Editorials and Views

the process of setting safety standards

Among the publications that have come across your editor's desk is Staff Discussion Paper No. 204, issued by The George Washington University and titled "The Process of Setting Safety Standards in the Courts, Congress and Administrative Agencies." The Paper was prepared by Michael J. Wollan in February 1968. It explores the noticeable trend in Congress toward more federal regulation of products and activities through standards, and discusses how such standards are created, what factors should be taken into account, who should participate in the standard-making process, and what procedures should be followed in that process.

The Staff Discussion Paper first covers the common law concept of safety, which has evolved numerous rules for determining whether a person can be held legally responsible for his behavior which results in injury to another. This is followed by separate "parts" dealing with specific problem areas, such as coal mine safety, flammable fabrics, control of drugs, transportation of explosives, and food additives and pesticides. The final portion of the Paper is a summary of the evaluation that Mr. Wollan presented in the earlier portions.

In the fire protection field, all of us recognize the increasing burden we have in the development of safety standards. As the author of the Paper points out, no product or activity is absolutely safe, and the meaning of "safety" depends upon where the balance is struck between the benefits of a product or activity and its hazards. Mr. Wollan notes that safety standards developed by the common law or by the federal government cannot impose a uniform concept. The factors dominant in common law standards are: (1) the probability of harm; (2) the seriousness of harm; (3) the social value of the interests affected; and (4) alternative courses of conduct.
Under "the probability of harm" the author notes that almost all activity involves some risk of injury. A man walking down the street may slip, fall on top of a little old lady, and break her leg. A horse being ridden by a defendant may break away and injure somebody, or a driver of an automobile may unexpectedly have a heart attack which leads to a serious accident. To require that protection be taken against all such risks would impose an intolerable burden upon human conduct.

"The seriousness of harm," from a common law viewpoint, attempts to evaluate when the harm, which might result from an act, is great as opposed to conditions where the likelihood of injury is small. If an arrow from a bow is shot into a meadow without the archer's looking, he might be considered negligent despite the fact that the chances of hitting someone are extremely small. The driver of a car can be held negligent in not looking for a train at a grade crossing, although the odds against the train's arriving while the car is crossing the tracks is high. In the United States, a number of situations have been in the courts involving extremely dangerous activities; defendants have been held absolutely liable for damage from explosives stored in quantity in the midst of a city, from fumigating part of a building with cyanide gas, and from drilling oil wells in populous communities.

"The social value of the interests affected" is the third factor dominant in common law standards. Mr. Wollan illustrates this by a case in which a man seeing a child on a railroad track in front of a rapidly approaching train ran out on the tracks to save the child. He was successful in saving the child, but was killed by the train. The jury found that he had not exposed himself to an unreasonable risk. Actually, of course, the social value of the action by the man outweighed the probability of harm and the seriousness of the risk, both of which were obviously extremely high. If a kitten instead of a child had been left on the railroad tracks, the decision probably would have gone the other way because the value of preserving a child's life is greater in the eyes of the law than that of protecting a kitten.

In determining whether a particular risk is unreasonable, the law also considers "alternative courses of action" that might have been open. If, for example, two possible travel routes are available, the reasonableness of taking the dangerous one will depend to a great extent upon the disadvantages of the other. The author of the Paper cites the situation where the owners of a steel mill were sued for damages from emission of fumes