

# DUTY OF CARE AND ITS RELEVANCE TO TODAY'S BUSINESSES

**D**uty of Care is a term that is often used but seldom understood by many individuals and organisations, particularly those sending their workforce overseas. Either through a need to maintain a competitive edge or to explore new markets, many organisations are internationalising and sending staff overseas, whether on a short-term or semi-permanent basis. In doing so many organisations and individuals are facing risks that their normal daily activities would never expose them to and which they may not have the capability or understanding to deal with. Businesses, therefore, have a moral and ever-increasing legal responsibility to ensure that due consideration has been given for the safety, security and well being of their staff when travelling overseas on their behalf.

The importance of understanding and implementing baseline risk management standards is paramount and should not be overlooked. At the very least, employers need to educate their staff through educational programmes and regular briefings because duty of care has a massive impact on any organisation and its workforce.

Legal duty of care in the UK stems from English tort law (a civil wrong) where a duty of care could be owed to another person in order to ensure that they do not suffer unreasonable harm or loss. For an offence under Common Law two elements need to be established: that there was negligence and there was a duty of care. The legal test for negligence stems from the 1932 case of *Donoghue v Stevenson* where Donoghue was bought a bottle of ginger beer by a friend in the establishment owned by Stevenson. As she drank it a snail fell from the bottle. She successfully sued Stevenson. As a general rule, three elements need to be shown: harm must have been reasonably foreseeable, a relationship existed and it was "fair, just and appropriate" to impose liability.

As UK case law developed during the 20th Century, Health and Safety legislation played an increasingly important part in protecting employees and ensuring that employers paid due care to their safety and well being. Under the Health and Safety at Work Act 1974, the duty of care relationship between employer and employee was further strengthened with the wording of Section 2 which states: "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his/her employees".

Legal duty of care obligations have been further enhanced through the introduction of new legislation including the Corporate Manslaughter and Homicide Act of 2007, which specifically defines a breach of a duty of care by an organisation as being "gross" when "that duty falls far below what can reasonably be expected of the organisation in the circumstances." (Section 1, 4, (b)).

Duty of care obligations are incorporated into many international and national laws and the understanding



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of these legislations is difficult for legal experts to understand, let alone businessmen and individuals.

Away from the legal understanding of duty of care, Professor Lisbeth Claus (PHD) describes duty of care as referring to: "A broad culture in which employers care about the health, safety, security and well being of their travelling employees". Good management practises advocate that happy staff increase productivity, reduce sickness and are more positive. Therefore by default if an organisation is keeping them safe and secure, while considering their broader wellbeing all of the above are likely to be achieved.

With more than 14 years' experience travelling around the world on behalf of various organisations in a number of different sectors, to me, the meeting of duty of care obligations is a fundamental part of good business practise.

Aside from the good business practises previously outlined, there are stated cases that have impacted organisations when sending their staff overseas, which demonstrates the wider impacts of failing to meet necessary duty of care obligations. The case of *Palfrey v Ark Offshore Ltd* (2001) relates to a UK company

***It is important to carry out a full risk assessment if you are sending individuals to work overseas***

(Ark Offshore), which was sending staff to West Africa. Although aware of the malarial risks that existed, and telling Palfrey that he needed to ensure he sought medical advice and guidance before travelling, they failed to do so. While in the country he contracted malaria and died from it. His family successfully sued as the judgement ruled that an employer has to be proactive in ensuring the safety and well being of staff that are sent overseas.

A second and more recent case; potentially with wider implications, resulted from the case of *Dennis v Norwegian Refugee Council* (2015) that was heard in Oslo. Steve Dennis was an aid worker who was working for the Norwegian Refugee Council (NRC) in the Dadaab camp close to the Kenyan/Somalia border. The convoy he was travelling in was ambushed by Somali gunmen and he, along with three other colleagues, was kidnapped and taken on foot into Somalia. After three days they were rescued by pro-Government militia. Injured and suffering from post-traumatic stress Dennis successfully sued NRC for gross negligence and was awarded \$500,000 when it was ruled that NRC failed to correctly assess the extent and nature of the risks that existed in the Dadaab camp, which their staff were subjected to. It also found that the security investigative process was flawed. This case demonstrates that even organisations sending staff to more volatile locations have an obligation to maintain a duty of care that ensures their staff can operate in a safe and security environment.

Duty of care is all about managing the risks that can impact the safety, security and well being of staff. Therefore without organisational risk management processes, an organisation will never be able to successfully manage the risks that it faces. A risk management framework is important for all organisations so that they can articulate and understand their risk tolerance and acceptance levels, which in turn guide their safety and security practises and procedures.

When organisations send their staff overseas there must be a travel risk management (TRM) policy or procedure that provides clear direction that must be followed to manage the risks faced by travelling employees; and to protect the organisation (see box out). It is vitally important to have risk management procedures in place, even a travel risk management procedure, but if the information contained within it is not shared with management and staff in a meaningful manner the organisational duty of care obligations may still not be met.

An educational programme is an organisation's way of sharing information that increases the levels of knowledge and understanding. Programmes do not need to be a formal, classroom-based affairs. Although this may be appropriate, it isn't always necessary. A programme could include email circulars, flyers, all the way through to a four to five day intensive externally provided programme. An organisation's educational and training programme should be threat based and



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specific to the likely risks that could be experienced by the traveller.

The main purpose of any risk-based education and training programme is to increase the levels of awareness and vigilance of the attendees to be able to successfully identify, avoid and manage the risks that they may face. However, in my experience, I have often found that the starting point is the introduction of a Management Awareness Programme. The reason behind this is that the manager plays an important part in the TRM process whether it be authorisation, being a point of contact or simply briefing their staff. Without the manager's understanding the importance of meeting duty of care obligations, there is a greater likelihood of unnecessary risks being taken and subsequent failures occurring.

For staff travelling overseas, the educational programme should correspond with the levels that are included within the TRM procedures. I would always advocate the creation of a simple matrix that plots to the country risk level and the length of stay; based on the organisational risk tolerance levels a certain level of programme must be undertaken. (Note: This is where cross-organisational agreement and buy-in is critical, especially from HR and legal departments).

It may be that most organisations do not have the time, skills or knowledge to establish in-house educational programmes and they need to outsource it, providing the organisational requirements are still being met. This does not absolve an organisation's responsibility and the duty of care obligations still need to be met.

No programme should be created without a full risk assessment being undertaken alongside a training needs analysis. By understanding the potential risks, programmes and their content can be designed within certain risk criteria. In nearly all cases it is appropriate to provide personal safety and security training, whereas in other cases it may be necessary to deliver first aid or defensive driving training.

When staff are travelling to hostile areas, managers and directors need to assess whether their duty of care obligations have been fulfilled. Has training been given that is appropriate for the area? Has communications training been provided on how to react to incidents? These are the kinds of questions those in power have to ask themselves in these situations. I have even provided briefings warning of the risks posed by certain strains of gonorrhoea in a certain city. Once educational programmes have been established it is important that they remain relevant and fit for purpose. One way of achieving this is to receive feedback from staff that have travelled overseas.

Generally speaking, employees are an organisation's most valuable asset and therefore it is appropriate to protect the assets so that they can continue to provide a service and be productive. Educational programmes that increase travellers' levels of awareness and their vigilance to the risks they may face provides the advice and guidance they may otherwise never have received. Educating staff in this way directly benefits organisations by reducing the risks to personnel, operations and at times, reputation, while clearly demonstrating an organisation's legal and moral commitment to meeting its duty of care obligations.

## Suggested content of TRM procedure

- Statement of intent
- Categorisation of countries
- Categorisation of trip types
- Pre-deployment research activities
- Logistical processes
- Medical and welfare
- Accommodation selection process
- Education and training
- Communication strategy
- Incident management



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