






<p style="text-align: center;"><b>Disaster Response Public Liability and Duty of Care</b></p> <p style="text-align: center;">Peter Heal ACT Insurance Authority</p> <p style="text-align: right;"></p>	<p>Today I'm going to talk about the basic liability issues that might arise from responding to an event of a disaster nature. As a risk manager coming from 30 years of traveling through the insurance field, I tend to be a compulsive, obsessive pessimist so I think it's important to understand who can be responsible for injuries or property damage arising out of the actions of an agency, business or individual in any situation including a disaster response.</p>
<p><b>Outline</b></p> <ul style="list-style-type: none"> <li>■ Types of Legal Liability</li> <li>■ What is Duty of Care?</li> <li>■ Vicarious Liability</li> <li>■ Practical example</li> <li>■ Assessing risk and planning now</li> </ul> <p style="text-align: right;"></p>	<p>I'll be talking to points on this slide in a practical sense. If you need specific information in relation to your own operations it would of course be wise to consult a solicitor for legal advice.</p>
<p><b>Legal Liability – What?</b></p> <ul style="list-style-type: none"> <li>■ Civil - <i>Common Law</i> eg: damages</li> <li>■ Criminal - <i>Criminal Law</i> eg: manslaughter</li> <li>■ Industrial - <i>Statute Law</i> eg: OH&amp;S Acts</li> </ul> <p style="text-align: right;"></p>	<p>Looking first at legal liability; I've put three areas up there. Firstly there's civil legal liability, which is common law, your normal duty of care, covering everybody's relations with other parties, varying with situations but resulting in damages in a successful common law claim. Criminal law liability might result in manslaughter convictions and industrial liability arising from breaches of statutes or health and safety acts.</p>
<p><b>Legal Liability – Who?</b></p> <ul style="list-style-type: none"> <li>■ Civil - Individuals</li> <li>■ Criminal - Police/WorkCover</li> <li>■ Industrial - WorkCover</li> </ul> <p style="text-align: right;"></p>	<p>The "who" of legal liability; who might proceed against you with legal liability? Civil liability might be individuals or businesses or organisations against other individuals, businesses or organisations. Criminal liability would be actioned by law enforcement agencies or statute enforcing bodies like the Police Force or WorkCover. Industrial liability would involve WorkCover, Comcare or even some industry associations.</p>
<p><b>Legal Liability – How much?</b></p> <ul style="list-style-type: none"> <li>■ Civil - Damages plus punitive costs</li> <li>■ Criminal - Imprisonment?</li> <li>■ Industrial - Fines &amp;/or Imprisonment</li> </ul> <p style="text-align: right;"></p>	<p>How much might this involve? In some cases with civil liability, you've all heard of people becoming quadriplegic from diving into shallow water, some of these claims have resulted in up to 10 or 20 million dollar payouts by organisations, plus costs. Criminal liability can be as extensive as fines or imprisonment. Similarly with industrial liability. Some of the statutory fines can go up to \$500,000 for corporations or \$50,000 for an individual (plus GST, of course) and more for a second offense. So, if you've done it twice your likely to get hit with up to 50% more on the fine.</p>

## Duty of Care

- Entrenched legal requirement
- Not just in the workplace
- Everything reasonably practicable
- Applies to staff, volunteers and visitors



Duty of care, this is what drives all common law, legal liability issues. It requires everyone to exercise reasonably practicable measures to protect the health and safety of everyone, not just in the workplace (although mainly there), but can also be in everyday life. This duty extends to all employers and their employees and to anyone else who has an influence on hazards in the workplace. (I'm not trying to cover the territory of the next speaker from Comcare however it's an important part of the issue we're talking about.) It applies to all staff, volunteers and visitors, to varying levels.

The term "reasonably practicable" is a pretty curly one and I guess it's up to the courts, in hindsight, to construe what was reasonably practicable after a situation arises. One interpretation is that the requirements of the law vary with the degree of risk in a particular activity or environment which must be balanced against the time, trouble and cost of taking measures to control the risk. "Reasonably practicable" is therefore taking all measures that are reasonable to ensure the safety of staff or visitors.

## Example - Storm

- Climate Change a reality?
  - 1 in 100 year events more regular
  - Increasing frequency of major storms
  - Buildings not designed to cope
  - Disaster preparedness not adequate
- Varying views on true exposure







I was interested to know that other people were affected by that November 2005 event. We had quite extensive losses across the ACT Government and in schools. Dickson in particular was hit; that was the spike of that storm. Global warming, as Les mentioned, is on everyone's mind at the moment; the results are subject to argument by experts. At a conference last week, attended by some of my staff at ACTIA, up on the NSW north coast, there were actuaries there saying that global warming doesn't exist, it's not eventuated yet, we haven't seen it, don't worry about it. The next speaker was from a global re-insurer who was tearing his hair out and saying "We've got to do something about this". So, there's a varied response to this issue. I think it's already here and as Les mentioned we're going to have to deal with those sorts of storms, whether it's due to global warming or just our failure to design for increased events. In some cases our preparedness for such disasters is not adequate.

## Example - Storm



We've certainly had our fair share of storms in Canberra of late; the November event seriously affected Dame Pattie Menzies House, a concentration of ACT Planning and Procurement offices.

<p><b>Example - Storm</b></p> <ul style="list-style-type: none"> <li>■ Heavy rains and hail associated with a summer storm</li> <li>■ Blocked gutters overflow with water pouring from ceiling over building contents</li> <li>■ Staff may act in a reckless fashion to protect contents</li> <li>■ No clear direction</li> <li>■ Hazardous environment / situation</li> </ul> <p>9</p> 	<p>The first front went through with heavy hail blocking every box gutter in the place and followed by a second cell with heavy rain which couldn't flow away so that water was running through offices and over live computers. Dilbert and his friends were running around with big sticks and not doing much at all. It's hard to say what could have been done to prevent that and it was only affecting an office environment. If it had affected an ACT cultural institution we would have been quite concerned about the end result. There were no injuries as a result of the flooding however electrical equipment was involved so the potential was there.</p> <p>In such situations staff may be responding in a reckless fashion and without clear direction in such a hazardous environment.</p>
<p><b>Aftermath - Hypothetical</b></p> <ul style="list-style-type: none"> <li>■ Potential personal claim against the supervisor</li> <li>■ Employer may not support the actions</li> <li>■ Intervening negligent act</li> <li>■ May go beyond the scope of employment</li> </ul> <p>10</p> 	<p>We didn't have any claims under our workers compensation arrangements or any common law claims however it was a scenario that could have developed more seriously.</p>
<p><b>Vicarious Liability</b></p> <ul style="list-style-type: none"> <li>■ Employers may be held vicariously liable for acts of an employee</li> <li>■ If part of "normal" tasks of employment</li> <li>■ Employer entitled to recover from the employee if a negligent act</li> </ul> <p>11</p> 	<p>Our employers and most businesses will have public liability insurance to protect them against the financial loss of a public liability claim or a claim against them. Vicarious liability is where an employer is responsible for the actions of an employee arising out of the course of their employment. An employer can be held liable for the carelessness of an employee no matter how careful the employer was in all matters including choosing and supervising that employee. The basic rule of vicarious liability is that an employer is liable for that negligence if the employee was acting in the course of their normal employment. In the case of the scenario mentioned before it would be up to the courts to decide if climbing up on the roof was part of the responding person's "normal" employment. There may be a situation where a supervisor says "Right chaps, we're all going to go up on the roof and clear this hail out" and maybe someone is lost over the side (and the Emergency Services don't catch him with a net!). There may be a case for that supervisor being found negligent in that there may be a case that they shouldn't have sent the staff up onto the roof and there being a vicarious liability case against the employer arising from the supervisor's negligence. There's also a situation where under common law a contract of employment is exactly that and it implies that</p>

	<p>the employee will perform the contract with reasonable care so that if a supervisor isn't performing that contract with reasonable care he may be liable. If the employer was not negligent; if they didn't tell the employee to go up on the roof and clear the hail, but the supervisor had, then the employer might seek indemnity from the supervisor as well. That could vary with different jurisdictions; something to keep in mind when considering this scenario. Whilst you do have a cover from your employer, if you do act in a negligent manner it may be that you're personally liable as well.</p>
<p><b>Assess risk now and act</b></p> <ul style="list-style-type: none"> <li>■ Safety of personnel paramount</li> <li>■ Allow for increased exposures</li> <li>■ Graded and reasoned response</li> <li>■ Preventative approach</li> <li>■ Implement pre-emptive actions</li> <li>■ Just good Risk Management</li> </ul> <p>12</p> 	<p>Again, the compulsive obsessive pessimist in me says that you need to do your risk assessments and act now rather than wait for that scenario to arise. My view is that safety of personnel is paramount in such instances; somebody at morning tea was commenting that another 20 minutes under water for an artefact was unlikely to make much difference in any case until Emergency Services turn up. It's important to work out now what the worst case scenario is and if we haven't got the right premises or the right storage arrangements perhaps these should be implemented before the disaster eventuates; implement alternative arrangements. Take a preventative approach and implement pre-emptive actions rather than just having response actions. the process of just good risk management comes into it where we identify the risks and analyse them against likelihood and consequences however the safety of employees should also be brought into the analysis rather than just focusing on collections. Develop treatments that reduce or mitigate the risk and, as an adjunct to that, communicate these initiatives through to employees, stakeholders, volunteers and other consultants and contractors on the site.</p> <p>Thank you.</p>