

Exercising your 'DUTY OF CARE'

It is long accepted that every teacher owes a duty of care towards every student under their supervision. Teachers are trained professionals holding themselves out as being capable of caring for a large number of young people in a wide variety of circumstances and for this reason, teachers must exercise reasonable skill. Common law principles and terms of employment impose a positive duty on teachers to do what is '**reasonably practicable**' to protect their students from '**foreseeable risks**'. This can cause or prevent drastic legal consequences.

'**Reasonably practicable**' means that the requirements of the law vary with the degree of risk in a particular activity or environment which must be balanced against the time, trouble and cost of taking measures to control the risk. It allows the duty holder to choose the most efficient means for controlling a particular risk from the range of feasible possibilities preferably in accordance with the 'hierarchy of control'.

The **OnGuard ACEPro Safety Training Program** provides some security to technology teachers dealing with incidents (reportable accidents) in their school workshops and workrooms.

What is your 'Duty of Care'

It is to be noted that a teacher's '**duty of care**' is a higher standard than that of a reasonable person. In the workplace, '**due diligence**' means taking every precaution reasonable in the circumstances to protect the health, safety and welfare of all persons. Evidence of due diligence is one of the two defences available to a person, charged with an offence under an *Occupational Health and Safety Act*.

Due diligence requires that you address identified risks in your workplace through a properly functioning and documented health and safety system. The more harmful or serious are the potential dangers, the more you must guard against them to prevent workplace injuries and illnesses. Whether an individual acted diligently, depends on whether he/she took every precaution reasonable in the circumstance for that particular case. What might constitute duly diligent behaviour in one case may not hold true in another. This is because each situation and each workplace is unique and needs to be assessed on an individual basis.

There are a number of general measures that all employers and workplace supervisors can and should implement in an attempt to comply with the OHS Act and to demonstrate due diligence. These include:

- carrying out all duties under the Act and ensuring that your company complies with the Act and associated legislation;
- setting up a well-documented system for identifying, reporting and responding to all actual and potential hazards in the workplace;
- establishing safe practices, procedures and controls that are specific to the hazards in your workplace and that either meet or exceed the requirements set out in the Act;
- providing instruction and training on an on-going basis to all employees, including supervisors and workers; (and visitors)
- communicating regularly with employees about foreseeable health and safety hazards;
- allocating adequate time and resources for the health and safety program to be established and followed by all parties in the workplace; including the occupational health and safety committee;
- monitoring and auditing of your program on a regular basis.

To prove due diligence, employers (directors, managers and supervisors) must be able to demonstrate that not only was sufficient health and safety instruction and training provided, but that recipients understood the training and successfully applied it to their jobs.

The duty holder must show that it was not reasonably practicable to do more than what was done or that they have taken 'reasonable precautions and exercised due diligence'.

In situations where an incident (reportable accident) occurs and a technology (workshop) teacher is involved, relevant state workplace safety authorities will review the school's safety training program. This involves analysing any record keeping procedures such as registers, to see if, in fact, teachers and students are trained, and how the students/teachers are trained in workplace safety.

In most States, it is mandatory to keep a register of workplace safety training, which is provided for by the LMS (learning management system) of the **OnGuard ACEPro Safety Training Program**.

In order for a technology teacher to be held liable for an incident (reportable accident) in his/her school workshop, it must be proven that they failed to exercise a proper standard of care for a teacher in similar circumstances.

After the reportable incident

During the relevant state workplace safety authority's investigation, it will become apparent if the technology teacher was suitably trained, when the teacher was last trained (currency) or their training was updated or refreshed. It will also uncover how that teacher was trained. (in-house, formal, informal, on the job)

The result of this review is two fold. First, the school may be found liable through the doctrine of vicarious liability if they have not implemented, maintained and enforced adequate safety training programs for their staff.

Second, the teacher may be held liable as either: they will not have had adequate safety training, or they have had adequate training, but failed to exercise reasonable care when putting their training into practice.

Any injury or damage suffered by a student as a result of an incident (reportable accident) can lead a plaintiff (usually the injured student) to bring a common law action against the school, the workshop teacher, or both.

A plaintiff can utilise a workplace safety authority's review that deems either the school or the teacher 'negligent'

What are acts of 'negligence'?

They are situations in which injury is not deliberate, **but it is foreseeable**. Usually, the 'negligent person' will have the regulatory authority investigating the accident, file statutory or criminal charges. In addition, the injured party may seek financial compensation (i.e. sue in common law). If due process has not been followed (i.e. a documented risk assessment procedure, appropriate training and recording processes), then these events will involve lengthy, extremely stressful court processes for all concerned.

The duty of care requires you to consider the consequences of your acts and omissions and to ensure that those acts and/or omissions do not give rise to a foreseeable risk of injury to any other person.

What is an OHS prosecution?

You should assume that a prosecution will follow all but minor workplace accidents. Although a relevant state workplace safety authority's inspector's investigation generally occurs shortly after the accident, a formal prosecution may be commenced at any time up to two years later. This can create obvious problems for an employer. A relevant state workplace safety authority's prosecutor commences an OHS prosecution by serving the employer with an "information and summons". The "information" specifies the basis for the charge, including a full description of the alleged offence.

Where an employer enters a plea of guilty, the matter is set down for a short "plea in mitigation". The purpose of this hearing is for the employer to put before the court all matters relevant to the assessment of penalty. These matters will generally include:

- the employer's past OHS record in the nature and gravity of the offence (including the foreseeability of the risk)
- the degree of culpability of the employer
- remedial actions the employer has taken
- the employer's general attitude towards OHS (both before and since the accident)
- the severity of the accident and injuries on the employer's contrition
- steps the employer has taken to assist injured employee(s)
- the employer's cooperation with WorkCover
- the employer's decision to enter a plea of guilty at an early stage.

A person (including students) who suffers an injury at a workplace is entitled to statutory benefits under a 'no fault' system. This means they are entitled to statutory benefits if their injury was caused by work (or activities at the workplace), irrespective of whether the employer was at fault for the injury. These benefits may include hospital and medical expenses, lost wages, or a lump sum compensation payment for permanent impairment.

What is a common law claim?

A person (student) who suffers an injury at a workplace because the employer is at fault may sue their employer through the common law system. This person usually has three years from the date of their injury to lodge a common law claim. For an injured person to be successful in their common law claim, they must prove that the employer is legally liable for their injuries. Usually they will argue that the employer has been negligent, or breached workplace health and safety requirements, or breached the agreement that the employer will keep the injured worker safe at work.

The basic principle in negligence cases is that liability to pay damages will arise where three elements are established by the person seeking damages, namely:

- that there is a duty of care in the situation under consideration;
- that there has been a breach of duty, that is, a failure to take care regarded by the law as reasonable in the circumstances; and
- that damage or injury has been caused by or contributed to by that breach.

These three basic principles of negligence must apply before a claim for damages can be sustained.

OnGuard Safety Training Pty Ltd has recognised the importance of safety training for students in school workshops and specific workshop equipment training for teachers. However, they also recognise that their training programs are merely tools for adequately trained and qualified teachers to utilise in their own delivery of course content.

So what happens after a reportable incident?

After a 'reportable incident' (accident), the relevant state workplace safety authority's review will uncover any legislative non-compliance, and this may lead to legal problems for the employer and its supervisors (teachers).

A subsequent step will include a plea in mitigation, evidence is usually given in written form by affidavit. This is a sworn document detailing the evidence of a person and attaching any documentary evidence relevant to that person's evidence. Affidavits are prepared in advance and should contain evidence of all the matters relevant to the plea in mitigation.

This generally includes:

- the factual circumstances surrounding the accident
- evidence of past training and supervision of the injured person and others
- past safety audits relevant to the accident
- details of any systems of work designed to prevent the accident from occurring
- the existence and content of an OHS policy
- the presence of an OHS committee and the extent of its proactive role in safety and management support
- the size and nature of the employer's operation, including the number of employees.

Regiments (rigid discipline and systemisation) also provide a positive defence to any action brought by a plaintiff if schools and teachers are able to demonstrate their training and ability to care for the safety of their students to the standard of a reasonable teacher.

Schools and teachers are well advised to comply with regiments instilled by the use of the **OnGuard ACEPro Safety Training Program**. To date, our Program has assisted the outcome of FIVE workplace accident prosecutions. (June 2009)

Indeed, workplace safety training must be adequately delivered and must be ongoing – by qualified and trained workshop teachers. The primary benefit of such training is to effectively prevent and respond to workshop accidents in schools.

The OnGuard ACEPro Safety Training Program also provides a positive defence to plaintiff common law actions. Our training program is not unlike an 'insurance policy' for technology teachers.

Workshop accidents in schools are unfortunate. Young students particularly will be inexperienced, while older workshop experienced students will exhibit unwarranted risk taking behaviours. Technology teachers must be aware of this fact. Every incident (reportable accident) presents different circumstances for schools and teachers to address.

Unfortunately, every action taken by a workshop teacher could potentially influence their future career and livelihood especially in the event of a reportable incident (accident).

OnGuard Safety Training Pty Ltd seeks to provide technology teachers with the resources and tools to adequately instruct and train their students while positively influencing their future careers through nationally recognised and awarded workplace safety training.

Failure to comply with workplace safety training regiments, including mandatory record keeping and registration, may lead to legal implications such as the term 'negligence'.

If this unfortunately becomes the case, and as a teacher you are charged as 'negligent', the plaintiff action (your injured student) will surely follow through the common law courts.

Both the school and its workshop teachers will have to rely on their safety training policy, its safety training program, enforcement of the safety training procedure, and the overall ability of teachers to exercise their standard of care.

The **OnGuard ACEPro Safety Training Program** can be a career saving tool for technology teachers in the event of a serious reportable incident (accident), and is certainly a precautionary mechanism for secondary schools generally.