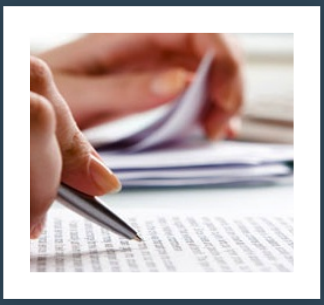

THE UNVARNISHED TRUTH

> Anyone completing an accident report form should be trained to understand the legal implications of what they write.

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What is the issue?

Siobhan Donnelly *highlights some common legal pitfalls to avoid when writing accident reports and investigating procedures*

The easiest way to successfully defend Employers Liability claims is to have robust health & safety systems, well documented supervision and monitoring and thorough training.

But even with the most tried and trusted systems, your defence against a claim can be weakened if the way you investigate and record the incident that triggered it leaves a lot to be desired. A little forethought and some clear protocols on accident analysis and reporting can prevent your strong defence dissolving into a weak one.

> In the courtroom the organisation's attitude is often demonstrated by one or two witnesses.

First consider who will write the initial accident report and who will carry out any subsequent investigation. From a legal perspective, it helps if these people are articulate and able to give cogent, persuasive evidence later. If you know an individual might embellish evidence or cave in under rigorous examination, it's better not to involve them in the reporting and investigation stage.

In the courtroom the organisations attitude and commitment is often demonstrated by one or two witnesses. So those tasked with appearing in court must understand they are the company. They must take responsibility for representing the organisation and its systems.

How can we avoid the main pitfalls?

On good form

Anyone completing an accident report form should be trained to understand the legal implications of what they write. They should think how the whole document will represent the organisation.

They should also be coached to state facts that are as neutral and objective as they can make them, avoiding personal comments or criticism. It's not uncommon to find remarks about the injured party's time keeping or work habits on accident forms.

The accident form is usually discoverable, which means the complainants lawyers will have sight of it, so any comments about the injured party should be substantiated with evidence. Claims like "he looked like he had been at an all-night rave" are misplaced.

If you need to refer to medical conditions, attribute the information to the person that provided it. In that way the diagnosis cannot be attributed to the investigator. Barristers often ask people who diagnose medical conditions in such reports when they did their medical degrees.

Try to ensure even the wording of the reportage is not incriminating. A phrase like "injured party alleged …", however legal sounding, could well be deemed by a judge to be implicitly negative on the employers part.

It is good to note the person who is the subject of the report "stated that …" or "complained that …", so you are simply attributing the statement to the injured party and staying away from conjecture about their honesty.

When completing accident reports give some thought to the tone of the document and the incidents context, one form observing the injured party "was not trained" failed to note the individual was the in-house trainer, for example. Remember you are also allowed to be positive and give praise where it is due on an accident report form. The report often conveys the company attitude, its tolerance and commitment to safety.

When the report is complete the investigator needs to set some time aside to review its format and wording to check it is complete and doesn't fall into any of the traps listed above. Then they need to make sure it is consistent with any later report under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations.

Timely remedy

In reviewing the report form it is worth considering the purpose of the remedial section. Remember that whatever the organisational purpose of the investigation, from a legal point of view you are investigating to find out how the accident happened not to prevent future incidents.

The HSE or Local Authority will seek remedies to ensure the accident does not happen again. Is it possible to remedy at the initial report stage before the first investigation to establish cause? I would argue you cannot change controls until you understand fully why and how the accident happened. There will be accidents where there is an obvious likelihood of recurrence and urgent remedial action is necessary. In other cases, it is worth remembering a court will often take a view that if you are claiming your safety measures were not broken, you should not have felt the need to fix them. Therefore intervention to repair or remedy is often deemed as accepting liability.

It's best to take into account where liability lies. If a third party such as a contractor, is liable but you employees could be injured if the situation prevails, write to the liable party telling them you intend to fix them with costs but you intend to remedy the situation to ensure the safety of those to whom you owe a duty.

Body of evidence

A personal injury claim can only be defended if it is investigated in a timely manner, before evidence is destroyed or tainted. Lost or dubious evidence will be unlikely to satisfy the burden of proof in civil court.

A complainant must prove on the balance of probabilities that the defendant was negligent, but unsatisfactory evidence is often enough to change the balance of probability in their favour.

Anyone tasked with investigating incidents must avoid jumping to conclusions. Failure to note evidence can take investigation down a one way street when an open mind is more conducive to finding the right answer.

In a recent example, an employee was knocked over by a forklift in a factory's warehouse. The investigation centred on the vehicle and its driver, the investigators assumption being he had been reckless in control of the vehicle. Further investigation by another staff member noted that there was a black and yellow line segregating pedestrians and vehicles and that the injured party had been talking to a colleague on the way to her break and was outside the line.

The investigators experience of the environment, the people involved and the likely mechanics of the accident can also lead to assumptions, but all conclusions must be evidence based statements. Detail the evidence, how it was established and the implications of those findings.

A standard procedure for investigating is desirable as long as it is a good procedure and anyone investigating an accident knows they must follow it.

It is also a good idea to build a clear picture of what happened immediately before and after the accident to build a clear context.

A defence does not become a defence because a company is committed to save on insurance premiums, but is built on preparation for court and on methodical review of current systems, together with a commitment to adopt new procedure to prevent a recurrence.

The above is reproduced from an article in Health and Safety at Work magazine July 2013. Siobhan Donnelly is a lawyer solicitor at SRT Donnelly & Associates.