Birmingham Health, Safety & Environment Association

Registered Charity No.: 255523

721 Hagley Road West
Quinton, Birmingham B32 1DJ
Email: secretary@bhsea.org.uk
Website: www.bhsea.org.uk

Fax: 0121 421 3463 **Tel. No. 07071 226212** *(09.30 –12.30) only*

Secretary: Andrew Chappell C.Eng., MIET., Dip.E.E., CMIOSH, MCMI

Newsletter November 2006

Welcome to Our New Members

We wish to extend a warm welcome to the following members, who have recently joined BHSEA: -

- Gary Etherton, Director, Falcon Construction Services Ltd.

October Meeting Notes

Accidents under the spotlight in Court

Nicola Cárdenas-Blanco, Solicitor, Martineau Johnson, Birmingham

Nicola said one of the reasons she enjoyed her job is the variety that comes from the type of work in which she is involved in the Commercial Disputes Department and which involves some regulatory or **criminal work** as well as **civil work.** She went on to say that she was going to talk about, firstly, how health and safety matters can fit in either category and, secondly, why this makes a difference with regard to "evidence" in both types of proceedings. She promised also to touch on some examples where Members' own evidence may not help them, and hopefully give some ideas as to how employers and staff can try to avoid them.

Nicola emphasised that it would be a bit of a crash course, as the subjects touched on are huge in themselves, but if there are any specific points

members would like to discuss with her, then she could discuss them afterwards.

Criminal proceedings - What these are and what they could include (types of prosecution).

As we know, Nicola reminded us, health and safety law in the UK is underpinned by the H&SAW Act 1974, and is supplemented by reams of other sets of Regulations, not to mention Approved Codes of Practice, Guidance notes and British Standards etc. The Act contains two main duties in the H&SAW, which are:

- firstly, the duty of the employer to take care (so far as is reasonably practicable) of the health safety an welfare of his employees whilst at work AND
- secondly, the duty of the employer to take care (so far as is reasonably practicable) of the health and safety of persons who may be affected by his undertaking.

It is worth mentioning briefly regarding the latter, because this includes all people who can be affected by the activities of your business. So this can include students, visitors, contractors and it doesn't matter if you are not running the business for profit (some have the misconception that if you're running say a charity, the rules don't apply to you - this is not true.) Breaches of these duties, or of many of the other duties made as Regulations by the H&SAW Act can result in action being taken by HSE inspectors, the most serious of which is a prosecution.
The decision to prosecute will be one that the inspector takes, depending on the evidence before him/her and the prosecution will be criminal in nature. The fact that it is criminal (a crime against "the state" plus the fact that it is defined in statute as "an offence") means that criminal procedure rules apply. There are different from the civil procedure rules, which shall be discussed in a moment.

What the powers of HSE inspectors are, what they can do
HSE inspectors are authorised by the H&SAWA to carry out investigations into an incident. So whereas you might ordinarily turn away an uninvited person, you can't do this with an inspector. They have the **"power of entry"**. An inspector can enter your premises at any reasonable time (no requirement to give notice), or if he thinks there is or might be a dangerous situation, he can enter at an unreasonable time as well. He can take a police officer with him if he suspects he may be obstructed, and any equipment he might need to get in - all for the purpose of examining or investigating circumstances surrounding a health and safety incident.
He can also order for some or all of the premises to be untouched, so anyone tempted to do a quick tidy up should not be so tempted. He can measure things and record things (e.g. video or photographs) and he can take samples. If necessary, he can even dismantle things. Any samples can be taken away and kept for as long as necessary for examination, to prevent tampering and to use it as evidence.

What this means in respect of documents, statements and other evidence
Another thing he can do is to require anyone he reasonably thinks may be able to give any information relevant to the investigation, to answer questions he thinks fit to ask

and to sign a declaration of the truth of his answers; and he can require you to do this away from other people (e.g. colleagues). The good news is that you can nominate someone to be with you whilst you do this. This means that you have the opportunity to call a solicitor to be present. If you are signing a statement taken in the heat of the moment, it is likely to be a very stressful and a potentially emotional time, so having someone there to hold an objective view and to try to minimise the chances of any self-incrimination may help - it is easy to give the wrong impression when you are under stress. The inspector can also inspect and take copies of any books or documents, and specifically including things you are required to keep by law (a health and safety policy, copies of risk assessments, things required by certain regulations e.g. data sheets for chemicals). Don't think you can get away with it if your information is just kept on a pc or in a locked cabinet either because the inspector also has the power to access those and to require you to help him do so (e.g. by providing passwords or keys).

Evidence during criminal proceedings – Police and Criminal Evidence (PACE) interviews - brief approach and potential pitfalls

During the process of an investigation, it may be that a person relevant to the investigation is "invited" to attend a PACE interview. This is essentially an interview under caution, so the officer will caution the interviewee beforehand, and the transcript of that interview can be used further in the investigation or prosecution. This subject opens up a whole separate category of issues that are best discussed another time, lest to say for the moment simply be aware that this is another part of the process where individuals can be required to give evidence under controlled circumstances which will then be relevant to the furtherance of the investigation. One thing to consider here is also relevant representation - are you being interviewed with a view to being prosecuted individually, or is there more thought that the company is at fault. Either way, you are entitled to have legal representation.

In summary, the impact of all of this (powers of entry, search and seizure, duty to answer questions and to attend interviews under caution) is that all evidence collected following an incident will be crucial in helping to decide whether or not there should be a prosecution, and if damaging evidence is found, it is likely to be used to further the prosecution's case. In the event of a prosecution, a court is also likely to use such information in deciding what sentence is appropriate.

Civil proceedings

What these are and what types of actions these types of proceedings could include

Civil proceedings cover those things, which are not criminal in nature. We are all involved in civil actions every day, such as driving a car or working to perform a contract. The types of civil actions that we are therefore concerned with today relate mainly to two huge areas of law, **tort, and contract.**

There are many different types of law than come under the heading of tort, but I propose to focus on one relevant one today that you will all have heard of - negligence. For an action in negligence there needs to be a **duty of care**, a **breach of that duty**, and the breach needs to lead to **some loss**. These duties exist in practically everything we do - when driving, a motorist has a duty of care to other motorists; likewise, an

employer has a duty of care to his employees. Personal injury and professional negligence claims come under the heading of negligence.
Where there is a contract in place, two or more parties have agreed, usually in writing, to perform certain obligations in exchange for some consideration, e.g. my dad will make a desk for me and I will give him £100. It doesn't matter however if the contract is not in writing because there is legislation that implies certain contractual terms in that event, and it is widely accepted that contracts can be oral,
Where something goes wrong, and either a party breaches a duty of care that was owed to someone else, or they break a term which is specified in a contract, the aggrieved person could have a right to pursue them for any damage they have suffered as a result, and this is where the right of a civil action arises.
Civil actions are helpfully governed mainly by the civil procedure rules, and in relation to evidence, there are certain things set out by these rules that parties to an action have to do. Often, parties either do not, or cannot do everything that is required of them by the court. However, the reason that parties should try to stick to the rules, is because at the end of the action, and I say this to simplify matters, the court looks at how both sides have acted. It considers whether they have acted proportionately, whether they have tried to save time and costs and whether they have acted appropriately.
Generally speaking, the winning side usually gets their costs awarded to them, but this is not always the case and the court can award costs against the party who has essentially, not
behaved themselves.

Duty of disclosure - what this is and how far does it extend
During civil proceedings, both parties will be subject to what is called a duty of disclosure. This means that they have to conduct a reasonable search for documents that are relevant to the proceedings. Contrary to some people's belief, this includes both documents which **support** your case and which are **unhelpful** to your case. So you can't "lose" things that are unhelpful. Plus, documents are often sent from one person to another, so if you "destroy" or "amend" one copy - how can you be sure that another does not exist? Each party is required to give the other side a detailed list specifying the documents that they intend to disclose.
The parties have to sign a statement of truth on their disclosure lists stating that the research has been carried out and all relevant documents disclosed. If the statement of truth is found to be untrue (i.e. that a party has failed to make full disclosure of all documents which are or were in its possession), then fines or imprisonment can be imposed.
Once the list is provided, the other side then gets to look at it, decide what they want to see and to ask the other side for copies. Those copies then have to be produced and sent. All of this needs to happen within the time limits that have been set by the Court, which often can be quite stringent.
The duty of disclosure is a continuing one, so if things turn up two weeks or two years down the line, as part of those proceedings, you are still under a duty to disclose them to the other side. So that means that you can't "temporarily" hide things either.
What does this mean for types of evidence - e.g. documents, letters, memos, emails,
e-data

This includes, say in a Personal Injuries claim for an employee injured in the workplace, copies of descriptions, job specs, and whilst some of you may now be thinking well that's ok as all of our info is on the system there is E-disclosure! The court already thought of this and so the duty of disclosure applies to e-documents just as it applies to hard copies. Emails, messaging, metadata (which is data about information such as the time an email was sent and opened), information on servers, hard-drives, blackberries, text messages on mobile phones and even "deleted" emails which can be retrieved off a system, are all still caught under this rule and could require disclosing.
There are restrictions to disclosure in the sense that the search for relevant documents that you undertake does not need to be disproportionate, however, you will be required to say what types of search you have done on a system, e.g. I have searched terms **XYZ** from date **x** to date **x.** So if the other side spot that you have not used a vital key word such as the name of the employee, or the date of the incident in an electronic search, they can ask you to carry out that search again more widely.

Pre action protocols and pre-action disclosure
The other relevant thing to mention about disclosure is that there are also things called pre-action protocols which apply to certain types of civil claim and which aim to help parties settle matters before they get to court by having a **"cards-up"** approach. Additionally there is **Pre-action Disclosure**. Civil proceedings don't even need to have been issued for this to be done, and also you don't even need to be a party. If someone can demonstrate that they have a reasonable cause of action and they think that certain documents are being held by the other party, or a related party that would clarify the position, they can make an application for pre action disclosure to get a court order to oblige that party to provide the documents you seek.
In covering those two areas of law, I hope to have given you some understanding of how the documents and information that is held in a workplace can feature in both criminal and civil proceedings and what the relevance of that evidence is.

Minimising the Risk
Now that you know how evidence can feature in proceedings, what I propose to round up with today are some more practical considerations to assist in minimising the risk of evidence in the workplace from letting you down.
I will say that if an incident has occurred and something has gone wrong, procedurally, it is likely that this will be shown to some extent in relevant documents. You can't and shouldn't hide these facts. But, what you can do, and what you're staff can do, is to have an awareness of how documents might be used as I have discussed and how you can try to avoid common pitfalls.
The examples that I have chosen are in relation to product liability. The reason I have chosen this is because it is an area in which there can be a number of different types of proceedings. There can be criminal liability, for example in relation to the Product Safety Regulations. Additionally there are contractual issues between suppliers and purchasers of products, plus duties of care to users of products, which may be breached and give rise to negligence. Also for the benefit of consumers, there is the Consumer Protection Act.

Firstly, your staff may not be aware of the duties of disclosure, and the powers of inspectors. The kinds of evidence/documents to think about could include reports, analyses, minutes, evaluations, design suggestions, quality control sheets, service history papers, old warranty claims, research and conference papers, personal logs and diaries - the list is endless. It could be essentially any document that contains information showing the defendant was aware of the problem. Even pencilled notes on typed documents fall within these rules.

If something has been destroyed, a gap in dates in documents (suppose you have all 1999-2000 invoices except 2) can be obvious and will at the least raise questions with the other side and at worse it could be otherwise assumed that there is something to hide. Besides which, any deliberate destruction could be a criminal offence. If the other side spot this - it will be exploited to its full advantage, as will any attempted destruction!

So you have been warned. - Other things that could be avoided include any testing programmes for products, or work schedules that are unreasonable. Do the records show that staff do not have ample time to carry out proper quality control, or are there other pressures on them? Has there been a lack of response to complaints or other issues raised, whether internally or externally? In this case, a *lack* of documentation could be as damaging as its presence. Have there been any changes in safety arrangements, which point either directly or non-directly to an increase in speed, efficiency or profit? Was a safety design recommendation ignored or refused because it was too expensive or costly? Care needs to be taken with such things, for example, if this was accepted practice in industry and one manufacturer rejects the idea due to cost - this will not bode well in the face of a claim.
Even worse is where documents record that safety procedures were not adhered to or that there were short cuts. Essentially, it is anything that says - this is how it should have been done, but in practice we don't always do that.
So, you and your staff in documentation and in practice can state true facts, give full information so that proper action can be taken, request action or investigation, seek feedback and be conservative in remarks and conclusions. What you and your staff might like to specifically avoid is exaggerating or dramatising, or worse, speculating on causes, consequences and solutions, giving unqualified opinions, which appear as fact, setting unrealistic objectives or standards, criticising or blaming other staff, implying that costs restraints/budgets are more important, implying that unreasonable risks are being taken, agreeing with complaints form customers, or joke about poor standards or likelihood of failure.

Prevention is better than cure

The best advice that I could give, and which I am sure would be supported by many of you as interested parties in the field of health and safety, is to prevent incidents occurring in the first place.
In an ideal world, we all would. But unfortunately, sometimes events take over. So it is then a case of dealing with those after the event. Part of that preventative process, can be to put yourselves and your staff in a better position, increase awareness of these issues - stick to the facts and avoid the creation of unnecessarily damaging evidence,

You can also train your staff to think in terms of possible legal implications of their actions.

Members' Questions

Malcolm Copson of Geopost asked in the case of Civil Pre-action Protocols, how much should be disclosed. Nicola replied that it is limited to the actions involved. The relevance must be proven and it should not be too wide.

George Allcock of GKN asked who makes the application for information. Nicola said in the case of Civil Procedure rules it would be a solicitor.

David Harrison of Birmingham University asked if it was reasonable to insist for a lawyer to be present if that resulted in a considerable delay. Nicola said it was important to be "reasonable" in these matters and a delicate balance was sometimes needed. With an interview "under caution" it was reasonable to ask for questions in advance, whilst waiting for the lawyer, so that the quality of reply might be enhanced. Ed Friend said, from his experience as an ex-HSE Director of Operations, that there was a legal duty to co-operate under Section 20 of the Act and a long delay could be considered a criminal breach itself!

George Allcock asked about the distinction between investigations for a prosecution case and those conducted for learning from mistakes. Nicola agreed they were very different and commented that if procedures had been improved in specified ways as a result, then this would viewed "in mitigation" of sentence.
Jim Hathaway of Beiersdorf UK said that it was sometimes difficult to elicit statements from employees for fear of disciplinary action afterwards. Nicola agreed that it is a problem and said that it was important to point out the advantages of co-operation in a criminal investigation. She added that in a civil case the witness cannot be forced to give a statement.

Malcolm Copson asked about requesting medical reports in a PI claim. Nicola replied that they could be demanded and commented that it was wise to suspect the reliability of reports that were dated **after** they were demanded!

Peter Evans commented that it was possible to issue a Court Summons for a witness to appear in court and Nicola observed that not many civil cases get to court.

At this point there were no further questions and the Chairman asked the members to show their appreciation in the normal fashion.

Towards a "Smokefree Birmingham"

Since this item appeared in the last Newsletter, the government have announced that this legislation wil come into force on 1st July 2007

Date of the next Meeting

2.00 pm on Monday 11th December 2006
at the Birmingham Medical Institute

The new Regulatory Reform (Fire Safety) Order 2005
Jonathan Herrick, West Midlands Fire Service

This is the most radical reform of Fire Safety Law for 35 years, sweeping away over 20 previous pieces of legislation. An "unmissable" presentation direct from the experts themselves

Don't forget, Buffet Lunch at 1.15.pm!

AND – if the Mince Pies somehow