What Real Estate Owners and Managers Can Learn from Tugboats and Glaucoma

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This article was adapted from an article published in the Fall 2008 issue of the New York State Bar Association Business Law Journal.

In law school, law students study a case called The TJ Hooper. A federal appellate court, in 1932, decided that a tugboat operator was negligent because the boat didn't have a radio, even though tugboats generally did not use radios at that time. The court decided that those new-fangled radios were inexpensive and easily available, so as technology marched forward, the tugboat industry was required to march along with it.

The same principle explains why, regardless of your age, you have a little puff of air blown into your eye when examined for new glasses. In1974, a court held that an ophthalmologist was negligent for not giving a glaucoma test to a young patient, even though common medical practice was not to give the test to patients under age 40. The test was simple, low cost, and harmless, so failing to give it was negligent, even if the probability of glaucoma was very small in a patient under age 40. In 2008, a federal circuit court decided that the same legal principle applies when it comes to banks implementing technology to discover check fraud.

Why is this idea important to real estate owners and property managers? Because it explains a very important principle about responsibility and negligence. The common law rule of negligence is that a person must act, in dealing with other people, in the same manner that a reasonably prudent person would act under those circumstances. For many years, courts decided how a reasonably prudent person would act by looking at how other people in the same position act in similar circumstances. Thus, the tugboat operator said "Other tugboats don't have radios, so it's reasonable not to have one." The ophthalmologist said, "Other doctors don't give glaucoma tests to people under age 40, so I wasn't negligent just because I didn't give the test."

However, the courts said no. As technology improved and there were inexpensive ways to protect the people that the tugboat operator and the ophthalmologist were dealing with, they were obligated to adopt those technological improvements even though adoption was not the industry standard. They couldn't just escape from responsibility by pointing to other people in the same industry who acted the same way, because the court could instead find that the entire industry was negligent.

The same concept applies to property owners and managers, so you need to keep yourself educated about cutting edge developments and methodologies in your industry. Do you have to be the first to adopt the most high-tech protective device? No, probably not. But neither should you be the last, and as the price of a device that could protect the residents or tenants of your buildings comes down, you can't just close your eyes until after the damage is done. I strongly recommend that you should conduct a risk assessment of your buildings, determine what risks exist, decide whether there are methods available to reduce those risks, and then take appropriate steps to implement those methods when it is reasonable to do so under the circumstances.

You do not want to bend over backwards to argue that doing nothing is "reasonable." As time passes, inaction will look worse and worse to a court that is trying to assess whether you should have done more to protect an injured occupant. Don't just wait until the next occupant or passerby is injured and a new safety rule or local law is adopted to force you to take action. You don't want to be the owner or manager with the word "defendant" stuck after your name when an avoidable problem is not avoided. An ounce of prevention can be worth a lot more than just a pound of cure.

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