Module C - Legal

**MODULE C - LEGAL**

**SUBMODULES**

C1. Conflict Of interest/Code Of Ethics
C2. Antitrust
C3. Torts
C4. Intellectual Property
C5. Speaking For The Society
<table>
<thead>
<tr>
<th>DATE</th>
<th>SLIDE</th>
<th>CHANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>6/16/06</td>
<td>3 &amp; Notes, 4, 8 Notes, 9 Notes, 14 Notes, 15 Notes, 16 &amp; Notes, 17 Notes</td>
<td>“accreditation” changed to “conformity assessment”</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>“accreditation” changed to “conformity assessment”</td>
</tr>
<tr>
<td></td>
<td>8</td>
<td>“accreditation” changed to “conformity assessment” and last bulleted item deleted.</td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>“accreditation” changed to “conformity assessment” and last bulleted item deleted.</td>
</tr>
<tr>
<td></td>
<td>14</td>
<td>“accreditation” changed to “conformity assessment” and notes added</td>
</tr>
<tr>
<td></td>
<td>15</td>
<td>“accreditation” changed to “product certification”</td>
</tr>
<tr>
<td></td>
<td>16</td>
<td>“accreditation” changed to “product certification” in heading: “An accreditation body” changed to “A certification body”; and Note revised.</td>
</tr>
<tr>
<td></td>
<td>17</td>
<td>“accreditation” changed to “product certification” in heading and second listed item revised.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>First paragraph revised.</td>
</tr>
</tbody>
</table>
C3. Torts
Objectives

This submodule deals with torts and their impact on standards development and related conformity assessment activities.
Agenda

The module will concentrate on the following topics:

What is a tort?
Potential tort problems in standards development and how to avoid liability
Potential tort problems in conformity assessment (accreditation and certification) and how to avoid liability
Potential tort problems in the timely implementation of new technology and how to avoid liability
Part I – What is a Tort?
WHAT IS A TORT?

• Definition
  – Civil wrongs recognized as grounds for a lawsuit filed by an injured party

• Example
  – “Negligence” resulting in harm to persons or property

What is a Tort?

Definition:
A tort is a civil wrong recognized as grounds for a lawsuit filed by an injured party.
The most important applicable concept is that of “negligence” resulting in harm to persons or property.
What is a Tort? (cont’d)

Purpose of tort law:
The primary aim of tort law is to provide monetary relief for damages incurred and to deter others from committing the same harms. In other words, tort law is primarily concerned with the equitable allocation of the cost of routine civil harms.

Source:
The law of torts is drawn primarily from decisions made by courts rather than from legislatively enacted statutes. The fashioning of tort law standards in our legal system is therefore, largely the responsibility of state court judges. Tort law will vary from state to state, but a certain national consensus has developed over time concerning most questions of potential liability that relate to the activities of an organization such as ASME.
Tort - Potential Applicability

The area of tort law that is potentially most applicable to ASME’s activities is negligence.

Negligent Tort:
Negligent torts are wrongs which occur because the defendant’s actions were unreasonably unsafe.
In general, negligence is considered conduct which falls below the standard established by law for the protection of others against unreasonable risks of harm. Negligence may also occur where one has fully considered the possible consequences and nonetheless has failed to act with reasonable prudence to avoid the risk of harm to others.
A party seeking to recover damages for injury caused by the negligence of another must demonstrate the other party did all of the following:
Owed a duty of care to plaintiff (i.e., an implicit responsibility held by one individual towards another)
Breached or failed to discharge that duty (i.e., was negligent)
Such breach of duty was the direct or proximate cause of injury to plaintiff’s person or property
ASME AND TORT LAW

• Source of liability
  – Fostering reliance creates a duty to use reasonable care

• Activities creating potential problems
  – Promulgating voluntary codes and standards
  – Administering conformity assessment programs

ASME and Tort Law

Sources of liability:
Associations such as ASME which undertake to promulgate voluntary codes and standards, and to administer associated accreditation programs, foster reliance upon the requirements that they develop and maintain in their codes and standards in the interest of public health and safety. As a result, ASME and its members have a duty to use reasonable care in connection with such activities to avoid potential liability. Two major aspects of ASME’s codes and standards program—standards development and conformity assessment—create the greatest potential liability. We will discuss these separately in the following parts.
Part II - Potential Tort Problems in Standards Development
NEGLIGENT STANDARDS DEVELOPMENT

• Party must
  – Demonstrate a failure to exercise reasonable care
  – Demonstrate this failure increased the risk of harm

Negligent Standards Development

A standards developing organization may be liable when a party alleging negligence in the performance of an undertaking to promulgate a standard demonstrates that the committee promulgating the standard failed to exercise reasonable care and either that such a failure increased the risk of harm or that harm was suffered as a result of reliance on the standard.

By undertaking to promulgate and maintain safety standards in the public interest, ASME could be subject to liability if it fails to carry out this responsibility in a reasonable manner.
Negligent Standards Development (cont’d)

Potential applicability:
The adoption of a standard, whether specifying either the design or the performance characteristics, could be held to constitute tacit approval of the safety level of products that meet the standard, particularly where it is foreseeable that manufacturers, government regulators, insurers and, most importantly, users will rely upon the standard.

As mentioned in the previous slide, a party alleging negligence in the performance of an undertaking to promulgate a standard would have to demonstrate that the committee promulgating the standard failed to exercise reasonable care and either that such a failure increased the risk of harm or that harm was suffered as a result of reliance on the standard.

The standard of conduct that the law imposes can perhaps best be understood in terms of the hypothetical “reasonable person.” In essence, the law presumes that there is a standard of behavior that a person of ordinary prudence, skill and care would follow in all situations, so as to avoid creating unreasonable risks of harm to others. When dealing with professionals, or persons of superior learning or skill (such as engineers), the law imposes an even higher standard of care and diligence. In effect, it hypothesizes a “reasonable engineer,” whose conduct is guided by his or her special knowledge and expertise. In all instances, however, it is a jury of lay people who must decide whether challenged behavior was or was not reasonable.
Avoiding Liability

Guidelines:
ASME’s procedure for achieving consensus reduces the likelihood the Society will be found liable to any person for injuries suffered as a result of a defective product. However the consensus process does not immunize a standard from being found defective or inadequate by a jury of laymen. So the best way to avoid future liability is:

- All individuals involved in the standards writing process should:
  - Carefully weigh all views expressed in the standards development process
  - Bring to bear their best professional judgment in carrying out their duties
  - All standards should be developed so that they have an objective, documented and technical basis.

Guidelines:
- Members must exercise reasonable care by
  - Carefully weighing all views
  - Using their best professional judgment
  - Objective, documented technical basis for the standard or code
Part III – Potential Tort Problems in Conformity Assessment

ASME operates four types of conformity assessment programs:

- Accreditation
- Product Certification
- Personnel Certification
- Management System Certification

There are potential tort problems in all of these areas, however we will concentrate on product certification since that is where the largest exposure is.
Negligent Misrepresentation in Connection with ASME Product Certification

Party must demonstrate:
A certification body may be liable when a party alleging negligent misrepresentation involving a risk of harm demonstrates:
Either that there was a failure to exercise reasonable care in ascertaining whether a Code Symbol Stamp should have been issued or reissued
Or that there was inadequate care taken in overseeing the use of the Code Symbol

NOTE: While ASME does not “approve,” “certify,” “rate,” or “endorse” any item, construction or activity, it is clearly more than just a standards writing organization. ASME issues Certificates of Authorization to manufacturers and suppliers determined by ASME to be capable of producing products in accordance with the relevant ASME code or standard. Upon issuance of an ASME Certificate of Authorization, a manufacturer or supplier also is issued an ASME Code Symbol Stamp and authorized to place the ASME symbol on its products, indicating the products were constructed in accordance with the applicable ASME code.
Negligent Misrepresentation in Connection with ASME Product Certification (cont’d)

Issues:
Several cases suggest any organization that maintains a “seal of approval” or similar type program has an affirmative duty to take reasonable steps to examine, with some degree of expertise, the product upon which its symbol appears.

ASME certification related to products means that the capability to fulfill requirements in the applicable standard by the supplier has been reviewed and accepted by ASME. The supplier is responsible for ensuring that products meet and, if applicable, continue to meet the requirements on which the certification is based.

The presence of the ASME symbol on an item may be misinterpreted by some as ASME’s representation that the item meets the applicable ASME code or standard. If such a person were injured by an item which a reasonably careful inspection would have revealed to be defective, ASME could very likely be a target for suit. This is particularly likely where others rely on the code symbol stamp as an assurance of code compliance.

As stated in a previous slide, a party alleging negligent misrepresentation involving a risk of harm would have to demonstrate either there was a failure to exercise reasonable care in ascertaining whether a code symbol stamp should have been issued or reissued, or that there was inadequate care taken in overseeing the use of a code symbol.
Avoiding Liability

Guidelines:
The best prescription for avoiding problems is for all volunteer and staff personnel to exercise prudence and care in carrying out their responsibilities on behalf of ASME. Of particular importance: Care should be taken to ensure that quality reviews and surveys are being carried out by competent and qualified personnel. At a minimum, this should involve careful selection and review of the work of “ASME designees” and “ASME consultants” conducting quality assurance reviews and surveys. Upon receipt of a report of verified nonconformance with applicable code requirements by a Certificate of Authorization holder, ASME should act promptly, within the limits of due process, to curtail use of the Code Symbol Stamp and “quarantine” (i.e., identify) questionable products with ASME symbol stampings, pending corrective action.
Part IV - Potential Tort Problems in the Timely Implementation of New Technology
Timely Implementation of New Technology

Potential Liability:
The consensus process is a double-edged sword. While it provides a deliberative process during which all views are carefully considered, the slowness of the process can be its downfall. One could envision potential vulnerability under this scenario: a new technology, which, if adopted, would enhance the level of safety provided by a standard, becomes available and is brought to ASME’s attention. The technology is considered for years while injuries occur under the un-revised standard. A court and jury could look back with 20/20 hindsight and find ASME negligent for not having adopted the newer, safer technology sooner.

This hypothetical situation is not far from the truth, as it occurred in a 1996 New Jersey Supreme Court ruling which found the American Association of Blood Banks to be negligent in setting standards for the testing of donated blood for the AID’s virus because the association did not decide earlier in the 1980’s that screening should be undertaken. Bear in mind, at the time, the AIDs virus had not been isolated in blood and there was no test for detecting it. However, the theory was that “surrogate testing” for possibly related factors like hepatitis B and donor screening would have been helpful; therefore, the jury found that the association had been negligent for not incorporating such items into their widely used standard.
Potential Liability (cont’d):
The Washington State Supreme Court recently upheld a decision against the National Spa and Pool Institute (NSPI) in a case involving a 1991 swimming pool accident. In this case, a 16-year-old boy broke his neck when he struck the bottom of a friend’s pool after jumping from a diving board. The attorneys for the boy argued the dimensions of the pool were so close to the 1961 NSPI standards (the pool was constructed in 1965) that it was likely they were followed. They further argued that the NSPI knew the board would be dangerous attached to a pool of the dimensions of that in which the accident occurred and cited industry studies that raised concerns about the safety of diving boards in that type of pool. None of the contractors who built the pool were NSPI members and no direct evidence was presented at the trial that anyone involved in designing or putting in the pool or board followed industry standards.

The boy’s lawyers told the lower court jury that the NSPI should have revised pool standards to prevent such an accident and also should have warned consumers of the danger. The jury agreed and found the NSPI liable and awarded the boy $6.6 million. The Supreme Court upheld the verdict, citing a legal doctrine known as “voluntary rescue,” which holds that people who voluntarily take on the responsibility of helping someone must act with care when doing so. If they don’t, they can be liable for injuries resulting from their actions.

Much has been stated about the potential ramifications of this decision on safety standards setters. Our legal counsel has noted two key facts that influenced this decision; namely, NSPI is a trade association formed for the purpose of promoting the swimming pool industry, and more importantly, NSPI failed to change the standard in the face of mounting evidence that it was defective. Nevertheless, it is an important case that should be kept in mind.
Avoiding Liability

Guidelines:
By recognizing and taking advantage of recent advances in communication technology and by streamlining the standards development process, “Redesign” allows new technology to enter the process sooner; thereby enhancing safety and diminishing the likelihood of a negligence allegation.
The Continuous Improvement Committee continues to refine the standards development process to bring the deliberation of new technology into the process in a timely fashion.
Pop Quiz #1

All of the following are good answers. Choose any three.
Use your best professional judgment.
Consider all views.
Document the standard thoroughly
Base the standard on a clear objective.
Act in a timely manner to incorporate technical changes in the standard.
If ASME verifies non-conformance by a Certificate of Authorization holder, act quickly, within the limits of due process, to curtail the holder’s use of the ASME symbol and quarantine questionable products.
Closing remarks

Things to keep in mind:
The operation of a standards development process and accreditation programs necessarily involves some degree of legal risk. Great care needs to be exercised to insure ASME does not lose sight of the U.S. Supreme Court’s mandate in the Hydrolevel Case that it be self-policing to prevent abuse of its process. It is the performance of the volunteers and staff who implement these programs which will determine the real level of ASME’s exposure to liability. By carefully and prudently carrying out their responsibilities, volunteers and staff can significantly reduce the likelihood that ASME will be found liable to any person for injuries suffered as a result of a product defect. While this may sound simple, it requires constant vigilance on the part of all individuals involved in the process. Questions regarding the proper interpretation or application of the principles discussed during this module should be brought to the attention of the appropriate ASME officer or staff member, who will, with the assistance of counsel, provide guidance.
SUMMARY

I. What is a Tort?
II. Potential Tort Problems in Standards Development
III. Potential Tort Problems in Conformity Assessment
IV. Potential Tort Problems in the Timely Implementation of New Technology
REFERENCES

Legal Implications of Codes and Standards Activities:

“Guide to Tort Law Compliance for ASME Volunteer and Staff Members” adopted by Codes and Standards Board of Directors March 23, 1982

References