

News & views from Summit Systems April 2019



BEWARE THE INSURANCE COMPANY - ITS NASTY LAWYER

For more than 25 years we have proclaimed that being a client of Summit Systems Ltd and adopting proper compliance systems for legal purposes is not only a good idea, it improves the survivability of a company by almost 100%.

There are however some threats to your survival that you may not know about and they are 1000 times more nasty than you could imagine. Most people taking out insurance wish to have the protection that they think they are buying but this may not be the case. Let the buyer beware!

It is relatively common for clients to have a policy extension for Directors and Officers Liability and this can be helpful for some of the laws that are unusual or relatively unknown. For example some of the 31 Employment laws and some of the stringent Environmental laws. So the arranging for cover to give protection for these is a good idea and nobody would dispute that.

In terms of the Health and Safety at Work Act there are limitations that you need to be aware of. It is illegal to have insurance for the cost of fines. It is okay to have cover for reparations, for legal costs and for court costs.

On a few occasions we have had severe clashes with the lawyers of clients that have cover for Directors and Officers as well as for Commercial risks and Material Damage or Fire and General cover. On a few occasions we have had situations where the client or the survivors of the client were called up to plead guilty to HSAW as a condition to being given a favourable commercial payout.

On other occasions we have been prevented in our proposals for defending the client on the ground of having satisfied all of their legal obligations and letting the lawyer run a case that would ensure several days in court at very high fees and great stress to the client and his or her managers.

Not all lawyers are nice people and not all lawyers are honest either. You need to know your rights and you need to understand that you always have the ability to take a case against them to the Law Society or to the Minister of Justice. The horrible disreputable lawyer will often change tack at 1000 miles an hour after being given a simple letter of warning that can be signed off by one of his or her colleagues that does not condone third class values.

TWO FINES FOR THE PRICE OF TEN

Two similar health and safety failings within three months have cost Rotorua timber company Claymark Limited over \$680,000 in fines, reparations and costs. WorkSafe says that one serious injury on a company's watch is bad enough, but that a second in close succession shows an unacceptable approach to worker safety.

Claymark was sentenced in the Rotorua District Court yesterday after two of its workers sustained serious injuries while operating machinery on two separate occasions. In the most recent incident at the company's Vaughan Road site in Rotorua, a worker had his hand caught in machinery used to de-stack timber when trying to reinstate a dislodged chain. The worker lost the tips of his middle, index and little fingers as a result of the incident.

WorkSafe's investigation found there was inadequate guarding on the machinery and no documented safe procedures for workers to follow when a chain became dislodged. The injured worker had also not been trained on the location of the emergency stop buttons on the machine (one of which was not fully operative or clearly marked). For this incident, Claymark was fined \$264,000 and ordered to pay reparations of \$4,000 in addition to \$24,000 already paid.

Less than three months earlier in December 2016 a worker's hand had to be amputated after it was drawn into a wood planer at the business' Kopu plant in Thames. A WorkSafe investigation found the planer was not appropriately guarded at the time of the incident (the guard supplied by the manufacturer was located by WorkSafe inspectors sitting in a cupboard above the planer) and there was no system of regular inspection to ensure guards were present and functional. For this incident, Claymark was fined \$330,000 and ordered to pay reparations of \$42,000 in addition to \$10,000 already paid.



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Rom 10 13-14. For whosoever shall call upon the name of the Lord shall be saved. How then shall they call on him in whom they have not believed?

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AVOID PROSECUTIONS FOR REAL - GO FOR 99.9999% SUCCESS

We are raising the bar yet again. For 25 years we have made claims that our injury prevention training courses and other things we do (there is a long list of them) are not only effective but actually work and stop 99% of potential prosecutions.

In our March newsletter we spent time on the things that most companies do to try and reduce or remove their risks of prosecutions. There are some things that will work but what they do not realize is that it is possible for the Worksafe NZ to lay charges under several sections of the Act at the same time for the one event.

For example in the case of the Nelson Diving Academy both the company and the driver of the boat (worker) were given four fines each under four sections of the HSE Act for the one event where several people were killed by crushing tidal compression at French Pass when they went down to experience the event.

You need to understand that the new Act has the same gateways for several charges to be laid simultaneously. Technically it is possible for an official to lay charges that could conceivably total several million dollars even though this may sound like an impossibility.

We now need to emphasise the importance of doing a few simple things that we know from long experience over several decades that will actually work to the tune of 99% or better. We will detail them and try to explain the reasoning.

1. QUALIFIED AND CERTIFICATED SAFETY OFFICERS

You may find it ironic or hard to believe that having a qualified Safety Officer could actually make the difference between a prosecution and no prosecution. This is more especially the case where the title Safety Officer is not even included in the Act. It is important to understand that it is not necessary for a title to be included in the law and the same applies with Fire Wardens. Everybody knows what Fire Wardens are yet they are not mentioned in the latest Regulations.

What we have found over more than 25 years is that Safety Officers are well known in other jurisdictions (countries) and the Judges well know of their importance and have due regard to their roles. Nearly all of the Officials share the same view and we are pleased to report that having trained about 50,000 Safety Officers over many years and having not one of them prosecuted we think that there is high regard for their role and reputation in the Worksafe NZ team (formerly OSH).

For the appointment and accreditation of Safety Officers to actually work, they must have refresher training every two years to retain currency and they must display their certificates at the work site. It is possible for us to print business card miniatures for contractors or people that travel. It is also possible for us to print off 10 copies of each certificate for issue to authorities as real evidence of the status of the process. In other countries they may be known as Accredited, Qualified Person, Workplace HS Officer. In the USA there are Certified Safety Professionals (CSPs) with salaries of US \$100,000 and in UK Safety Officers 50,000 pounds.



All Clients need to be acutely made aware that Safety Reps are NOT Safety Officers and the present law does not give Safety Reps powers beyond those of issuance of draft provisional improvement notices (PIN).

2. JOB TASK ANALYSIS AND OR SAFE OPERATING PROCEDURES

This is one of the most misunderstood things about health and safety. It is also the most essential in the mix to remove the risk of prosecution. What it means is that every job by every worker must have a prescription as to the names of the various functions or jobs or tasks and each one must be properly documented just like a recipe book has for the making of a cake.

Most people can understand that and the reasoning behind it. We can tell you of many times when in defending a client the "tide has turned" and the inspectors have suddenly decided to close down the likely prosecution as they have been given evidence to convince them that the worker did have proper training in the job function and then failed to carry out the training. The key ingredient however is that for every job function every page must be signed off by both worker and the trainer or manager.

3. HIGH QUALITY SYSTEM IN PLACE WITH EXTERNAL AUDIT

This is becoming more understood. To avoid prosecution it is evident that if the site has an annual external audit by a qualified auditor under the international standards then this can be used in court as a formal formidable legal defence.

The auditor must be competent and be able to issue the certificate to verify and prove that the standards have been implemented and are being maintained in a thorough and high quality manner at all times. Auditors should have ISO 19011 and or 17021 and then issue under standards such as ISO 18001, ISO 45001 or Australian Standards AS NZS 4360 AS 3806 and or Safetymap. As Judge Mazzone J of Boston once said "if managers of sites have proper systems in place with internal controls and then have an infringement, we can exercise leniency and give them the benefit of the doubt"