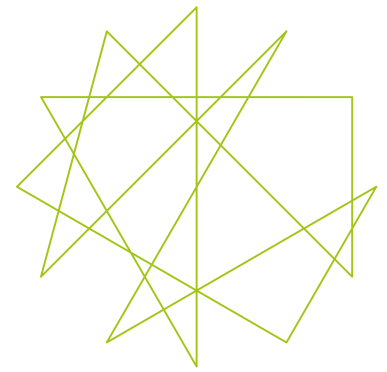


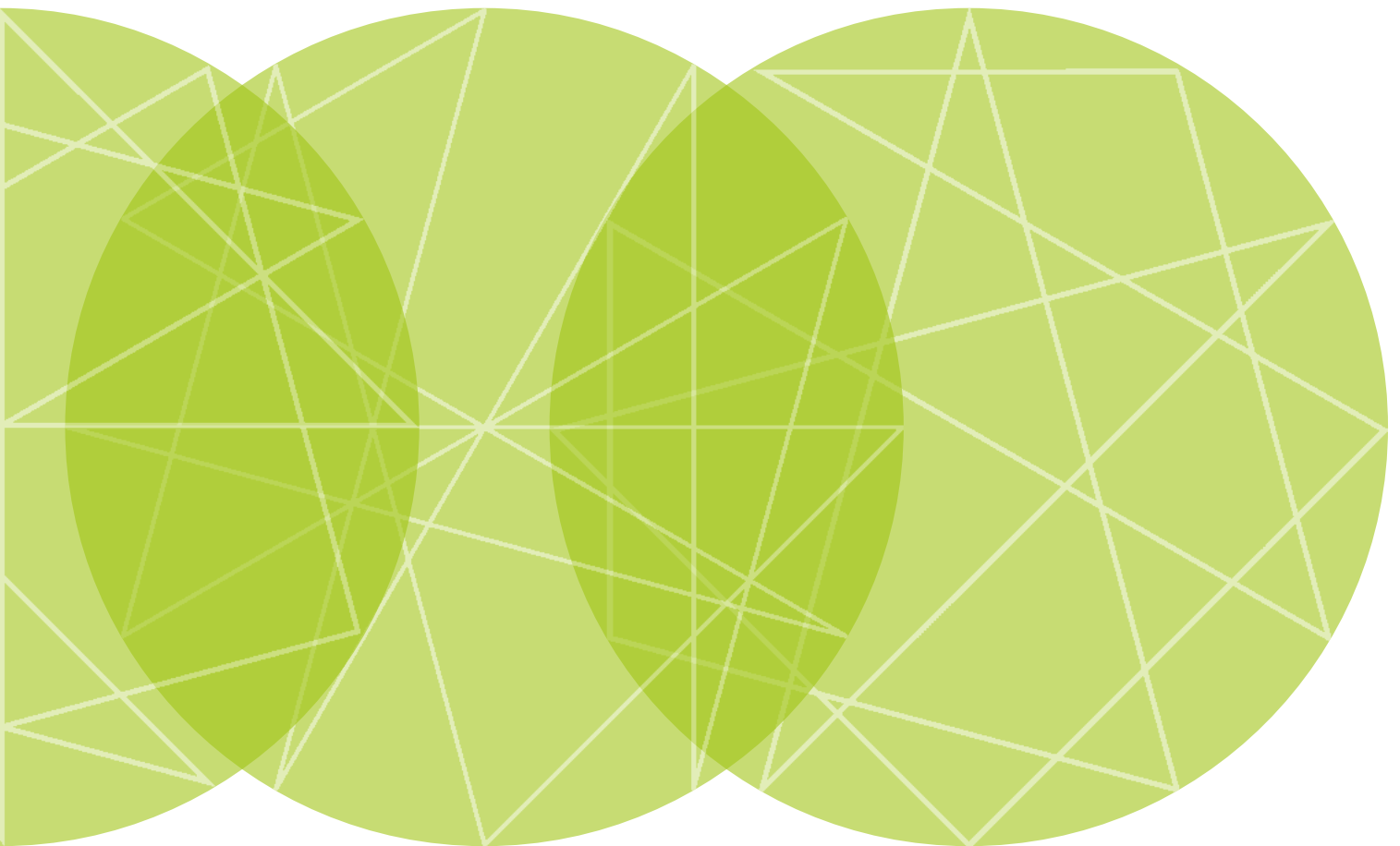
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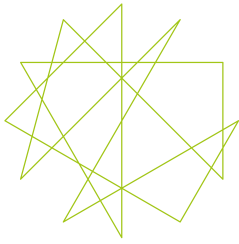
Duty of Care: A review of the Dennis v Norwegian Refugee Council ruling and its implications

Maarten Merkelbach and Edward Kemp

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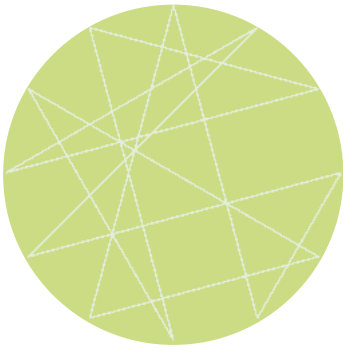
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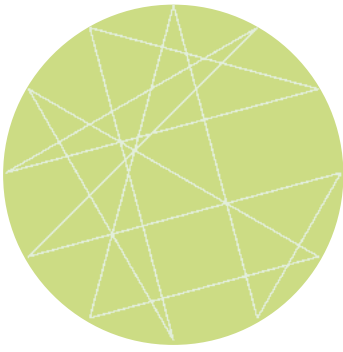
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Contents

Executive summary	03
Introduction	05
1 The facts and the ruling	07
1.1 The facts	07
1.2 Legal framework	07
1.3 The reasoning of the Court	08
2 The ruling, duty of care and security risk management	11
2.1 Context analysis (internal and external contexts)	12
2.2 Risk analysis	12
2.3 Identify mitigating measures	12
2.4 Implement mitigating measures	12
2.5 Crisis management plan	13
2.6 Crisis response	13
2.7 Redress measures	13
2.8 Follow-up and review	14
3 The ruling and broader considerations for the sector	15
3.1 Duty of care: moral and legal dimensions	15
3.2 Responsibility and non-contractual relations	16
3.3 Does the case lead to risk aversion?	16
3.4 Informed consent and assumption of risk	17
3.5 To document or not to document?	18
3.6 'Culture of security', responsible conduct and decision-making	18
3.7 Threat and risk analysis: foreseeability and control measures	19

3.8	Armed rescue operation	20
3.9	Role and position of the security advisor	21
3.10	Human resources management	22
3.11	Why go to court?	23
	Conclusion	25
	References	26
	Other EISF publications	28



Executive summary

On 29 June 2012, Steven Dennis, an employee of the Norwegian Refugee Council (NRC), was injured and kidnapped, along with three other colleagues, following an attack during a VIP visit to the IFO II refugee camp in Dadaab, Kenya. Four days later the hostages were set free during an armed rescue operation carried out by Kenyan authorities and local militia. Three years later, Dennis submitted a claim at the Oslo District Court against his former employer, the NRC, for compensation for economic and non-economic loss following the kidnapping. The Court concluded that the NRC acted with gross negligence in relation to this incident and found the NRC to be liable for compensation towards Dennis.

The purpose of this paper is to reflect on the court case and what lessons can be drawn from the Court's ruling for the international aid sector. In order to achieve this, the paper reviews the Court's legal reasoning and highlights the interrelation between the ruling, the concept of legal duty of care and security risk management. The paper concludes by providing an overview of some of the wider implications this case has for the international aid sector.

Dennis pursued three legal claims against the NRC. With a focus on determining negligence in relation to the incident, the Court considered and reached conclusions on the following: the foreseeability of risk, mitigating measures to reduce and avert risk, gross negligence, causation and loss.

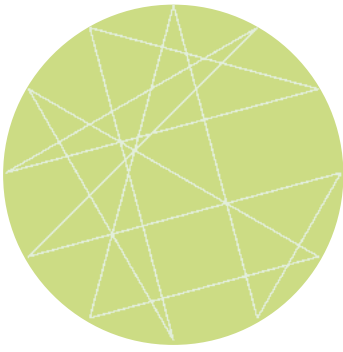
The Court found that the risk of kidnapping was foreseeable. It also found that the NRC could have implemented mitigating measures to reduce and avert the risk of kidnapping. The Court furthermore found that the NRC acted with gross negligence and that the NRC's negligent conduct was a necessary condition for the kidnapping to have occurred. In summary, the Court found that the legal requirements for compensation for injury, as well as compensation for pain and suffering were met. The Court ordered the NRC to pay Dennis approximately 4.4 million Norwegian Krone (approximately 465,000 EUR).

Although the terminology and approach used by the Court differ from a standard security risk management approach, the ruling refers to elements familiar to security experts and uses some of the evidence of failings in these areas to find that the NRC fell short of meeting due care standards in this instance. For example, in terms of context and risk analyses, the Court found that there was an insufficient understanding of the security situation in Dadaab by the NRC decision-makers, which resulted in the risk of kidnapping not being properly analysed shortly before the VIP visit. The Court also found weaknesses with regards to the identification and implementation of mitigating measures, particularly in relation to the decision to not use an armed escort, which was contrary to existing practice and security recommendations for Dadaab at the time.

A number of lessons can be derived from the ruling with implications for the international aid sector. The fundamental conclusion that can be drawn from the court case is that duty of care is a legal obligation that organisations in the international aid sector must adhere to and that they must do so to the same standard as any other employer. The ruling does not argue, despite the context, that operating in Dadaab was contrary to the law. The case instead highlights that mitigating measures must be proportionate to the risk. Therefore, the ruling should not cause organisations to become more risk averse but rather cause them to institute stronger security risk management procedures in line with the context they are operating in. The ruling furthermore highlights that an essential component of duty of care in high-risk environments is 'informed consent'. The Court found that informed consent was doubtful or entirely absent in some instances leading up to the incident.

Some additional issues raised by the court case that the paper reflects upon are: legal duty of care for non-employees, documentation and liability, organisational 'culture of security', armed rescue operations, the role of security advisors, human resource management, and finally, why this case went to court.

The case of Dennis v NRC highlights the legal repercussions organisations could face in the event that they do not meet adequate duty of care standards towards their employees before, during and after a security incident. For an organisation, it is essential to take account of the mandatory nature of duty of care. However, this goes beyond legal responsibility and the wish to avoid court cases with all their negative effects. More importantly, due consideration of duty of care has wide-ranging positive impacts on an organisation. It makes sense for an organisation to embrace and invest in duty of care rather than expend efforts to avoid it; in fact, embracing duty of care leads to a better organisation.



Introduction

On 25 November 2015, the Oslo District Court¹ ruled in a case that is widely thought to be a first test case of the Duty of Care² within the international aid sector in Europe and beyond.³ The case concerns a claim for compensation for economic and non-economic loss following the kidnapping and injury of Steven Patrick Dennis on 29 June 2012, while he was employed by the Norwegian Refugee Council (NRC) in Dadaab, Kenya. The Court ruled in favour of Dennis and awarded damages, and found gross negligence on the part of the NRC.⁴

Duty of care

There are two types of Duty of Care: moral and legal. This paper will focus primarily on the latter. Legal Duty of Care is an obligation imposed on an individual or organisation by law requiring that they adhere to a standard of reasonable care while performing acts (or omissions) that present a reasonably foreseeable risk of harm to others. A key terminological difference in an international context is that the civil law systems tend to refer to 'legal responsibility' rather than the 'duty of care', which is an Anglo-Saxon concept used mainly in the common law world.

► For more information please see Kemp and Merkelbach (2011), p. 20.

It is in the nature of any human enterprise that things can go wrong and that, sooner or later, they will. This does not necessarily mean that the law has been broken and that such an event is subject to a court

case – far from it. However, in this case, the Court did find that the law had been broken and it is, therefore, important to reflect on the ruling, how the Court handled the case, and what lessons can be drawn from it.

The Court's ruling has made it clear that 'due care' law applies to employers in the international aid sector just as it does to other employers:

The Court has not found any case law or examples from legislative preparatory works or legal theory that may be compared to the NRC's operations. Consequently, there are no clear guidelines for what requirements the aggrieved party may reasonably place upon the undertaking within the aid industry. In the light of this, the Court can at least not see any basis for applying a milder due care standard for employers within the aid industry than the one that applies to other employers.⁵

The Court's opinion that employers in the aid industry must meet due care standards is widely seen as having relevance and impact, and perhaps even precedent, beyond this single jurisdiction and instance.⁶ Most, if not all, national jurisdictions will have law and regulations that address health and safety at the workplace. In addition, there is applicable international legislation, such as European Union law.⁷ While in this case Norwegian law was applied, it is reasonable to assume that the basic reasoning of the Court is shared across jurisdictions even if the outcome may differ.⁸ The case and the ruling have, therefore, generated significant interest in the non-profit sector across Europe as well as further afield.⁹

¹ Henceforth referred to as 'the Court'.

² Unless otherwise specified, when using the capitalised term 'Duty of Care', this paper is referring to Duty of Care as a legal obligation. Please see Duty of Care box text for more information.

³ In the US, similar claims have been made but none of those claims have resulted in a court judgment following a trial. See for example: *Wagner v. Samaritans Purse*, District Court for the Southern District of New York (2011) (kidnapping in South Darfur) and *Vance v. CHF*, District Court for the District of Maryland (2012) (shooting of unarmoured vehicle in Pakistan).

⁴ Case No: 15-032886TVI-OTI R/05, *Steven Patrick Dennis v Stifelsen Flyktrninghjelpen (The Norwegian Refugee Council)*, delivered on 25 November 2015 in Oslo District Court – Translation from Norwegian (Hereafter: 'Dennis v NRC').

⁵ *Ibid.*, p. 13.

⁶ For a more detailed debate on whether the case is precedent-setting, please see Hoppe and Williamson (2016).

⁷ See de Guttry (2012).

⁸ See Kemp and Merkelbach (2011).

⁹ Interest has been generated not only among national and international non-profit organisations, but also in governmental and multi-lateral agencies, donors, and in the legal profession among lawyers and courts.

It is worth looking at some further elements that have contributed to the international attention given to what has been described as a 'landmark' ruling.¹⁰

Firstly, the type of incident that lies at the heart of the case – ambush, injury, death and kidnapping in a volatile, high-risk security environment – will be familiar and directly relevant to many organisations. Many aid workers and their organisations will be exposed to similar risks, and as a result have probably taken additional measures, or been forced to adapt their operations, in response to these threats. Unfortunately, some organisations have directly experienced similar incidents. The view is spreading that there is a 'new normal' in which the threat and occurrence of kidnapping in some operational contexts are no longer exceptional.¹¹

Secondly, it is rare that such an incident leads to a court case. In most cases, an incident and its aftermath are handled by an organisation (the employer) to the satisfaction of an affected staff member and family (probably including some kind of compensation). In other cases, claims are settled out of court, for example via mediation, discreetly and before controversy and negative publicity spill over into the public eye. A key question is whether there are lessons to learn as to why this case was different.

Thirdly, the case was brought against a well-established, experienced and reputable organisation – and the organisation lost. One must wonder how well other organisations might compare to the NRC in terms of security risk management. It would seem reasonable to assume that other organisations may be just as exposed to potential lawsuits under similar circumstances.

The fundamental conclusion that can be drawn from the case is that Duty of Care as a legal responsibility also applies to the international aid sector. Although the NRC did not dispute before the Court whether Duty of Care applied, even acknowledging its negligence in regard to decisions made at field level, the Court's legal reasoning and ruling of gross negligence are significant for the international aid sector. Although the case was brought in a Norwegian court, the reasoning of the Court is instructive and there is widespread

realisation that the case will be relevant and have an impact beyond this single jurisdiction and has broader implications for organisations¹² and the sector as a whole that deserve to be examined.

In the following sections this paper presents:

1. A review of the facts and the ruling, including the legal framework and reasoning of the Court;
2. The interrelation between the ruling, Duty of Care and security risk management;
3. Thoughts on some of the wider implications of the ruling for the sector.

¹⁰ See for example Warnica (2015). A 'landmark case', sometimes referred to as a leading case, is primarily a common law concept, where the judgment sets a long-lasting precedent. It must be noted that there are major differences between civil and common law systems with regards to the precedential value of judgments. Norway has a civil law system and this will affect how this ruling would impact similar cases in the future. See Simpson (1996).

¹¹ See Harmer, Stoddard and Toth (2013).

¹² For the sake of simplicity, in this paper we use the term 'organisations' – including those often described as international aid organisations – to refer to a variety of non-profit organisations, notably those operating in complex environments. These organisations include those that carry out activities in the sectors of humanitarian response, development, peace building, protection and advocacy, among others. The term 'organisation' describes any formally constituted entity within the sector including national, state and regional associations, and includes both governmental and non-governmental organisations.



The facts and the ruling

This section discusses the facts of the case, the legal framework, and the reasoning of the court. Key issues the court considered and treated here are: foreseeability of risk, mitigating measures to reduce and avert risk, gross negligence, and causation and loss.

1.1 The facts

The NRC is a worldwide aid organisation with more than 5,250 employees in 25 countries across Africa, Asia, the Americas and Europe. It had been present in the refugee camp in Dadaab, Kenya, where the incident took place, since 2006.

The summer of 2011 saw a dramatic increase in the influx of refugees from Somalia to Dadaab. The UN and humanitarian organisations were struggling to meet the massive increase in the need for aid. The situation there was considered critical by the NRC and other humanitarian organisations working in the area.

In the beginning of June 2012, it was decided that the NRC's secretary general would visit Dadaab. The purpose of this 'VIP' visit was to draw attention to the situation so that donors and others might provide more financial support.

Steven Dennis, a Canadian citizen, was employed by the NRC in Dadaab. He was one of four staff members kidnapped from a three-car VIP convoy during the secretary general's visit on 29 June 2012.

On the way out of the camp, the convoy was attacked by six men firing several shots. A Kenyan driver of one of the cars, who had been hired that same day, was shot four times and died on the spot. The Kenyan driver of another car was shot twice in the back and was seriously wounded. Two other staff members were also shot and injured.

Dennis, who had been travelling in the first car, was shot in the thigh. He was then taken to the rearmost car in the convoy and placed inside it together with three other hostages. A group of six kidnapers got into the same car and they drove off, later picking up two more persons who participated in the kidnapping operation.

After four days, an armed rescue operation was carried out by Kenyan authorities and the Ras Kamboni militia close to the Somali border and all four kidnap victims were set free. The ruling states that the NRC 'commissioned' the rescue operation.¹³ The NRC has stated that despite the ruling's language, it did not commission the rescue.¹⁴ Following the incident, Dennis developed Post Traumatic Stress Disorder (PTSD) and depression.¹⁵

1.2 Legal framework

Dennis brought a claim for compensation for personal injury in the Oslo District Court on 23 February 2015. There was, as appears from the judgment, no issue that the Norwegian courts had jurisdiction to hear the claim: Dennis's contract of employment was with a Norwegian employer with a head office in Oslo. The parties proceeded on the basis that Norwegian law would apply to the case.¹⁶

Dennis pursued three claims against the NRC under both the Compensation Act (general Norwegian legislation applicable to personal injury claims) and non-statutory rules of strict liability and responsible arrangement:

1. Compensation under the employer's liability rule (section 2-1 of the Compensation Act);
2. Compensation for pain and suffering (section 3-5 of the Compensation Act);
3. Strict liability.

¹³ Dennis v NRC (2015), p. 5.

¹⁴ Lisle (2016).

¹⁵ Dennis v NRC (2015), pp. 2-5.

¹⁶ There might have been scope for argument as to whether Kenyan law applied on the basis that Dennis worked in Kenya and/or the accident occurred there. The ruling's silence on the issue of applicable foreign law suggests the issue did not arise between the parties.

Liability and strict liability

Liability: being responsible for loss or damage by act or omission as required by law and the obligation to repair and/or compensate for any loss or damage caused by that act or omission and/or other sanction imposed by a court.

Strict liability: responsibility for loss or damage by act or omission without proof of intentional or negligent conduct.

The latter imposes a much higher standard for employers and makes it harder for the employer to avoid liability to pay compensation for the damage caused.

► See Kemp and Merkelbach (2011), pp. 19-20.

With respect to the first claim, section 2-1 of the Compensation Act imposes on the employer a strict liability for injury caused by intent or negligence. In the absence of any evidence that NRC employees acted with intent, the central issue was whether they acted *negligently*. The Court applied a fault-based liability standard akin to Duty of Care with a three-stage assessment of:

1. Foreseeability of the risk of injury;¹⁷
2. Reasonable and necessary measures to control the risk of injury;¹⁸ and,
3. Causation of loss.¹⁹

The Court's application and assessment of each of these concepts are further explained below.

In order to recover compensation for pain and suffering (i.e. non-economic loss), section 3-5 of the Compensation Act requires a defendant to have acted with intent or gross negligence. It must also be possible, under Norwegian law, to link the matter to the employer's managing bodies.²⁰ This is in marked contrast to the position in other legal systems, such as England and Wales and in the United States, where compensation for pain and suffering or emotional distress can be recovered with proof of ordinary negligence (i.e. without proof of intent or gross negligence).

Finally, Dennis sought to establish a claim under the non-statutory rules of strict liability and responsible arrangement. This could have imposed liability on the NRC without proof of any fault. The NRC's argument to the Court was that 'a judgment based on strict liability may cause enormous ripple effects for the aid industry. The consequence might be that important aid work is stopped.'²¹ As it was, the Court did not go on to consider this claim because it had found both negligence and gross negligence against the NRC.²² The Court's reasoning as to how it reached those two conclusions is both clear and instructive and is discussed further in separate sections below.

1.3 The reasoning of the Court

Foreseeability of risk

To begin with the Court's approach to negligence liability, the Court first examined the foreseeability of risk.

It assessed the *degree of risk* of the type of incident in question, namely a kidnapping. The United Nations (UN) had raised the risk level in Dadaab from 3 to 4 (the highest level being 5, entailing evacuation) and there had been several kidnappings in 2011, including kidnappings of aid workers. The information in the NRC's own security plan and minutes from staff meetings also showed that there was a high probability that a kidnapping might happen and this was known to the NRC's staff.

The Court also considered the *nature of the risk* of kidnapping. In particular, international staff and visitors were at a higher risk since kidnapping was mainly financially motivated; the risk of kidnapping increased in the event of visits by international VIPs.

The Court then assessed whether the *risk of injury* through kidnapping was foreseeable. The Court found that the risk of serious injury was very high in connection with a kidnapping incident. The Court came to this view by considering both the NRC's security plan which identified the risk of kidnapping as 'critical',²³ and also the facts of the incident itself which had resulted in the firing of several shots, wounding and risk of injury and death, both during the captivity and in connection with the rescue operation.

¹⁷ The knowledge or visibility to the employer of the risk of injury. See Dennis v NRC (2015), p. 13, which discusses the legal basis for fault-based liability under Norwegian law.

¹⁸ Such measures might also be described, by other legal systems, as 'mitigating measures' to 'eliminate, avoid and reduce foreseeable risks'. See Kemp and Merkelbach (2011), p. 50.

¹⁹ Described by the Court as a 'factual and legal causal relationship between the basis of liability and the injury'. Dennis v NRC (2015), p. 35.

²⁰ *Ibid.*, p. 28.

²¹ *Ibid.*, p. 10.

²² *Ibid.*, p. 34.

²³ *Ibid.*, p. 17.

Mitigating measures to reduce and avert the risk

The Court went on to consider, in summary, four measures to control the risk of kidnapping.

Firstly, the Court considered the use of an *armed escort*. The Court noted that the use of armed escorts in connection with aid work is debated and cannot be considered to be a general industry standard. However, the evidence was that it was common and mandatory to use armed escorts in Dadaab at the time, such that it amounted to an established practice on the ground among other organisations²⁴ as well as per the NRC internal regulations.²⁵ The day before the VIP convoy, the NRC's country director, in consultation with the regional director in Nairobi and head of field operations at the head office in Oslo, decided not to use an armed escort during the visit. It was argued that an armed escort was not provided because it might raise the profile of the convoy and increase the risk of improvised explosive devices (IEDs). The Court rejected that argument for lack of evidence. Furthermore, local security advice, the NRC's own security advisor and their security plan stated that an armed escort should be provided.²⁶

Secondly, the Court discussed the option of *cancelling the trip*. The Court carefully weighed the need for staff security against the need to create awareness of people in conflicts, crises and distress. The Court did accept that, considering the difficult situation in Dadaab in the summer of 2012, it was understandable that the NRC chose to send its secretary general there. However, against the backdrop that there had been no VIP visits for several months by any organisation because of the security situation, the NRC was expected to 'implement necessary and reasonable security measures when it was decided that the visit was to be carried out.'²⁷

Thirdly, the Court considered whether the NRC should have *re-routed the destination*. The IFO II camp that the secretary general was visiting was less established and more dangerous than others in Dadaab. There had been a kidnapping from this camp in 2011. There was no evidence that visiting another camp would make any difference to the media exposure of the VIP visit. The

Court, therefore, considered that visiting one of the other camps could have reduced the risk of kidnapping.²⁸

Finally, the Court considered the NRC's weak *information security*. The NRC had admitted that there was a failure with respect to information security and that the kidnappers might have learned that a VIP visit was due to take place on that day. For example, staff knew of the visit in advance and third parties in Dadaab had been informed. The Court considered that 'information security and low profile go hand in hand' and that 'these may be central measures to mitigate and avert kidnap risk.'²⁹ The Court accepted evidence that as few people as possible should know about a VIP visit. It concluded that there were several breaches of information security and that this increased the risk of kidnapping. The Court considered it a fact that the kidnappers, because of the information security breaches, could have known about the visit in advance and that there was evidence that the attack gave the impression of having been planned.

Gross negligence

Turning to the Court's assessment of whether Dennis could be compensated for pain and suffering, the Court considered whether the NRC's senior management,³⁰ which was responsible for assessing reasonable and necessary security measures for the VIP visit, had acted with *gross negligence*.

As in many jurisdictions, the ruling states that 'there is no sharp dividing line between simple and gross negligence' in Norwegian law.³¹ Nevertheless, the Court made the bold finding that 'the decision-makers acted with gross negligence both when establishing the security measures and in that staff members were not informed of their role and the increased risk to which they were exposed.'³²

The guideline followed to make this finding was that 'in the case of gross negligence, the deviation from the responsible conduct must be greater than in the case of ordinary simple negligence. The act or omission must be considered to be clearly blameworthy and must provide grounds for strong reproach for lack of due care. (...) What is decisive is whether the conduct represents a clear deviation from responsible conduct.'³³

²⁴ Dennis v NRC (2015), p. 15, cites the NGO Safety Program (NSP): 'The use of armed escort had become mandatory since 26/10', indicating that escorts were sector-wide practice at the time.

²⁵ Ibid, p. 18.

²⁶ Ibid.

²⁷ Ibid, p. 20.

²⁸ Ibid, p. 26.

²⁹ Ibid, p. 22.

³⁰ See Dennis v NRC (2015), p. 29-31 where the liability for the actions of managing bodies is discussed.

³¹ Ibid, p. 31.

³² Ibid, p. 34.

³³ Ibid, pp. 31-32.

The ruling, in various places, provides a long list of elements it considered clear deviations from responsible conduct. In particular, the Court had regard to actions which, in its assessment, increased the risk of kidnapping substantially and exposed staff members to increased risk:

- unnecessarily risky choice of destination and duration of the visit;
- unclear and unwarranted re-assessment of the risks of both kidnapping and IEDs;
- failure to implement reasonable, practicable measures to avert or mitigate risk by not using an armed escort;
- failure to consult security specialists in decision-making around the visit;
- failure to ensure and impose information security;
- incoherent and contradictory measures to keep a low profile; and
- failure to duly inform staff as to the risks of the VIP visit and convoy.

Interestingly, the fact that the key decision-making managers were seasoned and experienced staff added to the gravity of the conduct, since 'this heightens the expectation that they should know what would be relevant information and a sufficient basis for decisions to allow for a well-founded decision with regard to the security plan and necessary security measures.'³⁴

Causation and loss

The Court referred to a Norwegian Supreme Court case, which decided that the causation requirement would *normally* be satisfied if 'the injury would not have occurred if one imagines that the act or omission is removed. The act or omission is then a necessary condition for the injury to occur.'³⁵ The Court applied a test for causation expressed in terms of the breach of law being a 'sufficiently essential element of the causal landscape'³⁶ and it applied that test in light of all the circumstances assessed as a whole. The primary conclusion was that it was probable that the

kidnapping would not have happened had an armed escort been used. The Court also concluded, however, that the NRC's overall negligent conduct (including other mitigating measures or omissions discussed above) was a necessary condition for the kidnapping to happen.³⁷

The Court went on to determine compensation.³⁸ This included past and future economic losses. The general reasoning on the assessment for economic loss was to assess what Dennis would have earned had he not been injured minus what he is now likely to earn given his injuries. Turning to the assessment of compensation for pain and suffering, notwithstanding the bold finding of gross negligence against the NRC, the Court remarked that in Norway the level of such compensation is 'rather modest'³⁹ and it made an award, at its discretion, of NOK 100,000 (approximately EUR 10,500) as compensation for pain and suffering. This is another point of contrast with other legal systems which may, for example, recommend levels for such compensation with respect to the type of injury sustained⁴⁰ or at the other end of the spectrum, certain states in the United States, which allow potentially unlimited awards for pain and suffering that are determined by a jury.

The final assessment of compensation totalled NOK 4,393,403 for economic and non-economic loss (approximately EUR 465,000 using the exchange rates applicable at the time of writing).⁴¹ The Court additionally awarded Dennis NOK 1,200,000 (approximately EUR 127,000) towards legal costs.⁴² It can be observed that the total sum that the Court awarded was circa NOK 5,894,133⁴³ (approximately EUR 623,900) less than the total sum of compensation claimed by Dennis and about NOK 893,403 (approximately EUR 94,600) more than the NRC's final settlement offer (which was NOK 3,500,000 or approximately EUR 370,500).⁴⁴ Prior to the trial, the parties had been about NOK 3,500,000 apart in their final pre-trial settlement discussions. In conclusion, Dennis won far less money than he had asked for and only a little more than the NRC had originally offered.

³⁴ *Ibid.*, p. 32.

³⁵ *Ibid.*, p. 35.

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 36.

³⁸ *Ibid.*, pp. 28-29; pp. 36-48.

³⁹ *Ibid.*, p. 43.

⁴⁰ In England and Wales, see for example *Judicial College* (2013).

⁴¹ *Dennis v NRC* (2015), p. 47.

⁴² *Ibid.*, p. 49.

⁴³ The total sum claimed by Dennis was NOK 11,600,000 (approximately EUR 1.2 million). *Dennis v NRC* (2015), p. 46.

⁴⁴ The final offer totalled NOK 3,500,000 (approximately EUR 370,500) in addition to what had already been paid out by the insurance companies. Dennis's final offer was NOK 6,900,000 (approximately EUR 730,300) plus NOK 1,000,000 (approximately EUR 105,800) in legal costs and a public acknowledgement of gross negligence. *Dennis v NRC* (2015), p. 6.

2

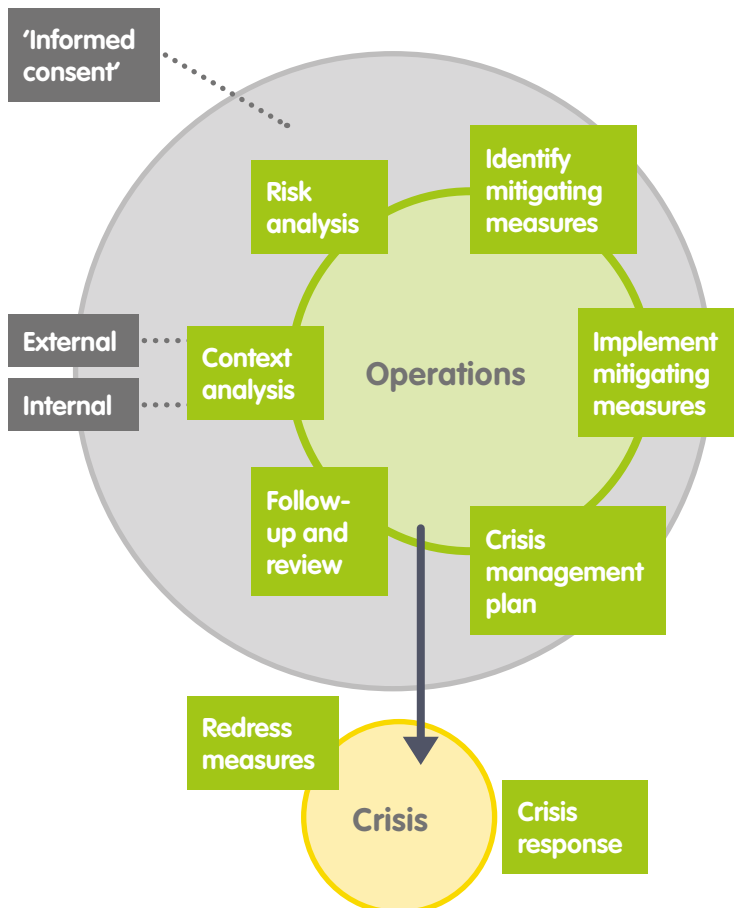
The ruling, duty of care and security risk management

What security risk management and duty of care have in common is the expectation that reasonable and practicable measures are taken to mitigate the likelihood and impact of foreseeable incidents. The ruling includes some strong language that this was lacking in this case. In the Court’s opinion, ‘there should have been a stronger security thinking and understanding in the Dadaab area. A more conscious and professional handling could have contributed both to increased security in general and to well-founded decisions on security measures in connection with the specific visit of the Secretary General.’⁴⁵

To arrive at this conclusion, the Court looked at many topics familiar in the non-profit sector’s security risk management practices. However, the Court’s legal approach differs in that it used a three-stage

assessment to come to a decision: foreseeability of the risk of injury, reasonable and necessary measures to control the risk of injury, and causation of loss.

What is proposed here is to reorder the various elements according to a process cycle typical of duty of care and more familiar to safety and security risk management in the non-profit sector, and identify the Court’s views of where good practice had been followed and where not. Of the good practices raised here, there are only a few summary comments relating to the basic security risk management steps that are considered standard elements of the Duty of Care across many jurisdictions, and that encompass the key elements of informed consent. Each of these steps can be unpacked into many constituent elements. The simple diagram below illustrates the convergence between security risk management and Duty of Care.



⁴⁵ ibid.

2.1 Context analysis (internal and external contexts)

It was known that the overall context in Dadaab had changed as a result of the large new influx of refugees, and that the newly established IFO II camp was less organised than others in Dadaab and that the Kenyan police were not in full control there.⁴⁶ In October 2011, the Kenyan authorities had ‘declared war’ on Al Shabaab who in turn threatened to seek revenge. The Kenyan police became an explicit target and several bomb attacks were carried out.⁴⁷

The Court found that the context analysis was not shared equally within the organisation: among key decision-makers and between security specialists and programme management staff. It found evidence that there was insufficient understanding of the security handling in Dadaab. Internal reports confirmed that the security situation in the area had been deteriorating. While early in the year a report had been commissioned to review the area’s context and risk analysis, its recommendations were not fully integrated by the NRC. By the time of the visit, the organisation did not have sufficient information to be able to reach a decision on removing the armed escort for the visit. From this lack of shared understanding, the gap gradually increased with each step of the security risks management cycle and finally led to decisions diametrically opposite to what had been the rule.⁴⁸

2.2 Risk analysis⁴⁹

Even though no kidnapping had occurred in Dadaab for nine months, there was no evidence that the risk of kidnapping had diminished at the time of the visit. On the contrary, the security situation had deteriorated and the risk of kidnapping was considered to be unacceptable and increasing. This was documented in internal NRC reports and in reports shared among organisations present in the area; the UN, for example, had increased its risk level from 3 to 4.⁵⁰

However, the NRC’s decision-makers on the ground argued differently. The regional director explained that there had been no kidnappings over the preceding nine months, implying the threat had receded and that the decision to change measures was justified.

However, the Court reasoned that there was no indication that the threat had diminished, and that the absence of kidnappings was not a sign that the threat was gone. The Court argued that the most likely explanation for the fact that there had been no kidnappings for nine months was that no VIP visits had taken place and that armed escorts had become mandatory.⁵¹ Moreover, since kidnapping was mainly financially motivated, international staff and visitors were at a higher risk than local staff. This indicated that the risk of kidnapping would increase in the case of an international VIP visit and for those travelling without an armed escort.

2.3 Identify mitigating measures⁵²

The last minute decision not to use armed escorts contradicted the NRC’s own internal documented security analysis and procedures, and sector-wide practice in Dadaab. The Court found that the decision was based on a misguided threat and risk analysis on the part of decision-makers, which in itself was in part due to their insufficient knowledge and analysis of the overall situation in the area at the time.⁵³

Although the use of armed escorts is not an industry-wide practice or standard, exceptions do occur. In Dadaab, the risk of kidnapping and IEDs was defined as critical in both internal and external reports shared among organisations in the area. The use of armed escorts had become a recommended security measure as of the end of October 2011. The NRC’s security plan reflected these realities, and the use of armed escorts was mandatory for the organisation in Dadaab. It was also standard practice across most organisations present in the area at the time.⁵⁴

2.4 Implement mitigating measures

The effective implementation of security plans and mitigating measures can be the Achilles heel of any security management system. In this case, as the Court highlights, there was not merely a failure to observe existing rules, but a conscious, deliberate decision to radically change – and contradict – existing risk analysis and measures from one day to the next, on an important occasion, and without specialist consultation.

⁴⁶ Ibid, p. 26.

⁴⁷ Ibid, p. 3.

⁴⁸ Ibid, p. 20.

⁴⁹ Although technically distinct, ‘risk assessment’ covers here both threat and risk analysis and risk evaluation.

⁵⁰ Dennis v NRC (2015), p. 4.

⁵¹ Ibid, p. 16.

⁵² That is, planning and documentation of all mitigating measures and controls - e.g. via standard operating procedures (SOPs) - that enable safe and secure programme implementation.

⁵³ Dennis v NRC (2015), p. 8.

⁵⁴ Ibid, pp. 15-16.

Although an armed escort had been ordered, the day before the visit the decision was taken not to use it. The explanation offered was that the convoy intended to keep a low profile and reduce the risk of IEDs. However, security specialists were of the opinion that armed escorts have a dissuasive effect on kidnappers and that armed escorts did not increase the risk of IEDs but, on the contrary, served as a measure to reduce the risk of IEDs. The Court found that the decision-makers should have acted differently, that at the least they should have consulted competent security advisors, and that it is 'probable that the kidnapping would not have happened if an armed escort had been used.'⁵⁵

2.5 Crisis management plan

While the ruling tells us little or nothing of the organisation's crisis management plan, the Court discussed the actual management of the crisis in more detail.

One can reasonably assume that overall the organisation's security policy and plan would have included guidelines for managing a range of critical events. It will also have included guidelines and instructions for a crisis management team, communications and the handling of information internally, with the affected families, and externally, e.g. the media.

The crisis management team will have included senior management both on location and at headquarters, and may also have been complemented by – possibly external – specialists in areas such as kidnap and ransom, psychology, etc.

2.6 Crisis response

Various measures were taken following the incident: crisis management teams were set up; next of kin were informed and looked after, and the kidnapped staff members were freed following a successful rescue operation. The Court does not address the armed rescue operation apart from stating the fact.⁵⁶ Furthermore, the victims were given immediate follow-up care. The ruling mentions in this regard that the kidnap victims were flown to Nairobi after the incident and given medical treatment; debriefing meetings

were held in Nairobi; arrangements were made for the kidnap victims to return home, and other employees who were affected or involved in the incident were sent on vacation.⁵⁷

The ruling makes various critical observations about the way the crisis was managed. The VIP convoy included many key senior staff. As well as the secretary general, the convoy included the area manager, the country director and the regional director. They were victims of the attack, and as such, they were not able to be involved in the immediate response and management of the incident. Although the Court does not touch upon this in the ruling, it is possible that as a result, it may have taken time longer than usual to set up the crisis management teams; the global security advisor had to come from Oslo to set up the crisis cell in Nairobi the day after the incident. A delay in setting up a crisis management team can negatively affect the response to an incident, as the first few hours in any crisis response are critical.

2.7 Redress measures⁵⁸

Staff benefitted from dedicated travel insurance and personal injury insurance, as well as disability insurance. The latter provided for disability pension up to the age of 67 years in the case of physical injury, but the insurance coverage was more limited in the case of psychological injury. The Court concluded that the NRC was 'underinsured with regard to psychological injury and the insurance process was time-consuming.'⁵⁹

Dennis received insurance payments, sick leave and salary for the remainder of the year, an amount towards legal expenses and coaching, and some coverage of costs relating to medical expenses. However, Dennis submitted further claims against the NRC to cover full compensation for his economic loss as well as compensation for his non-economic loss, including compensation for permanent injury and pain and suffering.⁶⁰

The Court applied Norwegian standards and scales to calculate the compensation to be awarded to Dennis. It looked at the insurance coverage, which was Norwegian, not Canadian. The Court also calculated loss of future income against Dennis's actual salary, not the presumed UN salary that Dennis argued he would

⁵⁵ *Ibid.*, p. 36.

⁵⁶ *Ibid.*, p. 5. For a more elaborate discussion on the armed rescue please see section further on in this paper entitled 'Armed rescue operation'.

⁵⁷ *Ibid.*

⁵⁸ Redress covers provisions for payment of damages (health, disability, injury/death, loss of income, post-incident treatment, etc.) to compensate an employee having suffered damages, expenses and losses incurred, or that will be incurred, as a result of the injury, as well as non-economic losses (pain and suffering).

⁵⁹ *Dennis v NRC* (2015), p. 44.

⁶⁰ *Ibid.*, p. 8.

very probably have earned in the future after obtaining a job at the UN, which the Court argued was far from certain. As to various other claims for expenses (e.g. legal) the Court ruled that insufficient evidence was provided (bills, time sheets, etc.).⁶¹

2.8 Follow-up and review

Duty of Care demands that the elements of the risk management cycle, from analysis to response plans and implementation of measures, are regularly reviewed and adapted if necessary. The frequency of review will depend on the context and is advisable when changes are observed or incidents occur. There is furthermore an expectation that recommendations will be followed. The ruling notes that a consultant was hired by the NRC to carry out a review of the security situation in Dadaab earlier in the year and that some but not all of the report's recommendations were acted upon.⁶² Apart from this context-driven review, the kidnapping incident led to an NRC after-action review that was frequently referred to and cited in the ruling.⁶³

After the incident, two security advisors drafted two internal reports for the NRC. In addition, an external review of these internal reports was commissioned. One of the internal reports and the review were presented at an NRC Board of Directors meeting. Also, an external review of the NRC's security systems was conducted. The reports were considered and approved by the NRC board on the 17th of April 2013 at a board

meeting. The short version of one of the internal reports was made available to all staff members on the 7th of May 2013 through electronic reading access.⁶⁴

While due and pertinent, the after-action review process was, however, met with scepticism by some staff. Dennis, in statements outside of the ruling, expressed doubts about the process and integration of lessons learned.⁶⁵ The ruling describes how some of the staff members directly involved did not receive answers to questions asked about the incident, nor were they given access to full reports on the incident. Several of those who were directly affected by the kidnapping were not given access at all since they were no longer employees.⁶⁶

Duty of Care does not require organisations to share the result of any investigation, which makes learning difficult within the sector. Several witnesses stated that the incomplete information that was made available to staff made it subsequently difficult for them to trust the management of the NRC. Furthermore, although of no direct consequence to the plaintiff's case, the Court made reference to the fact that persons who presented criticism and asked for an external inquiry had been characterised as 'troublemakers' and that shortly afterwards they were told that their employment contracts would be terminated.⁶⁷ Although not required by law, information should have been provided as a matter of courtesy and would have been in line with an employer's *moral duty of care* towards their staff.

⁶¹ Ibid, pp. 37-49.

⁶² Ibid, p. 3.

⁶³ Ibid, p. 5.

⁶⁴ Ibid.

⁶⁵ Dennis (2015).

⁶⁶ Dennis v NRC (2015), p. 43.

⁶⁷ Ibid.



The ruling and broader considerations for the sector

Implications and potential lessons for the international aid sector as a whole are presented here as comments – food for thought – on a selected number of topics and issues that the case raises and that will be of concern to any organisation. Obviously, it is up to each organisation to assess where they stand and what to do if they feel that they might fail the litmus test of ‘responsible conduct’.⁶⁸ There is a degree of convergence between Duty of Care and security risk management. Both have the objective of ensuring that reasonable and practicable, effective and necessary measures relative to foreseeable events are in place.

3.1 Duty of care: moral and legal dimensions

In English, ‘duty of care’ can have two meanings or dimensions: a moral duty owed to someone or a legal obligation. These aspects are not mutually exclusive, however, and need not be contradictory; there is a degree of convergence, influence and overlap between the two. Different parts of the world will have different moral attitudes and thus different legal standards.⁶⁹

The fundamental conclusion that can be drawn from this case is that Duty of Care – as a legal responsibility – also applies to the international aid sector.⁷⁰ Although the case was brought in a Norwegian court, there is the realisation that the case will have relevance and impact beyond this single jurisdiction and has broader implications that need to be examined.⁷¹

In an international context, a key terminological difference is that the civil law systems tend to refer to ‘legal responsibility’ rather than the ‘duty of care’, which is an Anglo-Saxon concept used mainly in the common law world. Here, we are concerned with the legal meaning of Duty of Care, i.e. legal responsibility. Duty of Care is a legal obligation imposed on an

individual or organisation requiring that they adhere to a standard of reasonable care while performing acts (or omissions) that present a reasonably foreseeable risk of harm to others.

In the case at hand, it was the Court’s job, applying Norwegian law, to assess the foreseeability of events and risks, and consider whether reasonable and practicable measures had been taken relative to these events. It should be kept in mind that the multinational work and makeup of the staff of aid agencies can give rise to complex legal problems that may expose stark differences between legal systems.

The principles surrounding legal responsibility are similar across Europe and the United States, and therefore, although the court case took place in Norway, the ruling is relevant to other European and American jurisdictions as well. Aid agencies based in these jurisdictions owe it to their staff to ensure a safe work environment, whatever and wherever that may be. As a rule of thumb, organisations are expected to take reasonable and practicable steps to protect staff against any reasonably foreseeable risks they face.

This should not be about organisations becoming risk averse, but that they need to undertake appropriate risk assessments to ensure effective risk management measures are implemented – as far as reasonably possible – and to ensure staff are properly informed of the risks they face.

Lastly, the consequences of legal liability for agencies can be expensive not only financially, in terms of damages that may be payable to staff following litigation, but also in terms of potential criminal liability, loss of reputation, damage to public relations, adverse effect on staff morale and recruitment and compromising fundraising efforts.

⁶⁸ Dennis v NRC (2015) states that ‘requirements for responsible behaviour become stricter when one ventures into risk areas.’ p. 13.

⁶⁹ See Claus (2011).

⁷⁰ It is nonetheless important to note that whether Duty of Care, as a legal obligation, applies to the international aid sector was never questioned by either the Court or the NRC in this case. The Court did, however, briefly discuss whether there was a basis for applying a milder due care standard for employers in the aid sector. See Dennis v NRC (2015), p. 13.

⁷¹ It is debated whether the ruling sets legal precedent. See Hoppe and Williamson (2016) for more information.

Organisations need to remember that while the incident may be beyond their control, how they manage it and the redress measures (i.e. compensation for damages incurred, of which aftercare is one aspect) are within their control.

3.2 Responsibility and non-contractual relations

Although the case involved legal responsibility in a contractual employer-employee relationship, it is important to recognise that Duty of Care is not necessarily restricted to contractual relations. Organisations may well owe those who are not employees – such as independent contractors, consultants and volunteers – a Duty of Care. But such responsibilities often fall outside the scope of specific legislation protecting employees and are reduced by the extent to which the non-employee controls their own work environment and execution of tasks, and has access to information about prospective risks.⁷²

The basic notion that an organisation's legal responsibility is relative to the 'degree of control'⁷³ it has over a person in a given situation – work environment, execution of tasks, information – can be a useful guideline in other non-contractual relations. Imagine an incident similar to that in Dadaab in which a journalist – someone with whom an organisation had no contractual relationship – was wounded and kidnapped. From a communication perspective, with the aim of increasing media exposure, it makes sense to capitalise on a journalist's interest and take him or her along during a field visit. But this decision brings responsibilities. How would a court look at it? While it can probably be expected that the journalist knows (or should know) the situation, and to some degree knows what he or she is getting into, it is the organisation that controls the trip, the vehicles, drivers and the convoy, the routing and timing, the analysis of whether or not it is safe at that point in time, and the measures needed to minimise risks. In other words, the organisation has assumed a degree of control over the journalist.

Essentially, the higher the degree of control the organisation has, the higher the organisation's responsibility. Thus, a court may well decide that even though there is no written contractual relation, the degree of control implies responsibility – in a way

analogous to a contractual relationship – and thus liability if something goes wrong. Or consider a family posting: to what extent does the organisation control the environment of family members or visiting friends of an employee? Does it organise the flights, airport pick-up, rent the residence and provide guard services, provide the vehicle, advise on safe and unsafe areas, etc.? The more the organisation gets involved and decides on behalf of someone – i.e. 'controls' the environment and person, for good, well-meaning reasons – the more it de facto assumes legal responsibility.

As a general rule, the relationship between two parties is determined by the actual circumstances and not by the parties' labelling of their legal relationship. While there are good practical, moral and ethical reasons to be involved and exercise control to one degree or another over individuals with whom one does not have a contractual relationship, the other side of the coin – legal responsibility – should not be forgotten, since such 'control' may well imply legal responsibility and liability.⁷⁴

3.3 Does the case lead to risk aversion?

Dennis sought to establish a claim under the non-statutory rules of strict liability and responsible arrangement. This could have imposed liability on the NRC without proof of any fault. During the court case, the NRC acknowledged that decisions made at the field level could be considered negligent. But in relation to the claim of strict liability, the NRC argued that '(a) judgment based on strict liability may cause enormous ripple effects for the aid industry. The consequence might be that important aid work is stopped.'⁷⁵ This relates to an often-presented argument that the potential of legal action leads to risk aversion: the avoidance of dangerous situations, tasks and jobs.

Risk aversion may be an institutional approach followed for security risk management reasons – e.g. if an organisation cannot or will not take the reasonable practicable measures that a given task and environment require⁷⁶ – but it is not the intent of the law to prevent high-risk enterprises.⁷⁷ If it were, a host of tasks and professions that entail dangerous situations and events would be outlawed: it would become impossible to practice policing, soldiering, logging, fishing or surgery, along with humanitarian action in hostile environments. Similarly, many high-risk sports

⁷² Kemp and Merkelbach (2011), p. 21.

⁷³ This is sometimes described as 'proximity'.

⁷⁴ Kemp and Merkelbach, (2011), p. 22.

⁷⁵ Dennis v NRC (2015), p. 10.

⁷⁶ This is referred to as part of an 'internal context' analysis within ISO 31000. See International Organization of Standardization (2009). Henceforth cited as 'ISO (2009)'.

⁷⁷ See for example English Case Notes, 'Hopps v Mott Macdonald & Another: High Court, 24th July 2009' in Kemp and Merkelbach (2011), pp. 44-45.

such as skydiving or bungee jumping would be illegal. They are not illegal, but taking due safety measures is regarded as essential.

The ruling does not argue (given the context, threats and risks and organisational objectives) that operating in Dadaab was contrary to the law. The ruling presents a more nuanced view and is quite explicit about the conditions needed to operate within high-risk areas:

Since the NRC constantly works in high risk areas, it is the Court's opinion that at the same time it can be required that the organization should be conscious of the risk situation, implementing necessary and reasonable security measures to limit the risk to the extent possible.⁷⁸

Importantly, the ruling finds that 'the requirements for responsible behaviour become stricter when one ventures into risk areas,⁷⁹ and 'the larger the risk of injury, the stricter the requirement that the employer should increase his diligence or assess alternative courses of action.'⁸⁰ In short, mitigating measures must be proportionate to the risks: the higher the risks, the greater the measures. The result is that if an organisation cannot live up to these stricter requirements it should take the decision to avoid the situation, or decide not to be present and operational at all.

In addition, the capacity of an organisation to operate in a given environment cannot be ignored by its donors, especially government donors. It is not only as aid workers that staff members are exposed and sometimes victims; they are also nationals of a country. At some stage in a crisis, a home country will be obliged to engage on behalf of a citizen in trouble. For example, the Irish government had to intervene when one of its nationals deployed for an organisation suffered an incident; this experience was one of the motivations that led the Irish Department of Foreign Affairs and Trade to develop the Irish Aid guidelines for NGO safety and security.⁸¹ Since then, other governments and inter-governmental organisations have also started to tackle their Duty of Care obligations for similar reasons.

3.4 Informed consent and assumption of risk⁸²

One element of the Court's decision that the organisation's decision-makers acted with gross negligence was 'that staff members were not informed of their role and the increased risk to which they were exposed.'⁸³ In general terms the ruling states that:

The NRC has several projects in high-risk areas. It is therefore natural that field workers assume a conscious risk by staying there. Since the NRC constantly works in high risk areas, it is the Court's opinion that at the same time it can be required that the organization should be conscious of the risk situation, implementing necessary and reasonable security measures to limit the risk to the extent possible. It can also reasonably be required that the NRC should inform employees of the risk that exists or if specific mandatory security measures are not going to be employed anyway.⁸⁴

The ruling notes various instances and examples where informed consent was doubtful or entirely absent, and describes that there was unease about how the visit was planned. Many staff in the convoy had not been informed until the last moment that an armed escort had been cancelled; little opportunity existed to challenge this decision or withdraw from the visit.⁸⁵ Those present had 'swallowed' the decision.⁸⁶ A telling example concerns the role of the first car in the convoy. In the view of the Court, 'the security plan entailed an unacceptable increased risk to the staff members in the first car.'⁸⁷ The first car's role was to scout 'any movements out of the ordinary', and 'to secure the most important delegation with the Secretary General, which was placed in the second car. [...] (I) If the first car was hit by an IED attack, the other two cars of the convoy could avoid the attack and escape.'⁸⁸ However, the ruling notes that staff in the first car 'were informed neither of their function as warners with regard to unusual movements nor the risk they assumed by being placed in the first car.'⁸⁹ Since staff in the first car were not informed of their task, role and expectations, nor the heightened risk they were facing, they were not in a position, nor asked, to give

⁷⁸ Dennis v NRC (2015), p. 13.

⁷⁹ Ibid.

⁸⁰ Ibid, p. 14.

⁸¹ Irish Aid (2013).

⁸² Kemp and Merkelbach (2011), p. 23.

⁸³ Dennis v NRC (2015), p. 34.

⁸⁴ Ibid, p. 13.

⁸⁵ Ibid, p. 33.

⁸⁶ Ibid, p. 30.

⁸⁷ Ibid, p. 33.

⁸⁸ Ibid, p. 26.

⁸⁹ Ibid.

their informed consent. The Court found that decision-makers acted with gross negligence by not adequately informing staff of their role and increased exposure to risk.⁹⁰ The legal argument, therefore, is that you cannot assume consent; as the employer, you have to be specific and explicit.

Generally speaking, informed consent is to be given freely, with full knowledge and information about the objectives, risks and measures taken to manage and limit the risks. Whether voluntary assumption of a risk by a staff member can be a defence to a claim of negligence varies from country to country. A staff member's voluntary assumption of the risk may be difficult to prove in an employer—employee relationship where an employee is often considered not to be in a position to choose freely between acceptance and rejection of a risk because he is acting under the compulsion of his duty to his employer; it may be easier to establish informed consent in an independent contractor or volunteer relationship.

The relation of a staff member with the organisation is not one of equals: the organisation is in the stronger position. It controls the information and analysis as well as the decision-making. Moreover, disagreement by a staff member may have consequences for his/her position and career at the organisation. It is advisable that informed consent can be demonstrated. This may be documented by way of a signed informed consent form following, for example, a training or induction in relation to the dangerous activity.⁹¹

However, courts and tribunals hearing a claim for compensation against an employer can take into account the blameworthy conduct of the employee or staff member and its causal effect on the accident in question. This can lead to a reduction in damages awarded for the contributory negligence of the employee.⁹²

3.5 To document or not to document?

Some practitioners believe that documenting the organisation's threat and risk analysis, security plans and measures should be avoided since these documents may be used against the organisation in court. It is a strange logic: could one avoid getting a speeding ticket if the car had no speedometer? Surely not.

The ruling is unambiguous in that law applies: 'the Court can at least not see any basis for applying a

milder due care standard for employers within the aid industry than the one that applies to other employers.'⁹³ And this law applies whether one documents steps towards compliance or not. The legal and regulatory demands on compliance will vary from country to country, sector to sector, and according to the degree of risk and the size of the organisation.

In the case of a dispute, the court will not only look at an organisation's internal documentation. In this case, the Court considered internal documents but also organisational practice, a range of witness statements, broader industry standards and the established practice of other organisations in the same context. It interpreted the evidence not against a fixed, written rule but against the notion of 'responsible conduct'.

Not documenting Duty of Care or health and safety measures in place at the workplace is arguably not responsible conduct and would thus argue against an organisation's claim that it fulfilled its obligations. In any organisation with more than a handful of staff, it would be difficult to communicate policy, rules, regulations and measures coherently and clearly to all staff and get the compliance one needs without documentation. Much would remain open to personal interpretation and preference, as would enforcement of a policy, measures or decision.

An organisation would do better to document that it has taken all reasonable, practicable and necessary steps, i.e. to demonstrate responsible conduct. Doing so will make it more able to achieve its objectives.

3.6 'Culture of security', responsible conduct and decision-making

The many issues – and indeed errors committed by the NRC – presented in the ruling give the overall impression that despite the availability of internal security expertise and advice, an organisational 'culture of security' was missing. From one day to the next, decision-makers overturned key elements of the security policy and operational practices at a critical juncture and without seeking due specialist advice. Why did no one in the hierarchy question this way of proceeding? It is unlikely that a decision-making process that failed to consider expert advice and contradicted policy would be accepted as organisational practice in domains such as the procurement of medical/pharmaceutical supplies,

⁹⁰ Ibid, p. 34.

⁹¹ Kemp and Merkelbach (2011), p. 23.

⁹² Ibid.

⁹³ Dennis v NRC (2015), p. 13.

budgeting and accounting or vehicle maintenance (to name but a few), or more generally within the NRC.

Long advocated by security and risk management specialists within the aid community, the so-called 'mainstreaming' of security within organisations has been slow and patchy, and whether staff and decision-makers operate within an organisational 'culture of security' remains a matter of opinion. Safety and security measures still tend to be seen as obstacles to, rather than enablers of, aid operations, programmes and project implementation in a sustainable and resilient manner.

The central focus of any humanitarian organisation – in fact, the reason it exists – is operational action to aid people in need. This requires access. Reliable and sustainable access can only be achieved if staff can operate relatively safely and securely. These three aspects – operations, access and security – are linked and directly influence one another. The relationships are dynamic: change the conditions or parameters of one and the others will change as well. Thus, safety and security are part and parcel of an organisation's operations, not an add-on; they should be seen and used as enablers, not obstacles or inhibitors. Only when the interlinked dynamic relations are understood and serve as a basis for decision-making – on any level of an organisation – can a 'culture of security' become a reality, with informed and responsible decisions. One might even exchange the notion of a 'culture of security' for the concept of a 'culture of responsibility'.

The remark made in the ruling that decision-making needs to 'balance between programme work and security concerns'⁹⁴, deserves more attention. The observation actually refers to one instance of risk management; other risks are, for example, financial, reputational, institutional, or quality. This is akin to the definition of risk used by the International Organization of Standardization (ISO): the 'effect of uncertainty on objectives'.⁹⁵ Risk is what happens to a programme or institution if a given event or incident occurs – when there is uncertainty as to whether it will happen or not and what impact it may have – and what can be done to manage, prevent, control it. In terms of decision-making, the bottom line is whether, after taking all reasonable practicable measures, the importance of reaching an objective outweighs the potential damage that one may suffer in trying to do so.⁹⁶ This is where the key decision and responsibility – and liability – lies.

The ruling provides some interesting comments on decision-making that touch on the definition of 'management' and where responsibilities lie. The NRC's position, which is broadly shared by most humanitarian security experts, was that there must be a balance between programme work and security concerns and that as a consequence decision-making authority lies with the line manager, i.e. in the first instance the country director. The NRC further argued that the errors in decision-making should be attributed to the individual in this position, not to the organisation as a whole. However, the Court pointed out that the country director, regional director and head of field operations in Oslo were all line managers, each with independent decision-making authority and responsibility for the implementation of necessary security measures. The Court established that these three persons jointly made the decisions regarding the security plan and security measures in connection with the visit in Dadaab. In the view of the Court this indicated that there was liability pursuant to the rule of liability for the actions of managing bodies, and not, as the NRC had argued, only liability of the individual decision-maker closest to the incident.⁹⁷

3.7 Threat and risk analysis: foreseeability and control measures

The regional director explained that there had been no kidnappings over the previous nine months, implying that the threat had receded and that the decision to change measures was justified. However, the Court reasoned that there was no indication that the threat had diminished, and that the absence of kidnappings was not a sign that the threat was gone. The Court stated that the absence of kidnappings could be explained by the implementation of measures to counter kidnappings such as the use of armed escorts and the avoidance of high-profile visits.⁹⁸

The Court's reasoning shows that incident data alone is not sufficient to assess threats and risks, and may be misleading. Generally, if data shows that there are incidents of kidnapping, it is probably safe to conclude that kidnapping is a threat and that the risk must be treated. But the inverse is not true. If there are no kidnappings, this does not necessarily mean that kidnapping is not a threat and the risk does not need to be treated.

⁹⁴ Dennis v NRC (2015), p. 31.

⁹⁵ ISO (2009), p. 1.

⁹⁶ Controls (mitigating measures) cover both causes and consequences. See ISO (2009).

⁹⁷ Dennis v NRC (2015), p. 31.

⁹⁸ *Ibid.*, p. 16.

The lesson is that it is not numbers but analysis that is important: the analysis of the three dimensions of a threat – Who (e.g. armed actors), How (e.g. method of attack), and Why (e.g. motivation, perception). In this case, it was clear that these three dimensions were present even if there were no numbers to illustrate them. As to the Who: the Court learned that it was known that there were one or two armed groups in the area seeking an opportunity to carry out an operation.⁹⁹ As to the How: several common denominators of the conditions and methods of kidnappers were known.¹⁰⁰ Lastly, as to the Why: the motivation for kidnapping was understood to be mainly financial, hence the increased attractiveness of foreign victims. It is when all three vectors of a threat converge on an organisation that the risk is highest or acute. Each of the three vectors should be addressed in analysis and incorporated into decisions made on controlling/mitigating measures to reduce the risk.

After the threat analysis, the next step is to define reasonable and practicable measures relative to foreseeable events/incidents. 'Foreseeability' implies that a risk needs to be treated, irrespective of whether the likelihood of a particular event occurring is high or low or its consequence is serious or relatively benign. Once foreseeable, the issue becomes what is reasonable and practicable – and, as the Norwegian case demonstrates, also necessary – relative to the foreseeable event. Measures should address both causes and consequences (i.e. impact) – both of which are usually multiple – of a given event. It may well be that possible measures are simply unreasonably complicated, expensive, or impractical and will not be implemented. This is a judgement call, but must be done on an informed basis. Common practice and/or standards within a sector will be one of the benchmarks. This is also where documentation is useful to demonstrate the reasons behind the judgement call, should the worst happen and a defence be required.

3.8 Armed rescue operation

The resolution of the kidnapping is briefly mentioned in the ruling: '(a)fter four days, a rescue operation was carried out close to the Somali border and all four kidnap victims were set free. The rescue operation

was performed by Kenyan authorities and the Ras Kamboni militia, upon a commission by the NRC.'¹⁰¹ The ruling does not consider or comment on the armed rescue operation any further.¹⁰² Nevertheless, a number of general remarks relevant to the broader aid community deserve to be made.

Firstly, the NRC has stated that contrary to the wording of the ruling, it did not commission the armed rescue operation.¹⁰³ It is not standard or common good practice in the international aid sector that an armed rescue operation is part of an organisation's crisis management planning. The authors of this paper are unaware of an instance where an armed rescue operation was commissioned and carried out on behalf of an international aid organisation.

Secondly, the authorities of a host nation may decide to intervene given that the state is legally responsible for the safety of all nationals and foreigners on its territory. In this case, the Kenyan police were involved, indicating that the rescue operation benefitted from the support of the Kenyan authorities, at one level or another.¹⁰⁴ The home country of an international staff member will also be concerned because from its perspective the hostage is a citizen rather than an employee.¹⁰⁵ Assisting a citizen abroad who is in need is part of a country's consular obligations. Furthermore, some countries have specific legal dispositions that require them to act as soon as a national is kidnapped, whether at home or abroad, in which case the state may take over management and decision-making concerning the case from the employing organisation.

Thirdly, experience in the sector, and with abduction of foreigners generally, shows that the decision to resort to armed action is taken at the top level of government, as a last resort, and that armed actions are executed by specialised forces. An armed rescue operation is a last resort when all other means (e.g. negotiations) have failed or if the kidnap victim's life is critically endangered, for example, if hostages are being killed or maimed, or when after prolonged captivity they risk dying from disease or exhaustion.¹⁰⁶ An armed rescue operation is a high-risk option, arguably more risky than a kidnapping event in itself. Any armed intervention will most probably include an exchange of fire (and potentially explosives) in which a hostage may be killed or injured; kidnappers may kill a hostage

⁹⁹ Dennis v NRC (2015) states that '[i]nformation received from three different and unlinked sources, including embassy source, referred to 1 or 2 kidnapping groups believed to be potentially operating in Dadaab and/or along the Kenyan/Somalian border', p. 15.

¹⁰⁰ See Dennis v NRC (2015), p. 16 for a list of the common denominators.

¹⁰¹ Ibid, p. 5.

¹⁰² However, the media did report on the armed rescue operation. See for example: Pedwell (2012).

¹⁰³ Lisle (2016).

¹⁰⁴ A fundamental notion here is that the State has a monopoly on the use of force. It is unclear why local militia was also involved.

¹⁰⁵ Whether there was any Canadian government involvement or position is not known, nor, given the nationalities of the hostages, whether there was any involvement by the Norwegian and Filipino governments.

¹⁰⁶ See for example: 'Obtaining release by force' in Humanitarian Practice Network (2010), p. 246.

when they feel trapped. Even when highly trained, specialised forces carry out the operation, success is not guaranteed and the hostage may even be killed in the operation.¹⁰⁷

An interesting question is where legal responsibilities might lie in the event that a state does intervene. For example, who is liable when a state carries out an armed rescue operation and it goes wrong, or where the individual is injured or killed? Does liability then lie entirely with the state or does the employing organisation retain a degree of liability? One approach to reflect on this issue is to consider the degree of control over a situation and decision-making, as with the discussion above of responsibility and non-contractual relations.

Under normal working conditions, the organisation as an employer has a high degree of control over the employee and their tasks, the environment in which tasks are executed, and the measures taken to ensure a safe and secure work environment. The employee is expected to follow the instructions the employer has issued, and to respect safety and security measures. In the case of a kidnapping, the control the employer has over the employee in the given context will probably lead to the conclusion that the organisation is responsible, subject to potential limitations in the event of an employee violating the organisation's rules and regulations.

However, even if an organisation is responsible, this does not mean that it is necessarily at fault and negligent; it may well have implemented all reasonable and practicable measures to prevent the event. As in the *Dennis v NRC* case, in many jurisdictions, causality needs to be demonstrated in order to conclude that an organisation was negligent, i.e. that its acts or omissions caused the incident and the damage that resulted from it. In summary, the conclusion could be that an organisation has responsibility since it exercised a degree of control over the employee and context in which the kidnapping occurred, and is potentially negligent if it can be demonstrated that its actions (or omissions) caused a kidnapping.

Once the state has taken overall management and decision-making in relation to a kidnapping, the state, rather than the organisation, exerts control over the situation. Negotiations and a decision to resort to armed force to rescue the civilian – whether a foreign citizen or its own citizen – will be controlled by the state, in which case it is reasonable to conclude that the state

assumes responsibility for the decisions and is liable if it goes wrong.

No firm conclusions can be drawn from the above general reflections, however. Any argumentation in such a scenario is highly contextual and analysis will be complex and far from black and white. It may lead to a situation in which responsibilities and liabilities are shared; for example, the employing organisation might be responsible for the occurrence of the kidnapping in the first place but the state is responsible for the management of the incident, the decision to resort to armed force and any damage this may have caused. It cannot be excluded that the organisation also retains at least some degree of liability for damages if it can be demonstrated that the damage suffered by the individual is causally related to the organisation having failed in its duty of care and the event of the kidnapping is a result of the organisation's acts or omissions in the overall context in which the kidnapping took place.

3.9 Role and position of the security advisor

Security risk management specialists are advisors, not decision-makers. So to ask them for advice seems self-evident. To give the most pertinent and honest assessment and truly independent advice, the security advisor needs to be as independent of the operational hierarchy as possible while at the same time having as much access to decision-makers as possible.

This is not contrary to a 'culture of security' where security concerns are shared by all and the institution at large. Compare, for example, the following. Although awareness of the need for responsible expenditure may be a widely shared concern in an organisation, this does not mean that everyone gets to make expenditure decisions; it is reasonable and common practice to refer to the finance officer for guidance and decisions. The context of security is the same: a culture of security does not mean everyone can or should always make autonomous decisions. What it means is that everyone is aware of the importance and role of security in the various activities and of the organisation and will refer to a security specialist for guidance and advice.

Security is one aspect of the challenges faced by decision-makers who need to 'balance between programme work and security concerns.'¹⁰⁸ Advice needs to be as objective as possible. To be objective, a degree of independence and protection from

¹⁰⁷ See for example Radhakrishnan (2014).

¹⁰⁸ *Dennis v NRC* (2015), p. 31.

pressure that may come from other interests is advisable. There is a risk that if security advice comes from a subordinate it may be skewed – consciously or unconsciously – to adapt to the superior. Thus, without in any way intending to question the integrity of individuals covering security positions (conflict of interest), to be functionally objective and independent, the security advisor's position should not be structurally subordinate to a field operational or programme line manager. Hence, in some organisations, while functionally advising a field manager, for example, hierarchically the line-manager and superior of the field security advisor is the organisation's security advisor at headquarters or regional office.

The ruling mentions that the NRC head of operations was not informed of some security reports and concerns. At headquarters, much depends on whether the security advisor (or unit) falls, for example, under human resources, the head of field operations, the CEO or secretary general or even governance. A security advisor's independence and access to decision-makers is key.¹⁰⁹ However, for information and reports to get to other decision-makers, departmental divides may need to be overcome. Access to a CEO may involve hierarchical delays and hurdles. Alternatively, one can place the security advisor directly under the head of operations, who will need or seek access to such advice regularly.

There is no 'one size fits all' solution. Due consideration should be given to relations within the organisation to allow for an optimal flow of expertise leading to informed decision-making.

3.10 Human resources management

It is well known that upon arriving in a new position in the field the amount of information that needs to be absorbed is overwhelming, irrespective of how experienced one is. It takes time and effort. But time is typically in short supply and effort tends to be directed towards the many day-to-day issues and demands that come across one's desk (or rather, mobile phone). The ruling notes that the NRC country director arrived only a few weeks before the VIP visit,¹¹⁰ and that her knowledge of the context and operation was still limited. In a way, it may be understandable that there were flawed assessments and decision-making at that level.¹¹¹ This reinforces the importance of the security

advisor's role in informing and advising, especially where managers are new in post and cannot be expected to know everything.

There is a structural and managerial angle to this, relevant across the sector. Significant questions, in this case, would include the following: How was the new country director prepared for deployment and to assume the position? How long was the pre-deployment briefing at headquarters and with whom? Was there a period of overlap with a predecessor, and if so how long? These are human resources management issues. Briefings and sufficient overlap when arriving to take up a new position go a long way to getting up to speed. However, these aspects are often curtailed, and often for contractual or reasons relative to an individual's availability, preferences for dates of contract, insurance and deployment. The question is to what extent can and should an organisation accommodate such factors if they are at the expense of proper – responsible – assumption of tasks in a high-risk environment? On another level, it appears that individual choice may have been privileged over operational need and common sense in that the Dadaab security advisor was allowed to take the day off while a top-level, high-risk visit was to take place. In short: to what extent, in the aid industry, do staff management decisions privilege other needs, requests or contractual stipulations, not key operational needs?

Lastly, there is a role for human resources in managing staff concerns and discontent. The Court makes reference to the fact that 'during the presentation of evidence some criticism was presented by others who were affected by the kidnapping in terms of how they were treated [...] after the incident'.¹¹² Amongst other things, the Court makes reference to the fact that persons who presented criticism and asked for an external inquiry, have been characterised as 'troublemakers' and that they shortly afterwards were told that their employment contracts with the NRC would be terminated.¹¹³ In its summary, the Court states that the organisation 'must confront its culture with regard to internal criticism'.¹¹⁴

One common approach to managing dissatisfaction or dispute is to appoint an ombudsperson. Another well-established resort to handle criticism – including legitimate concerns – is to have a whistleblowing policy

¹⁰⁹ Taking an incisive, proactive human resource approach might have avoided the criticisms made by those directly affected by the kidnapping incident in Dadaab that they had not received full information in response to their questions regarding the incident they had suffered. Experience shows that such questions will not go away and may come back over many years, or even decades.

¹¹⁰ Dennis v NRC (2015), p. 29.

¹¹¹ Ibid, p. 33.

¹¹² Ibid, p. 43.

¹¹³ Ibid.

¹¹⁴ Ibid, p. 7.

in place. Both can channel concerns and criticism and propose ways of dealing with them before they get blown out of proportion or come to a point of no return. And it may well be that matters of serious institutional concern will be brought to light and can be tackled that otherwise would have continued to be ignored and persist in their damaging influence.

3.11 Why go to court?

This was the first documented case in Europe of a claim regarding a security incident involving an aid organisation that actually went through the courts. Given the fact that it certainly was not the first serious security incident, why did this case go to court? Apart from the incident and facts in themselves, there must have been reasons and motivations that took it this far. The ruling does not specifically discuss this point, but it does provide some insights that are worth recalling and discussing in more general terms.

In the case at hand, mediation failed. For one, the financial resolution sought by Dennis was much higher than the organisation's offer. Secondly, Dennis demanded a public statement that the organisation acknowledged it had acted with gross negligence. While the organisation offered financial compensation and was willing to admit negligence, it did not accept an admission of gross negligence. In the end, the damages awarded were somewhere between what was demanded and was offered during mediation. The ruling of gross negligence affected the compensation awarded, notably for pain and suffering. Beyond the financial consequences, however, the decision of gross negligence was damaging to the organisation in terms of reputation and arguably a 'moral victory' for Dennis.

In general, apart from the financial, there may be less tangible reasons and motivations on the part of an individual to press charges. In the case at hand, Dennis has written elsewhere that at the 'heart of my case is a demand for a transparent process to assess if there was negligence and a lapse in the Norwegian Refugee Council's duty of care and if so, to hold my former employer accountable. These concepts of organizational accountability and of "procedural justice" have been sorely lacking to-date.'¹¹⁵ In other terms, a sense of justice appears to have played a significant role.

Related to this are the unease and dissatisfaction with the post-incident process experienced by other staff. The testimony of an expert witness recounted in the ruling is worth quoting at some length:

The expert witness emphasised in his statement that good follow-up and information in the wake of such an incident is of great importance. Persons who experience a kidnap incident like this one, will be very sensitive to how they are handled. This applies both institutionally and at an individual level. It is important that a follow-up is provided that gives individuals a feeling of being taken care of. If they do not feel that they are being taken care of, it may in general lead to a high degree of aggression and antagonism. Requirements for being able to go on with their lives would include good debriefing, that they obtain a clear picture of what happened and that they are given adequate information by their employer. In connection therewith, the Court notes that [one key witness], amongst others, explained that she can come to terms with the fact that mistakes were made, but that it is difficult to come to terms with the fact that they have not received full information. Several witnesses have stated that the incomplete information has made it difficult for them subsequently to trust the management of the NRC.¹¹⁶

The outcome of any court case is generally not a foregone conclusion. Hence, the question to be pondered before pursuing a claim is whether going to court is worth the effort and risk of losing. Does being 'right' – winning the case – outweigh the costs? The costs – and not merely the financial ones – are substantial. Below, some considerations are offered for both the individual and the organisation.

For an organisation, in Europe at least, the financial costs are probably the least of its worries. Less tangible but no less important, is the fact that a serious incident, its aftermath and the way it is handled affect all staff of an organisation. It may be depressing and dampen motivation; work may suffer. The longer the incident remains unresolved and drags on, the more doubt and discomfort gets a chance to settle. Externally, the reputational costs increase with the public and media attention given to a court case, and these costs get increasingly difficult to manage the longer the organisation is seen to be incapable of handling and resolving the case amicably. Eventually, a slipping reputation may lead to a drop in revenues and loss of good staff.

¹¹⁵ Dennis (2015).

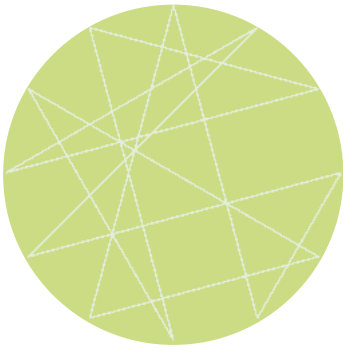
¹¹⁶ Dennis v NRC (2015), p. 12.

For the individual, it is difficult to bring a case (especially, as with *Dennis v NRC*, in a country other than one's own). A lawyer needs to be found,¹¹⁷ engaged and paid,¹¹⁸ evidence needs to be gathered, and witnesses identified. Apart from money, the process takes time, perhaps years, during which the stress of uncertainty is a constant companion; one does not know whether one will win or lose. Meanwhile, it will be hard to put the event behind one and get on with life. Also, involvement in legal action may dissuade other organisations from hiring an individual later on. This may be a factor that kept other aid industry employees who have had similar experiences as Dennis from taking their employers to court.

In conclusion, for the individual, it will be important to assess whether, apart from financial aspects, the perceived wrong is important enough to go through with a case, stressful and disappointing as it may be. For an organisation, the lesson is that it should not underestimate how treatment perceived to be unjust is part of an individual's core reaction, and may add or even lead to the motivation to press a claim. It would be well advised to pay close attention to how it manages the relations with all those affected by an incident (directly and indirectly) and the support it provides in the short and long-term.

¹¹⁷ Given there is little or no jurisprudence, finding a lawyer willing to take up the case may be more difficult than it sounds.

¹¹⁸ In this case, the Plaintiff resorted to crowdfunding. In the end, the ruling included an award for compensation of legal costs.



Conclusion

The fundamental conclusion that can be drawn from the case is that Duty of Care applies to the international aid sector. Although the case was brought in a Norwegian court, the reasoning of the Court is instructive and there is the realisation that the case will have relevance and impact beyond this jurisdiction.

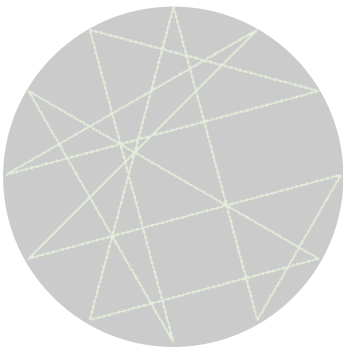
Dennis v NRC highlights the legal repercussions organisations could face in the event that they do not meet adequate Duty of Care standards towards their employees before, during and after a security incident. The Court highlights examples of good and bad practice throughout the ruling, which this paper has linked to standard elements of Duty of Care and security risk management practices.

The case and ruling are relevant to many organisations and the lessons that can be drawn from the case are instructive. Moreover, it is a precious opportunity for the sector as a whole to reflect and take stock. In this respect, one particular paragraph in Dennis's argument included in the ruling makes some pertinent points:

Aid organizations are major employers with the same responsibility for their employees as other employers. The case might give the impression that the NRC is not to have the same employer's liability because of its other good deeds. Employees must however know that their employer covers their back with a satisfactory handling of their security and that they will be taken care of if anything happens. A sound protection of employees will in the long run lead to increased productivity. The experiences gathered from the rescue operation in the case at hand have shown that it may be more costly to react after the fact than to prevent it from happening. Security incidents also affect those who are to be aided, in that programs are stopped or downscaled. Sound security for employees can prevent this, thus leading to more persons being helped in the long run.¹¹⁹

For an organisation, beyond the fact of legal responsibility, the point made here is that taking account of the mandatory nature of Duty of Care is necessary – and not merely to avoid a court case and all the negative effects this carries with it. More importantly, due consideration of Duty of Care has wide-ranging positive impacts on an organisation. It makes sense for an organisation to embrace and invest in duty of care rather than expend efforts to avoid it; in fact, embracing duty of care leads to a better organisation.

¹¹⁹ Dennis v NRC (2015), p. 7.



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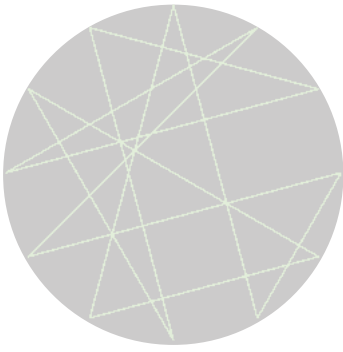
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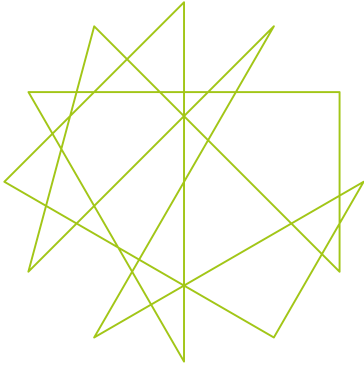
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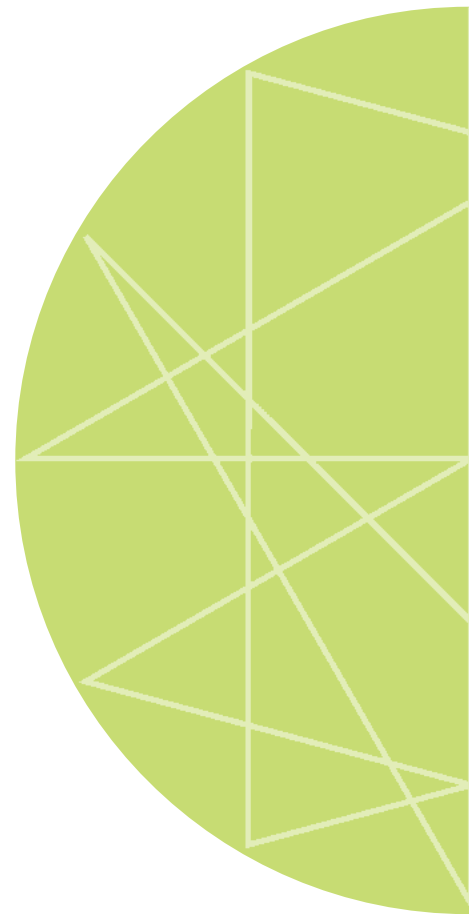


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