

Health and Safety Investigations New Approaches - Emerging Issues

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Since the Law Society published its guidance on company solicitors attending HSE interviews in 2005 the role of the independent solicitor acting for witnesses has become increasingly common particularly in significant investigations. That role is evolving. The guidelines, and approaches increasingly adopted by investigators are raising some interesting issues of principle and practice for all involved.

This briefing looks at:

- The Role of the Independent Solicitor
- When and why a witness needs representation
- Access by the witness to his/her own evidence and other material
- Uncertainties as between the general rules against witness collusion and fact finding internal safety investigations mandated by the HSWA
- The Approach to management witnesses
- Disclosure Requests to individual
- Unresolved Issues of Principle
- To explore with the company and the employee whom, if anyone, they wished to have present in any voluntary interview. If the proposal was for the company lawyer to be present then the position would be explained fully including that the solicitor was there for the company, was not representing the individual, but was there to see that "fair play" was observed by HSE. In particular that came out in proper context and in the witness's words and not those of the inspector holding the pen. The individual was free to have the solicitor there or not there as they chose;
- The solicitor would recommend to the individual that he/she asked HSE to provide to the witness a copy of the voluntary statement provided.

A separate briefing will follow in relation to the potential Tax (PAYE and VAT) implications of the employer funding independent representation for its staff.

The Role of the Independent Solicitor

Prior to the Law Society's guidance potential witnesses tended to be considered on the following basis by company's lawyers:

- To review the facts and to require HSE to state whether the individual concerned was under criminal investigation;
- Even if not, to assess if there was a realistic prospect that the employee may be personally at risk of prosecution or may otherwise personally be "in the line of fire" – for example in terms of disciplinary action;
- To identify – in the case of junior employees in particular - if arrangements were in place for separate representation, for example by union officials or union legal advisers;
- If there was an actual conflict or realistic potential for conflict to recommend (either directly or to be communicated via the company) that the individual consider independent representation;

However, the Guidance states:

"It is difficult to justify the employer's solicitor accompanying the employee to the interview... It is generally inappropriate for the employer's solicitor to attend such interviews as the employee's nominee or to seek to obtain the employee's consent to being present at the interview"

This is subject to the exception that where requests are made to provide a company witness, or where the company's interests and those of the senior employees are so closely linked, the involvement of the company's advisers can be appropriate and sensible.

In significant investigations independent advice is often made available to those being interviewed. This is on the basis that whilst funding is provided by the company there is no client relationship between the company and the solicitors involved. The only duties are owed to the individual client.

Witness Representation – When and Why?

There are number of reasons why an individual may wish to

take advice when it comes to his/her interview.

For example:

- Unfamiliarity with the process – for example: the difference between voluntary and Section 20 interviews, what may be an inappropriate question etc. As a result the witness may feel comfortable with having someone there to assist, particularly in interviews that are taped and may take place over many days;
- An assurance that he/she is doing the right thing by making sure that what is said in his/her statement is accurate and not taken out of context;
- There is someone independent (and who is familiar with the process) which will allow the witness to talk through issues concerning the process and his/her evidence before, during or after the interview has taken place; and

There is the possibility that there may be some exposure (no matter how remote) to personal liability under the relevant legislation

Witness Access to his/her own evidence

A witness's access to his/her own statement can be broken into two distinct issues:

- Access to draft statements prior to signing; and
- Retention of statements once signed.

Prior to signing his/her statement a witness will, in all likelihood, want to review the statement in an appropriate environment to ensure that it records his/her evidence in the proper context. Working through a draft witness statement can take some time especially if the evidence is complex and detailed. To do that properly an appropriate environment is required – an environment where the witness does not feel the pressure of time constraints and where legal advice can be taken if required.

Retaining his/her final signed statement means the witness has a record of what has been said. Having a copy of the signed statement gives the witness freedom to seek further legal advice after that statement has been given. There are a number of reasons why a witness may seek advice after providing a statement (for example a concern that a certain matter may not have been adequately covered during the first interview) but without access to his/her statement it makes it more difficult to be able to provide advice.

When it comes to witnesses being given access to his/her statement the Home Office Circular 82/1969 at paragraph 2 states:

"As a result, the Secretary of State is able to commend for adoption a revised practice which has the approval of the Lord Chief Justice and the Judges of the Queen's Bench Division. This is that, notwithstanding that criminal proceedings may be pending or

contemplated, the Chief Officer should normally provide a person, on request, with a copy of his statement to the [police]. It is recognised that on occasions a chief officer may think it necessary to exercise his discretion to refuse to supply a copy of a witness's statement. Circumstances giving cause for refusal are where the chief officer has reason to suppose that the statement is sought for some sinister or improper purpose which might prejudice the course of justice – for example, to enable the witness to lie consistently or where others are bringing pressure on the witness to obtain a copy of his statement with a view to persuading him to go back on it". (Emphasis added)

However the practice/protocol recently deployed by criminal investigators has not been consistent.

There are examples of unencumbered access being given. However refusal to provide is the increasing norm on both draft and final statements without evidence that the statements are being "sought for some sinister or improper purpose". The restrictions – such as only having access to draft statements in an HSE office and not being provided with final statements – hinder the witness's ability to either review his/her evidence appropriately or seek advice if needed.

Communications between Witnesses and internal safety investigations

There is a distinction that needs to be made between discussing "common domain facts" with an internal investigation team and collusion between witnesses.

The legal authorities are clear when it comes to witnesses not discussing their evidence with other witnesses (for example refer to *R v Momodou and Limani* [2005] EWCA Crim 177).

However a witness can speak to an internal safety investigation team on the same issues for obvious and legitimate safety reasons...

The HSE has recently clarified that it is not improper for a witness to discuss "common domain facts" with a fact finding internal investigation team.

Management Witnesses

The Law Society's guidance provides a "carve out" for management witnesses in that when a request is made to provide a company witness or the company's interests and those of the senior manager are closely linked it is appropriate for the company's legal advisor to attend the interview.

The difficulty is when this carve out is activated. There are circumstances where the company legal advisor has been involved in the statement process because the evidence sought has directly related to company information. However it is still too early to say the HSE will approach this issue in practice as a whole and whether they will take objection to company lawyers attending interviews of senior management where discussing their role in the company.

Disclosure Requests

Another "live" issue since the Law Society's guidance is that of disclosure request being made of witnesses. More specifically requests for employees to hand company documentation to the HSE.

If the witness is an employee and the disclosure request relates to the provision of company documents a number of issues that fall from that which broadly speaking fall into three categories:

- Logistics;
- Principle; and
- Privilege.

A sweeping request may mean that from a witness's perspective he/she may be asked to undertake a disclosure exercise of potentially thousands of documents. Logistically that would involve many hours of work which is not only time consuming and costly, but also unrealistic for an individual.

Further a request for company documents – whether it be sweeping or more focused – is a request to an employee to hand over what is fundamentally not his/hers. Ownership of company documents rests with the company.

The appropriate course would appear to be for the request to be made of the company (or their lawyers) at first instance and not the individual employee.

Issues of privilege can also arise. Where the document is legal advice itself or its sole or dominant purpose is to advance likely litigation, it will be privileged and should not be handed over. In particular this may relate to certain categories of documents created post incident. Whether privilege attaches to company documents is for the company – as the owner of the document – to consider and either claim or waive privilege.

Lastly what of internal safety investigations? These are desirable (and often mandated) post event with the vital public policy intent of preventing future accidents. It is vital that those involved can speak and act freely and the position "warts and all" is explored.

There is a dilemma however – the "warts" make the investigations attractive to criminal investigators who want to secure convictions. However their interest risks those involved being reticent which is a safety risk.

This need to balance competing public policy factors – punishment versus learning safety lessons has played out in the context of air marine and rail accidents with independent investigators able to protect safety investigation evidence from use in criminal trial. No similar safeguards (absent any valid legal privilege) exist for internal investigations.

Should they however be seized and used or do the prejudicial effect and the future risk to safety make this an unwise step in terms of public policy?

Unresolved Issues of Principle and Practice

There is one underlying them that is perhaps key. A company is a person in law. It has legal entitlements – including rights to a fair trial under the Human Rights Act and the right not to incriminate itself.

What rights however does and should a company have to know what is being said in its name? Are witnesses individuals only or are they agents of the company in what they have (or haven't) done pre and post incident?

The thrust of current HSE practice and the Executive's submissions to the Law Society is that all companies are to be regarded together – they have no such rights.

Witnesses are to be treated as somehow separate from the role which they occupy and the jobs they are paid to do. It is implied that it is somehow wrong for a company to know – or even to want to know – what is going on when it is being criminally investigated. The view expressed is that it will best know after the interview under caution and probably after it is charged and then receives prosecution disclosure.

The underlying issue of principle manifests itself commonly in a number of ways:

- In the initial phases of an investigation witnesses can often be treated as though they are giving evidence under compulsion; it is not explained to them that they are effectively giving voluntary evidence and/or offered the presence of a colleague or independent advisor ;
- Any appearance of a solicitor – however limited or professionally courteous - can be seen as obstructive with hostility expressed or shown to any legal presence on site or off site. Client companies are sometimes pressurised, under threat of being portrayed later to a court as non-co-operative, to remove lawyers from the criminal investigative loop.
- Witnesses are often not allowed to retain copies of their own witness statements or any transcripts or any notes taken from them voluntarily or under compulsion. This does not accord with the Home Office Guidance that indicates that a statement should be provided unless actual collusion is suspected. Where interviews are taped the PACE Code (E) is used except for the right of access to tapes;
- Statements can on occasions be prepared by investigators based on questions and answers with the witness which, upon review, do not always accurately reflect the evidence given by the witness. Rather than treating the preparation of a complex witness statement as a process which should be an iterative process, which continues until the witness is comfortable that it reflects his/her actual position,

the drafting of the criminal investigator is taken as

sacrosanct. It can then – on occasions - be seen as unwelcome if its own phrasing is changed by the witness directly, or by the witness after discussion with his own legal adviser;

- Pressure can be imposed upon witnesses and their advisers not to discuss any facts discussed with the criminal investigator with the employer even where the individual – sometimes a senior individual – firmly wishes to do so. Sometimes only when pressed can the investigator clarify the distinction for the witness between "common domain" facts, which is proper for the witness to talk about) and improper collusion which is clearly never to be tolerated;

If there are employers, individuals or advisors in any investigation who seek to impose any improper pressure, to collude, or to obstruct proper investigation then the available criminal sanctions can - and most would agree should - descend heavily upon them.

They are however the minority.

The issue for current policy debate is whether an approach that effectively treats this as the default scenario is wrongly affecting the representation of both companies and individuals. Is it legitimate and proper for an individual to know what he has said and for him to be able (only if he chooses, freely and without pressure) to inform the company what he or she has said about the company's own actions performed through his company duties? Is it legitimate for him to know the type of the interview being conducted and to be satisfied that the statement is in his own words?

Does the position differ for individuals depending on their relative seniority? If so at what level of seniority do their rights and the treatment of the individual change?

These are live questions which will hopefully find answers based upon consensus and public policy guidance.

Contacts

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