

## Water Purveyor's Legal Responsibility when Conducting a CCC Program

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## Basics – Selected Topics

- \* All water purveyors conduct CCC programs
- \* Some areas of liability for CCC programs are:
  - \* Failure to install as needed – failure to prevent CC - Duty
  - \* Failure to properly install – Duty; causation; damages; independent contractors vs. agents
  - \* When the customer says “no.”
  - \* Trip & fall, pits & all
  - \* Customer side contamination
  - \* Effects of BFD on other equipment in home or business.
  - \* Turn on, turn off liability

## DISCLAIMER

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## Negligence

- \* A failure to act as a reasonable person would under similar circumstances, which act causes injury to another.
- \* Trade, Industry, Professional negligence – Failure to adhere to the recognized professional standard of care for the (trade, industry, profession) in that [state].
- \* New standards of care regularly. Keep up with industry technology.

## Elements of Negligence

- \* Elements necessary to establish negligence are:
- \* (1) a **duty**, or obligation, recognized by law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks (*trade, profession industry can establish this*);
- \* (2) a **failure** on defendant's part to conform to the standard required;
- \* (3) a reasonably close "**causal**" **connection** between the conduct and the resulting injury; and
- \* (4) actual **loss or damage** resulting to interests of another.

## Elements of Negligence per se

- \* a plaintiff alleging negligence per se need not prove that a reasonable person should have acted differently -- the conduct is automatically considered negligent if it causes injury.\*\*
- \* Defendant violated statute.
- \* Plaintiff is member of class that statute was intended to protect.
- \* Violation of statute caused the injury.
- \* [https://www.law.cornell.edu/wex/negligence\\_per\\_se](https://www.law.cornell.edu/wex/negligence_per_se)

## Example of Negligence

- \* Duty - Utilities have a general *duty* to provide pure and wholesome water to persons who might reasonably be anticipated to drink the water, including the duty to take reasonable steps to prevent contamination of the supplied water.
- \* Breach of Duty - A utility *breaches* that duty by failing to require a proper backflow preventer to be installed at a funeral home. A cross-connection exists on the prep table, where a hose is left in bodily fluids to rinse the table. A nearby main breaks creating back-siphonage, and chemicals and bodily fluids enter the distribution system endangering and creating psychological damage to consumers.
- \* Causation - The chemicals *cause* people drinking the water to be sick, and/or to need mental health assistance.
- \* Damages - Those people *expend money* in doctors bills, and suffer *mental anguish* over the source and form of contamination.

## BFD Installer's Liability Case 1 – Duty of Care

- \* Employee using urinal is scalded on 20% of his body, including face, chest, groin area and genitals when hot water exploded from the urinal he is using. He & his wife both sued everyone, including plumber that installed a check valve (BFD) for pain & suffering, loss of consortium, future pain & suffering, etc., etc.
- \* Employee won a substantial judgment against employer (factory); the plumbers who made the cross connections; the plumbers hired to ID problem, and the plumber hired to install BFD.

### Case 1 – Duty of Care

- \* Problem was a CC in an industrial plant, where hot water was CC'd with cold water, apparently in more than one place, and the hot water had higher pressure. Plumber 1 was hired to ID the problem, and recommended a BFD. Apparently the owner did not like his install quote, so Plumber 2 installed it, but failed to test it.
- \* Installer (plumber 2) was told by plant manager only that the previous plumber had ID'd the need for a BFP, and that *there was no need for him to inspect the whole plumbing system.*

### Case 1 – Duty of Care

- \* Plumber 2 *breached that duty* when, having been informed of “a problem” for which the BFD was to be installed to solve, failed to ensure that it did so.
- \* Plumber 2 failed to test the system after installing the check valve to ensure that his work corrected the problem. That failure was a violation of state law, but Plumber 2 contended that this particular problem would not have been discovered even if he had tested. WEAK!
- \* The court disagreed, and said the jury could use the failure to test as evidence of negligence.

### Case 1 – Duty of Care

- \* Unfortunately for all, the BFD corrected only one of the cross connections that actually existed onsite, unbeknownst to Plumber 2.
- \* Court held that, although the plumber 2 was told by owner's rep he need not inspect the remainder of the plumbing, he still “**owed a duty as a plumber to exercise reasonable care and diligence in his work.**” “**The risk reasonably to be perceived defines the duty to be obeyed.**”

### Lessons of Case 1 – Duty of Care

- \* The duty to exercise due care and diligence is required of the plumber or installer. The customer's statements which might appear to limit that duty ***may*** limit that duty ***as to the customer-owner making them***, but does not limit it as to innocent third parties (burnt employee). Furthermore, count on the customer trying to avoid liability for what he told you by contending that you, as an expert, had better knowledge and experience and should not have relied on his statements. (The “you let me get away with it” defense).

## Lessons of Case 1

- \* You have a **duty of care** not just to your customer, but to the public in general if injury is reasonably foreseeable.
- \* Regardless of the customer's statements, rely on your professional judgment and expertise, and **refuse jobs** where the customer seeks to limit your judgment and ethics for the sake of cost.
- \* You may be responsible for information you are given about the job, even if it does not directly apply to the piece of work you are assigned. CYA
- \* Get insurance.

## Case 2 – Duty - Damages

- \* P claims: AquaKleen knowingly or recklessly sent an unqualified person to inspect and investigate,
- \* that person knowingly or recklessly misrepresented that she or someone else at AquaKleen had tested the water for the presence of contaminants,
- \* AquaKleen knowingly or recklessly failed to follow-up when more complaints were made and determine whether the water had been properly sampled and tested, and failed or refused to take another sample and have the sample re-tested,
- \* as a result the Cattaneos were needlessly exposed to sewage-contaminated water for **several additional months**,
- \* they sustained severe emotional distress damages as a result of the additional exposure

## Case 2

CATTANEO v.  
AQUAKLEEN PRODUCTS, INC

- \* it is undisputed that AquaKleen's installer, who was not a licensed plumber, installed the system improperly (failure of duty), creating a “**cross-connection**” between the AquaKleen system and a sewer pipe in the home.
- \* Plaintiffs claim that, **as a result (causation)**, sewage contaminated their water supply, which in turn caused them to sustain illnesses and **damages**.

## Case 2 Causation

- \* Defendant moves to exclude the testimony of Dr. Pike, primarily on the ground that it is not sufficiently reliable to pass muster under the rules of evidence.
- \* Dr. Pike is a physician with an M.D. and a M.S. in Toxicology. He is board certified in several fields: Medical Toxicology; Occupational and Environmental Medicine; Emergency Medicine; and Industrial Hygiene.
- \* He has reviewed documents concerning the improper installation of the water refinement unit; various individuals' observations regarding the Cattaneos' water; medical records; and published literature, specifically including a publication by an epidemiologist concerning inferences of causality

## Case 2 Causation

- \* “Dr. Pike’s opinions are that the Cattaneos’ water was contaminated by sewage and, as a result, the child contracted Hepatitis A and Mr. Cattaneo contracted Crohn’s disease.”
- \* “These opinions are based on **inferences** he draws from the **facts** that a **cross-connection** existed; the water in the home had a **foul odor**, allegedly **coincident with** the presence of the water refinement system; the water refinement system removed chlorine which had been added by the water district’s treatment system as a disinfectant;”
- \* “the two Cattaneos developed illnesses that can be caused by exposure to sewage-contaminated water; the timing of the development of the illnesses fits the timing of the alleged contamination of the water supply; and, in his opinion, there is no plausible alternative explanation for the development of the illnesses.”

## Case 2 – Independent Contractors

- \* Plaintiffs allege that AquaKleen was both directly negligent, by improperly training and supervising the individuals who sold and installed the system, and liable for the negligence of the installers on theories of respondeat superior and agency. AquaKleen counters that the installers were “independent contractors” whom AquaKleen had no duty to train or supervise, and for whose negligence AquaKleen has no responsibility.

## Case 2 Causation

- \* The judge was puzzled that neither side had taken water samples to definitively determine that sewage was present – Do **you** know why they didn’t?
- \* Judge refused to rule on pretrial limitation of evidence of:
  - \* Father’s drug use – possible correlation with his Crohn’s
  - \* New home owners’ complaints that house was turned over in disgusting condition; smelly water with particles.

## Case 2 – Independent Contractors

- \* **Control.** “There is substantial evidence in the record, to say the least, that AquaKleen had and **exercised the right to control and supervise these purported independent contractors**. AquaKleen **provided whatever training these people received** in selling and installing its systems.”
- \* **Held out as representing Co (Agents).** “AquaKleen then sent them into neighborhoods, like the Cattaneos’ neighborhood, wearing AquaKleen vests and driving AquaKleen vehicles, to solicit sales and to install the units.”
- \* **Selectively take responsibility for actions.** “When some of AquaKleen’s sales people were involved in misconduct in Yuma, Arizona, AquaKleen sent a company representative, also labeled an independent contractor, to take corrective action (which apparently including firing one or more offenders and removing others from the area) and to make apologies and assurances to the local police and the public.” Why? Possibly no respondeat superior – Lark & detour.

## Case 2 – Negligence per se

- \* “Plaintiffs allege that the installation violated [Colorado statute] which prohibits a **cross-connection** between a water system supplying drinking water to the public and any pipe, plumbing facility or water system which contains water that is below minimum general sanitary standards.”
- \* “The obvious intent is to prohibit a connection that endangers the public’s water supply.”
- \* “Plaintiffs **have come forward with no evidence that there was contamination of a water system supplying drinking water to the public (other than the water in their home) or that they were harmed by any such contamination (other than contamination of the water in their home).** This claim is dismissed.”
- \* Unless there was BFD on the house, this is a questionable ruling in an otherwise well decided case.

## When the Customer says “No”

### PORT OF COOS BAY V CITY OF COOS BAY 541 P2d 156 (Or. App. 1975)

- \* City demanded that marina install backflow prevention device, but they refused. City disconnected water. Marina sued for injunction claiming, among many other things, that because not every water user was required to have one, the rule **discriminates** against them. Facts showed that marina sometimes left hoses on docks turned on, and hose in water.
- \* State statute defines a cross connection to be (in part) a form of connection “whereby it is may be possible for contaminated water or water of a questionable or unsafe quality” to enter the system.

## Case 2

- \* Information from pretrial order on motions to dismiss, limit evidence.
- \* Result: “In the end, the jury **gave Roxanne \$465,000** on claims of “negligent infliction of emotional distress and extreme and outrageous conduct,” the station reports, while **Nick was given an additional \$462,000 on a Colorado Consumer Protection act claim.**”
- \* “We hope that wherever the Cattaneos are living today, their water is sewage-free. And now, if you’ll excuse us, we’ve got to gag for about twenty minutes.”

Source: *Denver Westword Blogs; Schmuck of the Week*

## When the Customer says “No”

City of Coos Bay

- \* Court found that water of Coos Bay was **alternative water source.**
- \* Court found that **efforts to identify greatest risk when commencing a new program, do not make discrimination.**
- \* Facts showed that water in **Coos Bay was contaminated.** What if it was a drinking water reservoir? Still “contaminated” if it does not meet DW standards as-is.
- \* **a regulation is unreasonable if the mathematical possibility of the event happening is too remote.** This one OK
- \* Lawful to discriminate at the **commencement of regulation.** Regulators have to start somewhere with new regs.

## When the Customer says “No”

City of Coos Bay

- \* Result would be the same in Florida, but perhaps without all the straining to make it fit. Very simply, the Bay was an water source of unknown and uncontrolled quality.
- \* (26) “CROSS-CONNECTION” means any physical arrangement whereby a public water supply is connected, directly or indirectly, with any other water supply system, sewer, drain, conduit, pool, storage reservoir, plumbing fixture, or other device which contains or may contain contaminated water, sewage or other waste, or liquid of unknown or unsafe quality which may be capable of imparting contamination to the public water supply as the result of backflow. . . .

## Meter Box Cases

- \* Generally, when the hazard is hidden, liability will result if the hazard existed for sufficient time for the utility to discover it.
- \* If not sufficient time to discover the issue – no liability.
- \* Other side of the non-liability argument – Open & Obvious.
- \* Also – Comparative negligence.

## Trips & Falls

## Pensacola v. Herron

- \* The evidence tended to establish the city's contention that the alleged defect was so hidden and obscured from ordinary observation that it was not noticeable from a casual inspection. A municipality is not an insurer against latent defects in its sidewalks, and, in the absence of proof of actual notice to the city of a defect like that complained of in this suit, it was necessary for plaintiff to have shown that the dangerous condition existed for such length of time prior to the accident, as to amount to implied actual notice of the condition that the circumstances of the injury brought to light.

## Conclusion – No liability

### *Pensacola v. Herron*

- \* Tested by the rule applicable to civil cases, it cannot be said that proof of the mere presence of sand and trash in the open iron water box per se warranted the fair presumption that the city had implied previous notice that the box had been left open and in such condition as to amount to a dangerous defect in the sidewalk at the time plaintiff Mamie Herron stepped in the same, therefore the evidence adduced at the trial was insufficient to sustain the verdict and a new trial should have been granted on that point.

## *Tampa v Jorda*

### Comparative Negligence

- \* Meter box lid gave way when stepped on – court found sufficient evidence that fault existed long enough to find liability and submitted case to jury;
- \* Jury found city guilty of negligence, BUT;
- \* Jury also considered evidence that woman was reading her mail and had just had a beer.
- \* City 10% guilty of negligence; woman 90% guilty of negligence leading to her own injuries.

## Brasca v. Jessup (NY)

- \* Moreover, although the section of the pipe on which the injured plaintiff tripped was not covered by a barricade, the pipe was **open and obvious** and could have been avoided by the exercise of reasonable care
- \* FL – Meter box protruded from parkway, but pedestrian was not walking in recognized pedestrian walkway
- \* FL – Grass growing into manhole evidence that open manhole existed for sufficient time for liability.

## Customer Side CC

## Customer Side CC

- \* If contamination occurs at customer location, and backflow preventer not installed; possibly liability.
- \* Would the risk posed by the customer's premises cause an industry expert to state that the risk required a backflow preventer? Liability to other customers.
- \* If the type of contamination that occurred was not reasonably foreseeable, probably no liability.
- \* But what if the utility has master backflow preventer to protect its other customers and the general integrity of the system, however, utility recognizes a cross connection or substantial risk thereof to multiple residents within that private system?

## Effect of BFD Equipment on Other Equipment

- \* More information coming to light as to the substantial danger of improperly installed BFD causing water heaters to explode.
  - \* Question – did the installer follow the recognized standard of care in the CCC industry?
    - \* What is the standard of care?
    - \* Safety valves?
    - \* Regular inspections?
- \* Liability to installer for damages and injuries.
  - \* Substantial liability due to injuries
  - \* Damage to water heater
  - \* Water damage

## Customer Side CC

- \* Notice to operators of private system – Demand that they notify their own customers or users.
- \* Notice to DEP and/or Health Unit ( whoever has jurisdiction)
- \* Anything else?

## Liability for Termination of Service or Disconnection

- \* Even though the law allows for disconnection of customers for failure to follow utility rules and the CC laws, there can still be liability in manner of disconnection
- \* Government utilities are required to give due process prior to taking a property right (continued water service); that is notice, and an opportunity for a hearing.
  - \* Notice must be reasonably calculated to inform the customer of their transgression, and provide procedure as with whom, where and how to appeal the decision.
  - \* hearing – could be simply a meeting.
  - \* BUT – what about customers with multiple consumers?

## Disconnecting Customers with Multiple Consumers Behind Meter

- \* A master meter can be disconnected for nonpayment; failure to install BFD or pay to have it annually inspected, just as a single consumer, BUT
- \* Florida law requires notice to the users (mobile home owners; condo owners; apartment dwellers, etc) enough time prior to disconnection to allow them to take their owner, manager, association to court to correct problem.
- \* Make sure you are right, or potential liability for defamation or unlawful disconnection.
- \* Alternative – Declaratory judgment by court of law.

## Disconnection Liability

- \* Always try to make sure customer knows water will be off to install or inspect BFD.
- \* Possible damage or injuries.
  - \* Water heaters dry
  - \* Dye in hair at salon
  - \* Dialysis machine
  - \* Etc.
- \* Also, if off for a period of time, make sure they know it is being turned back on.....