

FATAL ACCIDENT INQUIRY REVIEW

Response by Charles Hennessy, Solicitor Advocate, Glasgow

I am a Solicitor Advocate practising in Glasgow and I have been qualified as a solicitor for over 30 years. I was part of the Law Society of Scotland's Working Party on Fatal Accident Inquiries and have contributed to their response. I would like to add some further comments based on my own experience in Fatal Accident Inquiries and having taken the opportunity to speak to a number of colleagues who have been involved in various FAIs over the years. I think that the points I will mention are reasonably representative of the views of a number of solicitors with experience of the operation of Fatal Accident Inquiries.

1. There is a general perception that Fatal Accident Inquiries take place too long after the date of death. I think that statistics, such as they are, support this. I have seen statistics quoted (Scolag Journal November 2007, page 251) to the effect that of the 30 Fatal Accident Inquiries reported in 2007, 13 related to people who had died in 2006, 10 to people who had died in 2005, and 7 related to deaths before 2005. There were 36 Fatal Accident Inquiry Determinations published on the Scottish Courts website over the period from January 2008 to January 2009. Of those, I randomly considered 11 cases in which Determinations had been issued during the period from 2 October 2008 to 5 January 2009. In 6 of those 11 cases the Determination was more than two and a half years after the death. Many of the Inquiries did not actually start hearing evidence within two and a half years of the death. Hopefully some more thorough statistical analysis is being carried out for the purposes of the review, but I think it is clear that in a large number of cases the Inquiries do not start until a very long time after the death and that surely cannot be acceptable to anyone (especially the interested relatives) involved in the process. The delay also affects the quality of the evidence at the FAI. I have recent experience of an FAI in which witnesses were talking of complex and dramatic events which took place at least two and a half years earlier. Most of the witnesses volunteered that the passage of time had significantly affected their recall of events.
2. There is a perception amongst solicitors representing parties at Fatal Accident Inquiries that the Fiscal's service does not have the time, resources

nor the expertise to enable Inquiries to be prepared and presented promptly and properly. I appreciate that is a generalisation and that it is not true in certain cases but that overriding impression is fairly widely held. On that same theme, there are serious misgivings as to whether the investigation of the factual background to a Fatal Accident Inquiry is carried out with the same care and attention that might be accorded to a criminal inquiry. There may well be very good explanations for this but I think these factors all contribute to a feeling that the approach of the Crown to a Fatal Accident Inquiry can sometimes be rather unpredictable.

3. There is a definite feeling that the hearing of evidence at a Fatal Accident Inquiry can often last much longer than it should. This can be explained by a number of factors, none of which are particularly surprising. There is perhaps more of a tendency nowadays for all parties who might conceivably have an interest to be represented by solicitors. There can be a failure to identify in advance matters which are not truly contentious. There can be doubts amongst those involved in the Inquiry as to what the real and significant issues might be. This can give rise to elaborate examination and cross examination of many witnesses to ensure that no stone is left unturned. This can be coupled with a reluctance on the part of the Sheriff to curtail examination and cross examination so that the Sheriff can not be seen as restricting the nature or scope of the Inquiry in any way. The summary nature of the proceedings means that it may be impossible to anticipate certain lines of evidence before the evidence is actually heard. This can give rise to random examination and cross examination and the possibility of adjournments. In general, there is a feeling that the lack of focus of an FAI can prevent it being dealt with expeditiously.
4. Although the function of an FAI is laid down in statute, the legal personnel involved in any FAI often have conflicting aims and objectives.

Leaving aside those Courts in which Preliminary Hearings are held in Fatal Accident Inquiries, the Sheriff has very little before him to direct his attention to what may or may not be significant. The statute prescribes what his Determination should cover but it is potentially far ranging. For example, the power to make a Determination about precautions which "might" have prevented the death and any accident which resulted in the death, means that

the Sheriff may have to approach the Hearing from the standpoint that every small detail or nuance of the evidence before him might ultimately be of some significance.

The Procurator Fiscal has to lead the evidence in the public interest. In doing so, the Fiscal should adopt a position of neutrality, but the Fiscal can also form a view (not necessarily held by others) of what the significant issues are and obtain, prepare and lead evidence accordingly. He may prepare and present the Inquiry from a particular standpoint and with a particular focus. Sometimes this can be helpful to all concerned, but in other cases it can be positively unhelpful.

Where the family are represented by a solicitor at the FAI (and it is my impression this happens much more frequently than it used to) the solicitor must represent their interests. Since their interest is often to hear all of the circumstances aired in Court then there is an inevitable tendency for the family solicitor to ask as many questions as he possibly can of anyone who gives evidence. That can encourage enthusiastic but pointless lines of enquiry. Sometimes, that is what the relatives want and expect from their solicitor. Frequently, the solicitor for the family will be looking for anyone or anything to blame as a forerunner to a civil claim for damages on behalf of the family, so there is a positive disincentive for him to restrict his questions. Indeed there is good reason why he should not do so.

Nowadays there is a tendency for any party who might remotely be subject to criticism or comment at an FAI (and consequently might possibly be the subject of a subsequent civil claim) to instruct solicitors to represent their interests at the Inquiry. The number of individual parties represented at FAIs seems to have increased. It is not uncommon for a handful of solicitors (often with counsel) to be instructed. Whilst there are obviously cases where this is necessary, there is now a view from the public and lawyers alike that legal representation is almost obligatory "in case something comes up". Such a legal representative might take the view that the FAI is the battleground on which the subsequent claim may be won or lost and consequently determine to present at the FAI a full blown "spoiling" defence in advance of any such claim emerging. On the other hand, the solicitor for any such party might prefer to see that very little should be explored at the FAI, so as to provide no

ammunition for a subsequent claim. In either case, this can distort the fact finding exercise which ought to be at the root of the Inquiry.

5. It is implicit in the Fatal Accident Inquiry process that there must always be a reservation in the mind of the Sheriff as to whether he has heard all of the relevant evidence and has a reliable and balanced understanding of the full circumstances. As was remarked by Sheriff Kearney *“the summary nature of the proceedings including the lack of written pleadings, must make the Court cautious of drawing too sweeping conclusions from evidence which may be incomplete...hence no doubt the provision that the Sheriff’s Determination in the Fatal Accident Inquiry may not be founded upon in any subsequent proceedings”*. Those remarks still appear to me to be valid. I think it is appropriate, for the reasons given, that the Determination should not be treated as authoritative for the purpose of other proceedings. However, that rather undermines the status of the FAI process. The sworn evidence at the FAI is, of course admissible subsequently, and hence the FAI can often be regarded as little more than a “high quality” precognition taking exercise for future litigation.
6. On the structure of our FAI process and legislation, I do not think there is a good case for scrapping entirely our existing FAIs nor for making any fundamental changes to the whole system. I think that it would not be practical to establish a separate body to exercise these functions. I do not think that it would be acceptable for anyone other than police to be in charge of investigations into deaths, and I do not see it being desirable for the police to report to anyone other than the Crown Office or PF. I think that a case can be made for specialism of some kind in Crown Office to ensure that FAIs are dealt with appropriately. FAIs are civil proceedings and it is for consideration whether those with experience in the handling of civil claims and cases might not be better equipped to do this. The mechanics of how this can be achieved (new department/unit, new personnel, specific training etc) are for others to decide. No legislative change would be necessary.
7. I think the following procedural ideas are worthy of further consideration
Firstly, I think there would be some merit in having a provision to the effect that Crown Office must make an application to the Court within X months from

the date of death for a Fatal Accident Inquiry to be held into the death. That application should be brought before a Sheriff and should be intimated to all parties who conceivably have an interest. The application would give rise to a Hearing which would be in the nature of a Preliminary Hearing and that Hearing could be assigned for a date within (say) 4 weeks of the intimation of the application. Apart from anything else, there would be a benefit in the public commencement of the FAI process within a reasonable time of the death having occurred and after a reasonable time during which the Crown ought at least to have formed some provisional view of what is involved.

Secondly, the process of the Fatal Accident Inquiry should effectively be “managed” by the Sheriff in much the same way as the Sheriff is the “Case Manager” of certain types of civil litigation. I appreciate that this may conflict to some extent with the role of the Crown in FAIs. However, I think it is well accepted now that the Sheriff can (or even must) take a management role in other types of court proceedings. I would suggest that the public are more likely to be satisfied if the management of the Fatal Accident Inquiry process is overseen by the Court.

Thirdly, I would suggest that the provisions of the practice notes for FAIs in Glasgow and in Lothian and Borders should be reviewed and applied to all sheriffdoms. Consideration should be given as to whether the powers should be widened. Amongst other things consideration should be given to whether there should be power to order parties wishing to be represented at FAIs to make some written statement of their position or the issues which they consider might arise or which they wish to raise.

Fourthly, in relation to the vexed and difficult question of legal aid for relatives to have representation at FAIs I think there would be some merit in giving the sheriff power to determine this as part of his FAI management role. If there was preliminary procedure as envisaged, the sheriff should be in a good position to assess the likely range and scope of the FAI and to decide whether the interests of the relatives can be fully and properly represented by the Crown or whether there should be separate representation. I have experience of delays in FAIs and in the preliminary hearing process under the Practice Note in Glasgow because the solicitor for the relative was unable to obtain legal aid until late in the day.

I would suggest that adoption of these proposals might well speed up the process, make the Crown Office and other legal representatives involved in the Inquiry more accountable, provide an appropriate focus for the inquiry, and encourage a different approach by all of those involved in FAIs. I think there changes would enhance public confidence in the Crown Office and in the Fatal Accident Inquiry procedure itself.

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