Worker injuries—Applications of criminal liability

by George A. Peters

It is a common belief that safety specialists have as their primary work objective the prevention of incidents that could result in personal injury and property damage. However, despite the efforts of safety specialists, we know that injuries and losses do occur. The question then arises: "Could the safety specialist be held personally liable for those injuries and losses?" Obviously, this is an issue of considerable importance to the safety specialist, since no one wishes to face even a remote threat of personal legal entanglement.

The answer is that safety specialists can be held liable in several different ways, just as other professionals (such as lawyers, physicians, and accountants) can be held legally accountable for their actions or failure to act. For the safety specialist, there are several key hazards, but the ultimate risk is low for most persons and almost nonexistent for those who take the time to engage in the "self-protective practice" of their occupational specialty. We will now discuss these possible threats to the safety specialist and how he or she might avoid trouble by relevant forethought and appropriate liability avoidance behavior.

Some examples

In California, the Sylmar tunnel methane gas explosion, which cost the lives of 17 workers, resulted in State prosecution and the sentencing of the project manager to imprisonment for 20 years and the project safety engineer to a term of 18 months. That is, the trial court found the safety director criminally liable.

As in most cases of criminal conviction for safety offenses whether in administrative law courts or in the criminal courts, there are frequent reversals of the conviction, reductions in the initial sentence, or a substitution of a suspended sentence.

After civil actions against safety engineers, the insurance industry and manufacturers' lobbyists have been very successful in negotiating state code or legislative changes that serve to protect or [illegible] ate the [illegible] ct, spe-cialist profession, based on public policy considerations and the readiness of the profession to accept that kind of responsibility,. This had led to some complacency among safety specialists who have been quick to cite the reversals, reductions, and changes in the law.

However, it is more prudent to remember the basic principle of criminal law: that is, that there must be some advance notice of what constitutes a criminal offense. The law must be prospective, not retrospective, with ample warning of the threatened punishment for proscribed behavior. Since the Sylmar tunnel disaster occurred in 1971, some 13 years ago, there can be no surprise today; the basic concept of criminal sanctions under state law is clearly established by that case and many others.

In fact, criminal sanctions have been discussed for nearly two decades and most recent federal safety legislation has included some criminal or penal provisions. For example, the 1971 OSHA criminal penalty provision under Section 17(e) for willful violation of a standard or regulation resulting in death, Section 17(f) for advance notice of an inspection, Section 17(g) for making false statements and reports, and Section 17(h) for killing an OSHA inspector.

These provisions may seem to have been sporadically or weakly implemented, hence no real cause for concern. Again, it is better to perceive this situation as an advance warning. The machinery of law is in place, there has been advance warning, there is public acceptance, and enforcement could quickly and easily change.

Imagine what might happen if there were a sudden change in political philosophy or perceived self-interest among some of our major elected or appointed officials. Assume for a moment that there is a special fact situation, to a safety problem, given special focus and public interest under the limelight of intensive media coverage. Think what might happen with an increasing knowledge and competency among regulatory and enforcement personnel. Don't underestimate the influence of public expectations.

The caveat is: Don't use examples of past implementation of existing criminal sanctions as a guide to govern your behavior; use it as a warning of what could happen if the pitfalls are not avoided in the future.

Remind corporate management that good safety practices can avoid situations such as the 1983 Cook County (Illinois) Grand Jury indictment of five corporate officials on charges of murder and involuntary manslaughter. Cyanide poisoning of workers and charges that poison warnings were removed from shipping drums, among other unsafe conditions and practices, can result in unfavorable publicity and possible criminal convictions.

Generally, in such cases, there has been a history of violations sufficient to demonstrate knowledge or intent and those held accountable are those who had the power to stop the violations. The basic caveat to remember is that the threat of criminal or penal sanctions is far more effective, than civil or monetary sanctions, in motivating some reluctant members of corporate management to establish a meaningful safety program. Do not forget that civil actions invariably follow criminal charges and require far less in terms of proof or evidence. It is a double-barreled penalty.

An interesting example about which to speculate is the stockholder's derivative lawsuit against a major automobile manufacturer, relative to alleged defective brakes in over a million vehic[les]. The civil lawsuit alleged fraud and criminal behavior and asked for treble damages against three current and three former executives of the corporation. Their liability is based on claims that they permitted production of the vehicles, after knowledge of the safety defects, and furnished incomplete or false data to federal agencies. This lawsuit is an attempt to shift the corporate losses, due to product liability and recalls, to the responsible executives, so they will have to repay the losses to the corporation with the ultimate result that the stockholders will not suffer diminished dividends.

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Query: Does this mean that anyone injured from such alleged vehicular defects could claim that the injury was caused by an intentional act of a company official? Such intentional or criminal acts may seem outside customary insurance coverage and outside the legal protection afforded by the corporation. Does this presage another Pinto-type trial?

The caveat to remember is that any local prosecutors, under existing statute or common law, could institute near criminal or criminal actions if they have the courage, ambition, facts, and financial resources to do so. Thus, we need to understand some fundamental concepts regarding the common law before we start to outline your counterattack or personal precautions to such threats.

Basic concepts

Those who may get into trouble often seem characterized by certain identifiable attitudes such as the following:

First: Indifference, obliviousness, and unawareness. These are the people, when trouble finally surfaces, who say "I didn't know" when everyone knows that the law clearly holds that "ignorance of the law is no excuse." Obviously, ignorance of the law is to court disaster.

The initial remedy is simple: Gain some basic understanding by reading introductory publications (such as the ASSE publication, *Safety Law*[1]), then open up channels of communication with your company lawyer or other lawyers, and then try to get some practical experience from claims handling and relevant lawsuits. You need not become a "jailhouse lawyer" to become sufficiently aware, informed, and sensitized to know what to avoid and what to do.

I would suggest that safety managers will learn they cannot hope to have sufficient technical knowledge in-house once they learn the legal requirements of their position. Thus, the second remedy is to utilize the resources of varied safety consultants, on some retainer basis, both for access to this specialized knowledge and for some proof that the safety manager exercised reasonable diligence in attempting to obtain all the pertinent life-saving information that was then available for use

Salesmen and insurance loss control personnel have

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much to offer but they cannot [illegible] of what an informed safety consultant can [illegible] support of the safety manager. Thus, the safety specialist should sacrifice a little ego and not remain oblivious of what a company lawyer or an independent safety consultant can do to help him do a better job and avoid possible liability.

Second: Passivity, compliance, and dependency. There are some people who seek to avoid responsibility by saying "I only do what they tell me to do." Yet, we all know that the Nuremberg war criminals trials, more than 35 years ago (in 1946 and 1949), clearly established the fact that each individual is responsible and accountable for his own actions, despite any claim of acting under the orders of higher authority.

A war criminal may blindly follow orders or fail to assume responsibility when the logical consequence is the loss of human life or incapacitating injuries to others. Acquiescence by silence and inaction, when others would speak out or take action, is a form of voluntary participation in what might be considered wrongful and blameworthy behavior.

Can there be civil or criminal liability for the safety professional?

Under the law, it might be difficult to shift the blame to others, be they top management or line supervisors, when reasonably precautionary measures that could have avoided foreseeable harm could have been instituted by the safety specialist. This assumes, for purposes of argument, that the designated safety specialist is supposed to be the expert in his field, that he is the implied custodian of the life and health of other workers, and that he is the person upon whom all others rely, to some degree, for appropriate safety information and guidance.

In other words, how would such arguments and legal theories influence a jury, as contrasted with some safety specialist's testimony that he only did what he was told to do and that he did not propose, in writing, any other course of action to the managers controlling his activity.

The remedy is simple: The safety specialist should assume a role of professional responsibility. He should inform management of what should be happening, why, and how, in terms that are meaningful to them, effective in terms of safety performance and liability prevention for him and the company, and that fulfills his legal obligations. He should avoid blameworthy passivity, a compliance mentality, or excessive dependency on others in the discharge of his professional responsibilities.

A jury will not demand the impossible, but they will seek to determine if the safety specialist's acts or failure to act were reasonable under the circumstances. Simply stated, all that is required is reasonable behavior in the eyes of other citizens and there will be no finding of legal culpability, legal fault, or liability under the reasonable man standard or conduct.

Third: Obstinacy, culpability, and recklessness. These attributes seem to make the difference between those [illegible] involved in matters involving [illegible] [illegible] civil case, we have the behavior standard of acceptable conduct in terms of what a reasonably prudent person would do under similar circumstances. If you are uncertain what might be "reasonable" or "prudent," you can always ask your professional peers or a lawyer. Conduct that is unreasonable may subject you and your employer to civil liability; that is, expose you to the remedy of compensatory or monetary damages.

However, the standard of behavior that could result in criminal or penal sanctions is much more deviant or extreme because imprisonment is a more severe form of social punishment. The standard of behavior is expressed in terms of gross and reckless conduct, wanton and intentional harm, a degree of carelessness that amounts to the willful or indifferent disregard of the rights of others, obstinate foolhardy rashness, a culpable disregard of the harmful consequences to human life substantially certain to occur, acts of a wicked and corrupt nature with the intention to do evil, doing forbidden acts deliberately and with knowledge, and behavior of such a flagrant nature as to show utter disregard for the safety of others.*[2,3] In other words, this is an extreme form of negligence. Since the punishment is severe, a higher standard of proof is required and a unanimous jury verdict must be achieved by the prosecutor.

Obviously, the penal codes of all 50 states vary and there is a universe of legislative statutes and derivative agency regulations at the local, state and federal levels. There may be more exposure to the criminal law of foreign countries that you suspect.[4,5] Thus, it is a fundamental caveat that we conform our behavior to general principles of law rather than the letter of the law for one state or federal agency. Don't walk the thin line. It may be illusory!

Recapitulation

Let me summarize what has been mentioned or implied so far:

1. Your personal attitude is most important. You should perceive that the law consists of social rules designed to protect you and others from unreasonable risks of harm. Attitudes that lead to a disregard of those laws, deviant social behavior, and harm to others may result in legal action to punish you or compensate those harmed. Conversely, attitudes of attempted conformance, assumption of social responsibility, and general good faith are meritorious, mitigating, and the hallmark of those who need not worry about liability or litigation.
2. Can there be civil or criminal liability for the safety professional? Yes, all the laws are in place. Have there been verdicts against safety specialists? Yes. Does it

**The following jury instruction is now used in California to define the term culpable negligence:*

The term "culpable negligence" means conduct which is more than ordinary negligence. Mere inattention or mistake in judgment is not culpable negligence.

Culpable negligence means conduct which is aggravated or reckless. It must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life. It requires knowledge, actual or imputed, that the act tends to endanger another's life. Whether or not an act constitutes culpable negligence must be determined from the act itself, not from the consequences of the act.

[illegible] frequently. [illegible] higher [illegible] ies than other professional groups. [illegible] important. Yet even a small risk or unlikely event becomes important to someone whose risk materializes into unexpected actuality.

What about the immediate future? The risk will increase. When? That depends on uncertain and unpredictable factors such as changes in national political philosophy relative to enforcement policies and procedures; media coverage including the depth and quality of investigative reporting; general public awareness, interest, and agitation regarding perceived safety issues and events, whether some local criminal prosecutor hopes to make a name for himself; or whether an enterprising plaintiff attorney believes there is some advantage or need in naming individuals as party defendants under novel theories of law.

Who will be caught up in litigation? Very few safety professionals, since most have minimal or virtually non-existent risk. There are some moderate risk safety professionals, by virtue of their unique circumstances, but they can and should take timely defensive precautions to minimize their risk.

There are a few high risk individuals who create their exposure by their attitudes or ignorance. We know that ignorance can be quickly cured by appropriate and sufficient information that is acted upon. The attitude problem is more difficult, like the automobile driver who often runs red lights at intersections without receiving citations or getting involved in a serious accident . . . until the seemingly unlikely event occurs to him.

3. The safety professional cannot avoid liability by inaction, evasion of responsibility, or passive conformance to the direction of his work supervisor or printed safety regulations. An affirmative role may be demanded by the reasonable expectations of those who justifiably rely upon the proper job performance of the safety professional.

4. It is the safety professional's personal responsibility to become informed as to the nature of his duties, the character of his obligations, and the kind of knowledge that is required to discharge those duties and obligations. If he does not know, he should ask someone. There should be reasonable diligence in his inquiry or search for knowledge. He should seek assistance, where necessary, from inside and outside his company, from unbiased independent safety consultants and impartial lawyers. Closed shop bias can be dangerous, so listen to all sides of an issue before choosing a wise course of action. Information should be acquired as a preventive measure, not just as a corrective action after initial harm has been identified.

5. The safety professional should consciously attempt to keep abreast of his legal duties as they are defined in the courts . . . not just the administrative courts, but the civil and criminal courts. While prior notice is required for penal sanctions, civil actions are determined by "tomorrow's law" or law in effect at the time of trial, so the trend of law may be important. If your services, products, or company relate to a foreign country, their law may be quite different and far more severe or harsh than the laws in the United States.

Obviously, the safety professional cannot spend too much time trying to learn about the law, but he can establish good communication with lawyers in order to get a correct general picture of where the legal minefields may be located. He can read the law-related articles published in safety journals and publications during the past 20 years so that he can better communicate with lawyers by asking the right questions and comprehending the legal advice that they are giving. Some legal books or a law-oriented file in your office, work station, or at home could provide the ready reference needed when quick decisions must be made.

Have there been verdicts against safety specialists? . . . Does it happen frequently?

6. The safety professional may be committing a form of professional malpractice or lack of professional responsibility if he attempts to fight against or refuses to accept the reality of legal concepts; such as, foreseeable human misuse, abuse, and improper repair or maintenance. Why? Because those human error concepts vitally affect the way a safety professional conceptualizes accident investigation, accident causation, and the techniques by which accidents may be prevented in the future.

Similarly, legal concepts of informed consent are important when determining the adequacy and sufficiency of warnings, safety instructions, worker training, hazard communication, and the worker's right to know of safety and health risks that he may encounter. The legal concepts of acceptable risk, unreasonable danger, risk-benefit criteria, consumer expectations, and excessive preventable danger are essential in making a determination whether something is legally safe or unsafe.

Thus, safety and the law are intertwined in the area in which they overlap and interact. Therefore, the safety professional has a unique responsibility to become familiar with safety law since it helps him in making daily decisions as well as helping him avoid legal entanglements.

7. Let's assume the worst does happen and you do become involved in the world of lawyers, lawsuits, and courtrooms. Have you prepared yourself? Did you get any prior experience as an expert witness so that you are better able to handle yourself in those strange surroundings and procedures?

Did you achieve some type of state registration (P.E.) or board certification (CSP) that would suggest to the jury that your basic qualifications to practice have been evaluated by an independent recognized entity? Can you demonstrate that you understand the basic concepts, principles, and techniques of the safety profession so that you sound credible or believable to a jury?

Did you institute or implement a detailed, all-of encompassing and systematic safety program that had as its prime objective the prevention of injury or harm? Do you have some written or other objective evidence of that safety program, and the authorizing corporate safety policy statement or guidelines, and exactly how they were put into action? Do you have a safety library and other sources of technical safety information so that you could keep informed and quickly locate appropriate reference information?

Are you a member of the appropriate safety professional associations that keep you abreast of the latest developments and discoveries in your field of endeavor? Do you keep a list of safety conferences and professional meetings that you attend?

Do you keep a record of whom, when, and where you consult and the matters dealt with relative to critical safety decisions or actions so that you will have proof of the reasonableness of your actions years later? Do you keep a permanent record, in your home or safe deposit box, of critical safety problems where your efforts or recommendations, made with reasonable diplomatic persistence, were ignored or overridden by others?

In other words, if litigation does develop some time in the future, will you have access to some records and, therefore, demonstrate a good memory of the events? If you do not have appropriate records, will you appear to have memory gaps, lack of pertinent knowledge, or show such confounding of the facts that you do not seem believable or truthful? Will the absence of records seem to the jury to be a concealment or a destruction of evidence? Will the members of a jury or the judge perceive your responses and demeanor to be less than forthright, uncertain, or even incompetent?[6,7]

Do not depend upon others in terms of your defense; the lawyers can only do so much; they must depend upon you for the ammunition and convincing testimony! Thus, you can be your own worst enemy or your own best friend in anticipating your role in future litigation. Therefore, my message is to be forewarned and arm yourself by adherence to a defined, delineated, and socially acceptable sense of professional responsibility. Your future is in your hands and with forethought there should be no significant risk of civil or criminal liability. ✪

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