

THE ORIGIN AND DEVELOPMENT OF THE N.S.W. OH&S ACT

OH & S Map for NSW

New OH&S Law draws concepts from both Civil Law and Criminal Law.

All laws or "actions" both civil, criminal are "Formulaic" that is: each action has defined elements that need to be met.

CIVIL

Best example is the law of negligence
A main concept of negligence is the: "**Duty of Care**"
The formulae for negligence is known as the: "**Negligence Calc**"

Elements of the action.

1). A **duty to take reasonable care** owed by the defendant to the plaintiff.

- a) Reasonable foreseeability of risk of the kind of injury sustained
- b) A **relationship** of 'proximity' between the two people in connection with:
 - i. The type of act or omission
 - ii. The injury sustained
- c) **Absence of any exclusion** of liability by statute, contract or other common law principle

2). A **BREACH** of that duty of care by behaviour inconsistent with the risk foreseeable; (failure to meet the **Standard of Care**).

3). Injury actually **CAUSED** by the defendants' negligence, which was reasonably foreseeable and not too remote. (CAUSATION)

The Standard of Care

Once a court finds that the defendant owes a duty of care to the plaintiff the questions becomes 'what is the **Standard** of care'?

The **test** is that of the **reasonable person**.

"The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk" (Deane J in *Hackshaw v Shaw* (1984) 1 55CLR614)

CRIMINAL

Law has 2 main sources: statutes and common law.
Criminal offences have 2 basic elements: Actus Reus and Mens Rea.

ACTUS REUS refers to the physical act or omission, the circumstances in which it takes place and any consequences-
THE ACT.

MENS REA the guilty mind, an evil intention: - a knowledge of the wrongfulness of the act - the INTENT or 'INTENT'.

It is the need to prove 'intent' beyond reasonable doubt that makes the statement of confession so important in criminal cases. (Conversely it is the absence of the need to prove intent in OH&S cases that changes the nature of statements and records of interviews).

Examples of the elements of criminal offences

MURDER section 18 Crimes Act 1900.

The accused:

- 1). Did an act; or
- 2). Omitted to do a thing;
- 3). Which caused the death charged (of a human being) and
- 4). Such act was done or such thing was omitted to be done: -
 - a) With reckless indifference to human life; or
 - b) With intent to kill or inflict grievous bodily harm upon some person; or
 - c) In an attempt to commit, or during or immediately after the commission of, by the accused, or some accomplice with the accused, a crime punishable by penal servitude for life or 25 years.

Note: the mens rea does not have to line up exactly with the actus reus. Hence the concept of: **Sufficient intent**.

Definitions and Concepts

'Balance of Probabilities' - the "Civil"

Standard of Proof

(The lesser standard).

'Beyond reasonable doubt' the "Criminal"

Standard of Proof

Burden of proof in Criminal Law

The general rule is that the defendant cannot be convicted of the offence charged unless the prosecution has proven the commission of the offence **charged** beyond reasonable doubt.

Note: **each element** of the offence charged must be proved beyond reasonable doubt.

If the prosecution (or Plaintiff in civil cases) fails to discharge the burden for each element then the defendant "has no case to answer".

Prima Facie Case: a case which there is some evidence in support of the charge and which will stand unless it is displaced. There needs to be evidence that can be led as proof to **each** element of the offence charged, otherwise there is no case to answer. Part of the defendant's case would be to displace the evidence presented as proof to the elements.

New OH&S Law

The new OH&S Act is a "Criminal Code" that can be classified as "Duty of Care" Legislation. It draws concepts from both Civil Law and Criminal Law and is similar to but different from both. It is important to know each area of the law. The similarities and differences – to be able to operate effectively. The main question is "what do I do next" to answer that you need to know where you are.

- Like civil and criminal OH&S actions and offences are formulaic and have elements:
- Like civil the action is based upon the existence of a relationship – employer/employee or employer/non-employee engaged in the undertaking.
- Like civil the relationship results in a "duty of care" being applied. Employer to employee and contractor (for want of a better word).
- In civil there has to be actual injury or loss – in OH&S it is the **risk** to health and safety that is actionable.
- Like civil the (injury/risk of injury) must have been **caused** by the act or omission of the person who owes the duty of care.
- Like civil the extent of the duty of care is defined by a **standard of care**.
- In civil the standard of care is the reasonable man's response to the foreseeable risk.
- In OH&S the standard of care is strict or absolute and the risk does not have to be foreseeable – do not despair however as foreseeability does have a place in defence.
- Like civil the burden of proof of the case lies with the person bringing the case forward (civil/plaintiff) (OH&S/prosecutor).
- In civil the standard of proof that the plaintiff has to meet is the "balance of probabilities" (civil standard).
- In OH&S the standard of proof that the prosecutor has to meet is "beyond reasonable doubt" (criminal standard).
- In criminal the action is based upon two basic elements – **actus reus and mens rea** – the act and the intent.
- In OH&S the action is based in act or omission – the act – the prosecution does not have to prove mens rea or intent.
 - The absence of need to prove intent – at least to the point of the **Prima Facie Case** is a big distinguishing feature between OH&S and "criminal" law.
 - The absence of the need to prove intent means that the OH&S offences are of a strict or absolute nature.

A Prima Facie Case in OH&S does not have to prove requisite intent on the part of the accused or that the risk (to health or safety) was foreseeable. This is the big distinguishing feature of OH&S law in NSW.

That does not mean that intent and foreseeability do not or cannot feature in the case. It just means that they have to be dealt with in defence. Note: the defences in an OH&S action are also formulaic.

In this sense, once the prosecutor has lead evidence to "The Act" and established a Prima Facie Case the burden of proof shifts to the defendant to prove that the requisite 'intent' was missing. Foreseeability will or may also get a run. The standard of proof that the defendant must discharge is the civil standard or "on balance of probabilities".

(See News Flash)

Comment on Incident Response

It can be seen that the investigative response to an accident has several identifiable parts.

The investigator / prosecutor will firstly construct a Prima Facie Case and then proceed to negate defences.

But what of the potential defendants response and managers that are drawn in or 'joined' due diligence requires that the company undertake an investigation to determine changes needed to risk controls so that the enterprise can proceed.

The problem is that this may then be used in evidence against the company and managers – this is where legal professional privilege gets a run – fair enough but do not expect the resultant control changes to be kept under wraps. Also it is a bit of a race – an experienced inspector may see the need for a company investigation for new method and in that way he may be able to take hold of it.

The big issue is the form of the company's investigation! The overwhelming tendency is for the company to simply investigate in the same way that the prosecutor would. It happens all the time and it is not in the interests of the company to do this.

The company's investigation is aimed to:-
1). Determine new safe system of work
2). Assemble brief to negate the prosecutor's likely Prima Facie Case for – the company and the individuals (these will be different)
3). Assemble brief for use when the burden shifts to the company and individuals in defence. Remember it is formulaic to Section 26 and 28 of the OH&S ACT

Those are the **valid** defences.

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OFFENCES AND DEFENCES

Until now we have discussed the OH&S defendant as a single entity "the employer" which will usually be a company or corporation. Section 26 however joins in directors and persons concerned in the management of the corporation as defendants.

Note: the liability of a director or manager **MUST** be a subset of the liability of the company, i.e. Equal to or less.

Hence there are two sets of formulaic defences.

1). Employer / general – Section 28

Defendant proves:

- a) it was not reasonably practicable for the person to comply with the provision or
- b) The commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

Note: (corporations are persons at law)

2). Directors / managers – Section 26

Taken to have contravened same section unless.

- a) He was not in a position to influence the conduct of the corporation in relation to its contravention of the provision. (The Homer Simpson defence).
- b) He, being in such a position, used all due diligence to prevent the contravention by the corporation.

- Remember the company defence and the individual manager's defence is likely to be different.
- If you are a manager you need to assemble a brief that demonstrates 26 a) and b) as it relates to you.
- This then will influence the content of your written instructions to the instructing solicitor (company provided or not) handling your defence and the documents that you have that you will provide to him and which will be referred to in your instructions.
- This means that you can and need to be active in your own defence. You have to keep your wits about you, but it is to a formula – you must use this formula to guide your efforts – other wise you will be stumbling.
- Remember: the investigations are powerful – you cannot bluff or second guess your way through.

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Key questions that the prosecutor will be trying to answer.

- 1). Whether there existed, at the time of the accident, a system of work
- 2). Was it a safe system of work?
- 3). If not why not? Generally – unsafe acts and unsafe conditions
- 4). Whether the risk, giving rise to the injury, was
 - known
 - foreseeable
- 5). How is the risk defined?
- 6). What are the known controls?
 - Whether there are steps, which could have reasonably been implemented, prior to the accident that would have eliminated or controlled the risk?

- If it was an unsafe system he will be looking for a safe alternative system. He will be looking to show that it was available at the time.
- He will be looking to place it as "close" to the mine as possible.
- He will be looking to show that it was known to the mine or ought to have been known to the mine or that a lack of knowledge can be tied to statutory omission, eg. No or incorrect risk assessment.

Do not think that a prosecutor will stop his case or evidence at the Prima Facie Case stage: he will aim to lead evidence that negates the above defences.

It is here that the concept of the "safe alternative system" emerges. The prosecutor will try to demonstrate that the risk could have been controlled by adopting alternative method – that was or should have been available.

For example if the mine has a procedure that is not followed then the procedure will be put forward as a safe alternative to negate a due diligence defence. Failure to have a procedure in the first place is of course a statutory omission (going to requisite standard of care).

Reasonably practicable naturally draws in foreseeability. A prosecutor will seek to demonstrate that the risk was foreseeable by showing where it was foreseen: - Risk Assessment, Regulation, Standards, Safety Alerts and the like. An effort will be made to tie these to the actual knowledge of the corporation, the directors and the managers. Of course, like procedures, it is a statutory omission to not have a risk assessment.

It is important to note that:-
If pleading not guilty or seeking mitigation at sentence then an active defence with admissible evidence is needed AND the defence of the individual director or manager will almost invariably be different to that of the company – in some regard – so you will have to do some of your own homework and issue your own instructions (in writing) to the instructing solicitors – whether they are provided by your company or not.

See across for more on constructing defences.

THE TWO OH & S OFFENCES THAT ARE MOST LIKELY TO BE USED AGAINST YOU

SECTION 8 (1)

The elements of a charge under this that a prosecutor has to prove beyond reasonable doubt are:-

- 1). That the defendant was an employer, at the time of the alleged breach
- 2). That an employee's health or safety was exposed to risk
- 3). That the employee was at work at the time
- 4). That there was a causal nexus between the defendant's breach (or statutory duty) and the risk to the employee's safety

- The prosecution has to lead evidence to each of these. Those elements – along with the defences – define the scope and nature of the investigation. Hopefully they explain it as well or at least start to.
- Hopefully the similarity to the negligence call is now apparent.
- The first element establishes the relationship that assigns the duty of care.
- The duty only extends to at work this is geographic and temporal.
- The duty is to prevent exposure of health and safety to risk – absolute.
- For an offence to occur there has to be causation:
- The exposure to risk must have been caused by an act or omission by the employer.

Once a duty of care is established we need to define the standard of care this has no discrete boundaries.

SECTION 8 (2)

- 1). That the defendant was an employer
- 2). That a non-employee was exposed to risk to his health or safety
- 3). That the risks arose from the defendant's conduct of the undertaking
- 4). That the non-employee was at the defendant's place of work, and
- 5). That there was a causal nexus between the defendant's breach and the risk to the non-employee's safety

(See News Flash)

NEWS FLASH!!
Amendments up date the elements: Reasonably Practicable is to be incorporated into prima facie case.

Due diligence for directors – Good corporate governance

- Are you familiar with OH& S policy– objectives and commitments?
- How are the objectives measured?
- What inquiries have you made to ensure OHS Policy is compliant?
- How have you ensured that it has been communicated to workers?
- When was the policy last reviewed? – Who signed it?
- Do you understand what a systematic risk management approach to ALL foreseeable (and known) workplace hazards is?
- Do you know the results of your last - hazard ID exercise?
 - Risk assessment?
- What systems do you have in place to ensure that appropriate control measures have been implemented to combat the hazards identified?
- Can you explain why job safety analysis has not been done on every task?
- Is there a safety management plan?
- Do you have responsibilities under it?
- Can you show that you have discharged those responsibilities?
- Have you provided the necessary resources?
- Have you documented the reasons for refusal to provide resources?
- Are the responsibilities of "managers" defined on an organisational chart?
- What is your role in relation to managing contractors?
- Have you consulted with employees to identify training?
- Do you know where competencies are kept?
- Do you know if your employees are competent? Can you prove it?
- Is the training relevant to responsibilities, hazards and risks?
- Is there employee involvement in development and implementation of policy / procedures to identify and control hazards and risks?
- Do you know who is on the OHS Committee when did it last sit?
- What OHS risks face the company?
- Are you sure problem areas have been identified and are being addressed?
- Can you explain the co– process to identify hazards, assess risks, eliminate or control risks, review procedures and reconcile risks with the hierarchy of controls?
- Are you confident that your employees can respond to emergency? Are the emergency procedures documented?
- Do you monitor OHS compliance?
- Do you involve yourself in implementing remedial measures?
- Do you involve yourself in implementing remedial measures?
- Do your investigations step beyond immediate causes into system failure? Have corrective actions been taken?
- Do you run audits – do you read the results?

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DEVELOPING YOUR OWN STANDARD OF CARE

The OH&S Standard of Care – An Absence of Risk to Health and Safety

Prior to the advent of workers compensation claims by an injured employee on an employer defined a civil standard of care for employer / employee. This was stylised in the 1950's by the Nertney Wheel.



Because of its common law origins this is still a valid standard of care provided you know where to find the cases.

The Nertney Wheel has been updated under statute by the OH&S act, regs and subordinate legislation, in my investigation model it have been given the name:

THE TEN HURDLES OF STANDARD OF CARE

- 1). Consultation
- 2). Hazard identification and hierarchy of controls
- 3). Risk Assessment (probability x consequence)
- 4). Risk management including: procedures – standards of engineering practice (SEP).
- 5). Information
- 6). Instruction and training
- 7). Supervision
- 8). Monitoring
- 9). Review
- 10). Revision / rectification

The ten hurdles is a statutory standard of care.

- The ten hurdles is a statutory standard of care.
- Each of these has to be met to discharge the duty of care.
- Failure to meet any one of these could be an omission sufficient to establish causation (the test involving relevance and casual nexus).
- The ten hurdles is a path or series of stepping stones that must be walked along – you should not step across the path.
- Risk management procedures and SEP's are usually the entry point of most investigations - (Supervision and Risk Management are where most critical failures are found).
- If procedures are found and or SEP's are found then these indicate compliance with the other hurdles.
- If procedures and sep's are not found on the task where the risk has been found then the investigation will broaden out into the other hurdles.
- If the "safe system of work" fails at the procedure/SEP hurdle those most commonly it will collapse completely on consultation, hazard ID, controls and risk assessment.
- In almost every incident it has been found that if any available procedure, no matter how badly written, had been followed an adverse event would have been averted.
- It cannot be stressed strongly enough the importance for managers and engineers to populate and occupy the procedure/SEP stepping stone.
- Beware the mini risk assessment: some operators incorporate RA into the procedure. The OH&S regs require the results of RA's to be adopted by the employer. This means an authorised representative and infers a review process. Also it is commonly found that persons engaged on the job are usually incompetent in at least one aspect of the RA. Procedures that involve a mini RA usually fall over. Remember RA then procedure it is best not to mix the two – one derives from the other.

EXPANDING THE TEN HURDLES OF STANDARD OF CARE

- Before duty of care legislation the standard of care was largely defined by prescriptive regulations and codes / guidelines.
- Elements of prescriptive regulation still exist and these constitute mandatory standards. Codes and standards can be called up by regulation in which cause they become mandatory.
- There are many sources of information that can help define the standard of care for any circumstance. Almost invariably these all go to one of the ten hurdles.
- If the ten hurdles are the skeleton then prescriptive regs, codes, standards, guidelines, safety alerts, reports on accidents, inquests and enquiries are the organs muscles and blood.

THE KEY WORDS IN FLESHING OUT THE TEN HURDLES ARE: KNOWN RISK, KNOWN CONTROL

- Due diligence requires the application of known risks to known controls. Statistical evaluation becomes relevant here: common killers must be addressed.

* Key Words – known risk / known control

DEAL WITH WHAT IS KNOWN

- Hazard identification involves research: usually all aspects have already been dealt with somewhere so it is collection and sorting.
- Classification and isolation of unwanted energy is important.
- Gravity is the biggest killer.
- In strict NSW OH&S the risk assessment term is narrower than that presented in some standards and guidelines and varies from that put forward by training originating outside NSW. See MDG 1010 & 1014.

The great bulk of material on or relating to Occupational Health and Safety

There is that much stuff out there that it makes your head spin. The end result has been a lot of confusion but worse still there has been a lot of misdirected effort.

When confronted with or sorting through what seems and endless stream of material you need to mentally classify the material.

For example:

Q1 is this real? – it is only real if it goes to known risk / known control

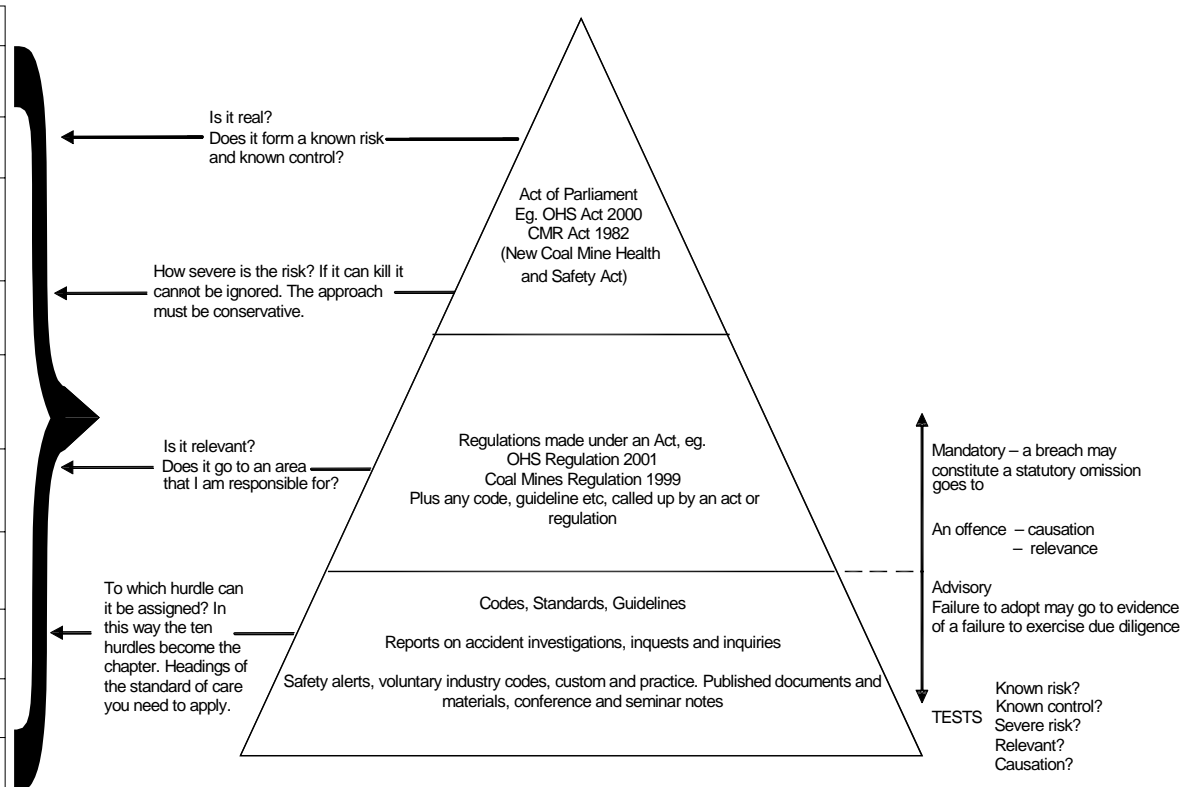
Q2 is this relevant to me? – does it go to an area where I have responsibility?

Q3 if it is real and if it is relevant – to which hurdle can it be assigned?

By using such an approach you should be able to extract the known risks and known controls that are relevant to you and fit them into a ten hurdle model that suits you.

The Aim is to define the standard of care that you have to apply

Legislative Support	Key Questions	Hurdle
OHS Act 2000 sg 13 -19 OHS Reg 2001 CL 3.	What do workers think about safety?	1). Consultation
Ohs Reg 2001 reg 9 & reg 5	What are the dangers and possible dangers? What are the known risks and known controls?	2). Hazard identification and hierarchy of controls
OHS Reg 2001 reg 10 RA to be authorised by the employer	How serious are the risks to workers which arise from the dangers? What is the probability? What are the consequences?	3). Risk Assessment
OHS Reg 2001 reg 11 CMRA and Regs	What can be done to eliminate or control the risks?	4). Risk Management Procedure SWP's Standards of engineering practice—SEP's
OHS Act 2000 3 8(i)(d), 11(i)(b); OHS Reg 2001 regs 13,16	What do workers need to know to apply the controls to be safe? Goes to competency	5). Information provision
OHS Act 2000 5 8(i)(d) OHS Reg 2001 reg 13	How can I train workers to identify and deal with risks, and to apply controls? Goes to competency	6). Instruction and training
OHS Act 2000 5 8(i)(d) OHS Reg 2001 reg 14 CMRA AND Regs	What management structure is in place to see that safe procedures are being followed and that standards are being applied?	7). Supervision
Implied OHS Act 2000 CMRA and Reg Australian Standards	Have I checked to see that my risk management is working?	8). Monitoring (performance WRT procedure and Sep's)
OHS Reg 2001 reg 12	Is my risk management plan still valid in light of changing circumstances and conditions? Do I need to change things?	9). Review
OHS Reg 2001 reg 12	Have I changed / improved what I need to change or improve?	10). Revise



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