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Immediate and expert advice when an accident occurs is of increasing importance to employers and their insurers. Greenwoods now provide an emergency out of hours contact service to assist clients with the management of police, regulatory bodies (HSE, EHO, EA) investigations and of the media. Advice at the earliest stage can often prevent basic errors in accident investigation and we can secure the protection of legal privilege for certain key documents.

A call to the single emergency number will enable you to make contact with an expert in Health & Safety or Road Traffic Act prosecutions.

REFORM OF THE CORONERS' SYSTEM - THE NEXT STAGE

The Coroners and Justice Act 2009 came into force in part on 12 November 2009. The Act introduced a number of reforms to the Coroners' system to include a new appeals procedure; the appointment of a Chief Coroner; giving power to the Coroner to investigate fatal accidents, including the entry onto premises, the search and seizure of documents and other evidence; and to disclose information to interested parties. The Act is a piece of primary legislation and the detail of how some of these new proposals are to be introduced is to be left to secondary legislation. It is intended that those sections of the Act related to coroners will be implemented by April 2012.

Government is now consulting on how the secondary legislation should be framed. The Consultation paper was issued in March 2010 and the closing date for response was 1 July 2010. There are a number of areas in the consultation which will be of concern to insurers and their insureds alike. Primarily these areas are the Coroner's powers to search and seize, rules relating to disclosure and the conduct of the Inquest itself.

The Coroner's investigation and the Inquest is often an important first step in relation to any civil claim or criminal investigation. Inquests are used by the family of the deceased to obtain evidence and lay the ground work of the claim. Likewise, Inquests can be used by the regulatory authorities to test the evidence prior to any prosecution.

Coroner's Powers of Entry, Search and Seizure

The consultation paper seeks views on who should carry out this function on behalf of the Coroner.

REFORM OF THE CORONERS' SYSTEM – THE NEXT STAGE (cont'd)

It anticipates delegating the task to the Police or the HSE, and suggests that it should follow the procedures set out in the **Police and Criminal Evidence Act 1984 (PACE)**. The paper invites views as to whether notice should be given to an occupier that a search is to be undertaken and what period of notice should that be.

We consider it is self-evident that when any investigative authority is given powers of search and seizure there should be appropriate guidelines in place which ensure that such power is not abused.

The suggestion of delegating these powers to the Police or HSE is not helpful. The Police and HSE inspectors are trained to gather evidence to prosecute a crime. That is why when their evidence is produced it causes such concern in the Coroner's Court because it is presented in such a way that it indicates that somebody or some organisation has been at fault.

It is therefore more appropriate for any such investigative powers to be retained by the Coroner personally and funding made available to the Coroner to employ an investigative officer who is trained to understand the function of the Coroners' Court and is not seeking to prepare either a Civil or Criminal case.

Disclosure of Documents

At present the disclosure of documents is undertaken voluntarily by individual Coroners and there is no uniform approach. The consultation paper differentiates between bereaved interested parties and other interested parties in relation to disclosure. Oddly the consultation does not suggest that all interested parties should have all disclosure automatically or that if one interested party requests disclosure it should automatically be sent to all the others. In other words disclosure will be considered on a case by case basis. It would be more sensible for the Coroner first to determine who interested parties are and having done so and acknowledged them as such, relevant documentation should then be disclosed to all interested parties.

In particular when one party requests disclosure, that request should automatically be circulated to all other parties so that they are aware of the request being made. Although there is a natural tendency and desire to treat the bereaved families as a special category, all interested parties should be treated equally. Some interested parties may be facing a loss of liberty if a prosecution is likely to be pursued.

Conduct of Inquests

The consultation paper seeks views on a number of areas worthy of comment. At present there is no procedure to allow the Coroner to summons a witness (or at least the procedure is rather convoluted). The short answer of course is that there should be a procedure which allows the Coroner to issue a witness summons. Views are also sought on the admissibility of documentary evidence. In recent years it has become more common for evidence to be admitted in documentary form where it is unlikely to be disputed or is not controversial.

We have recent experience of this in relation to expert evidence particularly with the experts who are based abroad. In our view the admissibility of documentary evidence should not extend to expert evidence unless there is clarity around the reasons why the expert is not able to attend and there is clear information before the Coroner as to the expertise of the expert and that the report is in a proper form, expressing proper and well thought out opinion. Without such guidelines there is a danger that rogue expert evidence will be admitted in an inappropriate form.

There are further areas considered in the consultation paper to include details of how an appeal from the Coroners' Court to the Chief Coroner should be conducted and performed.

Implications for the Insurers and the Insured

Most insurance policies provide cover for representation at the Inquest and also Health & Safety Investigations. The extension of Coroners' powers is likely to increase the cost of funding representation.

REFORM OF THE CORONERS' SYSTEM – THE NEXT STAGE (cont'd)

Insurers should therefore be aware that Inquests are likely to be more costly in the future requiring more detailed preparation. Insurers should therefore look at the cover which is provided under the policy and in particular the overlap with representation in respect of Health & Safety investigations.

Likewise insured's should look carefully at the extent of cover because the cost of representation at an Inquest can be significant, particularly if the Inquest is going to run for many weeks.

CRIMINAL INVESTIGATIONS INTO WORKPLACE DEATHS – THE GOLDEN RULES

A death at work will be investigated by the police as potential corporate manslaughter with the assistance of HSE pursuant to the *Work Related Deaths: A Protocol for liaison*. If there is insufficient evidence to support a corporate manslaughter charge the investigation will be handed over to the HSE to investigate possible health and safety breaches. Where no death occurs HSE will investigate alone.

The first 24 hours of any investigation are the most crucial. It is prudent for employers to have in place a protocol that sets out what steps should be taken if there is an investigation. Below are some 'golden rules' that should be incorporated into a protocol.

1. **Immediately contact your broker and / or relevant insurer.**

As soon as possible after an incident has occurred make contact with your insurer and your broker to advise them of the investigation. Access to legal advice at an early stage is critical and your insurers are likely to authorise or provide legal representation.

2. **Appoint one person as contact with the investigating authority.**

Ensure that requests for interviews and documents are made through one person and a record is kept of all requests and copies kept of all evidence handed over and attendances logged.

3. **The appointed person should make contact with the investigating officer as soon as possible.**

To avoid misunderstanding and to minimise disruption it is important to open a direct line of communication between the appointed person and the investigating officer. This will assist in an early understanding of the direction of the investigation and establish who the investigating officers wish to interview ,and if necessary make appropriate representations.

4. **Do not assume the company only is being investigated.**

The investigating authority may be considering prosecuting not only the company but also individual directors and / or employees. Beware of conflicts of interest arising between the individuals requiring separate legal representation.

5. **Individuals need to understand their legal rights in respect to interviews.**

Whilst the investigating officers are likely to make enquiries on an initial site visit, formal statements will generally be taken subsequently and by arrangement, although in serious incidents formal statements may be taken at the scene.

There are three types of interview: (1) **Section 9 statement.** Both police and HSE will take statements from potential witnesses in "Section 9" form. An individual cannot be compelled to give a section 9 statement. Once given however that individual becomes a potential prosecution witness. (2) **Section 20 statement.** An HSE inspector has the power to require any person he has reasonable cause to believe is able to give relevant information to the investigation to answer questions.

CRIMINAL INVESTIGATIONS INTO WORKPLACE DEATHS – THE GOLDEN RULES (Cont'd)

This is known as a “Section 20” interview. Any answers given by that person cannot be used as evidence against them. **(3) Interview under caution (PACE interview).** Where a person is suspected of committing an offence a police officer has the power to arrest a person and require them to be interviewed under caution. An HSE inspector does not have the power of arrest and so cannot compel someone to be interviewed under caution. Both the police and the HSE can invite but cannot compel a company to nominate an individual to be interviewed under caution as its representative. A nominee should not have given a section 9 statement.

6. Nominate someone to speak on behalf of the company.

Anyone who speaks on behalf of the company at any time should have authority to do so. Senior persons within a company should exercise caution as what they say to an investigator as this may be deemed to be an admission on behalf of the company.

7. Identify early on an internal advisory team to assist in the criminal / civil defence.

The legal team will benefit from assistance from people within the company with relevant expertise / technical knowledge. Ideally these people should not provide section 9 statements because if they do it will hinder the legal team’s ability to be able to rely upon their assistance if they become prosecution witnesses.

8. Do not allow investigating authorities to exceed their authority.

Be familiar with the powers of investigators to search and require disclosure of documents. The police and HSE have different powers. The police’s powers are set out the Police and Criminal Evidence Act 1984 and the Codes of Practice to that Act. The powers of HSE Inspectors are contained in section 20 of the Health and Safety at Work etc Act 1974.

9. Make a record of potential witnesses / collect evidence of the scene.

Ensure that the addresses and telephone numbers are obtained of potential witnesses whether employees or others. It is easy to lose track of witnesses over the lengthy course of the investigation process. Also photographs or videos of the scene of the incident can be valuable evidence. Make sure a note is taken of who took the photographs or video and when.

10. Do not rush to provide an internal investigation report.

Those investigating may be entitled to a copy of an internal investigation report. Any report produced shortly after the incident should ideally be written as an interim report. A report only has the potential to attract legal privilege if the investigation was instigated on the instructions of lawyers acting for the company and its dominant purpose is for litigation.

RECENT SIGNIFICANT CASES

R (on the application of the Law Society) v The Lord Chancellor 2010

On 15 June the Administrative Court held that the new Regulations limiting the costs recoverable by successful defendants in criminal cases were unlawful.

Under the last Government these Regulations had been introduced with a view to capping the cost of defendants who were successful in establishing their innocence. The costs were to be limited to the Legal Aid rate.

The Court found that the new scheme was unlawful. The comment of Elias LJ is worth repeating;

RECENT SIGNIFICANT CASES (Cont'd)

“The new look Regulations involves a decisive departure from past principles. The jettison of the notion that a defendant ought not to have to pay towards the cost of defending himself against what might in some cases be wholly false accusations, provided he encouraged no greater expenditure than is reasonable and proper to secure his defence. Any change in that principle is one of some constitutional moment. It means that a defendant falsely accused by the State would have to pay from his own pocket to establish his innocence. Whatever the merits of that principle, I would be surprised if Parliament had intended that it could be probably achieved by sub-delegated legislation which is not even the subject of Parliamentary scrutiny.”

This is a very clear and damning indictment of the Government's proposal.

This means that in defence cases which are funded by insurers in respect of Health & Safety Prosecutions it should now be possible to press for a full recovery of costs (subject to detailed assessment) and for insurers to recover a greater proportion of those costs.

GREENWOOD'S CASES

Greenwoods recently completed a significant case in relation to strict liability offences. We had noticed that following the decision in *R v HTML* there has been a tendency by the HSE to seek to charge defendants with strict liability offences as opposed to charge under **Section 2 or 3 HSWA** which provides a reasonable practicability defence.

A strict liability offence means what it says. In essence the offence is committed if the activity which was carried out was done in an unsafe manner or in breach of the Regulations irrespective of whose fault it was.

The defendant we represented had been charged with a breach of **Regulation 8.(1)(c) of the LOLER Regulations**. This Regulation places a duty on the operator to ensure that any lift is carried out safely. In this case the lift was being managed by the banksman. It was common ground that the banksman was appropriately trained and qualified. The defendant had a well thought out and defined written lifting plan which set out how a lift should be carried out on site. The banksman had been warned about how to lift properly a few days before the incident. On the day the banksman executed the lift in a totally inappropriate manner by cradling the load. This caused the load to fall on to him, causing serious injury. This was an unannounced and unauthorised departure from the lifting plan.

None of the above points were in dispute when the matter came before the Magistrates. In fact the HSE went so far as to accept at one point the prosecution was being brought because of the actions of the employee and not the employer.

In cases such as these it is vitally important that two aspects are explored carefully:

1. Whether such Prosecution is in the public interest.
2. Whether breach is in any way causative of the injury.

In this case we concluded it was difficult to challenge the public interest point (although please see comments below regarding the review of Health & Safety Law). However, it was argued very forcefully that the breach was not causative of the injury and that the breach had been caused solely by the actions of the employee. It took the Magistrates very little time to accept and acknowledge the detailed thought process and procedures which had been put in place by the defendant. Therefore, notwithstanding the very serious and life threatening injuries suffered by the victim, the Magistrates imposed on him a fine of £2,000.

This also meant that the Defendant and its insurers were able to deny liability in full in the subsequent civil claim.

HEALTH AND SAFETY LAWS TO BE REVIEWED

Prior to the recent general election, David Cameron had announced he was intending to carry out a review of Health & Safety Law. He has now appointed Lord Young to proceed with this review. This report is due to be published at the end of the summer. Although the review is likely to focus on public liability and voluntary sectors who are complaining that the current application of Health & Safety Law is leading to a risk averse society, with many (normal) activities now being regarded as untouchable, we consider that the review should also be extended to employers and should include a review of strict liability offences. The above case is a good example of where the application of strict liability is manifestly unfair. When regulations start being applied in this way it adds significantly to the cost of running a business and, conversely, detracts from a sensible approach to health & safety. It leaves those who adopt a sensible and proper approach to health & safety wondering what else they can do and also what is the point? We therefore suggest that as part of this review when any regulatory offence is to be prosecuted not only should the summons set out clearly the offence which is being considered but it should also include a declaration that it is in the public interest to proceed with the prosecution and that declaration is signed by an appropriate officer.

Greenwoods has already expressed views and engaged with Lloyd Young in his review and would be happy to take any further points up on behalf of clients.

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