The right way, or the lazy way

Using statutes, industry standards and company policies to demonstrate premises liability in the workplace

By Eustace de Saint Phalle and Andrew Clay

When addressing workplace hazards at an employer's place of business, each industry's activities present a unique set of hazards on the premises where the work gets done. Each location and industry will have a distinct way of dealing with these hazards to get the work done safely. Different hazards may require different mitigations, such as warnings, instructions, guarding, removing the hazard, adopting procedures to limit the time the hazard exists, making sure people avoid the hazard, and providing guardrails, harnesses, safety nets, visors, safety strips, or other protections. Most industries have developed principles and rules for safe practices for the circumstances where hazards frequently arise.

As we know from our case experience, the day-to-day practice in a specific workplace often falls short of best practices and becomes dangerous and sometimes even life-threatening.

In laying out your case against a defendant for its unsafe conduct causing injury, it is important to establish the rules that apply to that industry – the standard of conduct and the safety rules that apply for the premises and the activity. This is important to educate your audience, whether this be the mediator, the judge, or the jury. Your audience is probably not aware of the specific rules and procedures for a particular worksite and hazardous activity.

In the best-case scenario, there will be a relevant safety statute or regulation that your defendant has violated. More typically, your defendant will be going against accepted safety practices in their industry, often by adopting a lazy shortcut that endangers workers or bystanders.

It is critical to establish the applicable safety rules at the outset in your premises-liability case. Make your reader aware, right at the beginning, of the danger and of the particular measures that are accepted as reasonable and necessary to protect against the danger. Such rules are immensely useful to clarify what is at stake in the situation and the right way to face the danger. When you then describe the defendant's failure to behave properly, the reader understands that the defendant has recklessly courted danger and invited injury to your client.

This article discusses the uses of statutes, regulations, industry standards, and company policies as evidence of the standard of care in premises liability cases.

The duty to assess and mitigate hazards on the premises

A landowner or tenant has a duty to take affirmative action for the protection of individuals coming upon the property under their control. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368.) An owner must act as a reasonable person in view of the probability of injury to others. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119.) The owner's affirmative duty includes a duty to inspect for hazards, and to remedy any hazards discovered. (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 833; *Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330.) When an activity is known to be hazardous, the owner must either eliminate the hazard, guard against the hazard, and/or warn about the hazard. (*Williams v. Carl Karcher Enters* (1986) 182 Cal.App.3d 479, 488.)

These general principles apply where the owner/renter has injured an invitee, a bystander, or a worker on the premises. As to workplaces, a defendant has a duty to correct or warn of hazards that others may encounter. (*Markley v. Beagle* (1967) 66 Cal.2d 951, 955-956 [landlord was liable where a service worker encountered a faulty railing and fell]; *Kinsman v. Unocal Corp*. (2005) 37 Cal.4th 659, 664-665.)

These principles are useful to establish duty and to deflect defense arguments that they "didn't know" about a given hazard. However, the defendant is likely to argue that they in fact followed general safety principles, and that they adequately dealt with the safety issues on their premises. To counter this defense, it is useful to show the defendant's specific rule violations.

Show defendant's "descent into worker safety hell"

You will want to show defendant's "descent into worker safety hell," from the ideal of diligence to the reality of carelessness. Most of the time, people, businesses and industry start with the proper intent to provide a safe place to work. Problems with safety usually arise from improper training or lack of training, over-confidence, or pressure to take short cuts. When these situations occur at any worksite, a safe place to work can easily descend into a safety nightmare for the employee. They will be stuck with the choice between losing their job and working in a hazardous environment. (See, *Finnegan v. Royal Realty Co*. (1950) 35 Cal.2d 409, 442-443 [employees not liable where employer directed them to store explosives unsafely, since employees lacked control over the negligent conduct].)

In discussing safety rules and practices in your briefing, it is useful to organize the discussion as a succession of levels, descending from the ideal practices to the actual (unsafe) practices:

a. Statutes and regulations
b. Industry safety standards
c. The defendant company's own policies and procedures
d. The company's typical day-to-day practices
e. How the company behaved on the day of the incident

A pattern emerges with safety practices that we call the "descent into safety hell." Generally, we find that the conduct gets worse as we go down through the levels. The ideals for safe practices expressed in the regulations and industry publications get progressively diluted in the policies and the day-to-day practice of a given business. Safety principles that are great "on paper" are sometimes ignored in practice.

These levels can be used as an organizing structure for briefing on premises liability. It is persuasive to show the reader how the defendant's conduct has deviated from the accepted safety rules. Sometimes the deviation is early, for example, where the company did not adopt industry-standard safety practices. Sometimes the deviation is later, for example, where the company's own rules were regularly "bent" by the low-level managers or employees. This is where the pressures of time and money are most likely to deconstruct the safety structures at a worksite.

Statutory or regulatory violations

Where a statute prescribes specific safety practices, the defendant is presumed to be liable if the defendant violates the statute and thereby causes injury. (CACI 418.) The statute will define the standard of care for a defendant, if: "(3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (Evid. Code, § 669.)

Violation of a relevant safety statute is powerful evidence of negligence. "[W]here the court has adopted the conduct prescribed by statute as the standard of care for a reasonable person, a violation of the statute is presumed to be negligence." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263.) A defendant may try to defeat the presumption by arguing that the violation was justified, but this is rarely persuasive.

In premises liability cases, there are several different categories of laws that are useful sources of safety rules. The most common will be the Health and Safety Codes; state and local building codes; the Labor Code; and Cal-OSHA regulations.

State and local building codes may oblige the property owner to take certain safety measures. Property owners have a duty to keep the property in compliance with the safety provisions of relevant state or municipal building codes. Owners are liable where non-compliant structures on their property cause injury. (See *Merrill v. Buck* (1962) 58 Cal.2d 552, 559 (in an injury case involving a fall down a staircase, trial court properly gave a negligence per se instruction on the staircase's violations of the city building code]; *Finnegan v. Royal Realty Co*. (1950)

35 Cal.2d 409, 416 [property owner liable for improper fire exits in violation of city building code].)

For industrial injuries, look to Cal-OSHA

In industrial injury cases, Cal-OSHA regulations (particularly the industrial safety standards in Title 8 of the Code of Regulations) may be used to establish a defendant's standard of care to third parties. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [holding that the amendments to Cal. Lab. Code § 6304.5 permitted using Cal-OSHA regulations in third party cases].) For example, Cal-OSHA regulations setting standards for the nailing, anchoring, size, and railing of scaffolds may create the standard of care for an entity responsible for setting up scaffolding. (*Id*. at 925, citing 8 C.C.R. §§ 1513, 1637, 1640.)

In some cases, a federal statute or regulation may be adopted as a standard of care. (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [where defendant provided adulterated drug, court properly gave negligence per se instruction citing the US Food, Drug and Cosmetic Act].)

When citing statutes or regulations as negligence per se, it is necessary to meet the legal standards under Evidence Code section 669. Particularly, the plaintiff must convince the judge that, "the statute actually apply to the defendant, the injured party be a member of the class the statute was intended to protect, and the injury result from an occurrence the statute was designed to prevent." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 932.)

Be prepared to prove all these elements, and particularly the idea that your plaintiff was a "member of the class the statute was intended to protect." For example, if your client is injured as a visitor to a work site, the defendant may claim that a particular work safety regulation was designed to protect workers, not your client. As stated in the early case *Porter v. Montgomery Ward & Co*. (1957) 48 Cal.2d 846: "Some safety orders, such as those regulating machinery, might be regarded as peculiarly designed to protect employees when applied to places of employment which the public is prohibited from entering." (*Id*. at 849.) In such a case, the defendant may argue that the law does not apply to your plaintiff.

However, if the safety rule relates to a hazard likely to be encountered by non-employees (such as a railing or a staircase at the workplace), the court is more likely to find the rule creates a duty that applies to third parties: "An entirely different situation, however, is presented where, as here, a person is a business invitee in a department store and is using a stairway which the store provides for persons in her position as well as for employees. Plaintiff was entitled to the benefits of the safety order under the circumstances . . . ." (*Porter, supra*, 48 Cal.2d 846 at 849.) These issues are complicated and should be well researched in the particular case circumstances.

You should discuss potential statutory and regulatory violations with your expert on industry standards, who will be better positioned to know what standards are regularly used to guide conduct in your industry.

Even where you cannot use a given statute or regulation as a binding rule under negligence per se, it may be possible to refer to the rule if it informs industry safety practices that apply to your situation.

The recommended safety practices for the defendant's industry

You can use standards in the relevant industry to show what safety practices are necessary in the circumstances of your case. By "industry standards," we refer to the custom and practice in a given industry. (CACI 413, Custom or Practice.)

Industry standards are not definitive rules establishing the standard of care, and cannot be used in negligence per se jury instructions. However, industry standards are admissible evidence of negligence, because they show what a reasonable, similarly situated defendant would do. (*Holt v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 427, 435.)

Most industries have professional organizations which promulgate best practices and safety policies. Some industries produce detailed written standards, such as the ANSI standards for engineering (available at ansi.org).

Written industry standards can be powerful persuasive evidence of the "rules of the road" applicable in your case. Your expert witness will be critical to establish the relevant industry standards, how they apply to the dangerous activity in your case, and the ways these standards were violated by the defendant.

As noted above, sometimes a particular statute or regulation does not meet all the standards for negligence per se, if the Court rules that the regulation is not intended to protect your plaintiff. Such regulations may nevertheless inform the standard of conduct for the industry.

Sometimes, the industry standard practice is not enough to ensure safety. "[I]t is sometimes the case that customs themselves are unreasonable." (*C & C Props. v. Shell Pipeline Co*. (E.D.Cal. Nov. 27, 2019, 2019 U.S.Dist.LEXIS 206439, at *30; see, *Holt, supra*, 171 Cal.App.3d 427, 435 [practice of air pilot (flying low during crop dusting) was unsafe, even though most crop dusters did the same].) Standards used by some companies may become outdated, if new and higher safety standards are replacing older standards. Further, specific factual circumstances may require greater care than the usual standard in that industry. (*Howard v. Omni Hotels Management Corp*. (2012) 203 Cal.App.4th 403, 421.)

You should discuss with your expert any circumstances where (1) the industry as a whole needs to adopt better safety practices or the latest standards, and/or, (2) your particular situation required

additional safety measures beyond typical industry standards.

Defendant's own policies

Often, companies have their own written policies outlining safe practices in a given situation. Company policies are admissible evidence on the issue of negligence. (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 719-721.) This evidence can be quite powerful. Where the defendant has itself adopted a written standard of conduct, it can be presumed that the company considers this standard to be practical and feasible. "Such rules implicitly represent an informed judgment as to the feasibility of certain precautions without undue frustration of the goals of the particular enterprise." (*Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472, 478; see also, *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 587-588.)

Here, again, a discussion with your safety expert is vital. Ask your expert to review the defendant's policies and to point out: (1) adequate company policies and procedures which apply in your case, and, (2) inadequacies in the company's policies and procedures that allow hazards to persist.

In practice, employees often cut corners

Before you discuss what happened on the day of the incident, consider the company's typical day-to-day work practices related to the activity that caused injury. Do the defendant's employees usually follow all the company's safety rules? Typically you will find "corner cutting" – not all the company's safety rules are followed every day.

If the defendant's typical practices were substandard and hazardous, you may bring a direct cause of action against the defendant for the negligent training and supervision of its employees. (CACI 426; *Phillips v. TLC Plumbing, Inc*. (2009) 172 Cal.App.4th 1133, 1139.) "[The defendant's] negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of [adequate] safeguards." (*D.Z. v. Los Angeles Unified School Dist*. (2019) 35 Cal.App.5th 210, 229, citations omitted.)

If you find that the company's typical safety practices were improper, try to establish a causal link between the company's poor practices and the incident causing injury.

"What happened that day" – Often the worst behavior

We are now at the bottom of our "descent," where the actual negligent conduct occurred. Here, we may consider the defendant employees' conduct somewhat independently of training or supervision. Companies are vicariously responsible for their employees' conduct performed in the course and scope of employment (CACI 3701; *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297.)

Whether or not there were improper company policies or training, in most cases the defendant will be vicariously liable for its employees' negligent conduct.

With diligent discovery, you should be able to show what the defendant's employees did on the day of the incident, and how the defendant's employees' conduct deviated from safe practices, as established by statute, by industry standards, and/or by the company's own rules. It is important to establish a causal link between the particular unsafe conduct and the incident that caused injury.

Conclusion

Statutes, regulations, industry standards, and company policies can be vital tools to prove a defendant's negligence. Establishing the rules of conduct in a given situation will show your audience what needed to be done in a given situation to prevent injury and give them a focal point for determining that the defendant was at fault.

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