IOSH – Manchester Branch

Accident Investigation and Cognitive Interviewing: – “…a legal perspective…”

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Outline

• Purpose of Accident Investigations
  – and the problem with them……
• Implications of Accident Investigations
• The solution to the problem…. Legal Privilege?
• Stages of an internal investigation
• The Art of interviewing
• Witness interviews and psychology of investigations
Consequences of Getting it wrong!

- Civil compensation claim
- Insurance
- Adverse PR
- Share Price
- Lost new business/tenders
- Company
- HSWA / Regs
- Corporate Manslaughter etc Act 2007
- Incident
- Criminal liability
- Coroner’s Inquest (fatality)
- Failure to notify
- Individuals
- Directors and senior managers
- Fine or prison
- Any employee
- Gross negligence manslaughter
- HSWA
- Prison
- Any employee
Why investigate?

• Legal reasons
  • to ensure you are operating within the law
  • Management Regs 1999, reg 5 – plan, organise, control, monitor and review health and safety arrangements
• disclosure obligation to PI claimant re: accident circumstances
Why investigate?

• Strategic reasons
  • what went wrong? – strengths and weaknesses of your position
  • keep pace with (or even get ahead of) the external investigation

• Moral reasons
  • corporate responsibility
  • culture – attitude to safety
  • public image
Problem!

Need to balance ...

investigating cause of accident and learning from it, so as to prevent a recurrence

Against

avoiding admissions of liability
Solution?? Legal Privilege

- A fundamental human right guaranteed by the common law
- Once a document is “privileged” it is absolute:
  - It cannot be overridden by some countervailing rule
  - Not disclosable in legal proceedings
- Caution: it can be waived either expressly or inadvertently
- Legal Advice Privilege - when receiving legal advice
- Litigation Privilege - during or in contemplation of litigation
• S.20(8) HSWA 1974 – privileged documents do not have to be disclosed to third parties

• TEST:
  – legal advice privilege – confidential communications between lawyer and client for purpose of seeking and receiving legal advice
  – litigation privilege – confidential communications which were created for the dominant purpose of obtaining legal advice re: actual or contemplated litigation
• Utilising privilege does **not** mean:
  – you are failing to co-operate; or
  – are obstructing an inspector (unless you fail to comply with a specific statutory duty or intentionally mislead)
• Neither privilege **nor** your lawyers should be an obstacle to sharing experiences
Key issues (1)

- The law on Legal Professional Privilege is currently in a state of flux - there is no guarantee that any document created during an internal investigation will be legally privileged.

- Consider:
  - reviewing internal policies on accident investigation and why they are undertaken;
  - contacting lawyers as soon as possible following a fatality, RIDDOR reportable event and following any regulator contact;
Key issues (2)

- Consider:
  - keeping your internal incident investigation reports in draft indefinitely; and
  - ensuring that good quality investigations are always carried out and well written reports produced by training your teams in effective forensic accident investigation skills.
Internal Investigations

• The stages of an internal investigation:
  - reporting (internally and externally)
  - fact gathering
  - analysing the information
  - identifying risk control measures
  - implementing remedial actions
  - report writing
Fact Gathering

Qn – how will you conduct the investigation?
The right approach

• Be open, honest and objective
• Set aside any preconceived ideas – follow the facts
• Explore all reasonable lines of enquiry
• Beware of blaming – you are not a prosecutor!
Physical Evidence

- You may want to check:
  - position of injured worker(s)
  - equipment being used
  - safety devices in use
  - guards/controls on machinery
  - PPE
  - housekeeping
  - weather conditions
  - noise and lighting levels
  - time of day
Witness Evidence

• Not an easy task to do well!
• Conduct interviews separately and as soon as possible
• Aim – to establish the facts and gain a fuller picture
• Contemporaneous (and signed) record
• Must decide in advance:
  – what questions to ask
  – how to structure the interview
What do you want to know?

• Issues to explore:
  – what happened? Who was involved?
  – what equipment was being used?
  – what procedures/SSOW/SOPs were being followed?
  – what was IP doing immediately before the accident?
  – who was the site supervisor?
  – what was the sequence of events that led up to the accident?
Interview Structure

• The Beginning:
  – choose most appropriate location
  – make introductions and explain the process
  – take a verbatim, contemporaneous note
  – discuss confidentiality
  – allow sufficient time
Interview Structure

• The Middle:
  – Prepare questions but let the witness talk
  – Cognitive interviewing technique
  – “one of the most exciting developments in forensic psychology in the last 10 years”
Cognitive Interviewing ("CI")

- CI is a witness recall technique
- Enables lawyers/H&S professionals/insurance claims handlers to gain fuller and more accurate information from witnesses
- CI can obtain up to 40% more information than by standard interviewing techniques
- The notion of CI is based upon this premise:
  - the memory of an event is composed of a number of parts
  - each part is stored separately in the brain
  - information about an event will be “filed” in separate documents in various files in different drawers
Benefits of CI To You

• Privileged internal investigations are “warts and all” exercises
• The better the quality of information going in… the better the outcome will be, i.e. in understanding what happened and what were the causes (immediate and root)
• Sometimes the minutiae or seemingly trivial details can be as helpful as the more obvious “headlines”
Stage 1 – Set the scene
- comfortable, calm and relaxing environment
- build a rapport with the witness
- give an honest estimate of the likely timescale
- describe the scene you want the witness to envisage (consider an actual site visit or use of photos)
CI Model continued….

- Stage 2 – Explain the process
  - tell the witness what you aim to do and how
  - inform them you want them to mentally return to the scene
  - allow the witness to close their eyes/focus on the floor/pace around etc if this aids deep concentration
  - make it clear the witness will need to work hard
  - set clear parameters for beginning and ending the “story”
  - ask the witness not to self-edit. They should tell you everything
The CI Model continued

- Stage 3 – the Recall Techniques
- 3a) Free Recall
  - do not interrupt (however tempting!)
  - be prepared for emotions/distress
  - allow silence and pauses
  - use non verbal communication to reassure the witness
Stage 3 – the Recall Techniques

3b) Varied Free Recall
- change the order of recall or viewpoint
- the more attempts at recall are made, the more the witness will remember
- e.g. start at the end and work backwards
- e.g. ask the witness to think about what others must have seen
- note any inconsistencies and revisit later
The CI Model continued

• Stage 3 – the Recall Techniques
• 3c) Focussed Questions
  – now it’s your turn!
  – prompt recall of previously unmentioned features
  – clear up ambiguities
  – favour open rather than closed questions
  – repeat the witness’ words back to them
  – try not to “jump about” and go slowly
The CI Model continued

- Stage 3 – the Recall Techniques
- 3d) Review
  - once you have exhausted the witness’ memory, review the information by telling them what they have told you
  - gives the witness one more retrieval attempt
  - confirms you have an accurate record and understanding of what you have been told
Interview Structure

• The End:
  – ask if the witness has any questions
  – thank them for their help
  – tell them your next steps

• The Statement:
  – type promptly and send to witness for careful review and amendment if necessary
  – or write up face to face if only short
  – ensure statement is signed and dated
The Art of Interviewing

- We have covered the DOs, but also consider...
- DO NOT:
  - intimidate the witness or put pressure on them to perform
  - interrupt or cut short their answers
  - ask leading questions
  - show your own emotions
  - jump to conclusions
Leading Questions

• Do you have any problems with your site manager?
• How fast was Joe Bloggs running when he tripped and fell?
• Do you agree that Joe seemed distracted that day?
• Did you see the guardrail was missing?
Limitations with cognitive interviews

• Not appropriate in all investigations
• Likely to take longer than standard interview
• Requires significantly more concentration from interviewer
• Need cooperative and engaged eyewitnesses
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