

# Lessons From a Recent Negligence Case



Generally speaking, the law requires us to use care to protect each other against injury. The specific things we must do to meet the duty of care in a given circumstance depend on who we are and what our relationship is to the person we're protecting:

- When we're acting as employers entrusted with protecting employees in our workplace, we're required to follow OSHA/OHS standards.
- When it's a third party we must protect, the negligence law applies and requires us to use what lawyers call a standard of "reasonable care."

But in the real world, the lines between OSHA/OHS standards and reasonable care blur. Stated differently, the things we're required to do to protect our employees under an OSHA/OHS standard are often used by judges and juries in negligence cases to determine what we should do to protect a non-employee in similar circumstances. Following an OSHA/OHS standard, in other words, may be required even if the person at risk isn't one of our employees.

A recent case from Nebraska offers an illustration of this principle.

## **What Happened**

A homeowner hired a construction contractor to repair fire damage to his house. The homeowner planned to stay in a hotel while work proceeded. But a week into the project, he decided to go home and retrieve some items he needed from the basement.

It was night and the stairwell was dark. As a result, he didn't notice that the contractor had removed the basement steps. There was no sign and the area wasn't lit. So the homeowner ended up taking a nasty fall and sued the contractor. The jury found the contractor guilty of negligence and ordered it to pay the homeowner \$183,000 in damages. The contractor appealed.

## **The Issue**

Under OSHA standards, the contractor should have blocked off the basement entry and/or posted warning signs; it should have also lit the scene to prevent fall injuries. The jury considered all of these things in reaching its verdict. The contractor claimed it shouldn't have. OSHA laws apply to employer-employee relations, it argued. And since the homeowner wasn't an employee, the jury had no business

considering OSHA.

## **What the Court Decided**

The Nebraska Supreme Court disagreed with the contractor and upheld the verdict [*Orduna v. Total Construction Services, Inc.*, 2006 Neb. LEXIS 64, May 5, 2006].

On the face of it, the contractor seemed to have a good point. After all, OSHA requires employers to take measures to protect *employees* against workplace hazards. So it really shouldn't be relevant to a negligence case against an employer filed by a person who's not an employee.

## **What It Means**

But the *Orduna* case illustrates an important point: OSHA/OHS standards may be relevant in determining if an employer was negligent in its operation of the workplace—even if the injured person isn't an employee.

Remember what we said at the start of this article: The duty to protect non-employees involves using "reasonable care." To figure out if a defendant met this standard, judges and juries try to determine what a reasonably prudent person would have done in similar circumstances.

How do judges and juries know what this reasonably prudent person would have done? One answer is to look at whether there were any laws stating what should be done in that situation. Such laws might include OSHA/OHS standards. Thus the OSHA/OHS standard becomes a benchmark defining the reasonable care for that circumstance. Failure to meet the OSHA standard may, therefore, be at least evidence (if not out-and-out proof) that a person was negligent.

This is precisely what happened in *Orduna*. OSHA required the posting of warning signs in this situation. True, its primary purpose is to protect employees and the homeowner wasn't an employee. But the OSHA rule also established a standard of safety for preventing falls when stairs have been removed from doorways. Thus, the jury had every right to consider the contractor's failure to follow the rule as evidence that it didn't use reasonable care to prevent the accident.

## **Conclusion**

Although the case took place in the U.S., the exact same principles apply in Canada. *The bottom line*: OSHA and OHS standards aren't just a prescription of things to do and not to do in your workplace. They represent a wider judgment by society of what safety measures are appropriate in situations where certain hazards are confronted regardless of whom they imperil.