

"LIFE OF THE COMMUNITY" DETERMINES LEGAL STANDARD FOR NEGLIGENCE LIABILITY

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Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm (Restatement (Second) Torts § 282). The standard of conduct to which an individual must conform to avoid being negligent is that of a reasonable person under like circumstances (Restatement § 283). The standard of conduct of a reasonable person may be established by legislative enactment, administrative regulation, or judicial decision. 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).

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. 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). The following case reports illustrate the manner in which the customs, practices and usages of an agency or facility are indicative of the applicable legal standard of care used by courts to determine negligence liability.

UNREASONABLE RISK? - JURY ISSUE

In the case of *Wagoner v. Waterslide, Inc.*, 744 P.2d 1012 (Utah App. 1987), plaintiff was injured while riding down defendant's waterslide. At the time of the injury, plaintiff had his foot hanging over the side of the slide and cut his toe on the unfinished edge of the slide. As noted by the court, it was the responsibility of the jury to determine whether a defendant had exercised reasonable care under the circumstances. In this particular instance, the jury had to determine whether the waterslide posed an unreasonable risk of harm to defendant's patrons. Specifically, the issue was whether the exposed edge on the slide was unreasonable or reasonable.

As described by the court, a landowner is liable for negligence to an injured invitee (i.e., those encouraged, invited, or authorized to use the premises for a particular purpose) if (a) the landowner knows, or should know, of an unreasonable risk to invitees; (b) the landowner should expect that the invitees won't discover or realize the danger, or will fail to protect themselves; and (c) the landowner fails to exercise reasonable care. Conversely, reasonable care under the circumstances would require the landowner to either repair the dangerous condition on the premises or warn invitees of the actual condition and risk involved. This landowner duty, however, presupposes that the risk of injury in a particular situation is unreasonable.

As noted by the court, the applicable legal standard of reasonable care in determining liability for negligence arises from the life of the community. As a result, the life of the community provides a jury with a standard for determining whether a particular risk is unreasonable. Within this context, unreasonable risks are those which society considers sufficiently great to demand preventive measures. Further, a risk is unreasonable if the magnitude of the risk outweighs the social utility of the act. As described by the court, social utility factors include: (a) the social value, interest advanced or protected by defendant's conduct; (b) the extent of the social interest advanced by defendant's conduct; and (c) the extent of the social interest advanced by another less dangerous course of conduct.

In this particular instance, the jury returned a verdict for defendant. Therefore, in the opinion of the jury, defendant's waterslide did not pose an unreasonable risk of injury to plaintiff. In other words, the jury found this particular waterslide was not unreasonably dangerous when compared to similar situations in the life of the community in Utah at the time of the injury.

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Similarly, in the case of *Ortego v. Jefferson Davis Parish School Board*, 657 So.2d 378 (La.App. 1995), the jury found defendant's school playground slide did not present an unreasonable risk of harm. Plaintiff had alleged that defendant was negligent because the design and maintenance of the slide violated playground safety standards promulgated by the U.S. Consumer Product Safety Commission (CPSC). Defendant responded with testimony from its own safety expert that "the slide is not unreasonably dangerous." Specifically, defendant's expert noted that the CPSC standards are merely suggested guidelines and that they should not be applied to determine whether particular equipment is unreasonably dangerous. In addition, defendant's expert testified that the CPSC guidelines represented the ideal in playground safety, rather than a norm to which playgrounds are expected to conform.

In reviewing the trial court's judgment, the appeals court applied a "manifestly erroneous" standard. Under this standard, an appeals court may set aside a finding of fact by the trial court or jury only if it is manifestly erroneous. As defined by the appeals court, a thing is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by an ordinary person. Further, the appeals court found the existence of an unreasonable risk of harm may not be inferred solely from the fact that an accident occurred.

In this particular case, the appeals court found the trial court and jury could reasonably credit defendant's expert's testimony that the slide was not unreasonably dangerous over plaintiff's safety expert's opinion to the contrary, "even though the latter may have been equally reasonable." The appeals court, therefore, affirmed the judgment of the trial court in favor of the defendant School Board.

### LEGISLATED STANDARDS VS. AGENCY RULES ?

In the case of *McCarthy v. State*, 562 N.Y.S.2d 190 (A.D. 1990), the court also found that the United States Consumer Product Safety Commission's *Public Playground Safety Guidelines* did not establish, as a matter of law, the applicable standard of care in a playground accident. As characterized by the court, these guidelines were "not mandatory or meant to be the exclusive standards for playground safety." Therefore, to the extent such guidelines reflected the life of the community, a jury might consider such guidelines as evidence of the applicable legal standard of care. In other words, unless expressly adopted in legislation or regulation, industry safety standards are not conclusive evidence of the applicable legal standard of care. In the area of playground safety, California is one of the very few jurisdictions which has enacted legislation which expressly adopts the Consumer Product Safety Commission's *Public Playground Safety Guidelines* as a legal standard of care.

In the absence of such legislation, a court may consider an agency's own safety standards in determining the applicable legal standard of care. For example, in the case of *City of Miami v. Ameller*, 472 So.2d 728 (Fla. 1985), the court found the city's own standards (as well as recommendations by the playground industry) could be considered in determining whether the city had violated its legal duty to maintain its parks in a reasonably safe manner for public use. In this particular instance, the city's own standards reflected recommendations by the playground industry which required resilient surfacing under its playground equipment. Despite such internal and industry standards, the city had allegedly placed monkey bars in a public park over hard-packed ground surface.

In the case of *Rosario v. City of New York*, 549 N.Y.S.2d 661 (A.D. 1990), plaintiff had also alleged that the city failed to follow its own standards regarding playground surfacing. Specifically, plaintiff's expert witness had cited city specifications requiring 1.5 inches of padding under playground equipment. The court noted, however, that these specifications did not disclose their effective date, scope, and application to the city's existing playgrounds. The court, therefore, ordered a new trial for a jury to consider the existence of such a standard of care and, if applicable, whether the city failed to comply with its own standard under the circumstances of this case.

### LEGISLATED STANDARD VS INTERNAL RULES

In contrast, the court in the case of *Blankenship v. Peoria Park District*, 269 Ill.App.3d 416, 207 Ill.Dec. 325, 647

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N.E.2d 287 (1995) rejected plaintiff's argument that a legal duty arose from the defendant's "internal rules which required at least one lifeguard to remain on duty during the adult swim period." In so doing, the court distinguished between a legislated standard of care and the agency's more demanding internal policies. According to the court, the violation of a statute or ordinance designed to protect human life or property is *prima facie* (i.e., on its face, in and of itself) evidence of negligence. On the other hand, the court noted that "a legal duty is normally not established through rules or internal guidelines." Accordingly, the court found that "the failure to comply with self-imposed regulations does not necessarily impose upon municipal bodies and their employees a legal duty." Specifically, the court found that defendant's internal rules in this particular instance were superseded by the state tort claims statute which expressly granted general immunity to public entities from liability for a failure to supervise.

### INDUSTRY STANDARDS - CERTAIN, UNIFORM, & NOTORIOUS?

In the case of *Braden v. Workman*, 380 N.W.2d 84 (Mich.App. 1985), plaintiff, age 18, broke his neck following a head-long dive into defendant's manmade lake. Plaintiff alleged that defendant was negligent because the lake had no lifeguard or first aid equipment, specifically a backboard for neck injuries. Plaintiff's expert witness testified that a lifeguard and backboard were required, but he admitted that such safety measures were "not universally implemented." In fact, defendant offered evidence that such recommended safety measures, lifeguards and backboards, were seldom used in Michigan lakes similar to defendant's facility. Despite Red Cross standards and other safety guidelines, the court found that the majority of state park swimming facilities similarly had no lifeguards or backboards. Plaintiff had argued that state law required swimming lake operators to provide reasonable persons to observe bathers and provide rescue services and lifesaving appliances (i.e., backboards), if needed.

According to the court, the jury would determine what, if any, lifesaving persons and equipment were necessary, absent an expressed requirement in law or regulation. In this particular instance, the jury returned a verdict for defendant. On appeal, plaintiff argued that the trial court had erred in not admitting into evidence safety standards prepared by the state for swimming facilities.

The court acknowledged that the customs, practices, and usages of an industry are admissible to establish the applicable standard of reasonable care, and prove negligence, if such industry custom is "certain, uniform and notorious." However, in this particular instance, the court found that the safety standards offered by plaintiff's expert were far from notorious. On the contrary, the court found that the state publication had a limited distribution which did not include campground facilities similar to defendant's operation. In fact, plaintiff's expert was unaware of these particular "standards" until he conducted his research on behalf of plaintiff.

Similarly, in the case of *Hames v. State*, 808 S.W.2d 41 (Tenn. 1991), the court found that customary conduct, while not conclusive, can gauge whether ordinary care was exercised by defendant and plaintiff in a particular situation. In this case, plaintiff alleged that defendant was negligent in failing to have storm warning devices and shelters on a state park golf course. The court noted, however, that there was no industry standard requiring storm shelters or warning devices. Further, the court found that no state park golf courses employed such storm warning devices. In addition, the court found no evidence of an industry standard which required golf courses to have a policy to clear the course in the event of a lightning storm. In so doing, the court rejected plaintiff's argument that rules of the golfing association required such measures. Specifically, the court found that the golf association's standards applied to tournament play, not recreational use of a public golf course. As a result, the court found that defendant was not negligent because defendant's conduct did not fall below the applicable standard of reasonable care. Rather, the court found that the risk and danger associated with playing golf in a lightning storm was rather obvious to most adults with or without additional warnings, such as horns or sirens.

### AGENCY CUSTOM EVIDENCE OF REASONABLE CARE?

In the case of *Koprowski v. Manatee County*, 519 So.2d 78 (Fla.App. 2 Dist. 1988), plaintiff was struck by a large

rescue-type surfboard while walking past defendant's lifeguard stand on a windy day. Lifeguards testified that it was their custom on windy days to have the boards locked up or laid flat. Further, the lifeguards acknowledged previous instances where boards had become windblown when not properly secured. In this particular instance, the guards admitted that their own customs and practices indicative of reasonable care under the circumstances had not been followed. As a result, the court found sufficient evidence that defendant had negligently failed to take its own reasonable burden of precaution in light of a foreseeable risk of injury, i.e., securing boards on a windy day.

#### SAFER ALTERNATIVE EXISTS IN REAL WORLD?

In the case of *Shipley v. Recreation & Park Commission of East Baton Rouge*, 558 So.2d 1239 (La.App. 1 Cir. 1990), the court considered whether a particular type of base used in a softball game was unreasonably dangerous. Plaintiff's expert had testified that "all bases with permanent anchoring devices are dangerous and that either a throw-down base (one which is not secured to the ground), or bases similar to home plate (i.e., not above ground level) should be used." Plaintiff's expert, however, admitted "if these types of bases were used it would require a change in the existing softball rules to accommodate base movement and instances where the players would slide over bases."

While acknowledging that "these suggestions for alternative bases would perhaps make the sport of softball safer," the court refused to consider them in determining whether this particular base was unreasonably dangerous. On the contrary, the court indicated it would only examine this particular base "within the context of the rules of the actual game and not an imaginary game which does not exist." Further, the court found that this particular base conformed to industry standards, i.e., the Amateur Softball Association's guidelines required softball bases at first, second and third bases to be firmly affixed to the ground and not thicker than five inches. In addition, the court noted that the base was dimensionally the same as the "canvas strap-down base" advocated by plaintiff's expert as a safer alternative. Accordingly, the court held that plaintiff's evidence of safer alternatives, some of which were unavailable at the time of the accident, was not sufficient to establish that the defendant's base was unreasonably dangerous under the circumstances of this case.