

A longshoreman fell to his death through an open hatch on the deck of a ship. The longshoreman was an employee of a company that had contracted with the ship's owner to load and unload the ship. The fall occurred at night, when loading work was over for the day, and there was no reason for the longshoreman to have been near the hatch.

A negligence action was filed against the ship's owner for the death of the longshoreman. In that action, the owner has moved for summary judgment and has provided un rebutted evidence that it is customary for the crews of ships to open the hatches for ventilation after the longshoremen have left the ships.

How should the court respond to the motion?

- A. Deny the motion and submit the case to the jury with instructions that the custom is relevant but not conclusive on the issue of negligence.
- B. Deny the motion and submit the case to the jury with instructions that the ship's owner should win if the longshoreman was improperly near the hatch.
- C. Deny the motion, because the probability of serious injury caused by falling down an open hatch clearly outweighs the burden of keeping the hatch closed.
- D. Grant the motion, because the custom should be considered conclusive on the issue of negligence.

## Explanation:

### Elements of negligence

Duty – defendant owed duty of reasonable care because his/her conduct created foreseeable risk of harm to others

Breach – defendant breached duty by failing to use reasonable care

Causation – defendant's breach actually & proximately caused plaintiff's harm

Damages – plaintiff suffered physical harm (ie, bodily injury or property damage)

To determine whether a defendant was **negligent**, the trier of fact (eg, the jury) can consider all relevant factors—including whether the **defendant complied with community or industry custom**. But **custom is not conclusive** on the issue of negligence since, among other things, the entire community or industry may be negligent. Therefore, this court should deny the ship owner's summary judgment motion and instruct the jury that the custom of opening the hatches after the longshoremen have left the ship is relevant—but not conclusive **(Choice D)**.

**(Choice B)** The fact that the longshoreman was improperly near the hatch could show that he was **contributorily negligent**—ie, failed to use reasonable care for his own protection. This would completely *bar* his recovery if the traditional common law rule applied. But under the comparative negligence rule (default rule on the MBE), contributory negligence only *reduces* recovery. Therefore, the ship's owner cannot win on this basis.

**(Choice C)** In determining negligence issues, the jury can consider whether the probability of harm outweighed the burden of avoiding that harm (ie, the **Hand formula**). But here, there is no indication that the probability of serious injury caused by falling down an open hatch outweighs the burden of keeping the hatch closed. This is particularly true since it is customary to only open the hatches after the longshoremen have left the ship.

### Educational objective:

Evidence that the defendant complied with (or deviated from) community or industry custom is relevant—but not conclusive—on the issue of negligence.

### References

Restatement (Second) of Torts § 295A (Am. Law Inst. 1965) (explaining that the customs of the community are relevant but not conclusive on the issue of negligence).

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