



Notre Dame Law Review

Volume 41 | Issue 1

Article 1

11-1-1965

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Harry M. Philo

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Recommended Citation

Harry M. Philo, *Use of Safety Standards, Codes and Practices in Tort Litigation*, 41 Notre Dame L. Rev. 1 (1965).

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USE OF SAFETY STANDARDS, CODES AND PRACTICES
IN TORT LITIGATION

*Harry M. Philo**

Safety standards, codes and practices are assuming more and more importance in personal injury litigation. The problems and potentialities of their use are in no way confined to their admissibility into evidence during trial. This article will explore the scope of their potential use in the following aspects of a case:

- (1) whether there is a case;
- (2) pre-trial discovery;
- (3) trial preparation; and
- (4) trial.

Negligence is the failure to use due care. Safety standards, codes and practices seldom constitute documentation of what is due care in a given circumstance. Generally, they represent much less than due care. An appreciation of this is a prerequisite to advocacy in this area of litigation.

I. A New Subject

Few attorneys have any familiarity with safety standards. Few appellate courts have been called upon to examine the use of safety standards for trial with an adequate trial record or appellate brief. This is because products liability — the liability of a manufacturer, assembler, processor, nonmanufacturing seller or installer for injury — is a new field. This mushrooming field of litigation has heretofore been limited because of privity restrictions, notice requirements, con-

* Member, Michigan Bar; Union College; LL.B., University of Detroit College of Law; President, American Trial Lawyers Association of Detroit; partner, *Goodman Crockett, Eden, Rubb & Philo*, Detroit, Michigan. Mr. Philo is coauthor of *Lawyer's Desk Reference: Sources of Information for the Trial Lawyer and Legal Investigator* and *Pre-Trial Aids in the Machine Injury Case*; he is a special editor of *Am-Jur Trials*.

tributory negligence, jurisdictional limitations and workmen's compensation election statutes. Another important factor has been the reluctance of courts to submit negligence cases to juries, when they involve questions as to the safety of a product's design.

As society becomes more complex, the mutual duties of its members to prevent accidental injuries and death become greater. As society has developed, its level of conscience has become elevated. A nation previously flippant about 100,000 annual accidental deaths and 10,000,000 annual accidental injuries suddenly considers such an epidemic immoral and recognizes the need to prevent such slaughter. In response to this need, the law has begun to throw off the legal straightjackets which have insulated negligent manufacturers from suit. A manufacturer's duty to use due care has suddenly become the concern of the legal profession, which has never had occasion to examine what constituted due care, even where a manufacturer's negligence has been the cause of serious injury. This new concern requires extensive use of safety codes. The increased number of third-party suits by industrial accident victims, also of recent origin, greatly increases the necessity for reference to codes.

II. What Are Safety Standards, Codes and Practices?¹

Safety is not only common sense. It is a very sophisticated undertaking. It requires research, investigation, injury and accident statistics and analysis of those statistics by trained personnel. It requires substantial study of man and machine and their interrelationship in the expected environment, with particular emphasis on fatigue, monotony, attention arresters, intended use of products and foreseeable unintended uses. It requires a philosophical attitude that accidental injury and death can be prevented by proper design. It requires safe design for every foreseeable use, even emergency uses, by planning a sufficient safety factor or margin.

Fundamental to a discussion of this subject is a recognition of the genesis and evolution of safety standards, codes and practices, for which there are four primary sources:

- (1) creation or adoption by the laws of various governmental units;
- (2) promulgation by industry or by independent organizations who have gleaned them from industry practices;
- (3) creation by individual concerns in contracts or otherwise; and
- (4) development by independent sources, based upon safety principles and assimilated from trade usage.

The predominant sources for codes and standards stem from established industry or business practices. An example of this is found in the practices codified by the American Standards Association. The ASA is one of the most respected agencies for the establishment and maintenance of industrial standards. However, its function is not to create standards based upon need, but to assimilate them for purposes of acceptance, as set forth in *ASA Objectives*:

¹ See generally Blackman, *Safety Standards*, 10 AMERICAN SOC'Y SAFETY ENGINEERS J. 9 (1965).

The ASA does not write standards.

The main functions of ASA are:

1. To provide systematic means for developing American Standards
2. To promote the development and use of national standards in the United States
3. To approve standards as American Standard provided they are accepted by a consensus of all national groups substantially concerned with their scope and provisions
4. To coordinate standardization activities
5. To serve as a clearinghouse for information on American and foreign standards
6. To represent American interests in international standardization work.²

The result of the ASA work is a product developed by consensus, which may not represent due care. The state of the science of safety may far exceed actual practice and may reasonably require conduct beyond that assimilated in codes or standards.

To protect corporate profits and limit workmen's compensation liability, major industries have developed safety standards, codes and practices, cutting the injury rates in many factories to as low as one per one million man-hours. But these same industries spend little for the safety of the products they produce. There has been a significant lag in safety standards for manufactured products simply because there have been few products liability suits. Existing codes, then, represent industry's attempt to maintain profits by balancing the cost of formulating and complying with an adequate code with the cost of liability for failure to exercise due care. Thus, codes and standards represent a compromise between the safe and unsafe practice. They do not represent due care. They do represent industry's attempt to maintain and maximize profits. While, theoretically, profits and due care are not incompatible but complementary to one another, history indicates that industry has not recognized this fact. Due care has historically been only an instrument of profit and loss, and in the interval, millions have been injured and killed.

III. How To Use Codes

A. Is There A Case?

The first question the attorney with a personal injury case must ask himself continually, from the time of the initial interview to the moment when the case is rejected, lost or settled or the judgment paid, is: How could due care on the part of the defendant have prevented injury to my client? The answer must be sought within a framework of reference with two points of departure: first, the entire industry, of which the defendant was a part, was negligent; and second, the injured was not at fault. Capable safety engineers have come to realize that the slogans, "Be Careful," "Drive Safely," "Operate Your Machine Safely," etc., have caused more injuries and deaths than they have ever prevented, simply because they have deluded our society into looking in an

2 AMERICAN STANDARDS ASS'N, HOW STANDARDS ARE MADE.

entirely wrong direction for safety — the shelter of safe *practices* rather than safe *design* and *planning*.

The answer to the question of how due care could have prevented injury requires a survey of the safety literature. The advocate must first check the basic safety manuals, although he usually will not find the answer there. The next source of assistance will be all of the safety standards, codes and practices from such varied sources as the American Standards Association, the National Safety Council, federal and state governments, insurance carriers, industry associations, trade unions, safety organizations and engineering societies. This survey should include foreign standards. Ordinarily, a survey of this limited depth will be sufficient to prove that the defendant failed to conform to industry standards, which presently are evidence of due care.³

In many instances, however, the lawyer must research further if the safety manuals and codes do not provide the answer he seeks. He should then proceed to the scientific and engineering indices, which will best differentiate and clarify the standard of conduct required by codes and due care. The use of these indices with regard to a liability problem will always lead to an article by a safety professional or a dedicated engineer suggesting a method which in effect is due care and which, if followed, would have eliminated the injury or death.

Standards and codes represent a low-level consensus of these combined interest groups: industry, unions, insurance, government, users, suppliers, etc. The consensus includes the companies with tired-out production supervisors who are designated safety engineers, and it includes companies employing graduate safety engineers. It includes those companies with injury rates of forty per one million man-hours, and those with less than one per one million man-hours. The teaching of Judge Learned Hand in the *T. J. Hooper* case is, therefore, important:

There are, no doubt, cases where courts seem to make the general practice of the . . . [industry] the standard of proper diligence; we have indeed given some currency to the notion ourselves. . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.⁴

B. Use In Discovery

The liberal discovery rules of most jurisdictions greatly assist in the delineation of the issues for trial. Interrogatories should be submitted to the defendant to ascertain: membership in the National Safety Council, industry associations and local safety organizations; participation by executive personnel in government, engineering and standards associations, particularly their codes committees; representations in patents and patent applications; contractual obligations re-

³ See generally 2 WIGMORE, EVIDENCE §§ 451, 461 (1940, Supp. 1964).

⁴ The *T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932). (Citations omitted.)

quiring conformance with standards and codes; sales to foreign countries with better safety standards; knowledge of standards and codes; subscriptions to safety and technical journals; safety personnel and their training; the defendant's rules, etc.

Similar inquiry should be made by deposition of the defendant's directors of safety and research, sales manager, design engineers, safety experts and quality control personnel. If the witness is ignorant of safety practices, it is helpful; if he is knowledgeable, he must agree with the plaintiff's theory. If he is somewhat ignorant and somewhat knowledgeable, it will be obvious to the jury, and he will assist the jury in understanding the problem. Defense safety experts invariably admit upon cross-examination that safety is a sophisticated profession and that existing standards and codes represent considerably less than due care.

C. Preparation for Trial

The trial judge who is philosophically committed to the proposition that "safety is just common sense" has been part and parcel of our safety-unconscious society, and he will need a great amount of assistance in understanding plaintiff's case. It behooves the advocate to help the court as much as possible to understand the sophisticated areas of liability. Counsel customarily submit trial briefs on the law, and complicated medical problems have been clarified with medical trial briefs. Similarly, it is necessary in most tort cases to submit a safety brief with photocopies of the applicable National Safety Council Safety Data Sheet, American Standards Association safety standard, United States Government safety pamphlet, International Labour Organization safety code, industry code and applicable articles from the *Journal of the American Society of Safety Engineers, Safety Maintenance*, or any of the 300 technical monthlies available. With a safety brief, the jurist who, without its benefit, would have mumbled about a no-liability case, is likely to become a safety advocate, impatient with the culpable conduct of the defendant.

Such a safety brief will also be useful in preparing expert witnesses for trial. Frequently, plaintiff's experts will be men who have always acquiesced in the negligent standards of negligent industries. They need the assistance of such a brief in buttressing their opinions concerning due care. A collection of the relevant literature is particularly helpful in preparing them for cross-examination.

D. Trial Use for Defendant

Eventually, defense attorneys will have greater occasion to utilize safety standards than plaintiff's attorneys, since many industries today are adopting codes, complying with them and seeking to convince courts and juries that compliance constitutes due care. More and more defense counsel seek the admission of industry codes into evidence. In this regard, there is something inherently wrong with an evidentiary rule which allows such negligent industries as the railroad, construction and maritime industries to introduce their safety practices as evidence of due care without first presenting some expert who opines that the industry has adopted reasonably safe practices.⁵

⁵ See generally 2 WIGMORE, *op. cit. supra* note 3, §§ 451, 461.

E. Trial Use for Plaintiff

Presently, plaintiff's attorneys have many opportunities to utilize safety standards during trial.

1. Evidence of Due Care

The level of safety and frequency of injury are presently such that in most trials the defendant can be shown to have violated even the inadequate safety standards, to say nothing of failure to use due care. The plaintiff in such a case should seek to show the scope of the industry, the standards available, the defendant's participation in the formulation of the standards and his acceptance of them.

2. Evidence of Notice

Often the defense seeks to argue that the hazard was not recognized or the use was unforeseeable. The standards provide ideal evidence of notice regarding hazards to be protected against and regarding foreseeable but unintended uses. For example, nearly twenty years ago, England banned all two-hand tripping devices for power presses since they were generally bypassed. This would provide excellent evidence of notice as to foreseeable but unintended use of that device.

3. Availability of Remedy

A defendant usually argues that, even though he was aware of a particular hazard, there was no way to guard against it. The code which succinctly answers this argument makes good reading in the jury room.

4. Competency of Defendant's Expert

A substantial percentage of those who call themselves safety directors today suffer from an utter lack of qualification. The competency of an expert is always an issue. Cross-examination of defendant's expert regarding the available standards in the industry, his knowledge of them, the extent of the industry, the extent of acceptance of the safety practices and the extent of incorporation by reference in statutes, ordinances and contracts, is usually a great leveler of the incompetent witness.

5. Cross-examination of Due Care Opinion

The basis of the defense expert's opinion that defendant's conduct constituted due care is subject to extensive cross-examination. If the amount of care fails to meet the industry standard, then that contrast can be effectively shown to the jury by introduction of the code during cross-examination. An opinion should also be solicited as to whether or not the injury could ever have happened if the protection recommended in the standard had been in effect.

6. Cross-examination Regarding Industry Custom

In many industries there are *avant-garde* companies, such as DuPont, who attempt to formulate rules of due care. Since the industry includes these com-

panies, and their safety personnel are the most respected in the industry, it is illustrative to contrast the care suggested in the standard with the care advocated by the safer companies, including material submitted at the time of adoption of the consensus standard.

IV. Admissibility in Evidence

Safety codes, standards and practices properly presented are admissible in evidence in negligence cases. What is, or soon will be the law on this subject, is best expressed in *McComish v. DeSoi*.⁶ Numerous jurisdictions have held such evidence to be admissible.⁷

Lower courts have often stumbled and refused to admit a standard or code because of the hearsay rule. This occurs because the attorney does not know the conditions under which they are admissible, and the judge does not understand the rationale for the hearsay rule. (It is assumed here, of course, that the standard or code meets the tests of relevancy and materiality.)

The basis for the hearsay rule is that the declarant is not susceptible to inquiry regarding his sincerity, memory and perception.⁸ Yet, as indicated earlier, codes and standards are illustrative of the present thinking in the field of safety. They recognize and usually codify the customs and practices prevalent in the area, and are relied upon and form the basis for much of the knowledge of the industry and of experts. Because of these factors, no doubt exists as to their veracity, and, as in other cases where the declaration reaches such status, they are admissible as exceptions to the hearsay rule. They are within the Uniform Rules of Evidence rationale which makes admissible "a published treatise, periodical or pamphlet on a subject of history, science or art, to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject."⁹

The attorney in his proofs and appellate briefs should demonstrate the nature, rationale, genesis, evolution and general acceptance of standards and codes. This allows judges to view this evidence in its proper perspective as an authoritative and reliable source of information for digestion by the triers of facts. Discovery procedures may well determine that there is no dispute as to the acceptance and use of standards and codes. Under these circumstances, codes and standards may be admissible under the doctrine of judicial notice or by stipulation of the parties.

Usually, codes and standards are admissible to buttress the testimony of

6 42 N.J. 274, 200 A.2d 116 (1964).

7 *E.g.*, *Dotham v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Tampa Drug Co. v. Wait*, 103 So. 2d 603 (Fla. 1958); *Rouse v. New York, C. & St. L. Ry.*, 349 Ill. App. 139, 110 N.E.2d 266 (1953); *Leas v. Continental Fruit Express*, 45 Tex. Civ. App. 162, 99 S.W. 859 (1907); *Sage v. Northern Pac. Ry.*, 62 Wash. 2d 6, 380 P.2d 856 (1963). See FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 5.04 (1964); HURSH, AMERICAN LAW OF PRODUCTS LIABILITY (1961); 2 WIGMORE, *op. cit. supra* note 3, § 461; Annot., 75 A.L.R.2d 778 (1961).

8 See generally MORGAN, BASIC PROBLEMS OF EVIDENCE (2d ed. 1962).

9 UNIFORM RULE OF EVIDENCE 63(31). See accompanying comment.

an expert. The expert gains his expertise by reliance upon knowledgeable commentary, of which standards and codes are a part. The basic tools of a safety engineer are the safety standards and codes. It is ridiculous to allow the expert to testify based upon assertions in codes and standards while refusing to admit the assertions.¹⁰

The opinion in the *McComish* case¹¹ cuts to the very heart of the problem. It recognizes the position of codes and standards in industry. It recognizes that the search for truth is enhanced when the source for expert knowledge is viewable by the trier of facts. The opinion is best represented by the following excerpt:

In this case, however, the manuals were not received as learned treatises. They were introduced as safety codes, as objective standards of safe construction, generally recognized and accepted as such in the type of construction industry involved. A treatise is usually no more than one expert's opinion regarding a particular factual complex. On the other hand, a safety code ordinarily represents a consensus of opinion carrying the approval of a significant segment of an industry. Such a code is not introduced as substantive law, as proof of regulations or absolute standards having the force of law or of scientific truth. It is offered in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care.¹²

The understanding of the *McComish* court regarding the purpose and use of standards and codes suggests that, given the same information through briefs and records, courts in all jurisdictions will follow suit.

There may be situations where codes and standards represent an area for mandatory judicial notice. When incorporated into statutes or ordinances, they have the force of law and must be noticed.¹³ Regulations of a government-wide administrative agency which incorporates standards and codes are usually within the sphere of judicial notice.¹⁴

An example of incorporation by reference to codes and standards is found under § 1 of the Walsh-Healey Act,¹⁵ which specifies various stipulations which must be made in certain government contracts.¹⁶ Pursuant to § 4 of the act,¹⁷

10 See 6 WIGMORE, *op. cit. supra* note 3, §§ 1690-1700.

11 *McComish v. DeSoi*, 42 N.J. 274, 200 A.2d 116 (1964).

12 *Id.* at 282, 200 A.2d at 120-21.

13 MORGAN, *op. cit. supra* note 8, at 1-2.

14 See Federal Register Act, § 7, 49 Stat. 502 (1935), 44 U.S.C. § 307 (1958); 59 HARV. L. REV. 1137 (1946).

15 49 Stat. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1958).

16 Section 1 provides in pertinent part:

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation, all the stock of which is beneficially owned by the United States . . . , for the manufacture or furnishing of materials . . . in any amount exceeding \$10,000, there shall be included the following representations and stipulations: . . .

(e) That no part of any such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dan-

the Secretary of Labor has promulgated rules which rely to a great extent upon previously published safety codes.¹⁸

Where a defendant has complied with regulations or received certification from a governmental agency, such evidence is admissible. However, it has been held that receipt of certification is only evidence on the issue of negligence and may indicate only conformity to the *minimal* standards established by the agency, which standards may not be *due care*.¹⁹

Many private construction contracts include provisions such as the following:

The design, materials and construction shall conform to the following standards:

- (a) American Society for Testing Materials;
- (b) American Standards Association;
- (c) American Railroad Engineering Association;
- (d) National Electrical Code; and
- (e) National Board of Fire Underwriters.

The Contractor shall comply with the safety and engineering practices as set forth in the *Manual of Accident Prevention in Construction* as published by the Associated General Contractors of America as well as the established safety rules and practices of the owner.

As part of the contract, these codes, standards and texts are admissible without evidence of general acceptance or usage in the trade or knowledge.

Under the practice in over three-fourths of the jurisdictions, a rule adopted by an employer for guidance of his employees is admissible in evidence on behalf of the plaintiff, in an action against the employer for an alleged negligent injury to a third party.²⁰ Such rules constitute some indication of the care required, and may be admissible as admissions of the defendant concerning what he thought was proper care.²¹ They can be used to cross-examine with respect to defen-

gerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

Walsh-Healey Act § 1, 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1958). See generally address by Bernard R. Kennedy, *The Federal Register and the Code of Federal Regulations*, 51st Annual Meeting of the American Association of Law Libraries, July 2, 1958, in 51 L. LIBRARY J. 372 (1958).

17 See Yoffe v. Pennsylvania Power & Light Co., 385 Pa. 520, 123 A.2d 636 (1956);

18 25 Fed. Reg. 13809 (1960); the rules promulgated at the time of the Secretary's statement provide that if a respondent in an enforcement proceeding, see 49 Stat. 2038 (1936), as amended, 41 U.S.C. § 39 (1958), elects to demonstrate that his conduct constituted due care despite noncompliance with the rules, publications of the following entities should be received into evidence: the American Standards Association, Inc., the American Society of Mechanical Engineers, the National Fire Protection Association, the National Board of Fire Underwriters, the Public Health Service of the United States, the Bureau of Mines and the Atomic Energy Commission. 41 C.F.R. § 50-204.1(c) (1965).

19 See Yoffe v. Pennsylvania Power & Light Co., 385 Pa. 520, 123 A.2d 636 (1956); Kreindler, *Admissibility and Effect of Government Approval and Certification of Aircraft*, 3 B.C. IND. & COM. L. REV. 367 (1962).

20 E.g., Frizzell v. Omaha St. Ry., 124 Fed. 176 (8th Cir. 1903); Nelson v. Southern Pac. Co., 8 Cal. 2d 648, 67 P.2d 682 (1937); Hurley v. Connecticut Co., 118 Conn. 276, 172 Atl. 86 (1934); Lake Shore & M. So. Ry. v. Ward, 135 Ill. 511, 26 N.E. 520 (1891); Cleveland, C., C. & St. L. Ry. v. Jones, 51 Ind. App. 245, 99 N.E. 503 (1912). See Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957); Annot., 50 A.L.R.2d 16 (1956).

21 Southern Ry. v. Tudor, 46 Ga. 563, 168 S.E. 98 (1933).

dant's knowledge, competency, reliance and conformity to the rule.

Proof of rules established by other companies in the same field is admissible to illustrate what pertinent rules, practices or precautions have or have not been found to be reasonable and proper.²² The broadest latitude for admissibility is found in cases arising under the Federal Employers' Liability Act.²³

In cases involving defendants whose businesses are international in scope, safety standards and practices codified by foreign countries may be used extensively with respect to knowledge, reasonableness and adaptability. It may prove embarrassing for a defendant to admit he built a safer machine for use in a foreign country than he did for use in the United States.

Codes, standards, treatises or practices followed by an individual safety-conscious company, which are indicative of due care and represent care beyond that practiced or codified by industry, are admissible.²⁴ Such evidence has been held admissible to assist the jury in determining whether the defendant took all precautions within reason, and to suggest reasonable alternatives to defendant's conduct.²⁵

V. Where To Find Codes, Standards and Practices

This article, should it take the whole of the law review, could not exhaust the sources for such information. The library is the best place to become acquainted with the vast sources of materials. A real exercise in a learning experience is to select a product, go to the library and ask about codes, standards and treatises regarding that product.

A lawyer should begin with five basic safety manuals:

- (1) *Accident Prevention Manual for Industrial Operations*;
- (2) *Fire Protection Handbook*;
- (3) *Manual of Accident Prevention in Construction*;
- (4) *National Electrical Code*; and
- (5) *Traffic Accident Investigator's Manual for Police*.

Several other useful sources for codes and standards are the American Standards Association, the National Safety Council (data sheets), the National Fire Protection Association, the American Society for Testing and Materials, the British Standards Institute, the Bureau of Labor Standards, the Canadian Standards Institute and United States Government Purchasing Specifications. These are but a very few sources. Almost every industry has promulgated or is affected by codes and standards. Numerous governmental agencies, domestic and foreign, have also created rules and regulations. Standards and codes have numerous authors—all potential experts. In turn, experts are abundant sources of information regarding standards.

The attorney who handles products liability cases will soon realize that a

²² 2 WIGMORE, *op. cit. supra* note 3, § 461. See Annot., 137 A.L.R. 611 (1942).

²³ 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958). See Annot., 43 A.L.R.2d 618 (1955).

²⁴ 2 WIGMORE, *op. cit. supra* note 3, § 461. See *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 79 N.W.2d 688 (1956).

²⁵ See 31 So. Cal. L. Rev. 324 (1958).

safety library is as important to personal injury litigation as is a medical library. An office safety library can be developed by purchasing basic safety manuals and codes from the United States Government Printing Office, the National Safety Council and the American Standards Association, the three major U.S. sources of standards. There are literally thousands of safety standards, codes, safe practice sheets, safety films, safety libraries, etc. A book which lists for the general practitioner almost all conceivable sources, both national and international, is the *Lawyer's Desk Reference*.²⁶

VI. Trial Tactics

Since the trial is an art form, and the trial lawyer is an art director using the art director's tools in the staging of a trial, it is well to consider in what manner those tools are useful in the trial as regards safety codes.

A. Theme

It is an inevitable conclusion of tort attorneys that the defendants did not know about safety, did not care about safety, did not do anything about safety. This should be the theme of such litigation. Safety practices will greatly assist the development of this theme in *voir dire*, opening statement, proofs and final argument. Such a theme will cause jurors to consider the evidence in a qualitatively different manner than otherwise.

B. Pulling Power

At this stage of products liability litigation, opposing counsel fight hard to keep safety standards and codes out of evidence. Most judges will be quite reluctant to admit the codes when first offered. But juries want to see and hear every available piece of evidence, and it is possible to develop a reaction from the jury which will result in a pulling for each attempted introduction into evidence. There is probably no other evidence so susceptible to the legitimate development of pulling power. Of course, if this tool is to be used, one must be quite certain of ultimate reception since it is useless to set up a straw man who cannot be knocked down.

C. Construction for Impact

Constructing the trial to get a great impact at a given moment so as to clinch victory requires great skill and is a major tool in the hands of an expert. There are situations in which the introduction of safety standards into evidence can provide such a final impact. In a case where opposing counsel has fought throughout a trial to keep safety codes out of evidence, an overwhelming impact is accomplished when the work contract, *written by the defendant*, is introduced into evidence, incorporating by reference all the safety practices which the defendant has fought so hard to keep from the jury.

26 ROBB & PHILO, LAWYER'S DESK REFERENCE (1965).

VII. Conclusion

The law is a major vehicle for society to stop the wanton slaughter caused by accidents. Lawyers must use standards and codes to recognize and prove liability and ridicule the standards which are much less than due care. To the extent they do this, they do their part in helping our nation adopt a factor of safety which can drastically reduce the accidental injury and death toll.

The law's function is to guide the interrelationship of people within a society. As society advances, so must the law, or it will fail. Modern society has expanded technically to a position never expected or anticipated by the ancients. With this expansion, society requires higher levels of maturity and morality. As distant prime movers sell products and services involving sophisticated and complicated designs and plans, the unsophisticated must be protected. As knowledge expands regarding safety, society should benefit from it. Otherwise, there is no purpose to expansion or education, and the law ceases to function. While codes, standards and practices are valuable in personal injury cases, they represent only custom and not due care. Codified negligence is still negligence.