

Trap to Avoid: Blaming OHS Violations on Workers' Failure to Follow Safety Rules



Many an employer has tried to avoid liability for an OHS violation by blaming it on a worker's own carelessness or refusal to obey safety rules. Aside from the bad optics, blaming workers for their own injuries almost never works as a matter of OHS law. Here's why.

Worker Carelessness Is Foreseeable

To understand the flaws in the blame-the-worker argument, you need to remember how due diligence works. In an OHS prosecution, the Crown has the burden of proving that the employer (or other defendant) violated the OHS laws by doing something the law forbids or omitting to do something it requires. When and if the Crown meets that burden, the burden shifts to the employer to prove that it exercised due diligence, i.e., took all reasonable steps to comply with the law and prevent the violation. Showing that the worker and not the employer caused the violation is one way to do that—at least in theory.

The problem is that to prove “reasonable steps” the employer must show that it accounted for and took measures to prevent “reasonably foreseeable” hazards. And, as case after case has

confirmed, workers' failure to follow safety rules, whether carelessly or deliberately, is one of those hazards that employers should reasonably foresee. Examples:

- The whole idea of OHS laws is to protect the heedless and reckless worker, rules Ontario court in holding employer liable for welder's fall from a platform that was temporarily unguarded to allow vehicle traffic to pass [[v. FCA Canada Inc.](#), 2017 ONCJ 910 (CanLII), Jan. 31, 2017];
- BC tribunal rejects sawmill's due diligence defence based on argument that failure of victim, a millwright with 40+ years of experience, to follow lockout policy wasn't reasonably foreseeable and upholds \$75K fine [[A1607029 \(Re\)](#), 2018 CanLII 75854 (BC WCAT), March 26, 2018]; and
- Oil workers' failure to follow safe work procedure requiring maintaining a safe distance from trucks while unloading petroleum products was foreseeable, especially considering how confusing the procedure was, rules Alberta court [*v. Rose's Well Services Ltd.*, [2009] ABQB 1 (CanLII), Feb. 1, 2009].

Bottom Line

Just having sound safety policies and procedures isn't enough if your workers don't follow them. To be in a position to prove due diligence, you must also ensure that:

- You clearly communicate those policies and procedures to workers;
- You verify that workers understand and capable of following the policies and procedures;
- Workers receive the training, instruction and supervision necessary to comply with them;
- You take steps to enforce the policies and procedures including via discipline for infractions; and
- You supplement your safety policies and procedures with

the necessary engineering controls and PPE.

A Rare Exception Where Employer Not Responsible for Victim's Carelessness
"There's no way we could have foreseen that an experienced and thoroughly trained worker would make such a careless mistake."

Every once in a while, the victim-should-have-known-better argument actually does work. Like in the 2019 Nova Scotia case in which a veteran garage mechanic blew himself up by using an acetylene torch to remove a gas tank from a vehicle. Given all his training and experience, the victim should have recognized that using a torch on a fuel container would likely cause an explosion. But for some reason, he went ahead and took the risk. The garage owner was charged with criminal negligence under erstwhile Bill C-45. And it looked like the Crown had a solid case, especially given the "deplorable" state of safety in the garage. The fact that the garage owner lacked all credibility in the eyes of the court and "spoke ill of the dead in a disrespectful manner" did little to help his case. Yet, for all of this, the Nova Scotia court found the garage owner not guilty because the Crown didn't prove beyond a reasonable doubt that he knew the mechanic was going to use an acetylene torch to remove the gas tank [[R. v Hoyeck](#), 2019 NSSC 7 (CanLII), Jan. 11, 2019].