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FATAL ACCIDENT INQUIRIES AND PUBLIC INQUIRIES: A NEW LANDSCAPE?

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Compass Conference

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Background

Creatures of statute:

- Fatal Accidents Inquiry (Scotland) Act 1895
- Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976
- Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016



Momentum for change

- Concern from families/ trade unions
- Cullen review 2009
- Private member's Bill – Patricia Ferguson MSP
- Lengthy consultation process
- Result was Inquiries into Fatal Accidents and Sudden Deaths etc.(Scotland) Act 2016
- Act received Royal Assent 16th January 2016.
Substantive provisions have not yet come into force.



Main Changes

- Updating the definitions which control when a mandatory FAI must be held (section 2)
- Enabling FAIs to be held where a person resident in Scotland dies abroad (section 6)
- Requiring the Lord Advocate, on request, to give written reasons for a decision not to hold an FAI (section 9)



Main changes

- Requiring a preliminary hearing to be held in advance of an FAI (section 16)
- Re-drafting of former section 6: The Sheriff's Determination – important to note when framing submissions; may make recommendations (section 26)
- Creating an obligation to respond to a sheriff's recommendation and requiring the Scottish Courts and Tribunals Service to publish responses (section 28)



What is missing?

- Mandatory FAIs – the Act does not extend the mandatory categories (e.g. to deaths in care homes, as advocated by Cullen; deaths from industrial disease as proposed by Patricia Ferguson MSP)
- Delays – the Act does not require an early hearing in mandatory FAI's (Cullen proposed a hearing within three months of the death)
- Legal aid – the relatives of the deceased will still be required to demonstrate that it is “reasonable” for them to receive legal aid before any application will succeed. (Cullen proposed that it should only be a financial test for families).
- No requirement for enforceability. (Patricia Ferguson proposed that recommendations be binding)

Approach of Crown Office

- Change of approach, following Cullen review and reaction to criticism (e.g. setting up new CO unit)

“While numbers of deaths reported to COPFS vary year on year in the past 5 years numbers up to around 11,000 in any one year have been reported to COPFS and approximately half of these, 5,500, require some further investigation. In the year 2013-14 33 FAIs were held. In the year 2014-15 69 FAIs were held.”

(COPFS Bulletin)



- But, how many of these were discretionary?
- Reality - CO will consider public opinion and cost (reference to the “current financial climate”) in Govt responses to Bill
- LA still has discretion to avoid FAI if there have been criminal proceedings. But are issues properly ventilated if case results in a plea?
- Dangers in accelerating too far, too fast
 - Accusations of undue haste
 - Resources/time being spent on high-profile cases
 - Heightening expectations
- Invidious position



Conclusions

- Limitations of statute. Can it change the culture?

“The Bill will ensure that FAs remain inquisitorial fact-finding hearings and the aim is for these to be inquisitorial, not adversarial...FAs are held in the public interest and not principally for the family to get answers or closure.

(Letter from Minister to Justice Committee 21.10.15)

- Role of Fiscal
- Role of Sheriff
- Importance of meaningful family involvement
- Impact of Rules
- Over-riding importance of fair process



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Recent trends

1. Finding someone to blame
2. The spectre of private prosecution
3. Justice delayed...



1. Attribution of blame

- Traditional view was that a Fatal Accident Inquiry should be concerned with fact-finding rather than fault-finding.
- *“There is no power...to make a finding as to fault or to apportion blame between any persons who might have contributed to the accident.”*

Black-v-Scott Lithgow 1990 SC 322, at p327, per Lord President Hope



- However, the sheriff can make findings which may infer fault where it is proper to do so.
- *“It is true that the investigation into the circumstances of a death in an FAI may disclose grounds of criticism from which a basis for alleging fault may be inferred. That may be unavoidable if the FAI is to fulfill its function of investigating the circumstances of a death.”* (Cullen Report, 2009 at para 3.23)

FAI re Ms Mhairi Convy and Ms Laura Stewart, November 2014

- Road traffic accident caused by driver of vehicle suffering vasovagal episode. History of previous blackouts.
- Counsel for families of deceased invited sheriff to make a finding under section 6(1)(e) that Solicitor General should reconsider decision not to prosecute driver.
- Sheriff Normand found that such a determination was “*neither necessary nor competent.*” (para 12.20)



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2. Private Prosecution

The “Glasgow Bin Lorry”
Inquiry and the spectre
of Private Prosecution





Background

Inquiries into Fatal Accidents and Sudden Deaths etc.
(Scotland) Act 2016, section 20 (in similar terms to the
1976 Act)

- A witness appearing at an Inquiry is not immune from subsequent criminal proceedings.
- A witness is not required to answer a question tending to show that he is guilty of a crime or offence (*but note no equivalent protection re civil liability*)



- Section 26(6) The determination cannot be founded on in any judicial proceedings of any nature.
- Procurator Fiscal Depute to advise sheriff of need to administer an oral warning where appropriate.



- Advising clients who are witnesses previously (relatively) straightforward.
- If Crown renounce right to prosecute, evidence would not be founded on in criminal proceedings.
- Renunciation of right to prosecute must be “*unqualified and unequivocal announcement on behalf of the Lord Advocate*” (Thom v H.M. Advocate 1976 JC 48)

Bin Lorry FAI: A game changer?





Private prosecutions

- Private prosecutions are extremely rare (but not unprecedented.)
- Require the permission of the High Court of Justiciary.
- The most recent successful private prosecution was *X v Sweeney* 1982 JC 70 - the ‘Carol X case.’
- High Court made clear that in principle declinature to prosecute by the Crown does not bind private individual.



Procedural hurdles

- Private Prosecutions are very difficult to bring about in practice.
- Complainer must present Bill for criminal letters to High Court of Justiciary.
- Complainer obliged to seek concurrence of Lord Advocate *Robertson v HM Advocate (1892) 3 White 120*
- Complainer must have title and interest.
- Court will not lightly interfere with decision of Lord Advocate not to prosecute.



Some (more) hurdles

- In absence of Lord Advocate's agreement, complainer must demonstrate "*very special circumstances which would justify the....exceptional step of issuing criminal letters at the request of a private individual.*" (X v Sweeney at 79 per LJG Emslie)
- Examples of failed attempts: *McBain v Crichton* 1961 JC 25 (bookseller – obscenity - Lady Chatterley's Lover); *Trapp v M* 1971 SLT (Notes) 30 (teacher dismissed – witnesses at public inquiry – perjury)
- Practical issue of funding may well arise.



Possible implications

- May no longer be possible to rely on No Further Proceedings decision by Crown.
- Possible requirement to advise clients/employees cited as witnesses on right to silence and possibility of private prosecution



- Potentially tricky decision for witnesses who wish to give evidence at Inquiry.
- Risk of adverse publicity and reputational damage from exercising right to silence.
- Headlines like this.....



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www.eveningtimes.co.uk

NOBODY KNOWS GLASGOW BETTER

EveningTimes

60p Friday August 21 2015

BIN LORRY DRIVER REFUSES TO GIVE FAMILIES ANSWERS THEY WANTED



170 INSULTS TO THE DEAD

By LINZI WATSON and RUSSELL LEADBETTER

FOR three hours, bin lorry driver Harry Clarke refused to answer questions that may have given grieving families some comfort.

Mr Clarke answered 'no' to more than 170 questions during the Fatal Accident Inquiry yesterday afternoon.

The man and sister of Erin McQuade walked out after Mr Clarke first refused to answer questions.

He finally opened up when quizzed on the incidents of December 22, the day six people died in Glasgow when the lorry veered out of control.

RELATIVES' THREE HOURS OF AGONY - PAGES 4&5 MOMENT THE MOOD CHANGED IN COURT - PAGES 6&7



CONTACTLESS PAYMENTS NOW ACCEPTED IN OUR CABS. 0141 429 7070





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Potential hindrance to work of FAI's through loss of important evidence due to “chilling effect” of theoretical risk of prosecution on witnesses.



A reality check....

- Prospects of successful application for private prosecution appear remote as law currently stands.
- Exceptional circumstances require to be demonstrated.
- Issue is unlikely to arise in the vast majority of Fatal Accident Inquiries.



- One possible solution? Seek undertaking from relatives of deceased that no prosecution to be attempted (but unlikely to be straightforward).
- Uncertainty may soon be resolved. Watch this space!



3. Delay

- Recent FOI application, Crown said the average gap between death and Inquiry was 800 days
- Reasons: lack of: resources/ appetite/ court space/info from investigating agencies (AAIB or HSE)
- Effect on families (increasingly important in current climate where victims' rights are at the forefront)
- Effect on client - if a company (uncertainty/ share price)
- Effect on public safety, if the issues have not been determined
- Effect on quality of evidence.

Example 1: Andrew Logan

- Date of death : 18th September 2011
- Application for FAI by Crown: approx March 2014
- Inquiry: Dumbarton Sheriff Court, May 2015
- Evidence concluded: 4th June 2015.
- Determination issued: 25th September 2015.
- Albeit this is about the average gap, the Sheriff was critical:



- Sheriff Pender: “.... *it seems to me that one of the main purposes of a Fatal Accident Inquiry is to identify steps which could be taken with a view to avoiding similar deaths in the future. If that is so, it cannot surely be right that it should take around two and a half years for the application for an Inquiry to be made by the Crown, and a further ten months or so for the Inquiry actually to start .”*

(para 129)



“If one of the purposes of a Fatal Accident Inquiry is to identify steps which could be taken in the future.....it is important to know at the time of the Inquiry what the current position is in respect of those systems of working or practices. Otherwise there is a risk of, for example, recommendations being made which conflict with changes which have already been implemented, where, if the Court had been informed of those changes, it may not have made those recommendations at all. The making of comment or recommendations may therefore be counter-productive, particularly if steps already taken are equally or more effective than those which may be recommended by the Court.” (para 152)

Example 2: Superpuma

- Date of 16 deaths: 1 April 2009
- Date of commencement of Inquiry: Jan 2014
- Much criticism of delay by families
- Sheriff Principal Derek Pyle: *“What can, I think, very properly be said is that nearly five years is on any view far too long and that we all have a responsibility for that. And that everyone concerned in future fatal accidents involving aircraft of whatever kind should do much better.”* (para 52)
- Reamins to be seen when Clutha inquiry will start



“Clutha families' anger grows over Crown's FAI delay as third anniversary of helicopter tragedy looms

THE Crown Office have admitted there is still no date for the fatal accident enquiry into the crash three years ago that killed 10 people in 2013.”

Daily Record 13.11.16



Dealing with delay

- Effect of delay - for better or worse - may well depend upon the client's point of view and nature of their interest in the Inquiry.
- Media interest and public pressure can speed things up remarkably.
- May be important to obtain and lead evidence of any changes implemented by client in the interim.
- Opportunity for client to avoid adverse findings by taking pro-active approach prior to the Inquiry.

Public Inquiries - Background

- Historic difficulties. (From Duke of York to Marconi)
- 14 inquiries since 2005
- 4 completed in Scotland (Fingerprint, ICL, Vale of Leven, Penrose)
- 2 major Scottish ones ongoing (Trams/ Scottish Child Abuse)
- Inconsistent approaches (Profumo v Savile)

Change in Approach

Inquiry	Duration	Witnesses	Cost	Interest
Profumo	3 months	160	?	106,000 copies of report sold
'Bloody Sunday'	10 years (opening statement 42 days)	922	£200,000,000 (152 firms of solicitors)	6,000,000 hits on publication day

The Inquiries Act 2005

- Controversy
 - Minister can shut down the Inquiry (s.4)
 - Minister can restrict attendance / disclosure of evidence (s.19)
 - Minister can oversee publication and decide which parts of report should be withheld in public interest (s.25)
 - Minister can make rules dealing with evidence and return / storage of documents (s.41)



Powers

- No powers of search and seizure
- No power to precognosce (can simply submit statement?)

BUT

- Power to require attendance/ produce documents (s.21)
- Power to require a statement. Penalty notice attached
- Chairman decides whether reasonable excuse
- Breach of s.21 results in criminal sanction
 - Obstructing the inquiry; distorting, suppressing, preventing production. (s.35)



Scotland

- Any Scottish inquiry's terms of reference must not require it to determine any fact or make any recommendation that is not wholly or primarily concerned with a Scottish matter (s.28(2))
- S.21 powers are exercisable only in respect of evidence wholly or primarily concerned with a Scottish matter or, for the purpose of inquiring into something that is wholly or primarily a Scottish matter & Can't get material from HMG (s.28)
- But Scottish approach very positive:
Lord Hardie thought 2005 Act was a better vehicle to
“compel the production of evidence, the participation of witnesses and enable a robust final report to be prepared.”

Participants

- Core participants
 - Chairman decides
 - >1 core representative may have 1 lawyer
- Other representation
 - No automatic access to database
 - Piecemeal, and late, disclosure
 - Rules for CP's different to others (e.g. in Eng CP's making closing submissions)
 - Comparative justice. E.g. what if CP (Health board) is implicating employee (Nurse)
- Funding
- Disclosure



Mechanics

- Inquiry rules
- Documentation
- Inquisitorial nature
- Questions
 - Only inquiry panel, counsel or solicitor may ask questions unless others are allowed, who must apply setting out reasons (rule 9(5))
 - No cross-examination
- Witnesses
- Submissions
- The Report

Collateral matters

- Legal
 - Anonymity of witnesses
 - Disclosure of sensitive material. Privilege, PII
 - Judicial review
- Other
 - Press
 - Political interference
 - Pitfalls

Key common themes

- Change in culture
- “The rules are... there are no rules!”
- Spectre of Private prosecution
- Whether to bother
- Non-aggression pacts
- Getting a word in



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