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## An Introduction to Tort Law, Due Diligence, Duty of Care & Subsequent Liability

The principal reason for developing and implementing a Safety Management System (SMS) (aka a Safety Case - for discussion purpose), is to ensure that the people working within - and those that are associated with a project/service - are kept safe and 'free from harm'. This is especially true with regard to 'due diligence' and 'duty of care' under 'tort law'.

Many variations exist with regard to interpretation and meaning of these terms; therefore, legal advice should always be sought for a formal definition. However, the following meanings are considered appropriate in the context of this discussion paper.

**Due Diligence:** OH&S Legislation – Canada.

Due diligence is the level of judgement, care, prudence, determination and activity that a person would reasonably be expected to do under particular circumstances.

Applied to OH&S, due diligence means that an employer shall take all reasonable precautions, under the particular circumstances, to prevent injuries or accidents in the workplace. This duty also applies to situations that are not addressed elsewhere in the occupational health and safety legislation. For example: to exercise due diligence within the confines of OH&S, an employer must implement a plan to identify possible workplace hazards and carry out the appropriate corrective action to prevent accidents or injuries arising from these hazards.

However, in aviation (excluding Marine Law when working on water i.e. docks and aircraft on pontoon (a vessel)) under the Aeronautics Act (ANA) and the Canadian Aviation Regulations (CAR) due diligence also means:

A defence, which may be raised when someone is accused of doing something negligently or, in respect of aviation matters, if someone is accused of having contravened either a provision of the Aeronautics Act or a provision of the Regulations.

Under the Aeronautics Act - s.8.5 - **No person shall be found to have contravened a provision of this Part or of any regulation or order made under this Part if the person exercised all due diligence to prevent the contravention.**

The dictionary definition of due diligence (Black's Law Dictionary) is as follows:

*Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.*

Whether or not a person has exercised an appropriate level of care, in order to successfully raise the due diligence defence, will always be a matter of fact (evidence) and will depend on the circumstances of the situation.

Why does due diligence have special significance?

Due diligence is important as a legal defence for a person charged under the OH&S legislation or the ANA / CARs. If charged, a defendant may be found 'not guilty' if he or she can prove that due diligence was exercised. (Note the similarity to 8.5 of the ANA.) In other words, the defendant (Document Holder) must be able to prove that all precautions, reasonable under the circumstances, were taken to protect the health and safety of workers.

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**Duty of Care.** Duhaime Law Dictionary:

*An obligation to conform to a certain standard of conduct for the protection of another against an unreasonable risk of harm.*

**Tort Law.** Duhaime Law Dictionary:

*The body of the law which allows an injured person to obtain compensation from the person who caused the injury.*

or:

*The breach of a duty, primarily fixed by law, towards persons generally which is redressible by an action for unliquidated damages.*

Tort is derived from the Latin word '*tortus*', which meant '*wrong*'. Under French law, *tort* also means a '*wrong*' but in civil law, what is generally defined by common law as '*torts*', it is recognized as a civil liability and called a '*delict*'.

One substantial difference between a *tort* and a *delict* law is that the former is a product of common law, albeit now somewhat modified by statute, whereas the *delict*, as with most things in civil law, is purely a creature of statute.

## Defence in Law:

If the worst happens and there is a serious incident, then it is likely that litigation will follow, especially in today's world. Consequently, it is becoming increasingly common for Civil Cases to pursue management in liability (primarily promoted by insurance companies), resulting in hefty fines and even imprisonment.

A well-constructed and maintained Safety Case provides the basis of an excellent defence both for an individual and the Enterprise. By formally documenting processes and the results of actions and events, even if an incident has occurred, it would normally be possible to demonstrate that management or other parties had given serious consideration (*due diligence*) to understanding the risks that their system(s) posed, and that an appropriate (considered) safety mitigations were implemented and operable.

For example under 'Tort Law, a '*duty of care*' is a legal obligation which is imposed on an individual requiring adherence to a standard of '*reasonable care*' while performing any acts that could foreseeably harm others. It is the first element that must be established to proceed with an action in negligence. The claimant must be able to demonstrate a certain *duty of care* imposed by law, which the defendant has breached. In turn, breaching a duty may subject an individual to further liability.

The duty of care may also be imposed by operation of law between individuals with no current or direct relationship (familial or contractual or otherwise), which may eventually become related in some manner, as defined by common law (meaning case law). Duty of care therefore, may also be considered a formalization of the social contract, with the implicit responsibilities held by individuals towards others within a society. Subsequently, it is not a requirement that a duty of care be defined by law, though it may often develop through the jurisprudence of common law.

The above reasoning explains why Safety Cases are often designed and organized similar to that of a legal defence. The concept being that by understanding what has to be met in the worst instance will help prepare and mitigate events before they occur.

Sometimes it is an uphill struggle to enlightening or persuade others over the importance of Human Factors, ergonomics in the workplace, or even a Safety Management System, let alone a Quality Management Programme and the subsequent consequences of inaction. However, there are a lot of minor improvements that can be applied to 'creep' a culture and attitude to one more befitting this highly critical and legally defined industry, without a lot of additional work and cost. For example, HF Awareness Training (HFAT) is one of several places to start, since training should always be a part of any Change Management Program under a SMS, and training is another means (but not the only means) of proving a certain *duty of care*.

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On occasion a 'weak-link' will be identified via an audit, review process or report. Often the only prevention to a disaster is a matter of time, i.e. a case of "*when, not if*". In such an eventuality, it is critical to formally prove (any) 'due diligence' and/or 'duty of care' (unintentional tort) action, should (when) the unthinkable occur.

Given the aforementioned, it is useful to be familiar with the application of Bill C-45 as it has teeth and it will bit you hard. As a note of point, Bill C-45 is in addition to anything that Transport Canada may prosecute you for under a contravention. It is worth reviewing (in layman terms) the effect of the Bill.

Bill C-45 is federal legislation that amended the Canadian Criminal Code and became law on March 31, 2004. The Bill established new legal duties for workplace health and safety, and imposed serious penalties for violations that result in injuries or death. The Bill provided new rules for attributing criminal liability to organizations, including corporations, their representatives and those who direct the work of others.

In determining who is sufficiently important within an organization to be considered its directing mind, Bill C-45 refers to a "Senior Officer" (SO), which is a more familiar expression than "directing mind". The definition of SO includes everyone who has an important role in:

- ➔ Setting policy; or,
- ➔ Managing an important part of the organization's activities. (Pilot, Engineer, Administration, AE, CEO – in effect, just about everyone.)

The definition therefore focuses on the function of the individual, rather than on any particular title. For example, the Executive Assistant (EA) to the President or Chief Executive Officer(s) (CEO) could have a great deal of authority and effectively speak for that person in one organization and yet have only minor administrative functions, such as scheduling the president's meetings within another. In addition, Bill C-45 makes it clear that the Directors, the CEO and the Chief Financial Officer (CFO) of a corporation are, by virtue of the position they hold, automatically "Senior Officers".

In short, a corporation charged with an offence cannot argue that the individuals occupying these positions actually had no real role in setting policy or managing the organization and therefore were not SOs and subsequently liable.

**"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."**

Bill C-45 also added Sections 22.1 and 22.2 to the Criminal Code imposing criminal liability on organizations and its representatives for negligence (22.1) and other offences (22.2).

<http://www.ccohs.ca/oshanswers/legisl/billc45.html>

What do the CARs say?

CAR 103.12 For the purposes of paragraphs 6.71(1)(c) and 7.1(1)(c) of the Act, 'Principal' means

- (a) in respect of an air operator,
  - (i) any person who is employed or contracted by the air operator on a full- or part-time basis as the operations manager, the chief pilot or the person responsible for the maintenance control system, or any person who occupies an equivalent position,
  - (ii) any person who exercises control over the air operator as an owner, and,
  - (iii) the accountable executive appointed by the air operator under section 106.02;
- (b) in respect of a private operator,
  - (i) any person who is employed or contracted by the private operator on a full- or part-time basis as the operations manager, maintenance manager or chief pilot, or any person who occupies an equivalent position, and,

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- (ii) any person who exercises control over the private operator as an owner;
- (c) in respect of an approved maintenance organization,
  - (i) any person who is employed or contracted by the approved maintenance organization on a full- or part-time basis as the person responsible for maintenance,
  - (ii) any person who exercises control over the approved maintenance organization as an owner; and,
  - (iii) the accountable executive appointed by the approved maintenance organization under section 106.02;
- (d) in respect of an approved training organization,
  - (i) any person who is responsible for the quality control system, or any person who occupies an equivalent position, and
  - (ii) any person who exercises control over the approved training organization as an owner;
- (e) in respect of a flight training unit,
  - (i) the chief flight instructor,
  - (ii) any person who is employed or contracted by the flight training unit on a full- or part-time basis as the person responsible for the maintenance control system,
  - (iii) any person who exercises control over the flight training unit as an owner, and
  - (iv) the accountable executive appointed by the flight training unit under section 106.02;
- (f) in respect of a manufacturer of aeronautical products,
  - (i) any person who is responsible for the quality control system, or any person who occupies an equivalent position, and
  - (ii) any person who exercises control over the manufacturer as an owner;
- (g) in respect of a distributor of aeronautical products,
  - (i) any person who is responsible for the product control system, or any person who occupies an equivalent position, and
  - (ii) any person who exercises control over the distributor as an owner;
- (h) in respect of an airport,
  - (i) any person who is employed or contracted by its operator on a full- or part-time basis as the airport manager, or any person who occupies an equivalent position,
  - (ii) any person who exercises control over the airport as an owner, and
  - (iii) the accountable executive appointed by its operator under paragraph 106.02(1)(a); and
- (i) in respect of a provider of air traffic services,
  - (i) any person who is employed or contracted by the provider of air traffic services on a full- or part-time basis as the operations manager, or any person who occupies an equivalent position,
  - (ii) any person who exercises control over the provider of air traffic services as an owner, and,
  - (iii) the accountable executive appointed by the provider of air traffic services under paragraph 106.02(1)(a).