

Update Work Related Death Protocol Changes – The End of the “Suck it and See” Approach

From 1 October 2011, the way in which work related deaths are prosecuted will have a major impact on the client-lawyer relationship.

The work related death investigation process has for some time been co-ordinated by use of the Work Related Deaths: A Protocol for Liaison document, which is a collaborative attempt by a number of regulatory bodies to work together using one protocol which has been agreed by all.

In a significant change to the Protocol, it has been announced by the Work Related Deaths National Liaison Committee that other than in cases of homicide (including manslaughter) a prosecution under health and safety legislation following a fatality in the workplace can now proceed in the criminal courts, without awaiting the outcome of the Coroner’s inquest.

Of course, the changes will inevitably speed up the Prosecution process for health and safety cases, which the HSE have an appetite to achieve following much criticism of delays in laying charges, but in the same breath, in doing so, both Prosecutor and Defence lose the significant advantage of observing the Coroner’s hearing as a ‘dry run’ to shake to the surface the main issues prior to the prosecution process, seeing how witnesses perform, and noting a jury’s response to the evidence put before them. The Defence team have been able to advise clients to “suck it and see”, letting the events of the inquest unfold, before forming a view on liability in any subsequent criminal case.

For the client-lawyer relationship, the loss of the ‘dry run’ means that in fatality cases there must be an early and carefully taken decision in conjunction with lawyers as to the scope of the internal investigation, with every relevant (and potentially relevant) angle being examined with care, all relevant (and potentially relevant) documents gathered in and the recording of witness evidence in a way that enables a view to be taken as to those witnesses that should be relied upon in a criminal trial. In reality, it means that lawyers might well need to either interview witnesses themselves rather than relying upon client-taken statements, thereby ensuring that the lawyer can advise upon any witness’s reliability, and ensuring the totality of a witness’s evidence is recorded without having to wait and see them under questioning in a courtroom.

The loss of opportunity to ‘feel the water’ of the facts under the examination of the Coroner’s hearing means that lawyers will have to invest a great deal more time at the outset examining the issues and available evidence, as they know that it is likely that the previously much relied upon information from the Coroner’s hearing will no longer be available to them when advising on plea and in preparation for trial.