

**OH&S DUE DILIGENCE FUNDAMENTALS**  
**FOR THE SCAFFOLDING AND ACCESS INDUSTRY**  
**DRAFT ARTICLE FOR**  
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Imagine a worker commencing work for an employer on tube and clamp scaffolding falling ten feet to his death. The supplier erecting the scaffolding failed to secure guardrails. The employer and supplier and their supervisors are charged under OH&S legislation.

Or imagine that workers and supervisors at a construction project under high voltage power lines fail to cover the lines as required before completing scaffold erection. While putting on the top rail using a forklift, the rail contacts power lines and the worker is tragically injured. This site owner is charged as constructor/prime contractor, and the employer and its supervisor are charged under OH&S legislation.

Lastly, imagine a suspended work platform purchased from a supplier being installed improperly and collapsing, fatally injuring multiple workers. The company, its engineers and supervisors, as well as officers and directors are all charged under OH&S legislation.

The facts of these scenarios have been changed slightly from real cases. But all are real and unfortunately typical tragic Canadian cases which resulted in prosecution or penalties to site owners, suppliers, or employers and their representatives.

## **Why Worry?**

The Canadian OH&S environment has, for years, involved astoundingly high corporate and individual penalties and negative publicity for OHS violators. Corporate sentences in the hundreds of thousands of dollars have often been imposed. Supervisors, managers and workers have been fined and jailed.

## **What Can We Do? Due Diligence in Practice**

In every tragic workplace accident, OH&S investigators, prosecutors and courts are involved in assessing the same issues: what went wrong and did the corporation or the individual take the necessary reasonable steps in advance of the tragedy to prevent it? The concept of taking advance reasonable steps and action is well known as the concept of due diligence, and the most common legal defence relied upon in OH&S cases.

Due diligence as a defence to charges is one important perspective from which to understand the concept, but due diligence is much more than a defence. It provides a standard against which employers can judge the quality of their OH&S programs on an

ongoing basis. "Due diligence" or "reasonable care" is a matter discussed in long-established case law, and has been described as a matter of assessing whether "all the care which a reasonable (person) might have been expected to take in all the circumstances to avoid the circumstances which cause the accident". But how do courts examine whether an accused party was "duly diligent" or took "reasonable care". The legal standard is well-established, but what does it mean?

Here are some practical steps (and a few illustrative court comments) to help your business meet these standards to prevent workplace tragedies, OH&S penalties, and damage to your reputation.

### **Knowledge of OHS Legal Requirements**

It is fundamental that no party involved in a workplace tragedy, or charged under OH&S legislation, can argue, "We had no idea the law required that!" Implementation of due diligence in the workplace requires a detailed understanding of all statutory obligations which apply to the particular workplace.

OH&S legislation is structured so that it provides direction on the general duties and responsibilities required of workplace parties, and then specific provisions for workplaces or work activities in Regulations. All general duties in OH&S legislation, all applicable regulatory requirements, all personal protective equipment requirements, all requirements relating to equipment, machinery and devices used at the workplace must be known. Do your supervisors know and have a copy of all current regulatory requirements? Your senior managers? Do they know and apply Standards establishing precautions applicable to the industry and workplace? Would anyone from your company say, after a serious accident, that they did not know the legal requirements and applicable Standards?

### **Detailed Written Policies and Procedures**

Court expectations regarding specific procedures are illustrated by the following case, *R. v. Royal Homes Limited* (January 16, 1987), Ontario Unreported decision, Wellington County, Payne, J. It is not an access-related case, but the principles apply. A truck driver was fatally injured when his load slid off the vehicle. He was underneath the vehicle attempting to adjust a steel cable that secured the load. The employer had no procedures in place to deal with this matter and faced an OH&S prosecution for failing to "take every precaution reasonable in the circumstances". The court convicted, indicating that the employer was obligated to have detailed policies and procedures that should have included:

- routine inspection of every load prior to departure by supervisors;
- a comprehensive company policy for dealing with mechanical emergencies on route;
- an enforced policy of directing employees to refrain from placing themselves under any load; and

- regular and ongoing instruction and reinforcement of safety procedures by supervisors

Detailed policies and procedures must be developed to tell workers how to perform tasks and deal with workplace hazards which have been identified. They should take into account all OH&S obligations, including recognized industry Standards and general obligations to “take every reasonable precaution in the circumstances”. They should be understandable (organized, clear and written using a vocabulary that will be understandable to your workers). They should include detailed procedural instructions and safety “do’s” and “don’ts”. They must be kept up to date. They must be available to those expected to comply with them, i.e. handed out at training or pre-job meetings or safety meetings (not hidden in a back office). Would your procedures meet these standards if a government enforcer attended after a serious workplace accident?

### **Instruction and Training**

Well written and detailed procedures will not provide a due diligence defence if instruction and training in them is not conducted on an ongoing basis. It is not enough to claim that workers are generally well informed or experienced in regard to safety. It will not be sufficient for a corporation or supervisor to hand out policies or reminders from time to time, without more instruction. Any effective system must provide for appropriate instruction and training.

An employer cannot just assume that academically qualified workers (engineering students for example) are properly trained or leave training to a “wise old head” co-worker, who may not have been properly trained themselves. In *R. v. Corporation of the Town of Napanee* (1990) 8 C.O.H.S.C. 121 (Ont. Prov. Ct.), involving a confined space fatality, the court stated that to avoid liability, the corporation and supervisors should have ensured that there was adequate equipment, detailed instruction and appropriate demonstration of proper use of equipment and the proper procedures to follow, and supervisory follow-up to ensure that training was understood and actually being put into practice in the confined space entries.

Hiring supervisors who have experience in the particular activity without taking steps to ensure proper instruction or training in regard to specific hazards will also not be sufficient. In *Helmer Pederson Construction*, (February 1, 1990) Ont. Dist. Ct., Sudbury, S. D. Loukidelis, J. the court stated that “hiring a competent foreman or superintendent is not the end of a company’s responsibility”. Could your organization establish that workers and supervisors have detailed and ongoing training and instruction, and safety reminders, in relevant procedures and requirements to ensure safety in performing all hazardous work tasks? Could you produce records to prove this?

### **Supervision, Monitoring and Enforcement**

An effective system which meets OH&S due diligence standards should also make it clear that supervisors bear an important responsibility to engage in ongoing monitoring to ensure that workers are “doing what they are supposed to do”. While safety is certainly the responsibility of each individual worker, through duties imposed on

workers in the OHS, government enforcers and the courts uniformly expect that supervisors and managers will take the lead in supervising, monitoring, and ensuring safe work practices are followed. Supervisors must not assume that once an instruction is given, it will be complied with. Ongoing monitoring, supervision and follow-up is necessary to ensure compliance.

Lack of follow-up or inquiry by a manager was cited by a court in rejecting a due diligence defence in *R. v. Placer Dome (CLA) Ltd.* (2002), 2002 CarswellOnt 5721 (Ont. Ct. of Justice) affirmed on appeal (2003), 2003 CarswellOnt 3211 (S.C.J.). One employee was killed and another injured when a tractor tire they were inflating blew up. There was no safety equipment used to protect them in the event of a tire blowing up. The manager instructed workers not to work on the equipment because it was for sale "as is." However, the manager did not follow-up or make any inquiry after giving the instruction. He also failed to make any inquiry after receiving written notice in a weekly report that flat tires were being aired up.

The expectation of courts that systems be effective also requires that all elements of the system that has been established, be enforced. In *R. v. Wilson's Truck Lines Limited* (May 22, 1998) Ont. Ct. Justice, Toronto, McNish JP, [1998] O.J. No. 3219, the court, considering whether an employer had taken every reasonable precaution relating to procedures at a loading dock (a worker who was supposed to have a spotter but was working alone was crushed between a vehicle and a loading dock), stated: "The dock supervisor agreed that there were no written warnings, dismissals or suspensions for breach of safety procedures. He also never told any workers if they were on the ground without a spotter, that they would be disciplined."

The court concluded that "there was no discipline or action if any rules were breached ... the supervisor admitted that there was no written censure, no firings, demotions or suspensions. The atmosphere was very "laissez-faire". The company was convicted because its system was not enforced and effective.

Would your organization be able to establish to an enforcer or court (with documentation) that supervisors regularly monitor the job site, or conduct documented job observations to confirm that procedures are understood and followed. Are there pre-job checks of equipment and access structures before work commences? Spot checks? Site Walks? Do you require your supervisors to do them while work is ongoing? Do they document their checks of the site using a checklist? Is there is increased monitoring for high risk activities or after a near miss or report of non-compliance? Lastly but not least, have you ensured that supervisors and managers are trained in effective and proper disciplinary steps? Are they expected to monitor workers and enforce safety procedures as part of supervisory performance expectations?

Attempting to create due diligence steps after an accident has occurred, or OH&S prosecution has been commenced, is not an option. The OH&S due diligence fundamentals discussed above should be used as a guide for taking the necessary practical steps to meet court-developed due diligence standards, and for proper documented health and safety programs.

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