

# Roles and Responsibilities of Stakeholders



**QCTO: Occupational Health,  
Safety Quality Practitioner  
Qualification – NQF Level 5**

**ISO NET (Pty) Ltd**

**Learner Guide**

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**Key Stakeholders involved in prevention of accidents and incidents in the workplace**

## **OHS Legal Liability:**

### **Duty of care**

The concept of general duty of care is the cornerstone of modern occupational safety and health legislation in many countries.

While the history, development and implementation of such legislation vary across countries, some common principles apply.

The terms "general duty of care", "duty of care" or "general duties" relate to broad responsibilities, expressed in general terms, of a wide range of persons who are connected with the work or working environment.

These may include employers, employees, self-employed persons and others, such as people who control workplaces, design and construct buildings or manufacture and supply plant.

The concept reflects the fact that a "duty of care" is owed in law by one person to another.

Examples of such duties include:

- An employer must, as far as practicable, provide a work environment in which employees are not exposed to hazards.
- Employees must take reasonable care for their own safety and health, and that of others, at work; and
- Self-employed persons must, as far as practicable, ensure the work does not adversely affect the safety and health of others.

## **Statute and common law**

### **Statute law**

**Statute law** is developed through the process of Government and includes Acts and their supporting regulations.

Statute law is enforceable and breaches may result in prosecution.

### **Common law**

Another body of law, namely **common law**, developed as a result of civil actions. This occurs when a person believes that he/she has been wronged by another party and takes that party to court, seeking justice.

Common law claims typically seek some form of redress, frequently monetary. Common law is established (and changed) over time, through decisions made by the courts (precedents).

The general duty of care concept is based on principles established under common law and has subsequently been incorporated into statute law.

### **Common law duty**

Employers have a common law duty to ensure that they take reasonable care for the safety of all their employees. Employers have a greater level of control over working conditions as well as over matters affecting occupational health and safety, compared to the employee.

Sometimes this common law duty is described in terms of:

- Safe work practices (e.g. use of appropriate hand tools for the task).
- Safe place of work (e.g. equipment is well laid out and lighting is suitable for the task); or
- Safe system of work (e.g. tagging procedures exist for maintenance of equipment).

In common law, an employee may claim damages through a civil court for injuries arising from an employer's failure to take reasonable care. These are commonly called "negligence claims". The courts recognise that the actions of an employee may contribute to an injury and may reduce the size of a damages payout for "contributory negligence".

### **Differences between common and statute law**

<b>COMMON LAW</b>	<b>STATUTE LAW</b>
Must be some damage to person/property before action can be taken.	No need for an injury to occur before action can be taken.
Court needs only to be convinced of the plaintiff's case "on the balance of probabilities".	Prosecution must prove case "beyond reasonable doubt".
	Court may impose fines for breaches of legislation.

### **"Reasonable person" and "reasonably practicable"**

#### **The "reasonable person"**

In common law, each case is decided on its merits and the courts determine whether the action taken by the employer is reasonable in any particular case. They consider the way a hypothetical "reasonable person" might behave in each situation, to determine the standard of care which should apply in any particular case. It is based on the values of the society of the day and, in the end, will involve a value judgment.

There is no legal definition of how a reasonable person would behave (although there is considerable case law or precedents), and the final decision would depend upon the facts of each situation.

#### **Reasonably practicable**

An absolute requirement for an employer to ensure the health and safety of employees at work would be particularly onerous and most jurisdictions qualify (or moderate) the duty through use of the concept of "practicability" or "reasonably practicable".

What "reasonable" entails, is summarized by Lord Atkins in the case of ***Donohue vs. Stevenson*** (1932):

*"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.*

*Who then in law is my neighbour?*

*The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."*

Similarly, in ***Wilson's Clyde Coal Co. vs. English*** (1937), with regard to workplace health and safety, the following was held:

*"..... there is a duty on the employer to take reasonable care, and to use reasonable skill first to provide and maintain proper machinery, plant, applications and works; secondly, to select properly skilled persons to manage and superintend the business, and, thirdly to provide a proper system of working."*

What is considered reasonable in any particular case will depend on the specific circumstances. (Refer to our discussion regarding "reasonable person" – the concept is very similar.)

## **Hazard**

**Definition:** A hazard is a condition or practice with a potential for loss.

General duty of care style legislation applies to both health and safety at work. A "hazard" in relation to a person, means anything that may result in injury to the person or harm to the health of the person.

Injuries are easily recognised. "Health", however, is a broader concept. It includes work-related injuries and diseases, such as:

- Industrial deafness.
- Dermatitis.
- Occupational overuse injuries.
- Asbestosis and occupational cancers.

It could also include more general health problems like heart disease, high blood pressure and stress, where the work environment and procedures could be shown to be contributing factors.

## **Workplace**

"Traditional" occupational safety and health legislation applied narrowly to specified areas such as factories, shops, warehouses and construction sites. In contrast, a feature of modern general duty of care style legislation is that it applies as broadly as possible.

## General duties of the employer

### Introduction

With the OHS Act, Section 8, the general duties of the employer are set out in the Act, starting at **Section 2**. In turn, these general duties may be elaborated upon as follows:

- Additional Sections/Chapters in the Act (tier 2).
- Chapters of Regulations to the Act (tier 3).
- Codes of Practice drafted in compliance with the MHSAct or OHSAct, or standards incorporated into the Regulations to the Act (tier 4).

Although a combination of Regulations and Standards will usually comprehensively address a particular topic, they should never be regarded as all-encompassing. Where no answer exists for a particular issue, the employer has to consider what would be reasonable in the circumstances.

### Meaning of "employer" MHS Act

The MHS Act simply defines employer as "an owner". The Act then defines Owner as (in relation to a mine):

- The holder of prospecting permit or mining authorisation issued under the Minerals Act.
- (Where there is no prospecting permit or mining authorisation) the person for whom the activities under the definition of works is undertaken, but excluding an independent contractor.
- **"Works"** includes the following activities:
  - The transmitting or distribution of power from a mine.
  - Training at a central rescue station.
  - Making of, or repairs to any subterranean tunnel.
  - Any operation in connection with the above.

- The last person who worked the mine or his successor in title.

The Act defines Chief Executive Officer as "... *the person who is responsible for the overall management and control of the business of the employer.*"

### **MHSAct Section 2**

- 1) *The employer of every mine that is worked must –*
  - a) ensure, as far as is reasonably practicable, that the mine is designed, constructed and equipped:*
    - *to provide a healthy and safe working environment*
    - *with a system of communication, and mechanical/electrical equipment that will serve this purpose*
  - (b) ensure, as far as is reasonably practicable, that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can work without endangering the health and safety of themselves or any other person.*
- 2) *The employer must take reasonable steps to ensure that no-one is exposed to health and safety dangers at a mine that is not worked, but has not yet been issued with a closure certificate.*

**Section 2** would be regarded as the overall duties of the employer, summarised in a few paragraphs. They are fundamentally the rendering of the common law duty of care, a culmination of court decisions and legal precedents.

**Section 2** further serves as a starting point, with the remainder of the Sections in **Chapters 2 and 3** serving to elaborate upon what the employer's general duties would involve.

### **Section 5 - Employer to maintain a healthy and safe mine environment.**

- 1) *The employer must as far as reasonably practicable provide a working environment that is safe and without risk to employees' health.*
- 2) *The employer must as far as reasonably practicable:*
  - *Identify the hazards / assess the risks to persons other than employees.*

*Ensure that persons other than employees who may be directly affected by the activities are not exposed to health and safety risks*

As with **Section 2**, this Section would be regarded as the overall common law duty of the employer to act as a reasonable employer would, summarised in a few paragraphs.

**The OHSAct defines a workplace as follows:**

Any premises or place where a person performs work in the course of his employment.

2. The Minister may by notice in the Gazette declare that a person belonging to a category of persons specified in the notice shall for the purposes of this Act or any provision thereof be deemed to be an employee, and thereupon any person vested and charged with the control and supervision of the said person shall for the said purposes be deemed to be the employer of such person.
3. This Act shall not apply in respect of --
  - a. a mine, a mining area or any works as defined in the Minerals Act, 1991 (Act No. 50 of 1991), except in so far as that Act provides otherwise;
  - b. any load line ship (including a ship holding a load line exemption certificate), fishing boat, sealing boat and whaling boat as defined in section 2(1) of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), or any floating crane, whether or not such ship, boat or crane is in or out of the water within any harbour in the Republic or within the territorial waters thereof, or in respect of any person present on or in any such mine, mining area, works, ship, boat or crane.

**In the OHS Act**, the general duties of the employer are set out in **Section 8**. These general duties may be elaborated upon as follows:

- Additional Sections in the OHSAct (tier 2).
- Chapters of Regulations to the Act (tier 3).
- Standards incorporated as part of the Regulations to the Act (tier 4).

Although a combination of Regulations and Standards will usually comprehensively address a particular topic, they should never be regarded as all-encompassing. Where no answer exists for a particular issue, the employer has to consider what would be reasonable in the circumstances.

## **Section 8.1**

*Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.*

## **Section 8 (2)**

*The provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;*

- (b) *Taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;*
- (c) *Making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;*
- (d) *Establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further*

establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;

- (e) Providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;
- (f) As far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated in paragraphs (b) and (d), or any other precautionary measures which may be prescribed, have been taken;
- (g) Taking all necessary measures to ensure that the requirements of this Act are complied with by every person in his employment or on premises under his control where plant or machinery is used;
- (h) Enforcing such measures as may be necessary in the interest of health and safety;
- (i) Ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and
- (j) Causing all employees to be informed regarding the scope of their authority as contemplated in **Section 37 (1) (b)**.

**Section 9.1** provides as follows:

*Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.*

### **Manufacturer's and supplier's duty for health and safety**

#### **Introduction**

General duty of care legislation also imposes duties on manufacturers and suppliers regarding articles and substances for use at work.

They have a duty to ensure that items are designed and constructed so that it may be safely used in the workplace.

**Section 21 of the MHSAct prescribes as follows:**

- 1) Any person who —
  - a) designs, manufactures, repairs, imports or supplies any article for use at a mine must ensure, as far as reasonably practicable --
    - i) that the article is safe and without risk to health and safety when used properly; and
    - ii) that it complies with all the requirements in terms of this Act;
  - b) erects or installs any article for use at a mine must ensure, as far as reasonably practicable, that nothing about the manner in which it is erected or installed makes it unsafe or creates a risk to health and safety when used properly; or

- c) designs, manufactures, erects or installs any article for use at a mine must ensure, as far as reasonably practicable, that ergonomic principles are considered and implemented during design, manufacture, erection or installation.

2) Any person who bears a duty in terms of subsection (1) is relieved of that duty to the extent that is reasonable in the circumstances, if —

- a) that person designs, manufactures, repairs, imports or supplies an article for or to another person; and
- b) that other person provides a written undertaking to take specified steps sufficient to ensure, as far as reasonably practicable, that the article will be safe and without risk to health and safety when used properly and that it complies with all prescribed requirements.

3) Any person who designs or constructs a building or structure, including a temporary structure, for use at a mine must ensure, as far as reasonably practicable, that the design or construction is safe and without risk to health and safety when used properly.

4) Every person who manufactures, imports or supplies any hazardous substance for use at a mine must —

- a) ensure, as far as reasonably practicable, that the substance is safe and without risk to health and safety when used, handled, processed, stored or transported at a mine in accordance with the information provided in terms of paragraph (b);
- b) provide adequate information about —
  - i) the use of the substance;
  - ii) the risks to health and safety associated with the substance,
  - iii) any restriction or control on the use, transport and storage of the substance, including but not limited to exposure limits;
  - iv) the safety precautions to ensure that the substance is without risk to health or safety;
  - iv) the procedure to be followed in the case of an accident involving excessive exposure to the substance, or any other emergency involving the substance; and
  - vi) the disposal of used containers in which the substance has been stored and any waste involving the substance; and
- c) ensure that the information provided in terms of paragraph (b) complies with the provisions of the Hazardous Substances Act, 1973 (Act No. 15 of 1973).
- d)

(The Hazardous Substances Act provides for the control of substances which may cause ill health due to their toxic or flammable nature.)

(Negligent failure resulting in endangerment to a person at a mine is an offence. See section 86.)

#### **General duties of employers and self-employed persons to persons other than their employees**

## Introduction

General duty of care style legislation also provides protection to non-employees who may be affected by the work.

Both employers and self-employed persons have this duty. They must, so far as is practicable, avoid harming the health and safety of other people.

Employers and self-employed people are also required to take reasonable care for their own safety and health at work.

In the case of an employer, he or she must also ensure, as far as practicable, that the work of his/her employees does not harm others, for e.g. the public, visitors etc.

Section 9 of the OHS Act sets out the duties of employers and self-employed persons to persons other than their employees.

## Section 9

- 1. Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.*
- 2. Every self-employed person shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that he and other persons who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.*

## General duties of manufacturers and others regarding articles and substances for use at work

### Introduction

General duty of care legislation also imposes duties on manufacturers and others regarding articles and substances for use at work.

Manufacturers and others have a duty to ensure that items are designed and constructed so that it may be safely used in the workplace.

Section 10 of the OHS Act sets out the duties of manufacturers and others regarding articles and substances for use at work.

## Section 10

- 1. Any person who designs, manufactures, imports, sells or supplies any article for use at work shall ensure, as far as is reasonably practicable, that the article is safe and without risks to health when properly used and that it complies with all prescribed requirements.*

2. Any person who erects or installs any article for use at work on or in any premises shall ensure, as far as is reasonably practicable, that nothing about the manner in which it is erected or installed makes it unsafe or creates a risk to health when properly used.
3. Any person who manufactures, imports, sells or supplies any substance for use at work shall
  - - a. ensure, as far as is reasonably practicable, that the substance is safe and without risks to health when properly used; and
    - b. take such steps as may be necessary to ensure that information is available with regard to the use of the substance at work, the risks to health and safety associated with such substance, the conditions necessary to ensure that the substance will be safe and without risks to health when properly used and the procedures to be followed in the case of an accident involving such substance.
  - 4. Where a person designs, manufactures, imports, sells or supplies an article or substance for or to another person and that other person undertakes in writing to take specified steps sufficient to ensure, as far as is reasonably practicable, that the article or substance will comply with all prescribed requirements and will be safe and without risks to health when properly used, the undertaking shall have the effect of relieving the first-mentioned person from the duty imposed upon him by this section to such an extent as may be reasonable having regard to the terms of the undertaking.

### **Employees' duties for health and safety**

#### **MHSAct, Section 22**

##### **22. Employees' duties for health and safety**

*Every employee at a mine, while at that mine, must —*

- a) *take reasonable care to protect their own health and safety;*
- b) *take reasonable care to protect the health and safety of other persons who may be affected by any act or omission of that employee;*
- c) *use and take proper care of protective clothing, and other health and safety facilities and equipment provided for the protection, health or safety of that employee and other employees;*

*(Employers have a duty to provide personal protective equipment for employees. See section 6.)*

- d) *report promptly to their immediate supervisor any situation which the employee believes presents a risk to the health or safety of that employee or any other person, and with which the employee cannot properly deal;*
- e) *co-operate with any person to permit compliance with the duties and responsibilities placed on that person in terms of this Act; and*
- f) *comply with prescribed health and safety measures.*

*(It is an offence to fail to comply with a duty under this Act. See section 91.  
It is an offence to discriminate against an employee who has asserted any right granted by this Act. See section 83.)*

## **General duties of the employee**

### **Section 14 (a)**

- (a) Take reasonable care for one's own health and safety as well as that of other people who may be affected by what the employee carries out.*
- (b) Co-operate with the employer to ensure that the requirements as set out in the Act and the Regulations are fulfilled.*
- (c) Carry out any lawful health and safety instruction given to him by his employer.*

The instruction given to an employee must be reasonable, and have the purpose of ensuring health and safety. Ordering the employee to do something dangerous would be unreasonable, and also unlawful in terms of the Act (**Section 8.2 (f)** and **Section 26**).

- (d) Report anything which appears unsafe (substandard) or unhealthy at the workplace to the employer.*
- (e) Report an incident as soon as possible and at least at the end of the shift when the incident took place.*

## **Section 15**

*No person shall intentionally or recklessly interfere with, damage or misuse anything which is provided in the interests of health and safety*

## **Meaning and types of liability**

### **Criminal liability**

#### **Introduction**

A person who fails to comply with provisions of either an Act or Regulation would be prosecuted by the State in a court. The person would be known as the **accused**. If the accused is convicted, he could be sentenced to a fine or imprisonment, or both.

#### **Elements of criminal liability**

- It is always the **State** versus a person (or company).
- The trial is about whether the accused is **guilty** of the charges against him.
- The purpose of the trial is to **punish** the guilty person.

Criminal liability (i.e. offences) comes from 2 sources:

1. **Legislation** (statutes) e.g. the Occupational Health and Safety Act and Mine Health and Safety Act.
2. **Common law** e.g. murder, homicide.

## Civil liability

### Introduction

If the person's negligence causes loss or injury to another person (**third party**) that other person could sue for compensation in a civil court. The third party is then known as the **plaintiff** and the "negligent" person becomes the **defendant**.

### Important elements of civil liability

The court may order that the defendant compensate the plaintiff. This is the basis of civil liability - no fines or imprisonment is involved. In these civil cases, the State is generally not involved. In summary, the important elements of civil liability are:

- It is always one **private** person versus another.
- The trial is about whether the defendant is **liable** (for negligence).
- The purpose of the trial is **compensation** to the plaintiff.

Civil liability essentially has one source i.e. common law. There are 3 main categories of civil common law liability:

1. **Delict** (where one person causes harm or damages to another).
2. **Contract** (where one person fails to honour the contract, causing the other person to suffer loss).
3. **Unjust enrichment** (where one person unintentionally gains something to which he is not entitled. The rightful owner would sue to get that something returned to him).

## Vicarious liability

### Introduction

This is probably the most important legal concept of which managers must be aware. It applies to them on a daily basis, by virtue of the fact that they have people under their control.

### Evolution of vicarious liability

The concept of vicarious liability evolved from the following doctrines:

### **King Hammurabi's Code of Laws - ("The Careless Supervisor")**

An example of where this applied was where the supervisor failed to check that his workers were performing their job functions without carelessness, and the one careless worker lost his hand, the supervisor had to have one of his hands chopped off.

### **Actiones Noxales - (Sins of the Slave to be visited upon the Master)**

The master had to use his control over the slave to ensure the slave behaved like a reasonable person. If the slave committed a crime, the master had failed to properly exercise his control. This failure of control was as serious as the crime itself, and the master would take responsibility for the crime as if he had committed it himself.

The "Actiones Noxales" concept has not changed much, and the manager today would generally be held potentially liable for the wrongdoings of his subordinates:

- If an employee violates any provision of a statute, or commits a criminal common law offence, the manager could be held criminally liable.
- If a third party suffered loss or damage due to the employee's negligence, he could lodge a civil claim against the manager.

In both cases, the manager takes on the liability as if he himself has committed the wrongdoing.

### **Other legal terminology**

#### **Burden of proof**

This refers essentially to what must be established in order to win a case.

In a criminal case, the State must prove that the accused person is guilty **beyond reasonable doubt**. This is a fairly strict test to meet, (because of the potentially severe consequences to the accused).

Sometimes however, the State is assisted by legal presumptions in its favour, which can be established merely by submitting documents. It is then up to the accused person (defendant) to prove his innocence by proving that the documents are not valid. Legislation provides for such presumptions in favour of the State.

In a civil case, the plaintiff must prove his case on a **balance of probabilities** i.e. he must show that his version of the matter is more believable than the defendant's. This test is not as strict as that of a criminal case.

#### **Summons and charge sheet**

A **summons** is a formal document instructing the defendant to appear at a certain court on a certain date. In a criminal trial, failure to do this is treated as **contempt of court**, which itself is a criminal offence, and can incur severe penalties.

In a civil trial, failure to attend would result in **judgement in default** being awarded to the plaintiff. The defendant would automatically be liable to pay the full compensation sought by the plaintiff.

The **charge sheet** sets out the crimes or wrongdoings and the accused or defendant as the case might be is asked to plead guilty or not guilty to any, or to all the crimes or wrongdoings listed on the sheet. These two documents are served together to the defendant.

### **Admission of guilt**

The summons may allow the defendant the option of paying a fine, and thereby avoid a court case. Although convenient, such a decision must be carefully considered as it carries serious implications.

### **Standard of care – the reasonable man test**

The purpose of any trial whether civil or criminal is for the courts to determine whether the person facing the charges acted as a reasonable person, or whether this person was negligent in the circumstances, and must therefore be found guilty, or liable as the case may be. For this purpose, the courts would apply the Reasonable Man Test, which holds as follows:

- Could the harm have been foreseen or predicted?
- Could steps have been taken to prevent this foreseen or predicted harm?
- Did the person take these steps?

It is irrelevant what the "liable" person himself foresaw. The focus is on whether he conducted himself as a reasonable person would have in his circumstances. If this common law approach was translated into industrial circumstances, i.e. **the definition of reasonably practicable**, the test would be:

- What was the seriousness of the possible harm?
- What were the chances of the harm occurring?
- What was the level of risk involved in taking precautions?
- What cost was involved in taking the precautions?
- What difficulty was involved in taking the precautions?

### **Indemnities**

A company can require a person to sign an indemnity whereby the company contracts itself out from being liable for loss, damage or injury the signatory may suffer while being on the company premises. Regarding indemnities the following must be remembered:

1. Indemnities cannot apply to **statutory liability** i.e. the duties for the health and safety of persons which are imposed by legislation such as Occupational Health and Safety Acts can never be contracted out of.
2. Indemnities can only limit liability against possible **civil** actions, and even then only to a limited extent. The common law provides that one cannot use indemnities to contract out of possible liability caused by **gross negligence** or **wilful misconduct** towards the person (signing the indemnity).
3. Points (1) and (2) apply, no matter what the wording of the indemnity provides for, and no matter that the person may have signed it.

### Role of each key stakeholders in preventing accidents and incidents

#### Due diligence

#### DUE DILIGENCE COMMON LAW AND OCCUPATIONAL HEALTH AND SAFETY (MANAGEMENT LEADERSHIP)

“Due diligence is a defence to most OHS and Environmental offences. Due diligence is demonstrated if a company or individual takes all reasonable steps to avoid an event.

Accordingly, when company policy clearly describes an unequivocal (obvious) and clear commitment to providing a healthy and safe workplace, and when line managers' and supervisors' responsibilities for health and safety are clearly spelt out in their job descriptions, and when programme implementation has been assigned and the necessary resources provided, due diligence has likely been demonstrated and guilt before the law would only be tied to those who have failed to take the reasonable steps necessary to fulfil their responsibilities.”

*S R Miller*  
Senior Regulatory Council  
Petro-Canada

#### Meaning of due diligence

The defence of **due diligence** has brought a new dimension to management responsibility and accountability. All regulations include some requirements for:

- Employee training.
- Appropriate training records.
- Regular review of key training.
- Provision of proper procedures and safeguards.
- Regular inspection and testing of plant and equipment, and
- Reasonable efforts to prevent occurrences which result in harm to personnel, the community or the environment.

These operational practices and procedures are implemented within a company to optimise efficient production while preventing unintentional harm to employees, equipment and the environment. **Due diligence means taking care.** In the workplace, that means **taking all**

**reasonable care** in the circumstances to protect the health and safety of all workers. Due diligence must be expressed in the behaviour and attitudes in the workplace and cannot be made up after-the-fact.

Unfortunately, it has been observed in the courtroom that accused employers often "make up" a defence when presenting their side of the story to the court.

What is striking about these instances of alleging due diligence after-the-fact is that corporate witnesses (from supervisors to CEO's) often display a profound lack of understanding of the statutory duties of the employer with respect to the circumstances of the case before the court. The duties of employers are spelled out in the Act and include :

- Providing equipment, materials and protective devices as prescribed by the regulations.
- Seeing that this equipment is maintained in good condition.
- Seeing that the equipment, materials and protective devices provided are used as prescribed.
- Providing information, instruction and supervision to workers to protect their health and safety.
- Appointing a competent supervisor.
- Acquainting the worker with any hazards in the workplace.
- Carrying out the measures and procedures required by the Act and regulations.
- Providing assistance and co-operation to a joint health and safety committee, and
- Taking every precaution reasonable in the circumstances to protect workers.

Many witnesses called to give due diligence evidence for the employer either do not understand these duties or do not know how to ensure that they are discharged effectively. Yet, this understanding is essential to establishing due diligence in both the workplace and the courts. If an employer or managers don't understand their duties under the Act, attempts at being duly diligent will be simply hit or miss and using due diligence as a defence will surely fail.

Along with the lack of understanding of the duties imposed by the Act, employers often do a poor job of assessing potential hazards in the workplace. The various regulations to the Act specify the risks or hazards in the workplace that should be guarded against.

In addition, the list of duties outlined above points to other potentially hazardous situations in the workplace, including incompetence of supervisors, ignorance of workplace dangers, poorly maintained equipment and inadequate instructions and supervision.

The key to understanding the concept of due diligence is understanding the meaning of the words "duty" and "risk". In any prosecution under the Act, the state must show a breach of duty by the employer.

Once that has been accomplished, the state should be able to show that the employer failed to guard against the risk. For its part, the defence must show that despite the occurrence of contraventions of the Act, all due care was taken in the circumstances

### **Showing all due care**

How does one show all due care? One must go back to the concepts of duty and risk to demonstrate due diligence. Just as duty and risk can be used to establish negligent conduct, so too can they be used to demonstrate that all reasonable care was taken to prevent the alleged prohibited act.

Understanding not only how the prohibited act occurred but also why it occurred, is pivotal to the defence. When asking the question "why did this omission occur?" one will automatically know whether the duty was breached. The duty is tied directly to the prohibited risk.

Take, for example, a case in which an employer is charged after a worker in an industrial establishment loses a hand in a punch press. The state alleges that the machine the worker was using was not guarded. What are the elements of a due diligence defence?

The prohibited risk is operating a machine that may endanger a worker. The duties relevant to the defence of due diligence would include :

- The provision of a guard on the machine.
- Instruction on how and when the guard was to be used.
- Supervision of the worker by a competent person.
- Steps taken to see the guard was used; and
- Acquainting the worker with the risk of using the machine without a guard.

It is not uncommon to see a due diligence defence presented on the basis that the worker was well-experienced in the operation of the machine and was acquainted with the risk of running it without a guard.

A long paper trail of company rules and training sessions may also be presented to the court to show that due care was taken.

However, with just a little probing, it can be discovered that no steps were taken to reasonably verify that this experienced worker was, in fact, using the guard as required. The company relied solely on the worker's skill and experience with respect to the guarding of the machine and had no systems in place to see that the guarding regulations were being followed.

By showing that the company failed to carry out one relevant duty, the state can undermine the due diligence defence.

In this example, even if the worker was very experienced, it is not open to the defendant to argue that he does not have to provide information, instruction and supervision. That is the standard duty of care expected of the employer. What can be argued is the extent or quality of the training that was given or its relevance to the cause of the incident.

Likewise, it is still open to the state to argue that, despite the worker's experience, the extent or quality of the training or supervision he received was inadequate. The law does not stipulate a certain standard for training or supervision; it's up to the employer to set these standards.

Often in a prosecution, however, employers have no standards to show the court. They seem to prefer to argue that, because the worker was experienced, they don't have a duty to supervise. This argument is doomed to failure. To successfully maintain a defence of due diligence, an employer must have performed all of his duties with respect to the specified risk set out in the charge before the court.

Perhaps the greatest misconception about due diligence is the belief among employers that being generally due diligent in the workplace, is enough to establish a defence against specific charges in the court. That's not the case. The court is not interested in what was generally done to be safety conscious.

Due diligence is a defence which requires evidence that specific steps were taken to prevent the alleged contravention.

For instance, going back to the machine guarding example used earlier, due diligence could have been established by relating to the employer's duties under the law to the guard on the machine. If the guard was provided and maintained in good condition and the worker acquainted with the hazards, trained on the use of the machine guard and supervised, then due diligence would have been achieved.

**Due diligence does not mean that accidents will not happen.** Due diligence means **doing reasonable things to try and prevent harm to workers.** If an employer cannot demonstrate that he has fulfilled all of his statutory duties, then he can never establish due diligence.

### Foreseeing risks

Another aspect of due diligence that employers generally have difficulty with, is the idea of foreseeability. Foreseeability simply means determining risks in advance. With the passage of time, many dangers in the workplace have become so "foreseeable" that they have been incorporated in to the Act.

A guard on the punch press is a good example. Experience has shown that workers receive injuries on such machines. Even trained workers can inadvertently place a hand in the way of the stamping die during a momentary lapse of concentration.

Therefore, a regulation was developed that requires employers to provide equipment to try and prevent this from happening. The regulation itself foresees the danger.

There are many other risks which are not covered by regulations. Instead, it's up to the employer to foresee them and guard against them. The employer's actions against foreseeable risks can form the basis of a due diligence defence in court if an incident does occur.

Unfortunately, employers tend to take the opposite tack in court, arguing that the incident before the court was not foreseeable.

For example, employers still argue that an experienced and trained worker's failure to use a guard on a punch press is not foreseeable. In a way, that's understandable. We expect a skilled worker who understands the operation of the press to use a guard.

However, the argument does not take into consideration the fact that people may take short cuts and run risks. These things are foreseeable and the employer is responsible for ensuring through adequate supervision and enforcement that they do not take such risks.

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**Example**

In a recent case, a young worker doing piece work was injured after removing the guard from a machine to speed up his work.

Even though the employer had provided guards and trained its workers, the court found that inadequate supervision had led to the accident.

The employer had allowed the worker to come into the shop early and begin work unsupervised.

### **Addressing risks**

Due diligence in the workplace is not what is "made up" for the courtroom; it is a way of conducting business on the shop floor. Due diligence occurs when an employer knows his statutory duties; has assessed the risks and hazards in the workplace; has carried out his duties with respect to those risks; and has maintained standards of quality with respect to his duties in the workplace.

An employer cannot properly carry out his duties without accurately assessing the potential risks or dangers that occur and evolve in the workplace. An employer may have addressed all the problems associated with the guarding of his machines, for instance, but failed to assess whether they way in which he stores materials endangers workers.

Once an accurate assessment of the risk and dangers in the workplace has been done, the employer can determine his duties. For example:

- Is there competent supervision?
- Have the workers been trained with respect to both the operation of the machinery and the hazards that exist?
- Is there a procedure in place to monitor and enforce the training given to the workers?
- Have the protective devices required by the regulations been installed and maintained?
- If an employer can answer yes to these types of questions, then due diligence has likely been achieved.

The assessment of risks must be an ongoing process. Due diligence is dependent on the present conditions in the workplace, not those that existed last year. Employers must consider the impact of such things as changes to machinery, employees and procedures when determining whether he is carrying out his duties.

Advice on due diligence tends to centre on policies, practices and procedures. There is no doubt that these are essential but without adequate follow-through, due diligence won't be achieved.

When a huge volume of documents are entered into evidence by the defence, it is usually a sign that a lot of thought went into developing safety policies but little was done to implement them.

One case that stands out involved a large multinational company that had very effective policies and procedures to safeguard its workers. The company had an Achilles heel. No one had bothered to enforce the health and safety policies on the night shift. With only one supervisor for the entire plant, workers got into the habit of taking short cuts. It's troubling to see in court that many companies have the safety rules in place to prevent harm to workers, but render the rules ineffective by not adequately enforcing them.

### **Assessing training**

Training is another important element in carrying out due diligence. Often, proof that a worker attended a training session is submitted in court as evidence of due diligence. What the employer fails to prove, however, is that the worker actually understood the training. In an industrial context, all the prosecution needs to show is that the worker did not appreciate the dangers of the machinery being used.

Supervisors must be able to accurately evaluate the abilities of workers to ensure that training has been absorbed.

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#### **Example**

As a recent case demonstrates, this is critical to a due diligence defence. A worker was killed after the rigging of an elevator platform broke, causing the platform to fall to the ground. The worker who had rigged the elevator was in training to become an elevator installer.

Through expert witnesses, it was shown that the apprentice worker did not appreciate the dangers connected to the rigging of the platform. Although the worker sincerely believed he had been trained, the mistakes he had made in the rigging were more than errors in judgement. The supervisors who gave evidence in this case could not show that the apprentice had the necessary experience to be left on his own. As a result, the court found that the worker did not yet have the ability to be left in charge and ruled against the company.

### **A strategy for due diligence**

Protecting the company from convictions brought about by a lack of due diligence begins with a thorough understanding of the legislated risk control requirements; an understanding of that which must be done to meet the intent; and the immediate implementation of initial action aimed at correction of risk control issues.

Management must be able to demonstrate that risk control has equal status with production and quality and that it is an ongoing essential part of the business. They must also be able to demonstrate that procedures and processes are in place to limit non-compliance events.

A strategy for due diligence includes :

### **Plan**

- A policy is established and communicated.
- A defined plan is in place.
- Roles and responsibilities have been defined.

### **Implement**

- The plan has been communicated.
- Decision making processes are in place.
- Management is seen to support/demonstrate commitment to the plan.
- Training is provided.

### **Evaluate and monitor**

- Performance is monitored against plan.
- Regular reporting to senior management is done.
- Systems are in place to identify and manage serious loss potential.

### **Retain records**

- Records demonstrate efforts.
- Records demonstrate that deficiencies are identified and actions taken.

### **Continuously improve**

- Action taken addresses immediate and basic causes.

The above steps in the strategy for due diligence is discussed on the pages that follow.

### **Plan**

Your company must develop and communicate risk control policies. These policies must specify the level of commitment from management to the protection of people, equipment, materials and the environment from harm. They should also express management's expectation of employee contribution to the successful achievement of risk control goals and objectives.

The policy should be supported by a plan which establishes the short- and long-term goals for risk control. While compliance activities must be defined, the site's roles and responsibilities should extend beyond compliance alone and address good management practices.

This plan should identify the protection methods used in the operation such as:

- Roles and responsibilities.
- Training programmes.

- Record keeping systems.
- Use of professional expertise to assist and advise management.
- Adequate maintenance procedures, and
- Emergency preparedness and response procedures.

Managers must take this aspect of their job function seriously, be able to demonstrate activities undertaken to support the plan and be held accountable for their actions. The performance management process should incorporate annual assessment of these supporting activities and reward efforts to gain compliance.

### **Implement**

The plan must be communicated to all employees. Roles and responsibilities and the decision-making process for risk control issues must be clarified and communicated. Managers can demonstrate their acceptance and commitment to the goals and objectives through the actions taken on a daily basis in support of the policy and the plan.

Training required to meet employee roles and responsibilities under the plan and policy must be provided, tested and recorded. Regular reviews of the training given should also be provided, tested and recorded.

The enhancement of risk control awareness through training increases the importance of risk control matters, aids in internalisation of relevant goals and stimulates compliance with risk control objectives. All activities related to due diligence efforts must be documented in appropriate files.

### **Evaluate and monitor**

Evaluations should ensure that appropriate records are reviewed and verified to make certain that what is recorded is accurate. The type of records include:

- Inspections.
- Incident investigations.
- Task analysis and procedures.
- Task observations.
- Incident report schedules.
- Audits and others.

These records can establish the effectiveness of the implemented compliance actions against the planned performance. Regular reports must be provided to senior management to maintain awareness of significant loss potentials and provide opportunities for more informed decision-making.

Peers should be regularly bench-marked to determine changing standards and community expectations regarding levels of effort within the industry to further reduce workplace incidents.

Regular evaluations, or reviews, of the monitoring processes should be performed to continuously update and improve the company's risk control systems and compliance efforts. Codes and regulations should be regularly reviewed to determine changing impacts upon the operation.

### **Retain records**

Documentation must be kept to demonstrate those activities undertaken to protect the safety and health of personnel.

Records of what has been implemented, successes and failures, and efforts to correct deficiencies must be part of the record retention efforts.

### **Continuously improve**

The processes for following up and correcting compliance issues should be clearly defined by a work process that is being followed. This process should demonstrate that not only immediate causes are being addressed, but basic causes as well.

Due diligence is demonstrated through the daily risk control activities. It cannot be demonstrated if the following type of actions represent the company's culture:

- One employee is required to perform a task which normally requires two to perform it in a safe and efficient manner.
- Appropriate recruitment, orientation and training practices are not in place.
- Only general rules regarding risk control requirements are provided to new employees.
- Adequate regular maintenance is not provided for all equipment whose failure could result in a major loss.
- Lack of preparation renders a company unable to minimise loss when an incident occurs.
- Advanced knowledge is available but ignored.

It is the employer's duty to ensure that Representatives are properly empowered to perform their duties as health and safety representatives. Representatives must be trained during working hours.

Inspection intervals are not specified. Representatives have been given direct access to the inspectorate, are entitled to attend incident investigations and enquiries, inspect documents and participate in health and safety audits.

### **Functions of Representatives**

#### **Representatives may perform:**

- Review effectiveness of health and safety measures
- Identify potential hazards and major incidents
- Examine causes of incidents
- Investigate complaints
- Advise the committee and the employer

### **Representatives shall be entitled to:**

- Visit incidents sites and attend inspections
- Attend any investigation or formal inquiry
- Inspect any document related to health and safety matters
- Accompany an inspector
- Be accompanied by technical advisor if approved by the employer
- Participate in internal audits

### **Liability:**

A representative shall not incur any civil liability if he failed to do anything which he may do or is required to do.

### **Communicating with safety representatives:**

Good communication is essential for the success of any safety, health and environmental system within an organisation. Proper and official channels should be created and maintained to ensure effective communication. The line manager or foreman should always encourage communication.

This could be done by asking employees and safety representatives what hazards they are aware of. Toolbox talks, inspection lists and the use of suggestion box could be used during this process. Internal reports and complaints from workers could also be included and used for this purpose.

Self Evaluating Checklist (12)	Yes	No
<b>Section 18(1) (j)</b>		
Are all health and safety representatives appointed as health and safety committee members?		
Are your health and safety representative's functions specified on his/her appointment form?		
<b>Section 18(3)</b>		
Have all health and safety representatives received adequate training?		
Are all health and safety representatives appointed as health and safety committee members?		
Are your health and safety representative's functions specified on his/her appointment form?		