

**Due Diligence
in the
Workplace**

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Outline

- Concepts of Due Diligence
 - Legal defence
 - Internal responsibility system
- Duties of Employers and Supervisors
- Legal Liabilities

What is Due Diligence?

Commonly refers to:

- Legal defence to OHSA charges
- An effective occupational health and safety management system

Concepts of Due Diligence

- **Ensuring reasonable care is exercised regarding worker health and safety (hazards are identified, assessed and controlled)**
- **Ensuring workers are trained, understand and obey safety procedures**
- **Properly addressing workers' concerns about health and safety**
- **Proving no negligence contributed to circumstances that caused safety incident**

Legal Defence of Due Diligence

- Provincial OHS offences are quasi-criminal in nature
- Generally treated as “strict liability” offences
- Crown must prove beyond a reasonable doubt the “*actus reus*” of the offence
- Burden then shifts to the defence to establish, on a balance of probabilities, that it exercised due diligence

Legal Defence

- *R. v. City of Sault Ste. Marie* (1978):
 - “The defence will be available if the accused
 - [1] reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or
 - [2] if he took all reasonable steps to avoid the particular event.”
- Due Diligence is NOT a “standard of perfection”

Mistake of Fact Defence

Mistake of fact:

- Must be a genuine belief in a mistaken set of facts
 - Ignorance of the law (regulations, industrial standards) is no excuse
- The belief must be objectively reasonable
 - Willful Blindness
 - Reliance on statements/information
 - Gaps in the system – unforeseeable circumstances

Employer took “all reasonable steps”

Second branch of due diligence

R. v. City of Sault Ste. Marie:

- Accused may establish that all reasonable steps were taken by
 - [1] establishing a proper system to prevent the commission of the offence; and
 - [2] by taking reasonable steps to ensure the effective operation of the system.

Worker Negligence

- A worker's negligence, or even intentional breach of duties or employer's safety rules, is generally not a viable defence
- Employers and Supervisors are obliged to take reasonable steps to protect workers
- However, worker negligence may go to the foreseeability of the incident

Internal Responsibility System

System typically includes:

- Hazard Identification, Assessment and Control
- Proper Equipment and Materials
- Written Programs, Systems & Procedures
- Effective Training and Instruction
- Competent Workers
- Effective Monitoring and Review

Duties of Employers

- **General Duty under the Act:**
 - Must ensure, “where it is reasonably practicable, the health, safety and welfare of his or her workers”
- **Specific Duties under the Act:**
 - Provisions address equipment/tools; instruction and training; safety hazards; responding to recommendations
 - Where “reasonably practicable”
 - Protection of persons not in his or her employ

Duties of Employers

- Duties under the Regulations ss.12-14
 - OHS Program and Policy
 - Statement of Responsibilities
 - “Written” work procedures
 - Training Plan
 - System for “recognition, evaluation and control of hazards”
 - Emergency Response Plan
 - Ensure PPE is used
 - Ensuring safe work procedures are followed

Duties of Employers

- S.14(1) of the Regulations:
 - An employer shall ensure, so far as is reasonably practicable, that all buildings, structures, whether permanent or temporary, excavation, machinery, workstations, places of employment and equipment are capable of withstanding the stresses likely to be imposed upon them and of safely performing the functions for which they are used or intended.
 - Consider where employer is on another employer's job site

Workplace Violence

- Regulations on Workplace Violence – ss.22-24
 - Duty to conduct a Risk Assessment
 - Duty to provide information to workers regarding risks, including
 - Information related to the risk of violence from persons who have a history of violent behaviour and whom workers are likely to encounter in the course of their work
 - What about information concerning a co-worker?
 - Dealing with privacy issues

Duties of Supervisors

- OHSA Definition of Supervisor:
 - “a person authorized or designated by an employer to exercise direction and control over workers of the employer”
- General Duty:
 - ensure, where it is reasonably practicable, the health, safety and welfare of all workers under his or her supervision
- Specific Duties under the Act:
 - Safety hazards
 - Written and Oral Instructions
 - Ensure PPE is used or worn

Duties of Supervisors

- Duties under Regulations:
 - Responsible for ensuring employer's duties are carried out
 - S.133 – lockout – make all efforts to ensure the worker who installed removes the lock; ensure machinery can be safely operated before removing
 - S.252 – testing worker competence for operating mobile equipment
 - S.254: “A supervisor shall not knowingly operate, or permit a worker to operate, mobile equipment which is, or which could create, an undue hazard to the health or safety of a person, or which is in violation of these regulations.”
 - Competency for supervising crane operation, rigging, blasting, etc.

Legal Liabilities

- Liability under the Act:
 - Corporations - a fine of not less than \$2,000 and not more than \$250,000
 - Supervisors - a fine of not less than \$500 and not more than \$250,000, or to a term of imprisonment not exceeding 12 months, or to both a fine and imprisonment
 - In addition, the court may impose a fine not exceeding \$25,000 for each day during which the offence continues
 - “Creative Sentencing”
- Note: the negligence of a Supervisor is the negligence of the Employer

Legal Liabilities

Bill C-45

- Criminal Code s.217.1:
 - *Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task*
- Contravention of this duty, with recklessness or wanton disregard for safety, constitutes criminal negligence
- Penalties for criminal negligence:
 - Injury - 10 years in prison
 - Death - life imprisonment

Practical Tips for Due Diligence

- “If it’s not written down, it never happened”
 - Procedures should be in writing
 - Supervisors: take notes!!
- Establishing procedures is half the battle – monitor work, inspect the workplace and review procedure on a consistent basis
- Enforce safety rules – discipline workers for infractions
 - (note: zero tolerance doesn’t necessarily mean automatic discharge – progressive discipline may be appropriate)

Practical Tips

- Training:
 - Written training notes
 - Signed attendance
 - Test workers' comprehension and document
 - Some workers need more coaching than others
 - Monitor workers, particularly young workers to see that training is adopted

Example of Due Diligence

- *R. v. Preston Sand & Gravel*
 - Charged with 5 offences under Ontario OHSA
 - Acquitted; Crown appeals on legal issue
 - Crown ultimately concedes and withdraws charges on basis of Company's Due Diligence Program
- Components of internal responsibility system included:
 - Training programs; monthly meetings; daily inspections of the worksite; employees filled out index cards on a daily basis noting whether any safety concerns were observed

QUESTIONS

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