A BALANCING ACT: INTERNAL POLICIES THAT MANAGE RISK WITHOUT RAISING STANDARDS OF CARE

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Litigators frequently find themselves suspended on a tightrope between providing legal counsel in the midst of litigation and dispensing risk management advice. Many times, the lawyer that defends a retailer in the wake of an incident is not the same lawyer who drafted the policy which prescribes the retailer's ideal response to such an incident. This article will explore the best practices which underlie the development of policies that do not affect liability while still providing clear and specific directives to store personnel.

SETTING THE BAR

The elements of a common law negligence claim are duty and a breach of the duty that causes damage. Duty arises in a number of scenarios (e.g. special relationship, statute, contract) and its existence is a matter of law for the court to determine. If a duty does not exist under the law, the claim must fail.

The plaintiff's bar is in a continual crusade to create more duties that might trip-up defendants, thereby triggering new negligence claims. The "Reptile Theory" approach in recent years is an example of an effort that sought to establish additional duties through "safety rules" that were not necessarily found in statute or judicial opinions. While the defense bar has successfully resisted attempts to equate safety rules with duty, the battle becomes more difficult when a defendant's internal policies are involved.

Retailers, product manufacturers, trucking companies and other sophisticated organizations draft policies to ensure the efficient execution of their businesses. These policies may be purely operational, or they may be written to effectively manage risk. While some entities may consider the violation of certain policies to be grounds for termination, other policies may be written to establish ideals and function more as guidelines. While the common law duty of due care serves as a base line, these written policies may (often unnecessarily) set a higher bar for the policymaking institution.

For example, in most jurisdictions, a premises liability plaintiff must prove that the defendant retailer created a dangerous condition, actually knew about the condition, or should have known (constructive notice) about the condition. If the defendant retailer had a policy that its manager must "regularly inspect the floor," the manager would have license to walk the floor two, three or four times a day, thereby satisfying the policy. Even if on the day of the

slip and fall she only walked the store twice and the day before she happened to walk it three times, she can nevertheless testify honestly at deposition that she adhered to store policy on the day of the incident.

However, if store policy required her to "walk the store every three hours" and the slip and fall occurs four hours after her most recent inspection because she needed a lunch break or was unusually busy, the plaintiff now has a policy violation in his quiver to argue that the store "should have known" the condition was on the floor.

Some jurisdictions have created a safe harbor for entities that exceed the common law standard of care with their policies. In *Branham v. Loews Orpheum Cinemas, Inc.* (N.Y. 2006), a moviegoer left the theater for several minutes and when she returned, she tripped over a child seated in the aisle. She attempted to use the cinema's policy of checking the aisles every 15 to 20 minutes as evidence of constructive notice. The court ruled that while "internal rules may be admissible as evidence of whether reasonable care was exercised, such rules must be excluded, as a matter of law, if they require a standard of care which transcends the traditional common-law standard of reasonable care under the circumstances."

In jurisdictions that do not provide this safe harbor, well-meaning entities that use specific written policies to establish ideal behavior have sometimes done so at their own detriment once litigation occurs. While specific policies certainly provide structure and discipline to the persons who must carry them out, such policies are much easier to violate.

RESISTING THE COOPTION OF POLICIES

The defense bar's fight against the cooption of policies by plaintiff's counsel begins in discovery. While a narrowly tailored request for a defendant's policies (e.g. a request for policies on "floor maintenance," not "all policies and procedures") is likely discoverable in most jurisdictions, defense counsel can begin by requesting protective orders so that the use of policies is confined to the litigation and not disbursed within the plaintiff's bar to posture future claims.

Our efforts must escalate once the case goes to trial. In many cases, the court will find the internal policies relevant and admissible. In *Mayo v. Publix Supermarkets* (Fla. 1997), the plaintiff sued after falling from a scale which he argued was negligently placed. At trial, he sought to introduce the "procedures manual to demonstrate what was reasonable care in placement of the scale for public access." The District Court of Appeal concluded that internal policies are admissible if relevant, but that "a party's internal rule does not itself fix the legal standard of care in a negligence action, and that the party is entitled to appropriate jury instructions to that effect."

When a trial judge finds internal policies to be relevant and permits their use by plaintiff's counsel, the defense lawyer's job is to limit that use. Often through expert testimony, the claimant's attorney will present the internal policy as the standard of care. As the Arkansas Supreme Court stated in *Bedell v. Williams* (2012), "the fact that an expert testifies that a duty existed does not make it so. A jury question is not created simply because an expert believes a legal duty exists." The defense lawyer must guard against the expert's opinion by requesting, perhaps *in limine*, a jury instruction (e.g. "While policies may be considered for …, they are not the standard of care."). The instruction should come from the court both at the first introduction of policies and again when the jury is charged before deliberation.

POLICIES TO SHOW DEVIATION FROM THE STANDARD

While the plaintiff's bar would certainly like to cite specific internal policies as the standard of care, most (if not all) jurisdictions have been unwilling to go that far. Plaintiffs have instead made frequent use of policies to show *deviation* from the standard.

In *Peterson v. Nat'l Railroad Passenger Corp.* (S.C. 2005), the operator of a sweeper on a nearby street fell asleep, causing the vehicle to veer from the street and collide with nearby train tracks. The collision misaligned the rails of the track by several inches. Shortly thereafter, a train traveled down the tracks and derailed when it reached the area of misalignment. Peterson, an employee of the train, was severely injured.

Peterson sued under the Federal Employer's Liability Act, alleging improper maintenance and presented expert testimony that the railway defendants "violated federal track safety standards and their own internal policies." The railway defendants argued that their internal policies were inadmissible because federal law preempted the policies. Although the South Carolina Supreme Court agreed that only federal law established the standard of care, they found the internal policies to be admissible to show deviation from the standard.

In *Pink v. Rome Youth Hockey Ass'n, Inc.* (N.Y. 2016), a spectator was injured after a hockey game. While the game's physical altercations were confined to the ice, spectators in the stands "engaged in yelling and name calling." After the game, the plaintiff was injured when he tried to break up a physical altercation between other spectators. In his lawsuit, the plaintiff argued that had the association enforced its "Zero Tolerance Policy" and ejected the unruly spectators, he would not have been injured. The court noted that the violation of an entity's "internal rules is not negligence in and of itself" and further noted that when an internal policy exceeds the normal standard of care it cannot be the basis for liability.

In *Kane v. Lamothe* (Ver. 2007), the plaintiff sued the state and a law enforcement official who failed to investigate a claim of domestic abuse. She argued that the state police manual established proper procedure for investigating these claims and that it was not followed by the defendant. The court held that the manual did not create a duty of care and observed that "internal policies and manuals provide preferred standards but not legal requirements for which individuals may hold the State liable."

CONCLUSION

Where possible, in-house counsel and litigation counsel should work together to craft policies that achieve the twin aims of inspiring certain business behavior and neutralizing cooption by a claimant's attorney. There is no blackletter answer as to how specific a policy must be, but balance is essential to ensure solid footing in the midst of litigation.

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