

Due Diligence: 8 Arguments That Don't Work



If you're ever prosecuted for an OHS violation, you have 2 shots of winning at trial. The first is by showing that you didn't commit the violation you're charged with. If that doesn't work, you can still avoid liability by using the due diligence defence, i.e., proving you took all reasonably necessary steps to prevent the violation and ensure safety. Most due diligence litigation is about what 'reasonable steps' are required. Rule of thumb: You're not required to prevent all incidents, injuries and violations, only the ones that you did or should have reasonably foreseen. How you do that depends on the facts of the case. But here are 8 common arguments that almost never work.

1. 'It Wasn't Foreseeable Because It Never Happened Before'

There's no such thing as a 'free first bite.' If a hazard is foreseeable, the fact that it never happened before is no defence. Example: During machine servicing, a ram broke causing the attached beam to fall on a mechanic's head. The fact that the operation had performed thousands of times before without the ram breaking was no defence since the employer knew it *could* happen and didn't take the necessary precautions to ensure it didn't, the Ontario court ruled [*R. v. Dana Canada Corp.*,].

2. 'We Had a Safety Policy but They Didn't Follow It'

Simply having a safety policy or procedure isn't enough if that policy or procedure is:

- Not in writing;
- Unclear;
- Not effectively explained to workers;
- Routinely ignored or inadequately enforced.

3. 'It Was the Worker's Fault'

The possibility of workers' messing up or failing to use required safety measures is a foreseeable risk that you must take into account via a robust OHS

program. Example: Defying all safety rules, an experienced electrician who should've known better is electrocuted while performing work on energized equipment without wearing protective clothing and equipment. But the Nova Scotia court holds the employer responsible for the electrician's 'tragic miscalculation' citing its failure to implement an OHS program, safety manuals and written safe work procedures [*R. v. R.D. Longard Services Ltd.*].

4. 'The Victim Was Drunk/High'

Evidence of a victim's impairment doesn't automatically get you off the hook for OHS liability. You still must show you took all reasonable steps to protect the victim. Example: An experienced trucker standing directly behind the tailgate is fatally buried in an avalanche of materials that he unloosed on himself. The employer relies on the high levels of morphine found in the victim's system to deny liability for the incident. But the BC Tribunal rejects its due diligence defence because the victim wasn't directly supervised or trained in the dangers of doing his job while impaired [*WCAT-2016-00178 (Re)*].

5. 'It Was the Subcontractor's Fault'

Prime contractors, aka constructors, in charge of safety and OHS compliance at multi-employer sites can't blame their contractors and subcontractors for failing to control hazards on the site. Example: A roofing subcontractor's worker not wearing fall protection falls off a ladder. The prime contractor blames the subcontractor but the BC Tribunal holds the prime contractor responsible for not having an adequate system in place to oversee and supervise the contractors and subcontractors at the site [*WCAT-2013-03358 (Re)*].

6. 'It Was the Prime Contractor's Fault'

While prime contractors have *primary* they don't have *exclusive* responsibility for safety at a multi-employer site. Contractors and subcontractors at the site also have basic OHS responsibilities to protect their own workers. Example: An inexperienced and unsupervised temp working for a subcontractor is injured after falling through a wall opening. The subcontractor blames the prime contractor since it was in charge of safety at the site. But the Alberta court doesn't buy it and chides the subcontractor for not taking 'any steps whatsoever' for the temp's safety despite being his 'employer' under the *OHS Act* [*R. v. Canadian Consolidated Salvage Ltd. (Clearway Recycling)*].

7. 'Blame It on Human Error'

News flash: Human beings make mistakes. Exercising due diligence is about recognizing this fact and taking reasonable steps to prevent the mistakes that are foreseeable. So, blaming incidents, injuries and violations on 'human error' is a complete non-starter. Example: A WorkSafeBC inspector cites an excavation company for not getting the required underground locate of utility services before starting work on the site. The company admits the violation but chalks it up to an 'oversight due to human error.' The BC Tribunal pooh-poohs the argument noting that almost all accidents are due to human error [*WCAT-2012-00070*].

8. 'Our Safety Procedures Are First Rate'

Implementing good safety procedures, training, supervision and other administrative measures aren't enough if the OHS regulations require the use of

engineering and physical controls to manage a hazard. Example: Ontario court acknowledges that a steel mill's 'workplace procedures and enhancements' enhanced safety but rejects its due diligence defence because the mill didn't implement required machine guards [*R. v. Dofasco Inc.*].