

McCOMISH v. DeSOI, 42 N.J. 274, 200 A.2d 116 (1964). One of the defendants, Beloit, was employed to build a paper-making machine for a

paper company. The machine was two blocks long and two stories high and required the movement of a large section during the paper-making process. Beloit designed an "A" sling to accomplish this purpose. The A sling was made of cables held together by clips. One of the clips slipped while this sling was being hoisted by a crane, and the whole A sling assembly collapsed, killing McComish and injuring one Toman. In actions against various defendants involved, the plaintiffs put on the evidence of Steward, a consulting engineer. He testified that the clips used were the wrong size, insufficient in number and improperly spaced along the cables they were securing. This was based in part on safety manuals or codes put out by various private companies (American Tiger Wire Rope) and by government agencies (U.S. Army Corps of Engineers). None of these had the force of law but were admitted by the trial judge. A jury found for the plaintiffs for \$160,000 and \$16,500. The Appellate Division concluded that the safety manuals should not have been admitted because they were hearsay. In the Supreme Court, *held*, although the cases are divided on this point, the safety codes were rightly admitted into evidence. "The basic test . . . is whether reasonable care was exercised in the construction and assembly of the A sling. That is the standard to be used and departure or deviation therefrom is negligence. In applying the standard reasonable men recognize that what is usually done may be evidence of what ought to be done. And so the law permits the methods, practices or rules experienced men generally accept and follow to be shown as an aid to the jury in comparing the conduct of the alleged tortfeasor with the required norm of reasonable prudence. It is not suggested that the safety practices are of themselves the absolute measure of due care. They are simply evidence of 'how to' assemble the sling as commonly practiced by those who have experience in doing it."

Note

The objection to admission of safety manuals or industry-wide standards in written form is that they are hearsay. This is a technical concept usually explored in the course on evidence. Roughly it refers to second-hand evidence and it is objectionable because the plaintiff is not tendering a witness who can be cross-examined on the issue. Most jurisdictions traditionally sustained the objection to safety manuals and similar codes, unless they were enacted into law. Since 1975, the federal courts have been governed by a liberalized set of evidence rules, under which certain hearsay evidence may be admitted. A number of states have now also admitted such evidence. If the hearsay objection is overcome, is the evidence relevant and proper, perhaps as a reflection of custom?

Some safety codes prepared by trade associations or industry groups have been adopted by statute or ordinance. Many city ordinances, for example, adopt a building or electrical code prepared by industry. In such a case, the privately prepared safety code takes on the force of a statute or ordinance and is not only admissible but may set the standard of care.

In a jurisdiction that rejects the safety manual evidence, what would you do if you represented the plaintiffs in *McComish*?