

AMERICAN SOCIETY OF
SAFETY PROFESSIONALS

Liability for Construction EHS Professionals


Neil A. Feldscher, CIH, CSP, Esq., FAIHA

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Agenda

- What is liability and what are the types of liability
- Individual vs Corporate
- Where does this liability arise from?
- Examples
- Liability Protections
- Questions

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Facts Matter

- Liability/litigation depends upon the facts!
- No one size/analysis fits all.
- IT DEPENDS!

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Liability?

- An obligation to do or refrain from doing something;
- A duty which eventually must be performed;
- An obligation to pay money;
- Signifies money owed, as opposed to an asset;
- Also used to refer to one's responsibility for his conduct, such as contractual liability, tort liability, criminal liability, etc.

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Liability?

- An obligation one is bound in law or justice to perform;
- Condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden;
- Condition which creates a duty to perform an act immediately or in the future;
- Every kind of legal obligation, responsibility, or duty;
- The state of one who is bound in law and justice to do something which may be enforced by action;
- The state of being bound or obliged in law or justice to do, pay, or make good something

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Liability?

- Broad legal term
- Includes almost every character of hazard or responsibility, absolute, contingent, or likely
- An obligation to do or refrain from doing something
- Refer to one's responsibility for their conduct

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Liability

- Civil
- Criminal
- This is the legal outlook
- But, it goes beyond that!

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Civil Liability



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Criminal Liability



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Construction Drivers of Liability



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vs



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Who is Responsible for EHS?

Liability flows to the person or persons responsible for the specific EHS issue at question



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How are you named?



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But Why Individuals?

- Deep pockets?
- Litigation tactic
- Responsible party?
- Intentional Act?



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What is your position?

- Employee
- Self-Employed/Owner
- Independent Contractor
 - Are you really independent?

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From Where?

- Statutory/Regulatory
- Penal Law
- Common Law

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So what's the big deal?

<ul style="list-style-type: none"> ▪ Occupational Safety & Health Act ▪ Federal Insecticide, Fungicide, & Rodenticide Act ▪ Clean Air Act ▪ Clean Water Act ▪ Safe Drinking Water Act ▪ Resource Conservation & Recovery Act ▪ Toxic Substance Control Act ▪ Emergency Planning & Community Right to Know Act ▪ Superfund Amendments & Reauthorization Act ▪ Comprehensive Environmental Response, Compensation & Liability Act ▪ Endangered Species Act ▪ Health Information Portability & Accountability Act ▪ Genetic Information Nondiscrimination Act 	<ul style="list-style-type: none"> ▪ Regulations under any of the Acts listed to the left ▪ State versions or additions to regulations for any of the Acts on the left ▪ Local versions or additional to regulations for any of the Acts on the left ▪ Executive Orders ▪ Areas where agencies have regulated beyond those issues directly assigned by statute ▪ Transportation regulations ▪ Radiological materials regulations ▪ Workers compensation ▪ General employment law ▪ Workplace Violence statutes ▪ Common Law ▪ How about international versions of these same regulated areas?
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So what do we do?

- Become an expert in everything!
- Understand & practice issue spotting in subjects beyond your normal area of practice
 - You can't research everything (though with Google...)
 - Recognize the areas of regulation and the types of regulation that exist



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And let's not forget...

- Common Law (Civil litigation)
 - Negligence
 - Wrongful death
 - Assault & Battery
- Penal Law (Criminal litigation)
 - Criminally negligent homicide
 - Involuntary manslaughter
 - Willful resulting in the death of an employee
 - Assault & Battery
 - Knowing acts under various environmental statutes
 - Knowingly endangering others under various environmental statutes



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Penal Law

- Criminally Negligent Homicide
 - Death is a result from serious negligence or serious recklessness
- Involuntary Manslaughter
 - Unlawful killing without malice aforethought

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What about Civil Issues?

- Could be criminal issue if against the government

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Other potential liability

- Personal licenses
 - Complaints to licensing boards
- Employment/Hiring – future issues
- Reputation!


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Examples

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Example #1



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Example #1

- Large demolition project w/ sophisticated owner
- Hire Construction Management Firm (CM)/General Contractor
 - Hire subcontractors (specialty)
- Project Managers, Superintendents, Foreman, etc.
- CM has an overall safety manager for the site
- During demolition standpipe broken
 - Observed but not repaired (scheduled to be demolished soon why fix?)
- Worker causes fire with cigarette
- During the fire two firemen die

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Example #1 - Criminal

- Could this be presented as a criminal case?
- Should it be a criminal case?
 - Firemen are dead!
 - Does this look like a hard to prevent accident?
 - Was there knowledge of the hazard?
 - How difficult was this to prevent?
- Protections?

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Criminal – Where is the line?

- Is there a line where something is criminal?
 - Hurting the public?
 - What about the young?
 - Or the disadvantaged?
 - Or is it about conduct?
- Where should the line be?

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Example #1 – Civil

- Who would be suing?
 - Who would they be suing?
 - Companies?
 - Individuals?
- Protections?

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Example #2

- General contractor constructing concrete structure
 - Concrete subcontractor
- Construction Manager overseeing all work
- While pumping concrete the formwork collapses
 - Concrete pump operator positioned on the formwork is killed
 - Laborer on ground level is struck and killed
 - CM inspector on ground level injured

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Example #2 - Criminal

- Could this be presented as a criminal case?
- Should it be?
 - Workers are dead!
 - Does this look like a hard to prevent accident?
 - Was there knowledge of the hazard?
 - How difficult was this to prevent?
- Protections?

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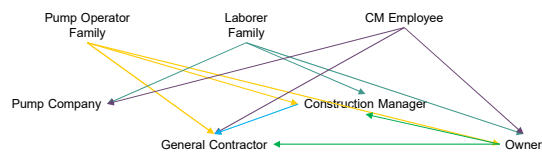
Example #2 – Civil

- Who would be suing?
 - Who would they be suing?
 - Companies?
 - Individuals?
- Protections?

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This is just the corporate litigation relationships. What about individuals?

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Example #3

- GC/CM has a contract that includes incentives
 - Includes incident-based incentives
- Bonuses are awarded based upon incident rate
- Allegations later that incident(s) were miscategorized
 - Would it matter how many were miscategorized?
 - Would it matter how "incorrect" the mis-categorizations were?



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Example #3

- What is the liability here?
- Would it matter who the contract is with?

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Protections



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Protection(s)?

- Don't break the law
- Don't do anything wrong
- Recordkeeping?
- Insurance?



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But Most Important Element...

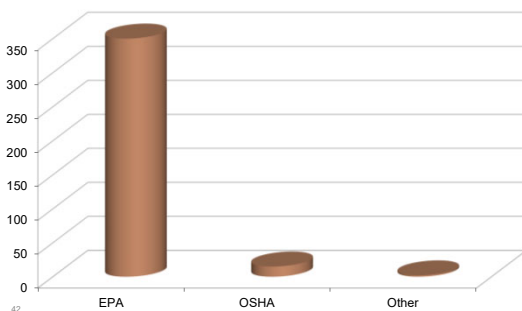
- Recognize and Identify your risk!!!!
- And then manage it as needed.

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Criminal Cases



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