



CCM+S Newsletter:

Compliance With the Law May Not Protect You: Two Steps to Avoid Negligence Liability

A design professional is typically expected to offer independent judgment based on his or her training and experience. There is a temptation to think that meeting the minimum code standards is sufficient for safety, and professional judgment can be reserved for issues of cost, aesthetics, or constructability. This is a dangerous temptation, as compliance with codes, regulations, or statutes does not automatically shield design professionals from potential liability in personal injury suits for alleged negligent design. In a recent February 2014 case, *Henry Tang v. NBBJ, LP*, the Court of Appeal reaffirmed the general rule that compliance with safety codes is not a complete defense to personal injury claims.

In 2010, Henry Tang and Hoai Mi Nguyen attended a Lakers game with their family, including their two-year-old son, Lucas. The family enjoyed the game from the comfort of a luxury box on the third level at Staples Center. At the front of the box was a solid wall 15 to 16 inches high, topped by an 11-inch wide beverage shelf. Affixed to the shelf was a glass barrier that rose 10 inches in front of the seats and 26 inches in front of the stairway that led down to the front of the box. Beyond the barrier was a 25-foot drop.

The family watched as the Lakers soundly defeated the Golden State Warriors. After the game, Nguyen picked up young Lucas and stood him on the shelf in front of the glass barrier for some commemorative photographs. Lucas seemed safe with the 26-inch glass wall behind him. Nguyen, just a few feet from her son, started taking pictures, and looked down at the camera to check the image between shots. Lucas slowly drifted along the shelf – to the portion of the shelf that only had a 10-inch glass barrier. Nguyen glanced back up to take another photograph, but to her shock, Lucas was gone. Nguyen screamed in horror, “Lucas fell!” The celebration turned to tragedy, and sadly, Lucas did not survive the fall.

Lucas’s family brought suit against the owner of Staples Center, LA Arena, and its designer. After the designer was dismissed on time limitation grounds, the LA Arena moved for summary judgment to dismiss the claim, arguing that the barrier height complied with all state and local regulations and safety codes.

The Court of Appeal rejected the owner’s argument that conformity with the codes provided a complete defense to claims of an unsafe design. The court noted that while a statute, ordinance, or regulation ordinarily defines a minimum standard of conduct under the law, it does not preclude a finding that a reasonable person would have taken additional precautions – more than the bare minimum – under the circumstances. The court noted that in a prior case, a 2003 earthquake in Paso Robles collapsed a masonry building from the 1890s, killing two people. Since an ordinance did not require retrofitting of unreinforced masonry buildings until 2018, the owner claimed it could not be liable for a failure to retrofit 15 years ahead of the deadline. The court rejected this argument and held the owner could not use that statute as a shield to liability.

While compliance with the design codes is a general defense to any claim, it is not the end of the analysis. Simple code compliance may, under certain circumstances, be insufficient, and a complaining party's expert witness may well opine that designing to code minimum is a violation of the standard of care. To add insult to injury, the failure to comply with an ordinance or statute *can* be used by a plaintiff to create a presumption of negligence against a design professional. The statutory standards are commonly invoked by plaintiffs in negligence actions to establish a breach of duty of care. Proof of a design's violation of a statutory standard actually raises a presumption of negligence or what is known in the law as negligence *per se*, and the designer must then try to rebut the presumption by establishing a justification or excuse for the statutory violation. Unfortunately, there is no counter-presumption for meeting the code. What does this mean for design professionals? Code compliance fails to offer complete protection from a negligence claim, but a failure to comply with a code creates a presumption of negligence.

What can a design professional do to dodge this potential liability? First and foremost, comply with all relevant codes, statutes, and ordinances in order to avoid an unfavorable presumption of negligence. But beyond code compliance, design professionals must exercise independent judgment and make sure their designs comply with the standard of care especially in the areas of health, safety, and welfare. Along these lines, be sure to document exchanges that show a proposal for additional safety measures beyond the bare minimum dictated by codes, statutes, or regulations, and any rejection of such a proposal by the owner (possibly for cost or for aesthetic reasons, such as for the sightlines in a luxury box). Be careful not to get value-engineered into liability for under-designing a project.

Second, ask the question: is the design reasonable taking into account all the circumstances surrounding its likely use? The court in *Tang* decided that a jury should answer this question, regardless of whether the barrier conformed to all relevant regulations. In the 1993 case of *Ramirez v. Plough, Inc.*, the court noted that the standard of care is what is reasonable, and a "legislative or administrative minimum does not prevent a finding that a reasonable individual would have taken additional precautions where the situation is such as to call for them." Compliance with minimum standards can certainly be a factor that the court will weigh to see if a design met the standard of care, but it is not the only factor, and may not even be the primary factor.

The best practice for design professionals is to ask the following two questions: First, is the design code compliant? If so, is the design also reasonable under the circumstances? And as always, if others disregard a designer's recommendations or set a lower factor of safety as a project goal, document the responsibility for such a decision and make sure that your concerns are put in writing to document that the owner made a decision against your written recommendation.

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