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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: IC Transportation Law, IIC Maintenance, IVB Safety and Human Performance

Supplement to

Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by John C. Vance. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a paper in Volume 4, *Selected Studies in Highway Law* (SSHL), entitled "Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines," pp. 1966-N1 to 1966-N32.

This supplement will be published in a future addendum to SSHL. Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies,

and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the 4-volume set is for sale through the Transportation Research Board (\$185.00).

APPLICATIONS

State and local governments are increasingly faced with lawsuits for personal injury and property damage resulting from highway incidents. Increasingly, plaintiffs are asserting that transportation agencies failed to follow either their own or standard guidelines pertaining to design features, safety practices, or maintenance procedures. States are establishing risk management programs to examine all aspects of their operations for the purpose of minimizing the potential for highway accidents. A better understanding of how courts interpret governmental responsibility in this area will significantly assist this process. This research should, therefore, be helpful to right-of-way officers, risk management officials, design engineers, maintenance engineers, safety officers, and attorneys responsible for tort matters.

The authors are also aware that their material will be read and evaluated by others in their field, and there is therefore additional strong pressure to be accurate.

After further discussion of the exception, *McCormick* continues by stating that:

[C]ourts in increasing number have made inroads upon the traditional position by allowing the use of published *government agency, professional, and industry standards and manuals in tort cases as tending to prove the standard of care.* (Emphasis added.)

Insofar as promulgated rules of evidence are concerned, learned treatises are the subject of Subsection 18 of Rule 803 of the Federal Rules of Evidence, which provides as follows:

Rule 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Nearly half the States have (as of the time of this writing) adopted the provisions of Federal Rule 803(18), or a variation thereof, into local rules of evidence. In the listing that follows, wherever "Rule 803(18)" appears, the language employed at the State level is precisely the same as in the previously set forth Federal Rule 803(18). Wherever a variation in such language occurs, the same is indicated in the column below:

ALASKA:	Rules of Evidence, Rule 803(18).
ARIZONA:	Rules of Evidence, Rule 803(18).
ARKANSAS:	Rules of Evidence, Rule 803(18).
COLORADO:	Rules of Evidence, Rule 803(18).
DELAWARE:	Rules of Evidence, Rule 803(18).
IDAHO:	Rules of Evidence, Rule 803(18).
MAINE:	Rules of Evidence, Rule 803(18).
MINNESOTA:	Rules of Evidence, Rule 803(18).
MICHIGAN:	In Section 707 of the Michigan Rules of Evidence, the provisions of Rule 803(18) are qualified to the extent of being "admissible for impeachment purposes only."
MISSISSIPPI:	Rule 803(18) is set forth verbatim in the Mississippi Rules of Evidence,

but is qualified by the addition thereto of the following sentence: "Treatises used in direct examination must be disclosed to opposing party without charge pursuant to discovery."

MONTANA:	Rules of Evidence, Rule 803(18).
NEW MEXICO:	Rules of Evidence, Rule 803(18) adopted as "Rule 11-803R."
NORTH CAROLINA:	Rules of Evidence, Rule 803(18).
NORTH DAKOTA:	Rules of Evidence, Rule 803(18).
NEVADA:	Nevada Revised Statutes Ann., §1.255, contains the preliminary draft version of Federal Rule 803(18), which reads as follows: To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine or other science or art, is not inadmissible under the hearsay rule if such book is established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.
OKLAHOMA:	Oklahoma Evidence Code, §2803(18).
SOUTH DAKOTA:	South Dakota Codified Laws, Chap. 19-16-22 (Rule 803(18)).
TEXAS:	Rules of Civil Evidence, Rule 803(18).
UTAH:	Utah Rules of Evidence, Rule 803(18).
VERMONT:	Vermont Rules of Evidence, Rule 803(18).
WASHINGTON:	Rules of Evidence, Rule 803(18).
WEST VIRGINIA:	West Virginia Rules of Evidence, Rule 803(18).

WISCONSIN:

The learned treatise exception is found in §908.03(18) of the Wisconsin Rules of Evidence, and reads as follows:

A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending 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 writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject.

(a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial . . .

(b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a) serve notice similar to that provided in par. (a) upon counsel who has served the original notice. . . .

(c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this sec-

tion in order to prevent a manifest injustice.

WYOMING:

Wyoming Rules of Evidence, Rule 803(18).

Methods of Introduction Into Evidence (p. 1966-N11)

In jurisdictions where learned treatise material is admissible, the proper procedure is to lay a foundation by having an expert witness testify as to the authoritativeness of the preferred material, and then to have the witness read portions thereof into the evidence. It is provided in the standard version of Rule 803(18), that the material is not to be received into evidence as an exhibit and taken to the jury room for perusal. Thus, Rule 803(18) represents a compromise between exclusion and such unrestricted use as might tend to confuse the jury.

With the foregoing broad considerations in mind, attention is now turned to a review of the recent cases. First for consideration are cases relating to the admissibility of codes, standards, and guidelines promulgated by voluntary associations. Because the question of admissibility and use at trial in these cases is governed by the same rules and considerations as are applicable in the case of the admission and trial use of manuals, standards and guidelines that are promulgated by governmental agencies, the same provide valuable instruction.

CODES, STANDARDS, AND GUIDELINES PROMULGATED BY VOLUNTARY ORGANIZATIONS

The format hereinafter adopted will be to abstract, in as brief a manner as possible, representative cases showing the marked trend of the recent case law in favor of the admission of those codes, standards, and guidelines promulgated by voluntary associations that are directed to safety considerations. Admission thereof is premised either on a judicially created exception to the hearsay rule based on principles of necessity and trustworthiness, or pursuant to the express mandate of Rule 803(18), as adopted at the Federal level and given replication at the State level in those jurisdictions incorporating the same, or a similar, provision into local rules of evidence.

Illustrative Cases

Provisions of the non-governmental National Electric Safety Code have been held admissible in the great majority of cases wherein profered for use.

For example, *Mosby v. Southwestern Electric Power Company*, 659 F.2d 680 (C.A. 5, 1981), was a wrongful death action brought by plaintiff widow to recover damages for the death by electrocution of her husband, who was killed when attempting to erect a citizens band radio antenna; the same came in contact with a high-voltage electrical transmission line owned and maintained by defendant Southwestern Electric Power Company. The latter was permitted to introduce at trial provisions of the

National Electric Safety Code, for the purpose of showing that the height of the transmission line in question met the safe clearance intervals specified in the Code. In holding that such admission and use at trial was proper, the Court of Appeals for the Fifth Circuit stated that: "Evidence of code compliance is a proper factor to consider in determining if a power line meets the common law standard of care in a particular case." For other cases in which courts have held that the National Electrical Safety Code is relevant and admissible to determine the common law standard of care, provided the proper foundation is established by showing that the code standard is actually accepted in the industry, see: *Rubs v. Pacific Power & Light*, 671 F.2d 1268 (C.A. 10, 1982); *Phelps v. Duke Power Company*, 332 S.E.2d 715 (N.A. App., 1985); *Mississippi Power and Light Company v. Johnson*, 374 So.2d 772 (Miss. 1979); *Davis v. Portland General Electric Company*, 286 Or. 195, 593 P.2d 1135 (1979); and *Hernandez v. Houston Lighting and Power Company*, 795 S.W.2d 775 (Tex. App., Houston 14th Dist., 1990).

Limitations on the introduction and use of the National Electric Safety Code are to be found in the cases of *Shell Oil Company v. Songer*, 710 S.W.2d 615 (Tex. App., Houston 1st Dist., 1986) and *Kedar v. Public Service Company of Colorado*, 709 P.2d 15 (Colo. App., 1985). In *Shell Oil*, it was held that the provisions of the Code were properly refused admission at trial because of failure to establish that it was the custom or practice of the electrical industry to follow and abide by the provisions thereof; and in *Kedar* provisions of the latest edition of the Code, relating to horizontal clearance levels, were held properly excluded at trial, because the same were different from the provisions of the Code in effect at the time the accident the subject of suit occurred.

Publications of the non-governmental National Safety Council have been admitted into evidence as bearing on the issue of negligence.

Brown v. Clark Equipment Company, 618 P.2d 267 (Haw., 1980), was a wrongful death action brought to recover for the demise of an automobile driver who was killed when a 35-ton front-end loader was backed by the operator thereof into the decedent's stopped vehicle. At issue on appeal to the Supreme Court of Hawaii was whether error had been committed at trial in permitting the introduction into evidence of a pamphlet of the National Safety Council, marked Exhibit FF, containing guidelines as to the proper operation of front-end loaders. In holding that the document was properly admitted, the Court stated:

There is a split of authority concerning the admission of safety codes or standards, similar to exhibit FF, promulgated by voluntary industry organizations, such as the National Safety Council . . . One view . . . is that they are inadmissible on the ground that they do not have the force and effect of law and represent merely the opinion of their authors, not delivered under oath and not subject to cross-examination . . .

Another view is that such codes are admissible as they are objective standards representing a consensus of opinion carrying the approval of a significant segment of the industry, and that such codes and standards contain the elements of trustworthiness and necessity which justify an exception to the hearsay rule. . . . However, where the safety codes or

standards have been held to be admissible as evidence on the issue of negligence, testimony by an expert has been required to establish the proper foundation for admissibility (the codes must be of the type relied on by experts) . . .

In our opinion, based on the testimony of [the witness] a proper foundation was established for the admission into evidence of exhibit FF. We believe that such safety data, codes or standards as exhibit FF promulgated by voluntary industry organizations, such as the National Safety Council, are admissible as evidence on the issue of negligence; that they are admissible as an exception to the hearsay rule on the basis of trustworthiness and necessity. We further conclude . . . that such safety codes are admissible as an alternative to or utilized to buttress expert testimony. We hold that the trial court did not err herein.

See also *Alabama Power Company v. Brooks*, 479 So.2d 1169 (Ala., 1985), involving alleged negligence in the maintenance of an electrical transmission line, wherein the Supreme Court of Alabama upheld the admission into evidence at trial of a publication of the National Safety Council, following testimony by an expert witness that the document constituted a reliable and authoritative representation of industry standards.

Publications of the American National Safety Institute have likewise been admitted into evidence.

Alderman v. Wysong & Miles Company, 486 So.2d 673 (Fla. App., 1st Dist., 1986), was a wrongful death action to recover for the demise of a worker killed when a heavy machine press that he was attempting to install turned over. Negligence was charged to defendant manufacturer in that the machine was alleged to have been so defectively designed in respect to the distribution of weight between front and rear that it had a tendency to topple over even when resting on level ground. It was asserted, on appeal from a judgment in favor of defendant manufacturer, that error was committed at trial in that a witness for the defendant was allowed to base his testimony on standards in respect to machine press brakes that were published by the American National Safety Institute. In holding that the admission of such standards into evidence did not constitute error, the Court said:

We are of the view that the evidence relating to ANSI standards was properly admitted by the trial court, since evidence of industry standards provided by private, voluntary organizations such as ANSI is generally considered relevant in a strict products liability action on the issue of alleged design defects, as well as to impeach expert testimony contrary to the promulgated standards.

The publications of a miscellany of other voluntary associations have been held to be admissible in evidence. For example, in *Johnson v. William C. Ellis and Sons Iron Works, Inc.*, 609 F.2d 820 (C.A. 5, 1980), a wrongful death action to recover for the demise of plaintiff's son who died of injuries received while working on a cotton compress, the Court of Appeals for the Fifth Circuit listed a number of publications directed to safety considerations that were unsuccessfully sought to be introduced at trial. In holding that reversible error was committed, the Court stated:

We have held that safety codes and standards are admissible when they are prepared by organizations formed for the chief purpose of promoting safety because they are inherently trustworthy and because of the expense and difficulty involved in assembling at trial those who have compiled such codes. [Citations omitted.] These rulings remain the law of the circuit. . . . Our prior decisions concerning such materials were not overturned by the adoption of the Federal Rules of Evidence, for there is nothing in the Rules that conflicts with them. . . .

The Federal Rules of Evidence simply modify the procedure for admission established by our earlier cases.

In *Taylor, Thon, Thompson & Peterson v. Cannaday*, 749 P.2d 63 (Mont., 1988), a publication of the American Institute of Architects, entitled "Architects' Handbook of Professional Practice," was held properly admissible into evidence, while it was at the same time ruled that violation of the provisions thereof did not constitute negligence per se. The Supreme Court of Montana said in respect to such Handbook:

The court admitted in evidence a handbook published by the American Institute of Architects. The handbook describes the standard of practice for architects in the United States. [Defendant's] argument on appeal is, in effect, that any deviation from the standards set forth [in] that handbook should be deemed negligence per se.

While violation of a statute may be classed as negligence per se, violation of other regulations is not generally classed as negligence per se . . . [A]bsent specific statutory incorporation, the provisions of a national code are only evidence of negligence, not conclusive proof thereof . . .

We affirm the holding of the lower court that the handbook standards were to be considered as evidence of a duty on the part of the architects. We refuse to accept the contention of [defendants] that the violation of such standards constituted negligence per se on the part of the architects.

See also *Broten v. May*, 735 P.2d 86 (Wash. App., 1987); and *McLaughlin v. Weichert Co. Realtors*, 218 N.J. Super. 63, 526 A.2d 1119 (1987), in which realtor codes were admitted to determine brokers "rights and duties."

In *Central Maine Power Company v. Foster Wheeler Corporation*, 684 F. Supp. 724 (D.C.Me., 1988), an action to recover for the negligent design of a power plant condenser, it was held that published standards of the Heat Exchange Institute, relating to the design and construction of steam surface condensers, were admissible as probative on the issue of whether there had been negligence in the design of the condenser.

Technical papers prepared for presentation to the American Society of Agricultural Engineers were held admissible in *Ames v. Sears, Roebuck and Company*, 8 Conn. App. 642, 514 A.2d 352 (1986). This was a negligence action brought by plaintiff, a 14-year old girl, against the manufacturer of a riding mower that began to shake violently when plaintiff was operating the same, throwing her to the ground and causing her arm to be severely cut by the revolving blade. In holding that the aforesaid papers were admissible under the learned treatise exception to the hearsay rule, the Court stated:

The rule in this jurisdiction regarding the use of learned treatises is that if a "treatise is recognized as authoritative by an expert witness and if it influenced or tended to confirm his opinion, then relevant portions thereof may be admitted into evidence in the exercise of the trial court's discretion." [Citations omitted.] The written materials objected to by the defendant in this case were five technical papers on the subjects of accidents and injuries involving riding lawnmowers and the design and operation of riding mowers and small tractors. Three of the documents were engineering studies prepared for presentation to the American Society of Agricultural Engineers.

At trial, the plaintiff's expert witness testified that he considered the papers to be authoritative on the subject of lawnmower safety and that he relied on the documents in formulating his opinions concerning the defendant's lawnmower. Furthermore, the defendant conducted an extensive voir dire of the witness in order to determine whether he considered the materials to be authoritative. This testimony satisfied the requirements for the admission of the documents under the learned treatise exception to the hearsay rule . . . Under these circumstances, the trial court was correct in admitting the materials into evidence.

Thus it is seen that the recent trend of the case law is clearly in favor of the admissibility into evidence of codes, standards, and guidelines promulgated by voluntary associations, provided (a) that a proper foundation for the introduction thereof is laid through testimony of an expert witness; and (b) it is shown that the codes, standards, and guidelines sought to be introduced, are accepted in the particular industry, business, trade, or profession to which they relate, as being reliable and authoritative.

This trend finds reinforcement and duplication in other areas. Of related interest are medical malpractice cases, therein authoritative text books and other writings in the medical field have been admitted into evidence, as an exception to the hearsay rule based on necessity and trustworthiness, where the same have bearing on the standard of care required of physicians in the treatment of their patients.

MANUALS, STANDARDS, AND GUIDELINES PROMULGATED BY GOVERNMENTAL AGENCIES

The trend of the recent law toward greater admissibility of publications would seem virtually to guarantee the same result in cases involving manuals, standards, and guidelines adopted by governmental agencies. This is for the reason that such publications are marked by the imprimatur of governmental authority, which presumptively is objective and designed to express the truth without bias. It is pointed out in a frequently cited law review article entitled "Admissibility of Safety Codes, Rules and Standards in Negligence Cases," by James L. Foutch, appearing in 37 TENN. L. REV. 581, that:

It would seem that standards set by governmental agencies should have the highest probative value regarding national, state or local practices, due to the inherently greater contact the governmental group has with all segments of the community under consideration. At least one jurisdiction

has noted that a governmental bureau has the facilities to make a full inquiry of every source in the particular business, to make an official finding of the standards, and to make an official publication as information to the public. Apparently as a result of similar analysis, some jurisdictions have admitted government agency standards with little comment.

The statement last expressed has full relevance to construction, maintenance, and traffic control manuals promulgated by State highway departments. Not only has no recent case been found in which such a document was rejected on traditional hearsay grounds, but the same appear to be admitted, as a general rule, without the hearsay objection being raised. For example, when the *Manual on Uniform Traffic Control Devices* (MUTCD), widely adopted by State highway departments, is sought to be excluded, it is generally on grounds of lack of relevance or materiality, not on grounds of preclusion as hearsay.

Of interest in connection with states adopting the MUTCD is the interpretation and meaning of the terms "shall" or "should," as appearing in said document.³ As might be expected, there is authority to the effect that violation of the mandatory language "shall" constitutes negligence per se, but that violation of the directory language "should" merely constitutes some evidence of negligence.⁴

The difference between the use of the mandatory term "shall" and the directory or advisory language "should" is well illustrated in the case of *Townsend v. State*, 738 P.2d 1274 (Mont., 1987). This was an action to recover for injuries suffered by a minor child when the bicycle that he was riding struck a pothole in a road owned and maintained by the State of Montana. At issue on trial was the proper interpretation of the provisions of the Maintenance Manual of the Montana Department of Highways, which reads as follows:

The early detection and repair of minor blemishes is the most important phase of maintenance work. Cracks and other surface breaks which are almost unnoticeable in their early stages, may develop into major repair jobs . . . if unattended. Such breaks can occur even in a few days where traffic is heavy. For this reason, close inspection of the pavement by competent and experienced personnel is absolutely necessary.

4.60 PATCHING POT HOLES

This type of failure *should* have immediate attention. Pot holes or chuck holes are dangerous to traffic, increase rapidly in size and are excellent for feeding water into the base and subgrade. (Emphasis added.)

Employees of the Maintenance Division admitted at trial that prior to the accident they had noticed the beginnings of potholes at the accident scene, but concluded that in view of the limited public use made of the road, the incipient potholes presented no immediate danger to the traveling public. The evidence disclosed that the defects in question were not, in fact, repaired until 3 months after the accident occurred. The jury returned a finding of no negligence on the part of the State of Montana, and plaintiff moved for a new trial. In granting such motion the trial judge stated that: "When the State's employees admit that to violate its maintenance manual is bad practice on their part and then have evidence

showing repeated violations of that maintenance manual, there has been established, in this court's opinion, negligence as a matter of law."

On appeal to the Supreme Court of Montana the question was presented whether the lower court erred in ruling that violation of the Maintenance Manual constituted negligence as a matter of law. In holding that reversible error had been committed, the Supreme Court stated:

The jury found no violation of the *reasonable care expected*. The trial judge disagreed and granted [the] motion for a new trial. As support for his decision, the trial judge found that because the State's employees admitted violation of their Maintenance Manual was bad practice and because there was evidence of repeated violations of that manual, negligence existed as a matter of law. The State argues, and we agree, that this conclusion is in violation of *Cash v. Otis Elevator Co., et al.*, (Mont., 1984), 684 P.2d 1041; 41 St.Rep. 1077.

In *Cash*, we held that violations of administrative codes not incorporated into a statute by reference are *evidence of negligence, but not negligence per se*. Likewise, the admitted violations of the Maintenance Manual provided *evidence of negligence*. The State then had the burden of producing other evidence to show it had exercised *due care* in maintaining Saddle Rock Road. Apparently, in the jury's mind at least, the State succeeded in meeting this burden.

We find that the trial judge erred in concluding that the conduct of the State's employees was negligent as a matter of law. The trial judge relied upon this erroneous principle of law in granting a new trial. Applying the correct standard of negligence to this case there is substantial credible evidence to support the jury verdict. (Emphasis supplied.)

This case illustrates that by avoiding use of the mandatory term "shall" in manuals and employing the advisory language "should" instead, the case will be permitted to go to the jury, which can then consider the issue of negligence (as in this case) on the basis of determining whether on all the facts adduced at trial, the exercise of reasonable care has or has not been shown. Use of the mandatory language "shall" may result in taking the case from the jury, a circumstance obviously to be avoided, to the end that (a) the State may be permitted to present evidence showing that it has acted with reasonable care in light of all the facts of the particular case, and (b) is therefore beyond the reach of liability in tort.

With respect to standards and guidelines published by governmental agencies other than State highway departments, it can be said that the same likewise have generally been held to be admissible.

In re *Air Crash Disaster at John F. Kennedy International Airport*, 635 F.2d 67 (C.A.2, 1980), the case involved alleged negligence on the part of Eastern Airlines in a crash, during a severe thunderstorm, of one of its Boeing 727 jet aircraft at John F. Kennedy International Airport. Eastern appealed from a judgment in favor of plaintiffs, and assigned as error the introduction into evidence at trial of certain Advisory Circulars of the Federal Aviation Administration. The trial judge instructed the jury with respect thereto as follows: "[The Advisory Circulars] may be considered by you in determining the standard of care that a reasonably prudent person would have exercised under the circumstances." In

upholding the action of the lower court, the Court of Appeals for the Second Circuit stated that the relevance of the Advisory Circulars to the issue of Eastern's negligence was manifest, and said in respect to the charge: "The advisory material was admissible to aid the jury in formulating a standard of care, and the judge properly charged the jury regarding these circulars and that standard."

Lollie v. General Motors Corporation, 407 So.2d 613 (Fla. App., 1st Dist., 1982), was a suit against the General Motors Corporation to recover for injuries suffered by plaintiff as the result of a fire caused by the rupture of the fuel tank in a Chevrolet automobile that was involved in a three-car accident. It was argued on appeal that error was committed at trial in permitting the introduction into evidence of Federal Motor Vehicle Safety Standard 301, which required that in a frontal collision with a fixed barrier at 30 mph the fuel leakage should not exceed one ounce per minute. In upholding the action of the trial court in admitting the Federal standard, the Appellate Court stated that the said FMVSS 301 was the only Federal standard in regard to fuel tank performance, and that as such it was valuable probative evidence on the issue of negligence in the design and construction of the fuel tank in question. See also, *Pierce v. Platte-Clay Electric Cooperative*, 769 S.W.2d 769 (Mo. 1989); *Gruber v. State*, 214 Cal. App. 3rd 78, 268 Cal. Rptr. 472 (1989).

Kirk v. Ford Motor Company, 147 Mich. App. 337, 383 N.W.2d 193 (1985), was a wrongful death action brought by the administrator of decedent's estate against the Ford Motor Company, alleging that the negligent design and placement of the fuel tank in a Ford vehicle resulted in the fatal burn injuries that were suffered by the decedent, when the car that he was operating became involved in an accident. Defendant, Ford Motor Company, appealed from a judgment in favor of plaintiff, asserting that error was committed at trial in allowing the introduction into evidence of certain government standards that had been proposed, but never were adopted. In holding that no error was committed, the Court emphasized that the standards were not admitted to show the defendant was liable for failure to comply with the proposed standards, but rather for the limited purpose of showing why, after design and testing of vehicles that would meet these standards, the Ford Motor Company abandoned any attempt to provide a more safe over-the-axle fuel tank location.

Cole v. Multnomah County, 39 Or. App. 211, 592 P.2d (1979), was an action brought by an inmate of Multnomah County jail who allegedly attempted to commit suicide by setting his bed on fire, in which negligence was charged to the County, in that proper supervision of the plaintiff was not accorded by the jail authorities, when it was well known to them that he had suicidal tendencies. One of the questions on appeal from a judgment for the County was to the admissibility at trial of two manuals, one entitled "Guidelines for Operation of Local Correctional Facilities," promulgated by the State Department of Human Resources, and the other entitled "Revised Procedures Manual," promulgated by the Corrections Division of Multnomah County.

The State manual was held inadmissible by the Court of Appeals because of "the almost total lack of information in this record about the

intended purpose or effect of the state manual." However, a different result was reached in respect to the County manual, the Court stating with respect thereto:

The record is also sparse about the county manual, but we conclude it contains a sufficient foundation to hold the county manual was admissible. Plaintiff made an offer of proof of certain provisions of the county manual while the "Chief Medic" from Rocky Butte Jail was testifying. The "medic" agreed that the county manual was the "procedures manual for the operation of the Multnomah County Jail" and was in effect at the time of plaintiff's injuries. While cryptic, we understand the thrust of the "medic's" testimony to be that the county manual contains the standards that corrections personnel are expected to meet.

So viewed, the county manual constitutes some indication of the care required under the circumstances . . .

Of interest in connection with the question whether a duty exists to upgrade highways in order to comply with the latest standards and guidelines promulgated by government agencies, is the case of *Marziale v. Maney*, 529 So.2d 504 (La. App., 1988). This was an action against the Louisiana Department of Transportation and Development to recover for injuries received in an accident on a high-rise bridge (hereinafter HRB). Negligence was charged, *inter alia*, in that the DOTD failed to comply with a policy of the Federal Highway Administration (FHWA) requiring shoulders on major long-span bridges, such as the HRB in question. Such policy was adopted by the FHWA some time after the bridge was constructed, there being no such policy in existence at the time of the original construction. In holding that failure to comply with the policy did not constitute negligence, the Court stated:

Importantly, DOTD's failure to update or upgrade its highways and interstates to meet current standards or even guidelines promulgated subsequent to the opening of the HRB does not establish a hazardous defect. To impose upon the State the burden of updating its thousands of miles of highways to meet the latest guidelines would be an impossible undertaking.

To recapitulate *the trend of the recent case law*, it has been seen in this paper that the trend is markedly in favor of the admissibility of manuals, codes, standards, and guidelines, promulgated either by voluntary associations or governmental agencies, and that relevant and material portions thereof can be used at trial, as constituting some evidence of negligence where failure of compliance is shown, or as constituting some evidence of the absence of negligence where compliance therewith is established by the evidence.

SUMMARY AND CONCLUSIONS (p. 1966-N31)

The following is quoted from *Transportation Research Circular No. 361* (July 1990), entitled "Tort Liability and Risk Management"¹⁵:

One of the most fruitful areas of inquiry for a plaintiff consists of the policies, guidelines and manuals of the public entity. These publications,

often called "bibles" by engineers, carry the imprimatur of governmental authority and mandate. Traffic engineering manuals contain the standards, warrants and procedures for implementation of the traffic engineering aspects of a highway program. Because it has the most direct impact on the driver, traffic engineering suffers the most scrutiny when plaintiffs try to build a case against a highway department. If a plaintiff can find a discrepancy between what a manual prescribes and what exists in the field, he is halfway home. His expert can then explain to a jury why the manual is correct and why variance from it increases the hazards to a driver and consequently is the cause of the accident. The closer a particular traffic manual approaches gospel, the more serious it is to deviate from it.

While the foregoing concerns traffic manuals, the same can well be extended to include construction, maintenance, and other manuals related to safety considerations. The conclusion seems inevitable that a review of such manuals with an eye to their potential for tort liability might well prove useful. In this connection, consultation with highway lawyers trained in the field of tort law as relating to the State and its agencies is highly desirable. Language unnecessarily exhortative in the interests of public safety, and useful in the hands of plaintiff lawyers, should undergo scrutiny, bearing in mind the fact that the use of mandatory, as opposed to directory, language cannot help but influence a jury, and possibly can lead to a directed verdict. Clear-cut directory or advisory language can, in most instances, serve the ends of public safety to the same extent and equally as well as mandatory demands, it being fair to say that in the end it is the exercise of sound professional judgment by competent engineers that is the best guarantee of public safety (and the surest safeguard against tort liability) not the language of manuals, standards, and guidelines, in whatsoever terms they may be couched.

It goes without saying that this is not a suggestion that such writings be watered down. It is, more properly speaking, a suggestion that the same be prepared with a view to the realities of costly tort litigation. As before stated, it is now clear that the provisions of such publications can be used at trial as *some evidence* of negligence (or the absence thereof, where compliance is shown). This rule should suffice to safeguard the interest of the public in having highway departments proceed in accordance with the age-old and legally sufficient standard of *reasonable care* in the conduct of their operations, compliance with which ordinarily renders the State tort-proof. (It is axiomatic that the State is not an insurer of the safety of its highways.) Manuals, standards, and guidelines

should be written with a view to providing useful instruction in the exercise of *reasonable care*, while avoiding the use of such imperative or peremptory language as hands plaintiff lawyers a legal weapon to be used against highway departments in tort litigation, in which adverse results can be financially disastrous.

To this end, the judgment and experience of knowledgeable highway lawyers should be employed for guidance.

JOHN C. VANCE
Attorney at Law
Orange, Virginia

¹ *Wigmore on Evidence*, Vol. VI, Sec. 1691 (Chadbourn, rev. 1976).

² *Id.*, Sec. 1692.

³ It is to be noted that in at least some jurisdictions compliance with the MUTCD is required "insofar as practicable," or words to that effect, which language would appear to allow room for the exercise of judgment and discretion.

⁴ See, generally, *Pierce v. Ohio Department of Transportation*, 23 Ohio App. 3d 124, 491 N.E.2d 729 (1985); *Lumbermen's*

Mutual Casualty Company v. Ohio Department of Transportation, 49 Ohio App. 3d 129, 551 N.E.2d 215 (1988); *Miller v. Indiana State Highway Department*, 507 N.E.2d 1009 (Ind. App., 4 Dist., 1987); and *O'Guin v. Corbin*, 777 S.W.2d 597 (Tenn. App., 1989).

⁵ See therein the paper authored by Breland C. Gowen, entitled "Manuals for Traffic Engineers: An Engineering Tool or Legal Weapon? The California Experience."

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