

Justice Committee

Inquiries into Fatal Accidents and Sudden Death etc (Scotland) Bill

Written submission from Digby Brown LLP

We act on behalf of the families of the late Laura Stewart and Mhairi Convy who tragically lost their lives following a road traffic collision on 17 December 2010. The circumstances of the collision were investigated at a Fatal Accident Inquiry held at Glasgow Sheriff Court. The determination of Sheriff Normand was published on 19 November 2014.

Our client's have raised a number of concerns in respect of the investigation into their daughter's deaths; the decision not to prosecute the driver and the holding and conduct of the Fatal Accident inquiry. The families responded to the earlier, wider, consultation on proposals for improving the system for Fatal Accident Inquiries in Scotland. In respect of the proposed Bill and accompanying memorandum the families would make the following observations.

Timing

There has been considerable criticism of the long delays in holding a Fatal Accident Inquiry. The First Minister and Scottish Government have recognised that the families of the deceased are a central part of the system of investigation of deaths in Scotland. It is recognised that unnecessary and prolonged delay is intolerable to those families. It is equally obvious that delay affects both the availability and quality of evidence available at a subsequent inquiry. Conversely, the families agree that it is most important that a full and thorough investigation takes place first and that, in complex case, considerable time can pass in undertaking all of the necessary investigations. It is agreed that a compulsory timescale for holding inquiries is not in the public interest.

Much of the criticism for delay however comes not from the need for further investigation but from the apparent lack of transparency in the investigative and decision-making process.

The collision which took the lives of our client's daughters occurred on 17/12/10. An initial meeting was held with the Procurator Fiscal on 2/2/11. The possibility of an FAI was raised on 6/3/12. On 9 October 2012 the families were advised that there would be no prosecution – a public statement to this effect was not issued until March 2015. On 8 October 2013 the families were advised that a Fatal Accident Inquiry would be held.

The families have held numerous meetings with COPFS since the collision. The families have received no satisfactory explanation for the extensive delay in the investigation and decision making process. The families were advised only that investigations were ongoing. No satisfactory explanation of what investigations were still being undertaken has been provided.

Given the central role that the families of the deceased play in the Scottish system of investigation more must be done to keep the families involved. To reduce delay more must be done to ensure the investigation remains on course.

In the majority of cases it should be clear from an early stage whether the event would meet the criteria for a mandatory FAI or is likely to meet the criteria for a discretionary FAI. In such circumstances consideration should be given to whether COPFS should issue comment on when they expect investigations to be complete.

Such comment would not, of course, be binding. It would however provide the families and the wider public with some comfort that a structure investigation is taking place and some knowledge on when a decision is to be taken. This would assist in managing the expectation of the bereaved families and potential witnesses to any subsequent inquiry. It would also be of assistance to commentator and the public in understanding and following the investigative process. Supportive the objective that justice must also be seen to be done.

Involvement of bereaved families

It is essential that bereaved families are kept involved in the investigation. While there are, and must be, limits on what information is disclosed to families, and when, it is important and in the public interest that the families are kept informed about the progress of an investigation.

It is right that bereaved families remain an integral party of the FAI system and have an absolute right to be present or represented at a subsequent Inquiry. At present COPFS have a policy of discussing matters with the families and considering their views. These views are taken into consideration when considering whether to hold an Inquiry but ultimately the decision is taken in the public interest. It is right that the overriding criteria for holding an Inquiry should be the public interest. Given, the stated importance and central role of the families in the investigation of deaths in Scotland it would be appropriate for the families involvement and their right to make comment and observations to COPFS to be placed on a statutory footing. This would ensure the right for the families; ensure it is given due weight and consideration and meet the legitimate public expectation that the bereaved families to indeed play a vital part in the investigation of deaths in Scotland.

Expenses

It is proposed that the right of the Courts to make an award of expenses in a fatal accident inquiry be removed. The policy memorandum justifies this on the basis that an Inquiry is not civil proceedings between opposing parties were expenses follow success.

This is an over-simplification of the general rule. A finding of expenses is made, in a civil matter, to reimburse a party for the reasonable costs of that party having to engaged in a process that they ought not to have been required to use. It is not a penalty inflicted on the 'losing' side.

The Courts have an inherent jurisdiction at Common Law to regulate their own procedure. This includes the authority to make an award of expenses in certain situations. This applies not only in civil disputes but also in administrative issues

such as the holding of a public inquiry. The ability to find a party liable in expenses is one of a number of powers available to the Court to prevent an abuse of process.

Participation in an inquiry is voluntary. It is however an expenses proposition, especially in complex cases where the families require legal representation. The existing authority makes it clear that the test which must be met before a Court will make a finding of expenses is very high. The reported cases disclose that this test is rarely met. The remaining powers of the Court can prevent an abuse of process continuing but do not redress the wasted time and expense incurred by such an abuse of process.

The policy memorandum does not set out what benefit, if any, is provided by removing the potential liability in expenses. It does not set out correctly the Courts purpose behind an award of expenses in an administrative process such as an FAI.

In the absence of a potential benefit our client's question the motivation behind, and the need to remove from the Court a useful power. The authority of the Court to make a finding of expenses, in limited circumstances, should remain.

Recommendations

At present the recommendations of a Sheriff are not binding. It is proposed that those people and organisations subject to a recommendation are required to reply stating what steps, if any, they propose to take to address the Sheriff's recommendations. There is no penalty should they fail to reply or should they do nothing to implement the Sheriff's determination.

It is suggested that replies are publish by the Courts website so that replies are available should there be any follow up. It is not clear however whether such a follow will or ought to be undertaken.

In our client's case, it was identified that there were failings in the investigation of a driver's medical conditions; the training of Doctors in the knowledge of medical conditions which affect driving and how those matters were reported to the DVLA.

On the unique facts of that particular case Sheriff Normand did not consider any recommendations would 'reasonably' have prevented the fatal collision. Had such recommendations been made, there is no guarantee anything would have happened and the risk to the public of yet another fatal road collision would not be reduced. This defeats the purpose of the Sheriff making recommendations.

Consideration should be given to whether failing to respond to a Sheriff recommendation should be dealt with by way of contempt of Court. This would ensure that recommendations are actively considered and full and detailed responses are received. To do otherwise would rob the objective or receiving and publishing responses of much of their practical effectiveness.

Should responses be received these should be passed to a committee, such as one of the Scottish Parliament sub-committees, for consideration. This would ensure those will skilled knowledge and interest in an area have matters of concern brought to their attention. Bringing such matters before the Scottish Parliament's sub-

committees would also improve the likelihood that such issues are given proper consideration for whether further change at a policy or legislative level is required to meet the Sheriff's recommendations and reduce the risk to the wider public.

Our client's appreciate your time in considering their comments. Should you require further information or wish to discuss our client's experience please do not hesitate to contact us to arrange a meeting.

Colin Moffat
Digby Brown LLP
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