



Compass Chambers

JUSTICE DENIED?

DELAY IN THE FIELDS OF REGULATORY CRIME
AND
FATAL ACCIDENT INQUIRIES

M A MacLeod QC/ B Ross, Advocate

Compass conference – 22 November 2019

1. H&S/ regulatory crime

- The causes of delay
- The consequences
- The remedies
- Practical steps



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COPFS

- Budget
- Complex investigations
- Outside agencies
- Other issues (Fraud etc)



“The Faculty questions whether COPFS has the resources and expertise to prepare and present the prosecution of other complex cases. For example there is considerable delay in indicting cases involving breaches of Health and Safety and environmental legislation, where it is known that resources at COPFS are limited. In the sphere of corporate crime, there is a concern that a lack of expertise coupled with a lack of resources may handicap effective prosecution, and the Crown’s conduct in this area has recently been the subject of sharp judicial criticism.” [Faculty of Advocates, December 2016]

Consequences

1. Witnesses recollection
2. Witness availability
3. Productions
4. Special defences (alibi etc)

Remedies

(1) Plea of Oppression

Tudhope v McCarthy 1985 J.C.48

(Assault by P.C. - delay 18 months – summary trial)

The test of oppression in delay cases was two-fold

(1) Was the delay undue, (2) had it caused grave prejudice to the accused.

Over-ruled by McFadyen v Annan 1992 J.C. 53

(Assault by P.C. – delay 8 months – summary trial)

The test is the same for all cases of oppression:



“Oppression occurs only when the risk of prejudice is so grave that no direction of the trial judge could reasonably be expected to remove it”

STUURMAN v HMA 1980 J.C. 111



“In the case of summary procedure the question must be: whether the risk of prejudice from the delay is so grave that the sheriff or justice could not be expected to put that prejudice out of their mind and reach a fair verdict”

McFadyen v Annan (per L J-C Ross)



The reality

“I would stress that cases where such a plea in bar of trial will be upheld will be rare and exceptional cases”

(McFadyen v Annan)

Confirmed by:

HMA v ARK 2013 S.C.L 901

2 teachers at an approved school charged with abuse 40 years before. Lack of exculpatory witnesses/material (including medical records).

Crown appeal



Held

- Speculative to say the material was exculpatory;
- Must be “inevitably” and “necessarily” unfair to be sustainable;
- No assistance from civil cases (B v Murray) concerning limitation of actions as different standard of proof;
- Compare with English position [R v B] if all lost – unsafe;
- But, looking at the issue after the event



(2) Devolution issue

Devolution minute also required if it is alleged to be a breach of article 6 right to a fair trial.

The right to a hearing within a reasonable time is a right independent of the right to a fair trial, but its breach will not prevent a trial taking place unless the **delay** has been such as to render a fair trial impossible because of some compelling reason such as bad faith, unlawfulness or executive manipulation. (HMA v CAM 2013 SCCR 67)

The remedy is a reduction in sentence, not stopping prosecution or quashing conviction (M v HMA 2003 SC PC1))



- Look at length of time “on the face of it”; unless gives grounds for “real concern” not a breach. If not:
- Circumstances of case (historical abuse etc)
- Complexity
- Conduct of prosecutor (timeline)
- Conduct of accused
- Must be looked at in Scottish context
- **RUNS FROM TIME OF CHARGE**



FORM 40.2

Form of minute of notice of intention to raise a compatibility issue or devolution issue

Preliminaries...

“The minuter intends to raise a compatibility issue within the meaning of section 288ZA(2) of the Act of 1995 on the following grounds. The minuter faces charges [list charges] on the indictment, arising from alleged criminality between [insert dates]”



“It is submitted that the trial in the present case will not take place within a reasonable time, given:

- (a) the period of time which has elapsed since the alleged criminality which forms the basis of said charges became known to the authorities; and,
- (b) the likely time it will take to complete the trial.

Accordingly, there has been a breach of the minuter’s right to a fair trial within a reasonable time. This breach is incompatible with the procedural basis guaranteed in terms of article 6 of the ECHR as incorporated into domestic law by the Human Rights Act 1998.”

(3) Action for damages ?

WHITEHOUSE v CHIEF CONSTABLE [2019] CSIH 52

Crown no longer immune from civil claim

Duty to investigate efficiently

Detained Nov 2014 – Proceedings discontinued June 2016

Impact of delay

- Loss of livelihood
- Prolonging reputational damage
- Emotional effect/stress

Anticipating the problem

- Inventory of documents
- Precognition of witnesses
- Prepare a chronology
- Take the initiative, or “sit in the long grass”?
- Strength of case / attitude of client

Delay in concluding trial

Khan v HMA 1997 JC 40

VAT fraud. Jury below minimum number after six months

McLaren v HMA 2017

UK's longest trial 320 days. Supreme Court

2. Fatal Accident Inquiries

“Any system where it takes this long to get answers is broken”

Liam McArthur MSP – February 2019

“The unacceptable delay in holding Fatal Accident Inquiries continues to cause concern, though it is hoped that the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 and the accompanying rules, currently under consideration, will improve matters.”

Faculty of Advocates, November 2017



DELAY IN FAIs

- Judicial Criticism
- The factual background
- Reasons for the delay
- Effect on families
- Effect on commercial clients or public authorities
- Effect on public safety and confidence
- Effect on the quality of evidence.
- Prison deaths
- Aircraft
- Practical steps
- The future



1. Judicial criticism

Kathryn Beattie, 2014: 10 years, Sheriff Ruxton

Andrew Logan, 2014: 4 years, Sheriff Pender

Superpuma Inquiry, 2014: 5 years, SP Pyle

Clutha Inquiry, 2019: 5.5 years, SP Turnbull

Post 2016 Act

Dionne Kennedy, 2019: 4 years, Sheriff Gilchrist

Sumburgh, 2020: 7 years, SP Pyle



Comments

“What can, I think, very properly be said is that nearly five years is on any view far too long...” (Sheriff Principal Pyle)

“The pernicious effects of such a delay are obvious: all aspects of the proceedings are adversely affected and potentially undermined.” (Sheriff Ruxton)

“.... 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 .” (Sheriff Pender)



2. The figures

- 55,000 deaths annually
- 11,500 reported to PF
- 6,000 investigated by PM (2 Doctors re suspicious deaths)
- 750-800 in-depth investigation
- 75 FAIs (mandatory)
 - 53 deaths in prison
 - 8 in police custody
 - Remainder – 14 – for accidents at work



3. Reasons for delay

- COPFS
- Increased complexity
- Recovering material
- Court space/ timetabling



4. Effect on families

- Profound effect

“It is intolerable that the relatives of the deceased person have to wait for so long for an inquiry to be held.” Sheriff Ruxton

- Current climate (victims’ rights etc)
- Press interest



5. Effect on others

Effects on commercial entities:

- Uncertainty
- Share price
- Contingencies
- Reputational damage

Public authorities and individuals:

“For those members of the medical profession whose actions might be subject to public scrutiny, such a lengthy delay is unacceptable.”(Ruxton)



6. Public interest

“The passage of such a long period between the death and the associated fatal accident inquiry is a matter of concern where, as here, the circumstances appear to give rise to matters of serious public concern. It is axiomatic that these matters should be addressed promptly lest they remain unresolved. Future public safety and future patient safety may be at risk and lengthy delay may exacerbate that risk. Equally, such delay may have allowed matters to resolve, for whatever reason, so that the issues of public concern no longer arise by the time the Inquiry is heard.” (Sheriff Ruxton, para 12)



“In the intervening period changes will inevitably have occurred. Systems of working, equipment, personnel, scientific and medical knowledge will all have moved on. Thus some of the concerns which prompted the holding of the Inquiry may no longer hold relevance or may have resolved by the time the proceedings are commenced. Thus, lengthy delay in holding an FAI has the potential to undermine the fundamental aims of the legislation and dilute the outcome of any particular inquiry.”



7. Quality of evidence

“Delay inevitably affects the quality of the evidence available to the inquiry. Stated simply, memories fade and direct recollection may be lost. However, the position is more complex. The passage of time allows genuine memory to become corrupted and there is the risk that it becomes affected by external influences, thus rendering an otherwise credible witness unreliable. This was a live issue throughout the Inquiry. Despite constant efforts to clarify the position during the course of their evidence, it was difficult to separate what was the direct recall of witnesses, unaffected by extraneous influence, and what was “recall” constructed from what had since been read, discussed or gleaned from elsewhere. Often it was a mixture of both.”

Especially if no reason to remember in the intervening period.



“Paradoxically, this potential for the corruption of memory applies with equal force to those witnesses who, in the intervening years, have constantly revisited and rehearsed the events... The quality of their evidence can also be significantly affected. They may harbour great feelings of anger and resentment which have festered over the years and doubtless magnified. They have been unable to come to terms with the death and... and there are issues of unresolved grief.”

Care to be exercised in cross-examining



Prisons

- Polmont and other YOIs
- Majority are formal findings
- Legal aid
- Particular problems: Suicide/ NPS/ training
- Lengthy delays



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Aircraft

“Everyone concerned in future fatal accidents involving aircraft of whatever kind should do much better.” (para 52)

However...

Clutha – December 2013 - 5.5yrs

And upcoming inquiries – Sumburgh occurred in 2013

BY CONTRAST - Cormorant Alpha Crash March 1992. FAI completed April 1993



[509]... The fact that it took more than two years from the publication of the AAIB Report to the decision that there were to be no criminal proceedings is surprising, notwithstanding the extensive work carried out by Police Scotland and HIIT in the intervening period. Ultimately, on any view, it took far too long to lodge a notice of an inquiry in this case, although it must be stressed that the inquiry itself was conducted with great efficiency for which all those responsible for its preparation and conduct are to be commended.

[510] I have no reason to infer that such resources as were made available to HIIT were not appropriately deployed. That causes me to conclude that HIIT were not sufficiently resourced to enable this inquiry to start far sooner than it did. I have no basis upon which to speculate why that is the case, although the competing demands on the COPFS budget are well understood. Ultimately, the provision of adequate resources is a matter for government.



[511] The traditional role of the procurator fiscal in the investigation of fatal accidents and sudden deaths is a valuable one that we should be slow to depart from. Setting timescales for the holding of fatal accident inquiries is, in my experience, impractical. They should be held as soon as practicable; however, what is practicable will inevitably vary from case to case. Unless suitable resources are in place to allow COPFS to properly discharge its functions in relation to fatal accident inquiries delays of the type seen in this case will continue to occur. I note, in passing, that an inquiry into the deaths caused by the Sumburgh helicopter crash in August 2013, referred to by the procurator fiscal (see paragraph [479] above) is still to be held.



Practical steps

- Same processes as with criminal investigations.
- 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.
- 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.



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The future

Improvements at COPFS

- £6,000,000 investment
- Delays reduced from average of 406 days (16/17)
to 272 days (17/18)
- Effect of Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016
- Special units (Helicopter unit etc)

127 outstanding cases

High profile inquiries

Bayoh (now a PI) Yuill and Bell (M9 incident), Sumburgh etc

Further systemic changes (Cullen etc?)

Changing times

Inquiry	Duration	Wit's	Interest	cost
Profumo	3 months	160	106,000 Copy reports sold	?
'Bloody Sunday'	10 years (opening statement 42 days)	922	6,000,000 "hits" within 24 hrs of publication	£240,000,000 (152 firms of solicitors)



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