CONSTRUCTION DIRECTOR AND OFFICER LIABILITY FROM COVID-19 WORKPLACE EXPOSURE

Norm Keith, B.A., J.D., LL.M., CRSP[1]

Introduction

COVID-19 was declared a pandemic by the World Health Organization ("**WHO**") on March 11, 2020. Many Canadian provinces, including Ontario, declared a state of emergency under the *Emergency Management and Civil Protection Act* ("***EMCPA***") on March 17, 2020. The federal government did not invoke its emergency management legislation. The COVID-19 pandemic has been highly disruptive of socio-economic activity in Canada, and around the world. This has given rise to governance and leadership challenges, and decisions regarding the state of the workplace, and exposure to workers, as well as clients/customers/patients in many businesses, workplaces and organizations across Canada. COVID-19 has also raised a number of questions about emergency preparedness, business continuity, and pandemic planning by governance experts and Boards of Directors ("**Board(s)**") of public and private corporations and organizations.

Construction companies have a number of risks associated with COVID-19 pandemic. The pandemic has also taken a toll on the provincial and federal economies and the gross domestic product. Canada is now and for the foreseeable future resulted in an economic recession. The pandemic has been, and continues to be a difficult challenge for public health, political and policy decision makers as well as the Boards of organizations.

A central concern for many Boards and Chief Executive Officers ("**CEOs**") has been the risk of potential legal liability for their organizations, individuals and them personally. This article will focus on the latter and, in particular, the legal exposure of Directors and Officers (""**D&O**") to personal legal liability arising from an employee or worker ("**worker**"), customer, client or patient ("**3rd Parties**") from becoming infected by COVID-19 arising out of or in the course of employment and in connection with the business or the workplace.

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[1] Norm Keith, practices law in Toronto, Canada, is a partner Fasken, he was assisted by David Marchione and Carla Oliver, Gordon Lee, in the preparation fo this article,

This article will deal with three specific areas of potential legal liability of D&O; civil, regulatory, and criminal liability. The first is primarily based on the standard of care for D&Os set and enforced by Canadian courts in civil actions; the second is based on the standards set by public and occupational health and safety statutes for D&Os; third, and lastly, is the criminal law standards, set under the Westray Bill amendments to the *Criminal Code* (known as the "**Westray Bill**"). Finally, the article will provide some guidance on legal risk mitigation for D&Os.

Civil Liability

Civil liability in Anglo-Canadian law is based on the legal theories of contract, tort and other equitable remedies. The primary risk for D&O related to COVID-19 exposure in the workplace is on the unintentional tort of negligence. A civil claim for negligence must establish a duty, breach of duty and damages. There is a general legal duty of care on organizations and their D&Os to provide a safe workplace for workers and 3rd Parties.

Organizations and D&O have these obligations under common law negligence duty of care, jurisprudence, public and occupational health & safety statutes and regulations. The latter generally focuses on worker safety, but by implication also applies to 3rd Parties who have visited or have other contact with the workplace.

In the SARS epidemic of 2003, nurses in Ontario treating patients with SARS became infected and died. 53 nurses and their families commenced a class action against the Province of Ontario, and other provincial governmental bodies and officials, alleging a breach of a legal duty of care owed to those nurses. In subsequent litigation challenging the legality of the class action, the Court of Appeal for Ontario held in *Abarquez v. Ontario*[2] that there was no relationship of proximity between them and the residents of Ontario sufficient to give rise to a private legal duty of care that may result in a negligence civil action.

To succeed in a civil action there must be clear, convincing and compelling evidence, on a balance of probabilities, to support the claim for damages against D&O for a worker or a 3rd Party to allege that they have been infected and suffered harm and loss from a COVID-19 exposure arising out of or at the business location for which the D&O have a duty of care.

Civil liability related to workers who suffer injury, illness or death arising out of or in the course of employment from COVID-19 is governed by either workers' compensation legislation or the civil court system. The former provides workplace

[2] *Abarquez v. Ontario*, 2009 ONCA 374

health & safety insurance for the vast majority of workers in Canada Such legislation provides a bar to civil law suits against employers and D&Os. The latter gives a minority of workers and most 3rd Parties the right to sue in court on the basis of the tort law theory.

In Ontario, for example, the *Workplace Safety and Insurance Act* ("*WSIA*")[3], provides for a no-fault system of compensation for workers, and their dependents for an accident, injury, and illness arising out of and in the course of employment. This applies to an exposure to COVID-19 that gives rise to an occupational illness or death. The historic trade off in workers' compensation legislation in Canada, and around the world, is that the worker and their dependents gave up their right to commencing a civil action against the employer and co-employees in exchange for prescribed compensation of "no-fault" benefits. Therefore, where workers' compensation legislation applies there is no right to sue an employer or D&Os arising out a worker contracting COVID-19 in the workplace.[4]

The other legal risk for D&O exposure to COVID-19 civil liability lies with workers and workplaces not covered by workers' compensation legislation and non-worker 3rd Parties. When a customer, client, or patient is infected by the COVID-19 virus as a result of exposure to the business/workplace, it may be argued that D&Os breached their duty of care towards such workers and 3rd Parties by failing to follow public or occupational health and safety legislation, regulations or standards related to COVID-19 risk management. Whether the workplace is a retail grocery store, a hospital, or golf course, such risk of legal exposure exists for D&Os.

When determining whether or not the D&Os have satisfied their duty of care, the Supreme Court has said that perfection is not demanded of D&Os. The Court said it will not consider that directors and officers have breached their duty of care if they acted prudently and on a reasonably informed basis. If the decisions taken are reasonable business decisions in light of what they knew or ought to have known, then the "business judgment rule" answer and defence may be invoked and the courts will not be expected to intervene.[5]

A risk mitigation answer for D&O legal risk in this regard relating to 3rd Party claims for COVID-19 illness is corporate and D&O insurance. Insurance will normally cover such exposure to allegations that D&Os have failed to meet a generally accepted standard of care in dealing with infectious disease during a

[3] Workplace Safety & Insurance Act,1997, SO 1997, c 16, Sch A

[4] *Ibid.,* s. 28

[5] *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68.

pandemic other public health guidance has been followed, and whether an OHS contravention has taken place amounting to a potential statutory tort. All of these risk factors are very case specific. However, insurance may be obtained, and should be reviewed, to determine the coverage and protection of D&Os from third party claims arising from civil actions.

Regulatory D&O Liability

Occupational Health and Safety ("**OHS**") statutes in Canada generally do not identify D&Os as having specific personal legal responsibilities under those statutes. The one exception is Ontario, where Section 32 of the *Occupational Health and Safety Act* ("***OHSA***")[6] states:

> ***32*** *Every director and every officer of a corporation shall take all reasonable care to ensure that the corporation complies with,*
> *(a) this Act and the regulations;*
> *(b) orders and requirements of inspectors and Directors; and*
> *(c) orders of the Minister.*

This legal duty on D&Os under the Ontario OHS law may also be incorporated by reference in other provincial OHS laws since D&Os often are included in the definition of a representative of the employer. On balance, we recommend that organizations and all D&Os consider themselves bound by similar duties to those expressed in the Ontario statute, above, for the purpose of managing this category of regulatory legal risk.

In the writer's opinion, an OHS law legal risk for D&Os may be an insurable interest. Insurance for corporate and D&O risk under an insurance policy or employment contract, is permissible because of the legal characterization of OHS laws in Canada.

OHS laws are legally characterized as quasi-criminal, strict liability, and regulatory statutes. OHS laws are not criminal law for several reasons, including the absence of criminal intent or *mens rea*. A regulatory offence, which may be used to prosecute D&Os, does not require proof to commit the offence, required in a true crime. The D&O exposure to regulatory prosecution under the *OHSA* may result in a fine up to $100,000, or 12 months in jail, or both. The presumptive penalty of an individual being convicted under the *OHSA* is a fine rather than a jail term.

The author is not aware of the availability of insurance for this OHS regulatory risk, or insurance being offered for that purpose. However, insurance is generally

[6] RSO 1990, c.O.1, as amended

offered for D&Os legal defence costs in a quasi-criminal, strict liability regulatory offence such as that under the *OHSA*. If a Ministry of Labour, Training, Skills and Development investigation related to a COVID-19 illness in the workplace results in a D&O charge, there is a presumption of innocence and a right to a fair trial, and other related fair trial rights under the *Charter of Rights and Freedoms*. Very few D&Os have been convicted in Ontario, or anywhere in Canada, under OHS law. However, if there was a conviction, either by way of a guilty plea or after a trial, of a D&O charged with such an offence, then the above-mentioned penalties are the associated risk with that type of proceeding. There is a positive defence of due diligence, which will be referred to later, for all D&Os charged with OHS law offences.

Criminal D&O Liability

The *Criminal Code*[7] has three different provision that may apply to D&Os arising from a COVID-19 exposure at the workplace by a worker or 3rd party. The first is s. 180, a charge of common nuisance. The provisions of s. 180 are as follows:

> "*180. (1) Every one who commits a common nuisance and thereby*
>
> *(a) endangers the lives, safety or health of the public, or*
>
> *(b) causes physical injury to any person,*
>
> *is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.*
>
> *(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby*
>
> *(a) endangers the lives, safety, health, property or comfort of the public; or*
>
> *(b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada."*

R v. Thornton[8] is the leading Supreme Court case regarding the risk of mass transmission of a life-threatening disease (HIV) through knowingly donating contaminated blood to the Red Cross Society, which resulted in the conviction for common nuisance that was affirmed by the Court of Appeal and the Supreme Court. This case draws a limited parallel to the risk of public transmission of

[7] Criminal Code (R.S.C., 1985, c. C-46)

[8] *R v Thornton*, [1993] SCJ No 62

COVID-19, that requires proof of the breach of a statutory duty with intent or failure to ensure knowledgeble compliance.

The second is aggravated assault, for the knowing transmission of a communicable disease, under section s. 265 and 268 of the *Criminal Code*. Sections 265 and 268 are as follows:

> *"265. (1) A person commits an assault when*
>
> > *(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;*
>
> . . . . .
>
> *(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.*
>
> *(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of*
>
> > *(a) the application of force to the complainant or to a person other than the complainant;*
> >
> > *(b) threats or fear of the application of force to the complainant or to a person other than the complainant;*
> >
> > *(c) fraud; or*
> >
> > *(d) the exercise of authority.*
>
> *268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant."*

Cuerrier[9] and *Mabior*[10] are the leading Supreme Court cases which established that a with an infectious diesase person could be convicted of aggravated assault for their non-disclosure of their status prior to sexual intercourse; this is based on the consent to engage in sexual activities would have been obtained by fraud, contrary to s.265(3)(c) of the *Criminal Code*. Non-disclosure constitutes fraud vitiating consent. *Mabior* applies the *Cuerrier* test and clarifies the interpretation of significant risk of serious bodily harm. This requirement is met upon proving a realistic possibility of HIV transmission. However, the principles established in these cases are limited to HIV and not necessarily to any other communicable disease such as COVID-19.

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[9] *R v Cuerrier*, [1998] 2 SCR 371

[10] *R v Mabior*, 2012 SCC 47

Third and perhaps most important is the Westray Bill amendments to the *Criminal Code*. The heart of the Westray Bill, for the purpose of this article, is the establishment of a positive duty under Section 217.1 of the *Criminal Code*, which reads as follows:

Everyone 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.

This positive duty placed on "everyone", includes D&Os of all organizations. The Westray Bill has not been used to enforce this criminal OHS negligence standard for any health related issues. However, there are currently several long term care homes in Quebec that are currently under police investigation.

Criminal legal liability is the most serious but also the most difficult to prove. An OHS criminal negligence charge has a criminal intent element that requires proof of demonstrating wanton and reckless disregard by a D&O for the lives and safety of workers or 3rd Parties, in order to prove the criminal offence. If a D&O is charged and convicted of the crime of OHS criminal negligence established under the Westray Bill, the penalties include up to life imprisonment, and a fine up to $100,000 per count. Jurisprudence with respect to the Westray Bill prosecutions has been sporadic, with individuals, rather than corporations being the primary target of such criminal investigations and prosecution.

The police could investigate a criminal complaint that a D&O failed to take reasonable steps to prevent bodily harm in respect to and the exposure to COVID-19 in the workplace. There would be significant challenges, evidentiary issues, and proof required to even permit the laying of such a criminal charge. The facts would undoubtedly have to be egregious, shocking, and support the threshold mental element that the D&O demonstrated wanted and reckless disregard for the lives or safety of persons affected in the workplace by the COVID-19 exposure and subsequent infection.

This type of fact situation, given the strong rule of governance through public health authorities and the restrictions of workplaces under orders issued under the *EMCPA*, are very unlikely. There is no insurance available for a D&O charged with a criminal offence.

A review of the cases where individuals have been charged and convicted of the contravention of the Westray Bill indicates that no infectious disease has been the factual basis of an OHS criminal negligence conviction.

Recommendations

Steps that D&Os should take to ensure compliance with public health authority guidance and OHS law compliance for risks associated with COVID-19 must be business and workplace specific. However, some guidance at a general level is warranted and should be the beginning of such risk management consideration.

We recommend the following to mitigate against the legal risk for D&Os arising from a potential COVID-19 exposure associated with the business or workplace:

1. Exercising leadership of the exposure risk for workers and 3rd Parties of COVID-19 exposure in a proactive, positive and public manner;

2. Following objective, public and occupational health and safety guidance on managing COVID-19 as a workplace hazard;

3. Completing all recommended 12 steps of reopening the workplace after a COVID-19 shutdown;[11]

4. Revise and verify the D&O insurance coverage and related employment contract indemnity for D&Os and enhancing where appropriate;

5. Ensuring continuous improvement approach to emergency management, business continuity, and pandemic planning now and in the future.

We urge organizational leaders, D&Os, and their risk advisors to obtain expert medical and legal advice in the preparation and revision of their COVID-19 policy, program, and management system. We strongly urge D&Os to have written confirmation of their status, insurance, and corporate indemnification from this type of risk to avoid unnecessary anxiety and focus on their primary mandates and fiduciary duties towards the organizations they represent and serve.

For further information, on any of the above, please feel free to contact the writer, *Norm Keith*, partner at nkeith@fasken.com or my work number 416-868-7824.

[11] See my article, posted on linkedin, on the same subject: