

# Technical and safety standards – impact on owners' non-contractual liability

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## Facts

## Decision

## Comment

Most jurisdictions have their own technical standards and regulations for planning and construction. In Switzerland, such standards are issued (and regularly updated) by the Swiss Society of Engineers and Architects (SIA). The SIA is a private association (as opposed to an official authority) composed of construction industry specialists. The SIA's set of technical standards are commonly used in contracts for works. In a recent decision,<sup>(1)</sup> the Supreme Court clarified the relevance of these standards in relation to the owner's non-contractual liability.

## Facts

In September 2005, after a cheerful family reunion, one of the guests fell from the balcony of his hotel room. He was found with severe injuries the following morning. The exact sequence of events and reasons for the accident could not be established. The injured party sued the hotel owner, arguing that the balcony railing was not high enough to prevent the accident because it failed to comply with current SIA technical safety standards. The injured party argued that such non-compliance constituted a fault in the work and (extra-contractual) liability of the owner.

The first-instance court established that the balcony railing was 91 centimetres (cm) high. At the time the hotel was built, the relevant SIA safety standard required a height of 90cm for balcony railings. However, in 1996 the SIA increased the standard for railings to 1 metre – a 10cm increase. At the time of the accident, the balcony railing thus no longer complied with the current SIA safety norm.

The first and second-instance courts both dismissed the claim, holding that the mere fact that a work no longer complies with the most current technical standards does not *per se* constitute a fault in the work leading to the owner's liability. The injured party appealed to the Supreme Court.

## Decision

The Supreme Court set out the basics of an owner's (extra-contractual) third-party liability. According to Article 58 of the Code of Obligations:

*"The owner of a building or any other fixed (immovable) work is liable for any damage caused by defects in its construction or design or by failure in its maintenance. The owner may recourse against persons liable to him in this regard."*<sup>(2)</sup>

The owner's third-party liability is a (strict) liability for causality not requiring a fault.

The Supreme Court recapped that a work is defective – in the context of Swiss (extra-contractual) liability law – if it does not provide sufficient safety for its intended use. If a work is open and used by the public, it must meet higher safety requirements than a work to which only a limited number of persons have access. Whether a work satisfies the safety requirements must be assessed from an

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objective viewpoint, but does depend on the actual circumstances and particularities of its intended use. Important practical limitations of the owner's liability include:

- personal responsibility (of the injured person); and
- reasonability and proportionality of the cost of available safety measures.

Accordingly, the owner is not expected to undertake safety measures which appear disproportionate or inadequate in view of the work's intended use or costs of such safety measures.

The Supreme Court confirmed the lower courts' view that the mere fact that a work no longer complies with updated technical norms (in particular, SIA technical standards) does not mean automatically that the work is defective and the owner is liable under Swiss liability law. It must be assessed objectively whether the work offers the security which is expected under the circumstances, in view of typical risks inherent to such work and its intended use.

However, it would be wrong to assume that technical standards are irrelevant to owner liability. The Supreme Court held that an increase of technical norms still indicates an increased risk arising from the respective work, against which the owner must, as a rule, take all reasonable and adequate protective measures. However, in this case the Supreme court found that replacing or raising the balcony railing by 10cm in order to comply with the latest SIA safety regulations was not proportionate for the owner in view of the relatively high costs (approximately Sfr45,000) and given the fact that the accident would in all likelihood still have happened.

Accordingly, the owner was exempt from liability on the basis of the reasonability/proportionality test. Indeed, based on the said principles, the owner was not obliged to undertake substantial modifications and incur important costs if they appeared unreasonable or disproportionate under the circumstances. The Supreme Court stated that every court has wide discretion in this regard and an appellate court will only reluctantly overrule a lower court's discretion. As a result, the Supreme Court rejected the appeal and confirmed the lower courts' decision.

## **Comment**

The concept of 'defect' is different in the context of Swiss (extra-contractual) liability law and Swiss law on contract for works. Indeed, under liability law, a work is defective if it does not provide for the (objective) safety required in view of the work's intended use. Under construction law, a work is considered defective if it does not comply with what was agreed in the contract for works, which is much more subjective.

However, this difference is crucial when it comes to possible recourses that the owner of a work may have against its contractor. Indeed, the owner may be held liable for the damage caused by a defective work by a third party, but it will only have a recourse against its contractor if the latter breached the contract for works and did not fulfil the agreed specifications of the works (irrespective of objective SIA safety measures). Owners are thus well advised to implement all applicable SIA safety standards into their contract for works as technical specifications for the work.

The fact that an owner may discharge itself of its extra-contractual liability on the basis that certain safety measures would be unreasonable, or the related cost be disproportionate, is cause for debate under Swiss law. Indeed, some scholars opine that such reflection should not limit the owner's third-party liability.

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## **Endnotes**

(1) April 9 2014, 4A\_521/2013.

(2) See [www.admin.ch/opc/en/classified-compilation/19110009/index.html](http://www.admin.ch/opc/en/classified-compilation/19110009/index.html) (informal English translation).

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