonable risk of harm known to City

shaft did not have protective rubber covering
hidden from view just below dirt

99 Base anchors one method used to secure bases
side stakes bent, replaced by stakes of heavier guage metal

100 ☐ 3 sets of stakes for dimensions of baseball & softball
rubber caps on unused base anchors
to keep dirt our & prevent injuries

101 ☐ City rented field to softball assn.
but retained responsibility for field maintenence

102 ☐ Fields dragged, but P&R dept did not check
whether protective caps displaced, or
anchor shafts exposed by prior games or field maintenance

103 ☐ Unprotected steel shaft in basepath
constitutes unreasonable risk of harm
wear & tear on field common

104 ☐ No evidence of similar multiple peg use (3)
in other recreational programs,
or info re safety of this type of installation

105 ☐ Players & Assn unaware
of multiple set of anchors installed

106 ☐ City knew, or should have known, unprotected base anchors
posed unreasonable risk of harm
failed to implement procedure to insure covering of unused shafts

107 ☐ P&R maintenance employees: occasionally struck or ran over base anchors
while mowing & grading fields

108 Coaches & officials not informed of additional base anchors

109 Nor were unused base anchors checked
To determine if weather,
field maintenance, or games
uncovered unused stakes or dilodged protective coverings

110 Asn & Asn director had no knowledge of dangerous condition
City had never told Asn of base anchors
in base path

111 Injury not caused by Asn playing on muddy field
but sliding into unprotected base anchors
outside scope of danger playing on muddy field

112 Shipley
v.
Recreation & Park Commission of East Baton Rouge

Safer Alternative Exists in Real World?
Legal Standard for Negligence Liability
Louisiana Appellate Court, 1990

113 Issue: whether anchored base used in
softball game
was unreasonably dangerous

114 Plaintiff's Expert: all anchored bases dangerous
should use unsecured throw down base, or

base similar to home plate, i.e., flat to ground

115 ☐ Expert admitted recommended bases would require
change in rules
to accommodate base movement, players sliding past base

116 ☐ Court: while such bases may make softball safer
would NOT be considered
in determining whether this base unreasonably dangerous

117 ☐ Court: would only examine this base
within rules of actual game
NOT imaginary game
which does not exist

118 ☐ Court: this base conformed to industry standards
ASA required bases
firmly affixed to ground,
not thicker than 5 inches

119 ☐ Court:
this anchored base had same dimensions of strapped down base
recommended by plaintiff's expert

120 ☐ Court: evidence of "safer alternatives" at time of accident
NOT sufficient to establish anchored base was unreasonably dangerous

121 ☐ Some alternatives NOT available
at time of accident

122 KOPROWSKI
v.
MANATEE COUNTY
Fla.App. 1988

Common Practice Ignored,
Injury Foreseeable

123 P struck by large rescue-type surfboard
(10'long, 30-50 lbs.)

124 P walking past guard stand;
guard left board
leaning against stand
on windy day
airborne board struck P's leg.

125 Guard conceded possibility that wind could have blown board
25' from where he placed it.

126 Common practice to prop rescue boards against stand,
but if negligently placed could flip over.

Boards had been observed
being blown 6'.

127 Negligence:
NOT necessary that one be able to foresee

the exact nature of the harm done

it is only necessary to foresee that some injury
is likely to result

128 Guard stated, when windy, boards locked up or laid flat

Guard conceded boards windblown
when not properly secured,
previous instances.

129 Later Case Studies

130 **DUTY TO FOLLOW ESTABLISHED PROCEDURES TO WARN BEACHGOERS OF LIGHTNING STORMS**

131 ***Seelbinder v. County of Volusia*, (Fla.App. 05/31/2002),**

forty-seven-year-old plaintiff Marlene Seelbinder (Seelbinder) was seriously injured when she was struck by lightning as she stood on a public beach

132 **once a landowner assumes a duty to provide warnings of weather conditions to those authorized to use the premises,**

a legal duty may arise to implement such measures in a non-negligent fashion.

133 **The County has undertaken to give beachgoers warnings of the risk of lightning that relies on human observation and weather station monitoring.**

134 **Once an identified storm risk is deemed sufficient to warrant warnings, the procedure prioritizes those persons in the water.**

135 **There was no evidence offered that the County's employees failed to exercise reasonable care in executing the procedure, merely that the procedure failed to protect Seelbinder.**

136 **ENTRAPMENT DANGER IN PLAYGROUND**
REPORTED BUT NOT CORRECTED

137 ***Clark v. Fair Oaks Recreation and Park District*, 106 Cal.App.4th 336, 130 Cal.Rptr.2d 633 (Cal.App. Dist.3 02/14/2003), plaintiff Burgin Clark, aged 10, broke his leg in an accident on playground equipment owned by defendant**

138 October 12, 1998, **District Park Supervisor Rodney Melton, a certified playground inspector, performed a safety audit of Village Park's equipment.**

139 **orally and in writing, that he had found many violations of the 1991 CPSC guidelines that could cause life-threatening or permanently disabling accidents (**"priority one" hazards),

140 **including the risk of entrapment from the improper spacing between the rungs of the arch climber.**

141 **District argued that "the 1991 guidelines did not shift the focus from head entrapment to entrapment per se; rather, both sets of guidelines, correctly understood, spoke only to head entrapment."**

142 **"[t]o establish that the injury-causing risk created by the dangerous condition was reasonably foreseeable,** the **plaintiff need show only that the general character of the event or harm was foreseeable, not that the precise nature of the accident was so.**"

143 **appeals court concurred with the trial court's finding that "the arch climber presented a life-threatening hazard of 'entrapment'; thus, an accident in which entrapment caused serious injury was reasonably foreseeable."**

144 **1991 guidelines' definition of the word entrapment includes "any condition**

that impedes withdrawal of a body or bodily part that has penetrated an opening."

145 **Melton and Hinson testified in videotaped depositions that, in the case of an arch ladder, the risk of injury would most likely be to a leg.**

146 **appeals court, found substantial evidence supported the trial court's finding that "the injury which occurred was a reasonably foreseeable risk produced by the dangerous condition of the arch climber."**

147 **FEAR DRIVES NON-WOOD BASEBALL BAT CONTROVERSY**

148 **2006 Bill has been reintroduced for 2008 in the New Jersey State Assembly (Bill No. 3388) to enact "Steven's Law" prohibiting the use of non-wood bats in certain organized games in which minors are participants**

149 ***Sanchez v. Hillerich & Bradsby Co*., 104 Cal. App. 4th 703; 128 Cal. Rptr. 2d 529 (12/19/2002),**

150 **alleging that the design and use of this particular bat significantly increased the inherent risk in the sport of baseball that a pitcher would be hit by a line drive.**

151 **appeals court found Sanchez had presented sufficient evidence to establish that use of this particular bat significantly increased the inherent risk** that a **pitcher would be hit by a line drive and that the unique design properties of this bat were the cause of his injuries.**

152 **undisputed that the bat in question, the Air Attack 2, was designed to cause the ball to come off the bat at a higher launch speed than with wooden bats and older metal bats**.

153 **1998 correspondence from the NCAA indicated that the Baseball Rules Committee was unanimously convinced that bat performance was indeed a safety risk to pitchers and infielders**

154 **April 5, 2002, CPSC determined "available incident data" was "not adequate to show increasing injuries to pitchers over the period of time**

that bat performance increased."

155 **CPSC found data from other sources, including the NCAA and Little League, was not "clear or detailed enough to determine that an increase in injuries has occurred with an increase in bat performance."**

156 **CPSC concluded that "available incident data are not sufficient to indicate that non-wood bats may pose an unreasonable risk of injury.“**

157 ***United States Baseball v. City of New York,* 509 F. Supp. 2d 285 (S.D.N.Y. 2007),**

158 **whether the New York City Council acted constitutionally by excluding the use of metal bats by high school age students use in competitive baseball games.**

159 **alleged that the City had no empirical evidence to show that the "Bat Ordinance" regulation would meet the stated safety objective, i.e., to protect high school age students from the risk of injury.**

160 **court would find the Bat Ordinance constitutional as long as there was "a rational relationship between the disparity of treatment and some legitimate government purpose."**

161 **court would uphold the legislative classification to ban metal bats "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."**

162 **appropriate role of the courts was not to "judge the wisdom, fairness, or logic of legislative choices.**

163 **court found general agreement that "many existing metal and composite bats do produce more hits than wood bats."**

164 **city council could rationally determine that more hits with metal and composite bats could "result in an increased risk of injury to infielders from hard-struck balls."**

165 **found "a conceivable rational relationship exists between the Bat Ordinance and the legitimate purpose of public safety,"**

166 "the **link between a perceived danger and the Bat Ordinance" as "a classic legislative judgment that the City Council could constitutionally make.“**

167 **AGE APPROPRIATE PLAYGROUND SAFETY GUIDELINES**

Ossip

v. Village Bd. of Hastings-On-Hudson, (N.Y. Sup. Ct., 2006)

168 **under her mother’s supervision when she fell from a set of monkey rings in a playground operated and maintained by defendant Village**

169 **Village argued that the safety consultant had limited his opinion to criteria which applied to “playgrounds that are suitable for children 2 to 5 years of age.”**

170 **Village argued that Ossip’s playground consultant had erroneously “failed to address the standards provided by CPSC Guidelines for playgrounds suitable for 5 to 12 years old.”**

171 **CPSC *Handbook for Public Playground Safety* differentiates between “preschool-age” children (two through 5 years) and “school-age” children (5 through 12 years).**

172 **Muriel was five years old at the time of this accident, one month short of her sixth birthday and just several weeks short of the start of kindergarten,”**

173 **the court found the monkey rings met the appropriate standard for children 5 to 12 years old:**

174 **no evidence of any negligence or an unreasonably dangerous condition on the playground at the time of Muriel’s injury**, the state **court dismissed Ossip’s negligence claims against the Village.**