Safety Expert Witness

Use of the OSH Act as Standard of Care in Common-Law Negligence Cases

By Greg Gerganoff

IN BRIEF

- **The standard of care is one of the key elements establishing common-law negligence. The Colorado Supreme Court recognized the admission of the OSH Act as some evidence of identifying standard of care in common-law negligence cases in 2002.**
- **A logical application of the OSH Act could include written opinion and testimony of a safety expert who can explain the hazard of a given situation or condition and describe the suitable safety regulations given the facts of the case.**
- **Safety experts also offer other benefits in common-law negligence cases, such as in the initial case assessment and discovery phases and at trial.**

When personal injury events occur legal negligence actions may arise. Two types of negligence are defined by law: negligence per se and common-law negligence. According to AllLaw (2016):

> Negligence per se is defined as an act that is negligent because it violates a law that has been designed to protect the public. Some common examples of laws that, if violated, can result in a negligence per se claim are speed limits, building codes and blood alcohol content limits for drivers.

This article focuses on common-law negligence and the use of safety expert witnesses.

Common-law negligence is established when the plaintiff shows: 1) the defendant owed the plaintiff a legal duty; 2) to conform to a standard of care; 3) the defendant breached that duty; 4) the plaintiff suffered injury; and 5) the existence of a causal relationship between the breach and injury (FindLaw, 2016; *Scott v. Matlack Inc.*, 2002). One of two key focal points in this article is the standard of care. How does a litigant go about proving (or disproving) standard of care?

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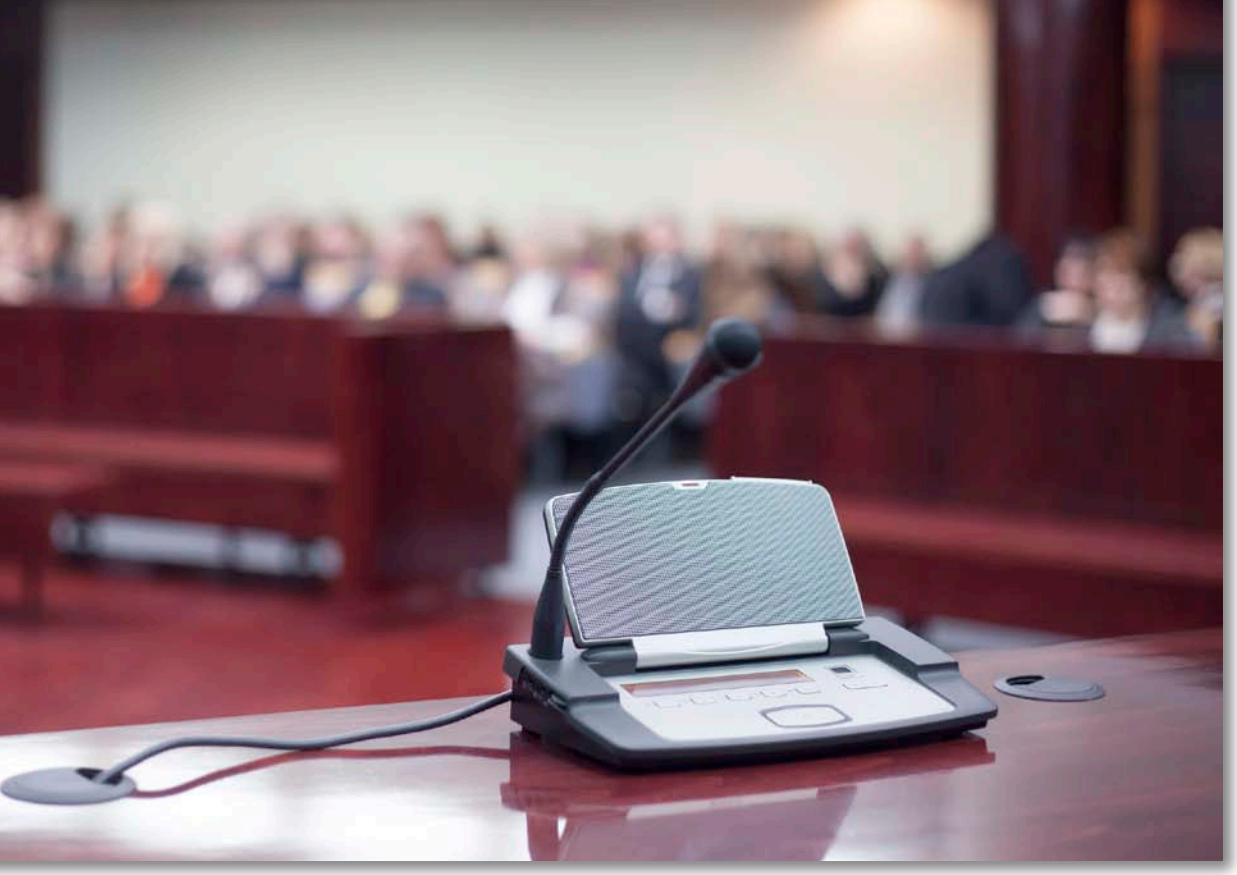
Proving Standard of Care

Attorneys have traditionally looked to several sources accepted in the judicial community to prove standard of care in common-law negligence cases. In Colorado, a potential source of this crucial element can be found in *Scott v. Matlack Inc.* (2002), and in other states in the safety standards of the OSH Act of 1970. As safety professionals know, the OSH Act is a body of federal safety rules and procedures applied to certain businesses and industries addressing employee safety in the workplace.

The OSH Act is administered by OSHA (or OSHA-approved state plans) and divided into four parts: general industry, construction industry, maritime, longshoring operations and agriculture. The act specifically excludes mining, which is governed by MSHA, pursuant to the Mine Safety and Health (MSH) Act of 1977. OSHA enforces compliance in the workplace upon employers through one of these four parts.

A note of clarification regarding negligence per se, common-law negligence and why this article focuses on the common-law negligence. Prior court rulings regarding the use of the OSH Act in negligence cases have long prohibited the use of the OSH Act in negligence per se cases [*Canape v. Petersen*, 1995; Geographic applicability, 1970, 29 CFR 653 (b)(4)]. But in 2002 that changed when the OSH Act was allowed to be used in common-law negligence cases.

Let's now return to the availability of the use of the OSH Act as a standard of care. In *Scott v. Matlack Inc.* (2002), an independent contractor fell from



atop a tanker owned by defendant Matlack and sustained injuries. Plaintiffs sought to introduce OSH Act safety regulations to prove a standard of care breach by the defendant. The defendant argued that the OSH Act could not be put forth as a standard of care pursuant to OSH Act section 653 (b)(4). (This section of the act provides that it may not be used to change an employee's or employer's common-law liability and was generally thought to prohibit the use of the act in any manner other than OSHA compliance.)

The Scott court made several rulings regarding the use of the OSH Act in common-law negligence cases. The most important for the purposes of this article is: "It is proper for the trial court to admit Occupational Safety and Health Act regulations as evidence of the standard of care in an industry" (*Scott v. Matlack Inc.*, 2002, 1160). The trier of fact (judge or jury) is allowed to hear evidence of the OSH Act "as some, nonconclusive, evidence of the standard of care in the relevant industry" (*Scott v. Matlack Inc.*, 2002, 1160).

So, what does it all mean?

Common-law negligence cases now have a slightly broader source of potentially useable standard of care tools in the form of 29 CFR 1926, 1928, 1915, 1917 and 1918. An interesting side note raised by the Scott ruling is the question of whether any other federal safety regulatory scheme, such as the MSH Act, might be useful in the same manner. However, this is a topic best suited for a future article.

Who benefits from this ruling? Any litigant (plaintiff or defendant) may avail itself of the OSH Act in proving standard of care. So how can the OSH Act be introduced and used in a common-law negligence case? Remember, a litigant seeking to demonstrate that someone did or did not satisfy standard of care toward another may use the OSH Act as "some" evidence of an industry standard in its case. This is a good point in the discussion to examine the role of a safety expert witness.

The Role of a Safety Expert Witness

First, what is a safety expert? A safety expert is typically someone who, through education and field safety work, has learned safety regulations (e.g., OSH Act, MSH Act), industry practices and customs. Each industry possesses unique working conditions and situations leading to hazards commonly encountered, and the proper or customary methods of addressing such hazards. As safety professionals know, each part of the OSH Act (parts 1926, 1928, 1915, 1917 and 1918) applies to specific industries and often contains unique safety standards.

So what role would a safety expert play in a common-law negligence case? During several phases in a lawsuit a safety expert could assist legal counsel: assessment, discovery and trial testimony.

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Case Assessment

First, let's discuss case assessment from a safety perspective. A common-law negligence case has two sides: plaintiff and defendant. The plaintiff must show/prove that the defendant failed to meet the standard of care. The defendant wants to show that the standard of care was satisfied or that the plaintiff's choice of standard of care does not apply to the facts of the case. The safety professional can explain what and why a condition or action was or was not compliant with the OSH Act. Questions the safety expert could ask include:

- Is there a supportable basis for the claim or defense using the OSH Act as a standard of care?
- What should have been done that was not, or what was done?
- Were safety steps or processes undertaken following common industry custom or OSH Act stan-

dards? Why or how? Answering these questions early in the progression of the case may help determine the suitability of an anticipated claim or defense using the OSH Act.

The judge or jury will view the expert as a person with knowledge and skills learned over years of experience. That person's opinion can be helpful in problem solving.

An OSH Act perspective relative to a common-law negligence case assessment can offer early guidance to legal counsel. After all, legal disputes are essentially comprised of evidence woven into arguments in support of a position and an early case determination of the OSH Act's application may be beneficial.

For example, a person who was tied off falls to the ground; the case hinges on the anchor point. A case assessment reveals that the anchor point could not hold more than 1,000 lb. Now, one side or the other knows there may be a problem with its case. Better to learn about the problem before trial.

Discovery

During the discovery phase in a lawsuit, both sides can request information from the other. Discovery includes requesting documents and photographs, taking depositions and asking questions. The discovery phase is important because key evidence can materialize to help either side, and evidence is critical to a lawsuit. Like many industries and professions, safety consists of many unique aspects such as recordkeeping, training and records of training, competent person designations, safety programs, testing results and more. Knowing what to ask for can produce case-deciding evidence. Lawyers may be unaware of what to specifically ask for if they are unfamiliar with safety, OSHA or other OSH-related matters.

A hypothetical example may help highlight the use of a safety expert in discovery in a common-law negligence case. Suppose a person falls from the height of 5 ft while working and his lawyer wants to use the OSH Act as a standard failed or satisfied. The safeguard triggers for working at height in one industry are not the same trigger point for another. If the injured employee were in the construction industry the standard of care may be satisfied, but not if the fall occurs in general industry. Such a distinction in action triggers is likely unknown to the attorney. There may be differing trigger points to hazard remediation depending on the portion of the OSH Act applicable to the case facts (e.g., fall protection triggers for Part 1926 vs. Part 1910).

OSH Act part distinctions may be helpful to legal counsel. Part 1910, General Industry, and Part 1926, Construction Industry, address safety issues of two separate industries. Part 1926 deals with all work-related activities that involve the construction of buildings, roadways, bridges and industrial plants. Part 1910 deals with manufacturing, oil and gas, and maintenance activities. Distinguishing construction activity from general industry activity is an important process for plaintiff or defendant.

These distinctions are not intuitive, but are rather a product of the OSH Act, OSHA's letters of interpretation (LOI), rulings of the Occupational Safety and Health Review Commission and federal court interpretation of the OSH Act. For example, an activity that appears to be maintenance may actually be a construction activity, such as work to repair a boiler in a manufacturing plant. Such a repair would appear to be maintenance and the activity is taking place in a manufacturing plant so the attorney might logically conclude that such an activity would fall under general industry regulations. There are several instances in which an activity initially appears to be maintenance (general industry) but is in fact deemed construction industry. Such distinction can have a significant impact to an employer for various reasons (*Secretary of Labor v. Ryder Transportation Services*, 2014).

To determine which OSH Act section applies to a specific case, safety professionals can look to OSHA LOI, which are opinions issued by OSHA on how the agency views certain activities or conditions. In the case of falls, OSHA (2003) has issued several LOI making the distinction between construction industry activities versus general industry activities. Once the appropriate industry is identified the applicable safety rules can be identified. Assisting the attorney in properly classifying the applicable industry standards may be the difference between winning and losing the case.

Another way safety experts can assist legal counsel is through knowledge of other sources of safety guidance or rules that the OSH Act adopts through incorporation by reference, such as ANSI standards.

Returning to the injury scenario in which the employee fell 5 ft, let's add a few more facts. Suppose the employee was painting a section of a manufacturing plant. The company typically repainted walls on a fixed time schedule. The area being painted was recently upgraded, however, and an old boiler was replaced, necessitating the wall repaint. At issue is whether the painting activity was a general industry (1910) (4 ft) or construction industry (1926) (6 ft) activity. Consequently, the safety standard of care was triggered under one part but not under the other part.

In short, discovery may result in obtaining evidence that clarifies which OSH Act part applies (or does not apply), which, in turn, governs the standard of care available for use in the common-law negligence action.

Trial Testimony

The third area of safety expert use is testimony at trial. The judge or jury will view the expert as a person with knowledge and skills learned over years of experience. That person's opinion can be helpful in problem solving (Black's Law Dictionary, 2016). The problem solving provided by the safety expert witness is one of explaining the hazard, ap-

plicable safety regulations, how the hazard is eliminated with what steps should be taken, and why regulations exist and how they should be properly implemented.

Using fall protection as an example, the safety expert can identify when a full-body harness for fall arrest may be used and when a positioning body/waist belt may be used. While an attorney may view both as the same, the safety expert can explain the difference and the reasoning.

The Scott Ruling & Safety Experts

To use the OSH Act as a standard of care, a safety expert is required. The court made clear the mere arguing or raising of the OSH Act as a standard of care in common-law negligence to be insufficient. The expert's role is to explain the applicable OSH Act sections, explain and describe the hazards that are part of the facts of the case, and tie them to the proper OSH Act sections. Without the expert witness to provide such explanations, the OSH Act cannot be used to establish the standard of care in common-law negligence cases.

In short, evidence of industry safety standards is relevant and admissible to determine whether a defendant complied with the standard of care s/he owed the plaintiff, or that a defendant's actions did comport with a standard of care (*Yampa Valley Electric Association v. Telecky*, 1993, as cited by *Scott v. Matlack Inc.*, 2002).

Expert Witness Admissibility

Finally, let's briefly discuss admissibility of the expert witness. The mere fact that the plaintiff or defendant uses a safety expert does not automatically mean the trial court will allow the expert to testify. Besides presenting sound professional bona fides, the expert must present a valid and well-supported position on the facts relative to the appropriate OSH Act section. The rules of evidence used in state and federal courts generally require expert testimony to be objective, recognized and generally accepted in the industry involved (*Scott v. Matlack Inc.*, 2002). While this does not require two opposing experts to arrive at the same conclusion, their opinions must be based in logic, and rationally tied to the regulation and known facts of the case. The trial judge will determine expert witness admissibility by hearing arguments from both plaintiff and defendant regarding admissibly of the expert witness, then deciding whether to admit the expert to testify in court.

Conclusion

This article focuses on the Scott case, a Colorado Supreme Court ruling from 2002 that granted the use of the OSH Act via safety expert witness as a form of nonconclusive evidence of standard of care. As a point of interest, since the initial draft of this article, the author has spoken with a handful of attorneys who were unaware of this ruling and its potential value to common-law negligence cases.

Other states that follow the Colorado Scott case position on using the OSH Act as some form of evidence in proving standard of care include (this list is not exhaustive):

- Arizona (*Wendland v. AdobeAir Inc.*, 2009);
- Minnesota to a limited degree (*Solo v. Trus Joist MacMillan*, 2004);
- Oklahoma (*Taber v. Allied Waste Systems Inc.*, 2015);
- Tennessee (*Hall v. Allstate Insurance Co.*, 2015).

For those whose state supreme court has not yet ruled directly on the admissibility of the OSH Act in common-law negligence matters, readers should learn whether the court has ruled on the applicability of other statutory or regulatory law being applied in common-law negligence cases. If the courts have so ruled, then the use of the OSH Act as a standard of care may be likely. **PS**

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