

IMPLICATIONS FOR PUBLIC PLACES OF WORK

David Abbott dvabbott@bigpond.com
Principal, DVA Consulting NSW

Paper Summary

In these times of greater legislative control and the propensity for litigation it is pertinent to “Winning the Game” that local government should be cognisant of the need to comply with the requirements of the Occupational Health and Safety Act and Regulation, particularly where the “workplace” is also a public place. The paper explores the problems and issues associated with public liability in conjunction with those of occupational health and safety. How they can be so different and yet so similar in many ways. It discusses the need for processes and procedures that may assist in minimising the exposure to risk.

Introduction

The purpose of this paper is to bring to your attention some of the issues that are pertinent to local government in seeking to comply with the requirements of the Occupational Health and Safety Act and Regulations. In particular where the workplace is a public place. The paper also looks at the problems and issues associated with public liability in conjunction with those of occupational health and safety. How they can be so different and yet so similar in many ways is explored, along with some hints about processes and procedures that may assist in minimising the exposure to risk.

The subject is a complex one and cannot be fully explored in a paper such as this. It requires considerably more study on your part to be adequately conversant with the issues. The subject matter presented here is meant to whet your appetite to discover more, not to give you all the answers.

DISCLAIMER: I am not lawyer and do not hold myself out to be one. Do not rely on any information contained herein, please make your own enquiries and act on your own information, not what is contained in this paper.

Occupational Health and Safety

In NSW, health, safety and welfare requirements in the workplace are incorporated in the statute known as the Occupational Health and Safety Act 2000 (the OHS Act) and this is supported by regulation known as the Occupational Health and Safety Regulation 2001 (the Regulation). The Act and Regulation impose a number of obligations on those involved in performing work. They are specified in the Act and Regulations and substantial penalties are specified for breaches.

It is not the purpose of this paper to examine the entire subject of OH&S and how it is dealt with in the OHS Act and Regulation. Rather it is intended to be about complications which flow when the workplace is not a confined space such as a factory or office but is a public place such as a roadway, a footpath, a park or other place where any member of the public is entitled to walk or drive or have general access.

While on the face of it the OHS Act is about protecting the health, safety and welfare of people at work, its net covers all people who enter a work site. In the situation where the workplace is a public thoroughfare for vehicles or pedestrians, the implications are that anybody entering the place of work has

the same right of protection of health safety and welfare as an employee.

Section 3 of the Act, in particular 3 (b) refers to protection of people at a place of work against risks arising out of the activities of persons at work. Section 3(h) refers to protecting people against risk arising from the use of plant that affects public safety.

In a "closed" environment such as a fenced construction site to which only authorised personnel are able to access or a factory type premises the OHS Act imposes strict controls of induction (in addition to other safety measures) for those entering the place of work. This includes visitors to the site. Compare this with a construction or reconstruction project being carried out on a footpath in a suburban shopping centre. In most cases it is not possible to completely isolate the place of work to prevent any member of the public from entering the site. A large proportion of municipal type work is carried out under live traffic or pedestrian activity. It is obvious that in these circumstances every single person that enters the work site cannot be given induction training about the site and its hazards, as required by the OHS Act.

The dilemma then, is how to manage the situation without seriously exposing you or the organisation to unacceptable risk of prosecution should an incident occur.

Public Liability

Public liability in NSW is a common law process arising from an act of negligence, which results in injury or loss to another party. The substance of public liability claims is strongly influenced by the "duty of care" that one person owes to another. There are other factors, which influence the court in deciding a public liability case for damages, including proximity, the level of duty of care, contributory negligence and others. In the context of this paper

these matters are only of background interest to having a basic understanding of the complex nature of the laws of negligence.

In local government it is not uncommon (in fact becoming very common) for people injured in or on a public place to make a claim against the council seeking damages for pain and suffering allegedly caused by the negligent act of the council.

For the purposes of this paper the claims brought against councils or other public works type authorities can be broadly classified into two streams. Those that result from injuries sustained during the period of work being carried out on the public place and those that occur after work is completed and the public place is in its normal state of accessibility to the public. It is the first of these that are pertinent to this paper.

OH&S and Public Liability - Comparisons

Why should the two be compared?

When managing risk it is important to understand all of the factors, which contribute to that risk, so they can be taken into consideration as part of the mitigation program.

Both OH&S obligations and Public Liability claims are matters that must be considered in the planning and execution of any works to be conducted in a public place under live vehicle or pedestrian activity, to minimise the possibility of prosecution or damages claim or both.

The first difference that should be recognised is that the OH&S obligations are statutory ie., they are spelled out in legislation enacted by the Parliament. They are quite

specific and detailed and enforceable with penalties set with upper limits by the Act and Regulation. On the other hand Public Liability claims are based on common law rights, which are decided by the courts on the individual merits of each case. The courts have over the years established the principles and precedents of the law of negligence and they are widely known. However the determination of their application in each case is based on the distinction between the particular case and other precedent cases, and the extent of damages suffered since the injury and into the future.

The second difference is that breaches of the OHS Act and Regulation are prosecuted by the WorkCover Authority in NSW, normally in a local court or the Industrial Magistrates Court. With a public liability claim it is the injured party that institutes proceedings usually in the District Court, normally through a solicitor. On the one hand (OH&S) you may be breaching a statute law which has a prescribed maximum penalty, or a specific penalty (Notice of an Offence). While on the other (public liability) you are essentially being sued for negligence with the quantum of damages being specified in the Ordinary Statement of Claim and against which you defend with the hope of not paying any, or at least less, depending on the strength of the plaintiffs case and the respondents case and any other factors considered by the court.

It is interesting to note that Section 32 of the OHS Act provides in essence that there is no right of

action in any civil claim simply because of a contravention of the Act. It also provides that it cannot be used as a defence against any right of action. The fact that the OHS Act makes these provisions does not mean that a person or organisation cannot be prosecuted for a contravention of the OHS Act and also face a civil claim for damages ie a public liability suit.

Another major difference between the two is that under the OHS Act and Regulation the legislation can be contravened without an accident or injury occurring. If an act is committed or omitted which has the potential to cause a deleterious affect on a person's health safety or welfare, such action or inaction can be penalised. With public liability a claim can only be made where someone has actually sustained damages to their person or property.

One very significant difference is that the potential for a public liability claim is ever present, ie., from the day work is commenced in or on a public place where the public has access and continues ad-infinity while access is available. So if a road or other public place exists and is accessible and used by the public there exists the potential for someone to be injured and thus to seek damages. If and when you seek to carry out work such as reconstruction, repair or improvement etc., not only does the public liability potential increase during the period of the work by reason of the increased hazards created, but the potential for breaches of the OHS Act and regulation are also present. As said earlier the OHS Act and Regulation liability extends to any person in, on or near the worksite who has the

potential to suffer a risk to their health safety or welfare. The difference is that before the site becomes a place of work and after it ceases to be a place of work there is no liability under the OHS Act and Regulation, but the common law liability is there the whole time.

In this paper the above are the only differences which are discussed because they are sufficient to demonstrate how significantly unlike the two avenues for liability are. Having said that it begs the question "so what?" it is all very interesting but how does knowing that help? The following discussion will look at some of the similarities of the prevention and mitigation measures, which might be adopted.

Dealing with the Public Place of Work

Although there are these obvious differences between the two potential avenues for legal action and damages claims, particularly during the period of establishment of a "Place of Work" in or on a public place, many of the underlying strategies to mitigate the risks can be common and may be used effectively.

One of the first strategies that one can adopt is to recognise that there are potential risks for legal action from both statute law and the common law, while the place of work exists. As part of the OHS Act and Regulation you have a statutory duty to consider the likely hazards and take steps to eliminate or minimise them. Although not mandated by statute the common law imposes on you a duty of care to minimise the risk of injury to persons. So again it is a question of

identifying the potential hazards and removing or minimising them.

Some consideration of the potential hazards likely to be encountered during the works, soon leads one to the view that many hazards are common to both circumstances, and if mitigated for one source of liability will also be for the other.

It would be good practice when planning operational aspects of a worksite, which will be in a public place, to review the matters for meeting the requirements of the OHS Act and Regulation and at the same time incorporate consideration of meeting common law duties of care. In this way a sound plan of action for risk elimination and minimisation can be developed.

Looking now at more specific applications of this principle let us first consider the preparation of Work Method Statements as required by the OHS legislation. Why not incorporate in, or at least have in contemplation the implications for common law claims during preparation of those statements.

Taking another example of meeting OHS legislation in regard to site inductions. How do you induct the public? Not in the usual way but with information in the form of warning signs, directional signs, strategically placed barriers, other warning devices, traffic control measures, good house keeping on site and etc. if these requirements are properly met then they also reduce the potential for common law claims. Please do however consider there may be other matters to be considered to meet the risks from either source. Don't forget to leave the site safe at times when there is

no one on site as this is a prime time for public liability incidents to occur.

As a commonsense approach consider yourself to be a member of the public coming upon the site for the first time and ask yourself would I understand the risks? Would I understand the signs and what they meant? Would I know where to go ie., are the directional signs easy to follow? And how to avoid injury, etc.

Good housekeeping on site will minimise risk. For example if possible isolate part or all of the site from public access, particularly where there is a high risk of injury from plant operation, ground collapse, uneven ground conditions and the like. Note do not place plant where the exhaust fumes can impact on adjoining premises. Do not leave obstacles, tools and the like in the path of either workers or public.

The last strategy discussed here is that of record keeping. Daily diaries containing relevant information, which may be used to defend any prosecution or damages claims are essential. Photographs can also be useful to demonstrate compliance with minimum standards of safety,

including placement and wording of warning and or information signs, barricades, or other warning devices. If for some reason you have a claim or a potential prosecution if you have acted with due diligence and can prove it with good records it may make a huge difference to the outcome so do not dismiss record keeping as a chore, which is not necessary.

Conclusion

Despite the fundamental difference between the requirements, processes circumstances of application and statutory legal implications imposed by the Occupational Health and Safety Act and Regulation and those imposed by common law ie., public liability, there are non-the-less many common strategies to eliminate or minimise the risk of either prosecution or a claim for damages.

This is particularly so when the place of work as defined by the OHS Act is in existence in or on a public place to which the public has access.

In planning for such works one should have in contemplation both the statutory and the common law hazards/risks and cater for them in preparing mitigation plans and work method statements.

Author Biography

David Abbott is the Principal of DVA Consulting. His work involves him in many facets of local government engineering and administration. He also consults to government agencies and to private enterprise in matters of contract documentation and tender evaluation, staff evaluation, conflict resolution and with a special interest in investigation and reporting on particular aspects or circumstances related to public liability claims. His qualifications and experience are well suited to this type of work. He has an honours degree in civil engineering, a post graduate diploma in business and has had thirty five years in local government, including Director of Engineering at Campbelltown, Wollongong and Sutherland Councils.

Postal Address: David Abbott PO Box 170 Lugarno NSW 2210.

E-mail: dvabbott@bigpond.com