

Thirty Park Place
CHAMBERS

**Accidents in the workplace:
offences, investigations and
interviews**

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Topics for discussion

- Offences that can be committed by employers
- Offences that can be committed by individuals (Directors/Senior Managers and employees)
- What to expect from an HSE Investigation
- Powers of HM Inspectors of Health and Safety
- Gathering Evidence
 - Physical evidence and documentation
 - Witness statements
 - Interviews under caution

Section 2 – General duties of employers to their employees

“ (1) It shall be the duty of every employer to ensure, as far as is reasonably practicable, the health, safety and welfare at work of all his employees”.

Section 2 - Continued

Section 2 (2) provides that without prejudice to the generality of the above, the matters to which that duty extends include (not an exhaustive list):

- Provision and maintenance of plant and systems of work that, so far as is reasonably practicable, safe and without risks to health.
- Arrangements for ensuring, so far as is reasonably practicable, safety and absence of risk to health in connection with the use, handling, storage and transport of articles and substances.
- The provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees.

Section 2 (3) creates a duty on an employer to prepare and revise a written statement of general policy in respect of health and safety of employees and the organisation and arrangements for the carrying out of that policy and the bringing of the policy and any revisions to the notice of employees.

Section 3 – General duties on employers and self-employed to persons other than their employees

“(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety”.

Section 1 of the HSW Act 1974 – Preliminary states the following:

“The provisions of this Part shall have effect with a view to –”

(Section 3 is in this Part of the Act)

“(b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work;

*(3) For the purposes of this Part risks arising out of or in connection with the activities of persons at work shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purposes of an undertaking and the **condition of premises so used** or any part of them”.*

Breach of sections 2 and 3 HSWA 1974

- Existence of a material risk to the health and safety of persons.
- The above includes the condition of premises used to conduct an undertaking.
- Section 3 there must be a link between the undertaking and the exposure to risk.
- There does not need to be an accident for there to be a material risk to health and safety.
- The occurrence of an accident can be evidence of a material risk to health and safety.
- There can be concurrent exposure to risk.
- The issue is not who caused the risk but one of exposure to risk. Exposure to risk means exposure to real and not fanciful or hypothetical risk.
- Foreseeability of danger is not an element of the offence but is relevant to the question as to whether there is exposure to risk - the more foreseeable a risk the less likely the risk is going to be fanciful or hypothetical.

Section 40 of HWSA 1974

- Reverse burden of proof.
- Balance of probabilities.
- Defendant to establish that it did everything that was reasonably practicable to eliminate or reduce risk

Section 37 of HSWA 1974 – attribution provision

“(1) Where an offence under any relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributed to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in such a capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, the preceding subsection shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate”.

- Consent – he is well aware of what is going on and agrees to it (actual knowledge)
- Connivance – equally aware of what is going on but agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it (actual knowledge).
- Neglect – failure to perform a duty of which the persons knows or ought to know – this includes by reason of the surrounding circumstances been put on enquiry so as to require him to have taken steps to determine whether or not the appropriate procedures were in place.

General duties of employees at work

Section 7 “It shall be the duty of every employee while at work-

- (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and
- (b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.

Sentencing

Imprisonment an option for sentencing courts for breach of duty under section 7 of the Act and for **section 37** offences:

- 6 months imprisonment in Magistrates Court.
- 24 months imprisonment in Crown Court.
- Unlimited fine (maximum of £20,000 in the Magistrates Court if offence committed before 12th March 2015)

Corporate defendant – unlimited fine (maximum of £20,000 in the Magistrates Court if offence committed before 12th March 2015)

Sentencing Guidelines – Corporate defendant – fatality.

Draft Sentencing Guidelines – Health and Safety Offences.

Other offences

- Breach of Regulation (e.g. Control of Asbestos Regulation 2006)
- Corporate manslaughter (cannot be committed by an individual):
 - An organisation causes a person's death, and
 - Amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
- Gross negligence manslaughter (can be committed by an individual or a corporate body):
 - Breach of duty of care
 - Causation.
 - Gross negligence (having regard to the risk of death whether the conduct was so bad as to amount to a criminal act or omission).
 - Sentence – unlimited fine, individual maximum life sentence.

Investigation

- Police and/ or HSE.
- Causes
- Whether action has been taken or needs to be taken to prevent a recurrence
- Lessons to be learnt
- What is the appropriate response to the breach of law

Investigation

When considering an investigation and the resources to use for such an investigation include:

- Severity and scale or potential or actual harm
- The seriousness of any potential breach of the law
- Knowledge of the duty-holder's past H&S performance
- Wider relevance of event, including serious public concern

**What do you think will be of
relevance to
an investigation?**

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- Failure to heed warnings
- Savings before safety
- Failure to assess risks
- Poor/inadequate communication
- Poor leadership
- Lack of enforcement
- Lack of monitoring and review

Section 20 HSWA – Powers of HSE Inspector

- Right of entry
- Take a Constable or other person
- Take samples, measurements, photographs, etc.
- Direct areas must be undisturbed
- Test or confiscate articles, seize and destroy
- Inspect and take copies of documents
- Interview and take statements.

Note: Police also have a power to arrest.

Gathering evidence

Physical evidence:

- Photographs
- Measurements
- Samples
- CCTV recordings

Gathering evidence

Documentary evidence:

- Health and safety policy
- Risk assessments
- Safe working instructions
- Personnel Records
 - Training records including induction and ongoing job specific training
 - Contract of employment
 - Job description
- Minutes of meetings:
 - Safety Committee meetings
 - Team meetings

Interviewing witnesses

- Statement - section 9 CJA 1967. This can be used in evidence. Criminal offences for the maker to state anything that they know to be false or do not believe to be true. Section 9 statements can be used in evidence in criminal prosecutions.
- Statement – section 20 of the HSWA 1974. Any person who the inspector has reasonable cause to believe is able to provide relevant information. Giving false information / refusing to answer questions is a criminal offence. No answer given by a person pursuant to that section shall be admissible in evidence against that person (or spouse) in any proceedings.

The Police and Criminal Evidence Act 1984 (PACE)

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Interviewing suspects

- Explanatory questioning.
- Where there is reasonable suspicion that a person (includes a company) has committed a criminal offence any questions regarding their involvement in that offence amounts to an interview.
- Reasonable suspicion means more than vague unsubstantiated feelings, or a hunch, but this is less than evidence supportive of a *prima facie* case.
- There is no specific obligation on an investigator to interview a suspect prior to charging them with a criminal offence. However, where someone is suspected of a criminal offence, it is normally the case that they will at least offered the opportunity of being interviewed under caution – it provides a suspect with an opportunity to answer the allegation made against them and give their own account before a decision to prosecute is made.

Interviewing suspects

The purpose of the interview under caution, from the investigators point of view, obviously goes beyond providing a suspect with an opportunity to provide their account:

- Important evidence against the suspect which could otherwise be difficult to obtain.
- Identify further lines of enquiry.
- Reduce the likely issues if the matter were to proceed to trial. A good interview will often cover topic areas and seek to pin down a suspect to detail, this leaves less movement at a later stage.
- Getting suspects to explain their own documentation and systems.
- Provides the basis for adverse inferences if an account changes. We will return to adverse inferences later in this session.

Interviewing suspects - the caution

“You do not have to say anything.

*But it may harm your defence if you do not mention when questioned
something you later rely on in Court.*

Anything you do say may be given in evidence.”

Interviewing suspects

Rights to representation

- Suspects interviewed at a police station are entitled to free legal advice under the duty solicitor scheme.
- The duty solicitor scheme does not apply if you are interviewed elsewhere, such as if you have attended a voluntary interview at a HSE office.
- The right to consult with a solicitor extends to the right to consult in private.
- This can be done in person or over the telephone.
- Where a solicitor has been consulted and is available, he must be allowed to be present during interview.

Interviewing suspects

Capacity

- If a company is a suspect that company will be asked to nominate a person to attend the interview under caution to answer questions on their behalf. Suffice to say that the person nominated should be someone who is in a position to answer such questions.
- An individual who is a suspect will be interviewed in a personal capacity.
- A person should not ordinarily be interviewed in an individual capacity and also as a representative of the company as there might be a conflict between the two.
- If this arises, it is likely that a company would be asked to nominate someone else.
- If a company cannot nominate someone else, which might occur if the body co-operate is small, then there should be two separate interviews. One in relation to the company and the other, individual.
- Consideration of separate representation.

Interviewing suspects

Arrest / voluntary attendance

- If the police are the investigating body (manslaughter) an individual can be arrested, detained and interviewed at a police station.
- If an individual is not arrested they can be asked to voluntarily attend a police station or other place, such as the offices of HSE to be interviewed under caution.
- Where an individual voluntarily attends (and is not arrested) he is free to leave the interview at stage.

Interviewing suspects

Disclosure – what will you know in advance?

- If you are invited to be interviewed, rather than arrested, then the letter from the HSE inviting you to interview should set out the offence that is suspected, a factual summary of the nature of the case and the specific issues which it is proposed will be covered during interview.
- It is good practice to identify documents that it is proposed to refer to in advance and if a suspect does not have copies of those documents already, provide them.
- A failure to do this could result in a defence solicitor advising his client not to attend, to respond no comment, or required that the interview is stopped for time to consider such material or that the interview is suspended, causing a waste of time and resources.

Interviewing suspects

Conduct of interview

- Rights
- Audio or audio and visual recording
- Solicitor present
- Stop interview to speak to a solicitor

Interviewing suspects

General topics (Health and Safety checklist)

- Plan:
 - How do you demonstrate the board's commitment to health and safety?
- Do:
 - What have you done to ensure your organisation, at all levels, including the board, receives safety advice?
 - How are you ensuring all staff – including the board – are sufficiently trained and competent in their responsibilities?
 - How confident are you that your workforce, particular safety representatives, are properly consulted on health and safety matters, and that their concerns are reaching the appropriate level, including as necessary, the board?
 - What systems do you have in place to ensure your organisation's risks are assessed, and that sensible control measures are established and maintained?

Interviewing suspects

General topics (Health and Safety checklist)

➤ Check:

- How well do you know what is happening on the ground, and what audits or assessments are undertaken to inform you about what your organisation and contractors actually do?
- What information does the board receive regularly about health and safety, e.g. performance data and reports on injuries and work-related ill health.
- Where changes in working arrangements have significant implications for health and safety, how are these brought to the attention of the board?

➤ Act:

- What do you do to ensure appropriate board-level review of health and safety?

**To be interviewed or not to be interviewed,
that is the question...**

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- If arrested the only real choice is between being interviewed and answering questions or being interviewed and answering no comment.
- Adverse inferences.
- No adverse inferences from a refusal to attend a voluntary interview.
- Possible adverse inference if attend and do not answer questions (fail to mention when questioned something that is subsequently relied on in evidence).
- Interview could result in a decision being made not to commence further enforcement action.
- A poor interview could assist the prosecution.
- Lack of cooperation with prosecution is relevant to sentence and could increase costs.
- Pre-prepared statement.
- Interview by letter.
- Seek good legal advice and this is a very important decision to get right.