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## **Session with Eversheds LLP - “Work Placements in the Education Sector - Legal Duties and Real Risks”**

John Wilson – ASET Chairman

To give some background to today’s session, in the early 1990s ASET first became involved in Health and Safety issues relating to work placements, in response to questions raised at conferences. This culminated in the publication in 1997 of a report entitled ‘Health and Safety Guidance for the Placement of HE Students’. For this report solicitor’s opinion (not Eversheds’) was sought to try and establish a reasonable set of preparations to undertake before and during a placement. The report was adopted by CVCP (now UUK) as definitive guidance. Since 1997, all UUK’s Health and Safety responsibilities have passed to UCEA. Recently there has been talk of revising/updating the report and ASET have been considering undertaking this (a working party has now been established and will be convening for a meeting in August 2006). In the past year USHA, the Safety Officers body alongside which ASET worked on the 1997 report, have been active in drawing up an independent report, a draft of which has been circulated. There has subsequently been much talk and confusion about the status and merits of this new USHA report.

*The following record is a non-verbatim account of the session with the Eversheds panel on 7 September 2005, which has subsequently been approved by Eversheds.*

Angela Peers – Manchester Metropolitan University

Are you familiar with the existing document and the new draft and, if so, could you outline the main differences of responsibility?

Siân Jones-Davies - Eversheds

Yes, we have seen both documents. The existing document encourages a more proactive approach, placing an onus on the institution to assess and manage health and safety risks. Examples of the proactive approach include the use of checklists, seeking feedback from the student and visits to placements. The draft revised guidance proposes a more reactive approach, for example, by the suggestion that the institution inform the placement provider of its health and safety expectations, rather than complete a checklist or carry out health and safety visits. Eversheds have serious concerns that this will result in a weakening of the manner in which institutions seek to discharge their health and safety obligations and will expose institutions to potential claims and investigation where students are thereby exposed to risks to their health and safety.

Angela Peers – Manchester Metropolitan University

Would such a new report not dilute or even remove the duty of care?

Siân Jones-Davies – Eversheds

No, not in the eyes of a court, as there has been no change in the law. Institutions will still owe a duty of care and a court would expect institutions to have regard to appropriate (rather than simply the most recent) guidance in discharging that duty of care.

Lisa Ward – University of Huddersfield

Why is the onus of responsibility not on the employer?

James Thompson – Eversheds

It is all about the triangular relationship between the student, employer and institution. Both employers and institutions have Health and Safety responsibilities.

Eversheds Presentation (supplement to ‘Work Placements in the Education Sector–Legal Duties and Real Risks’ handout)

The responsibility for the health and safety of placement students does not just rest with employers; the institution’s legal duties extend off campus. Claims for breach of these duties could be pursued and, even if they are not successful, the time, money and damage to reputation incurred in defending them could be very harmful to the institution. Eversheds’ view is that institutions should always maintain a degree of responsibility to seek to prevent both the corporate body and individuals being exposed to prosecution. Such a case could either come in the form of civil action where a claim is made against the institution, or criminal action in the event of death or serious injury where the institution’s, and even an individual’s, precautions can be scrutinised. If anyone in an organisation is able to control/dictate how the placement programme is run then they may acquire responsibility for the risk, which they must then manage and safeguard against. Under Section 3 of the Health and Safety at Work Act 1974, organisations are liable to an unlimited fine and the £15 million that Transco were fined for four deaths shows the sort of figures applicable for breach of the Health and Safety at Work Act. However, simple steps can be taken to seek to make sure both the institution and individuals are not held liable.

The triangular relationship demonstrates simply the continual link between all three sides of a placement. The link between students and the institution always remains and responsibilities cannot be delegated.

Under common law there is a general duty to look after students’ welfare. To prove an institution negligent, it must be shown that it has breached its duty of care. If an institution sends an individual to a placement and has not checked that it is safe, then it may have breached its duty and could be held liable.

In addition, Section 3 of the Health and Safety at Work Act highlights employers’ responsibility to look after people in their workplace who are not employees. If an institution sends someone on placement, it is possible that a court may interpret that the placement is in fact the workplace as, by definition, the workplace is not location specific. It remains for a judge to decide the scope of coverage.

Furthermore, if parties breach their contractual responsibilities then they may be liable. If contractual obligations have not been fulfilled then students, or possibly their parents, could bring legal action.

Although an institution may not have initiated the procedures, it can inherit the responsibilities. It needs evidence of what action it has taken as this will assist a legal team to defend a case against it.

Placement situations could theoretically also lead to criminal prosecutions. If there is proof of gross negligence, there is nothing to say a placement officer could not be charged with manslaughter. An example of this would be placing a student with a company known to have a bad Health and Safety reputation, ignoring warnings from students of near misses etc. Such action might not necessarily lead to a conviction but could bring about gross negligence charges. Placement practitioners therefore need to make sure they do enough to cover themselves and their organisation.

Regarding placements abroad, although UK criminal law has no jurisdiction overseas, charges could still be brought against negligent pre-placement preparation. A civil claim has in the past been brought against St Andrews University regarding one of their students who was attacked while on overseas study (rather than on a placement) in Odessa.

Health and Safety is an area an institution should not compromise on. By doing relatively little an institution can seek to protect itself, explicitly by demonstrating its duty of care with an audit trail of protective exercises such as checklists, risk assessments, Health and Safety visits and maintaining points of contact with students. In situations like this it is often seen that there are no such things as accidents and blame can always be apportioned. By maintaining a level of responsibility an institution can seek to avoid becoming a scapegoat.

Do what your health and safety policy says and keep documentary evidence to show it has been carried out. Risk assessment forms are very important in this. Maintain living documents, do not just write then file records away, keep them under constant review and regularly audit policy. All Health and Safety regulators and police love documents so set out what all parties are going to do, make sure you do what you say and have a written fall back position. Finally, have a procedure for withdrawing students should such action be necessary.

Student perception is very important. If you do not perform the measures recommended, beware of creating a bad reputation for your institution. The press love stories about Health and Safety, damage and death, and it could cause a major PR issue and a deterrent for future students if an incident occurred.

Eversheds advise on all the issues highlighted in the 'Proactive and Holistic Management of the Student Relationship' diagram. This shows how many facets need to be taken into consideration.

Finally, you must take basic steps to document your preparation for placements to protect yourself and your institution. Remember your institution's continuing responsibilities - it should never be a case of out of sight, out of mind.

### Question and Answer session

Sylvia Hargreaves – Nottingham Trent University

Regarding Criminal Liability, is Section 3 of the Health and Safety at Work Act the only reference point for this?

James Thompson – Eversheds

No, risk assessment has a wider reach and is implicit in this. You should always do and carefully document risk assessment, though obviously different levels on this are determined by the nature of the placement. Placements in offices are less likely to require specific visits and Health and Safety assessment than placements in the construction industry, for example. You are more likely to get prosecuted for not correctly discharging your duty of care.

Carrie de Silva – Harper Adams University College

Referring to risk assessment, would you recommend visits for all new employers?

James Thompson – Eversheds

If you were being prosecuted, the first question the Health and Safety Executive (HSE) inspector would ask you would be have you been there? You should be aware of factors like where their Health and Safety policy is displayed and who is the contact in the company with responsibilities in that area. You should go, as, if possible, should a Health and Safety expert.

Carrie de Silva – Harper Adams University College

What if practicalities make such action extremely difficult?

James Thompson – Eversheds

There is no leeway on this issue. Inconvenience or lack of resources are not an excuse in an inquiry. The best advice we can offer is that if you can possibly go, go. If not, this may be seen as a weakness by the HSE.

Zineb Norcliffe – University of Huddersfield

Is Health and Safety expertise an essential requirement for the visiting person or will any placement tutor satisfy?

James Thompson – Eversheds

It would be great if the visit could be made by a Health and Safety expert but, if not, then any visit is better than none. A practical balance needs to be struck but, in an investigation, such a point could be raised.

Siân Jones-Davies – Eversheds

Whoever the visitor is, it would be preferable if they are aware of their institution's policy, be able to recognise risks and have training in risk assessment. They should also be able to refer back to the Health and Safety officer when appropriate. There is a spectrum of possibilities from no visit, up to a visit by a Health and Safety manager. The further along the spectrum, the better should be the situation for the institution.

Zineb Norcliffe – University of Huddersfield

What about placements abroad?

Siân Jones-Davies – Eversheds

Obviously there are more practical difficulties in visiting overseas but there are also potentially far higher risks which an institution should consider addressing. It should also make sure it checks the local legal situation.

Tamsin Pyne – University of Plymouth

Are there generic guidelines on risk assessment for overseas placements?

Siân Jones-Davies – Eversheds

Useful reference points on placements include the QAA, UKCOSA ([www.ukcosa.org.uk](http://www.ukcosa.org.uk)) and ARMED, a HEFCE funded site (<http://armed.ilrt.bris.ac.uk>).

Jan Young - College of St. Mark & St. John

What are our responsibilities to the employer?

Helen Cookson – Eversheds

It depends on the arrangements put in place. What the student is doing determines risk and potential liabilities and you need to decide who will accept them. Expectations need to be clearly expressed, for example, is active supervision expected and by which party, who is accepting what risks? If you know a particular student has a condition, say a mental illness, you may have a responsibility to tell the employer of this.

Siân Jones-Davies - Eversheds

In relation to the triangular relationship between institution, placement provider and student, the courts may regard the institution-employer relationship (if indeed the placement provider is an employer - there may not be an employment relationship between the placement provider and the student) in a particular situation as a contractual one, even if there is no written contract in place. Therefore it is better to have the 'rules of the game' expressly articulated from the outset.

Jan Young - College of St. Mark & St. John

In regards to students' conditions, what about confidentiality/DDA issues?

Siân Jones-Davis – Eversheds

You need to make it clear to students from the outset what you may disclose and in what circumstances and seek their consent to this. It is important in terms of managing expectations that all sides are aware of disclosure situations that may arise.

Helen Cookson – Eversheds

There are exceptions to the duty of confidentiality such as when disclosure is in the overriding public interest. Even sensitive personal data (e.g. medical information) may be disclosed responsibly under the Data Protection Act, for example if it is necessary to protect the vital interests of a person.

Jo Noblett – University of Central Lancashire

Sometimes Health and Safety jobs are delegated to lower clerical and administrative staff and responsibility becomes interwoven into their jobs. Should this happen and can they become personally liable?

James Thompson – Eversheds

The HSE always tend to climb trees to look for higher levels of responsibility and usually leave the lower practitioners alone whilst investigating the senior people who defined the Health and Safety policy. The individuals on the bottom rung tend to be ok unless they can be seen to have been overtly negligent. Generally though, it is a mistake to delegate down so far within the institution and emphasis would shift to a corporate level.

Tricia Tape - Loughborough University

In terms of checking premises, I am responsible for 300 students in 120 locations. Although I receive feedback every year for every company, are you saying I need to perform onsite risk assessment every year at each location?

James Thompson – Eversheds

It is all about being reasonable and striking a balance. Start with the ones you perceive to be the most risky. This alone shows that you have thought about the risks in your actions.

Siân Jones-Davies – Eversheds

Also consider what you are promising students generally about placements. Be aware of making blanket statements to students. The more emphatic the statement, the more likely it may be interpreted as a contractual promise. If the promise is not kept, this could lead to civil proceedings for breach of contract.

Harriet Robinson – King’s College London

Are Health and Safety issues impacted by differing definitions of what a student is and what a placement is?

Siân Jones-Davies – Eversheds

Definitions can vary from institution to institution. There may be no precise definitions of some things and the courts may decide upon their own definitions. There is a danger that institutions may in their own minds have defined placements too narrowly and overlooked their responsibilities in areas such as opportunities for voluntary work, concentrating rather on compulsory placements in which they are directly involved. In general, risk and duties arise where there is a degree of connection between the parties.

Helen Cookson – Eversheds

You need to be aware that this would be judged on how it is perceived by an outside third party with no knowledge of institutional structures. It would be based on the facts of what is offered, how it is communicated and any statements of responsibility. Defining the scope of definitions may be useful for greater awareness internally, but may not absolve responsibility if matters come before the courts.

Angela Peers – Manchester Metropolitan University

The QQA code is very all encompassing in its definition of a placement including all course related activity outside of campus. Is the duty of care limited to the working day, like it normally does once a studying student is off campus, or does it extend outside of the work experience and environment?

Siân Jones-Davies – Eversheds

Duty of care is not generally defined simply by reference to a 9-5 day. It may in some situations be reasonable to extend the duty of care to areas not directly connected to the course-related part of a placement.

Tricia Tape - Loughborough University

I have 80 students placed in London in close proximity to the locations of the recent bombings. Would I therefore be expected to, say, warn students against going to London?

Siân Jones-Davies and James Thompson – Eversheds

Generally such incidents are difficult to predict as distinct, say, to a situation involving an area which is a known trouble zone where risks are more likely to arise and are more foreseeable. It is a difficult situation but you should focus on factors like what support and planning you have in place. Be proactive in collating and maintaining emergency contact numbers and outline a plan that enables you to be able to account for all your students in the occasion of such an event.

Dave Hotchkiss – Plymouth College of Art and Design (By proxy and subsequently responded to by Eversheds after the session)

In the creative industries many placements are only short term and with sole traders who do not have Employers' Liability insurance. Could you please clarify what insurance is essential and minimum as if we demand Employers Liability insurance we will be losing a wide range of valuable experiential opportunities?

The only insurance which employers are compelled to take out by statute is Employers Liability (EL) insurance. There is no statutory obligation for a sole trader, who by definition will not have any employees, to take out EL insurance. By implication, therefore, sole traders will not carry EL insurance. A sole trader may, however, voluntarily take out some other form of insurance (for example, public liability insurance which will include occupiers' liability insurance) which will indemnify for liabilities to third parties in respect of injury or death, or loss or damage to their property, at work. Such insurance would not necessarily cover an incident relating to a student, however; whether it did would depend on the exact cover in place and the specific circumstances of the incident arising.

As some placement providers may not comply with the statutory obligation to take out EL insurance, or do not need to because they are sole traders, it is sensible for an institution to request clarification from a placement provider of what insurance the placement provider has in place, and to request a copy of any policy documents or schedule relating to that insurance, in order for the institution to establish whether it covers students and in what circumstances.

In relation specifically to EL insurance, what will determine whether a student on placement is "an employee" for that purpose will be the definition of "employee" under the particular EL insurance policy. Temporary employees may not ordinarily be covered by the definition. Even where a placement provider has EL cover which includes additional temporary individuals, it may need to notify its insurers when it takes on such individuals as it will be under a continuing duty to disclose circumstances which may affect its liability cover (for example, employing additional persons).

Institutions should generally have regard to the apportionment of risks and potential liabilities across the triangular relationship of institution, placement provider and student and whether that apportionment is reflected in the insurance cover (not just in respect of EL insurance) in place across that relationship, particularly where students do not fall within the definition of “employee” for EL purposes. It is suggested that institutions discuss with their brokers the type and extent of cover currently in place (taking into account the existing cover, not only of the institution, but also of the placement provider), whether that cover is sufficient and appropriate, and whether it might be possible to extend their own insurance to cover students on placements.

Institutions will wish to avoid unintentionally finding themselves in a position where an incident involving death, injury or loss to a student arises where no insurance cover is in place across the triangular relationship.

In summary, therefore, an institution should, as a minimum, look either to: (1) place students with placement providers with EL insurance or some other form of appropriate insurance which will specifically cover the students; and/or (2) check whether the institution's current insurance programme is applicable and/or an endorsement or extension of cover to the current programme is available that will adequately cover students on placements; and/or (3) consider with its broker whether any specific policy to cover students on placement with placement providers is available in the market.

From a Health and Safety (not insurance) perspective, both the institution and the placement provider will have non-delegable statutory duties to ensure the Health and Safety of a student during the placement.

ASET would like to thank the Eversheds team for giving its conference delegates such an invaluable opportunity.

Transcribed by Keith Fildes, with acknowledgement to Sarah Flynn.