Scottish Civil Justice Council

Consultation on the draft Fatal Accident Inquiry Rules

A response by the Association of Personal Injury Lawyers

January 2017

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

While APIL welcomes the aims behind the draft Fatal Accident Inquiry rules, we are concerned that there are simply not the resources available to the Crown Office and Procurator Fiscal Service (COPFS) to comply with the requirements of the rules in practice. This is particularly so given the announcement in the Scottish Government Budget 2017/2018 that planned spending for COPFS will be reduced by £4million[1]. We would welcome greater efficiency, but the timelines set out in the draft rules are unworkable, meaning that FAIs would not be effective. Effectiveness should take precedence over efficiency.

Q2) Do you have any comment on the content of the inquiry principles?

The inquiry principles are to be welcomed. The aims of efficiency and effectiveness are important. We are concerned, however, that the COPFS does not have the resources to deliver on these aims. There is a distinction between what is desirable and what can be delivered in practice.

2.4 – Judicial continuity

Q3) Do you agree that wherever possible the same sheriff should deal with the inquiry from the point that the procurator fiscal gives notice that an inquiry is to take place, until final determination?

We welcome the provisions on judicial continuity. We suggest that this should be taken further, and there should not only be continuity, but also specialism. There should be a certain number of sheriffs dealing only with fatal accident inquiries, nominated by the Scottish Civil Justice Council. Experiences in Glasgow demonstrate that there are much more effective outcomes to FAIs where the sheriff dealing with the inquiry is a specialist in the conduct of FAIs.

2.5 – Inquiry Management Powers

Q4) Are you content with the approach to the sheriff's inquiry management powers?

If the inquiry management powers are to be applied to preliminary hearings as well as full inquiry hearings, then the powers are far too sweeping and the demands on agents far too onerous at that stage. Nothing worthwhile will be achieved. Participants cannot be expected to lodge and disclose documents or evidence only 4-6 weeks after first notice.

Rule 2.5(1)(c)(i)

If the sheriff is to make an order to restrict evidence on particular issues (draft rule 2.5(1)(c)(i)) parties and their participants should have the right to be heard on these issues first.

3.7 – Before the first preliminary hearing

Q8) Do you have any comments on the duty and timeframe set out in Rule 3.7?

[1] Page 148 http://www.gov.scot/Resource/0051/00511808.pdf

The reality is that lawyers will be instructed when the notice of the FAI goes out. Under the timeframes set out in the draft rules, there will be 42 days between the first notice and the preliminary hearing. The idea that the lawyer and other participants in the inquiry will be in a reasonable position within a month of instruction to have a fixed idea of the scope and shape of matters, to be ready to make criticisms, is not realistic. It will not be possible for newly instructed agents to comply with rule 3.7 and provide a note of the matters considered likely to be in dispute, a list of evidence and a note of its relevance, and a list of potential witnesses and their relevance, only 35 days after the first notice.

We suggest that there should still be a preliminary hearing 5/6 weeks after the first notice, but this should be much more general, with each party being required simply to outline the issues from their perspective. There should also be a pre-inquiry hearing, which should take place a suitable time after the preliminary hearing, and around 5/6 weeks before the inquiry. The pre-inquiry hearing will involve all of the detail that would currently be required at the preliminary hearing by virtue of draft rule 3.7, but this would take place much later on in the process.

We believe that the current rules set out too big a wish list for the preliminary hearing, and very little would be achieved from holding preliminary hearings so soon after first notice, if these requirements were to remain.

Q10) Are you content with the provisions on agreement of evidence?

Notice of uncontroversial evidence - 4.10

We query who the "first participant" is, as referred to at 4.10(2). This terminology is not used anywhere else in the rules, and there should be clarification as to what is meant by this term.

Q12) Are you content with the provisions on expert witnesses?

Expert evidence – 4.12 – 4.14

As above, there is currently an issue with lack of resources for fatal accident inquiries. The Procurator Fiscal is often stretched and so does not have the time or resources to choose the right expert in the case. Families then have to become involved in the case and instruct experts of their own to find answers. Very often, however, the family are unable to afford their own experts and simply have to rely on the cross-examination of the Procurator Fiscal's expert. The Procurator Fiscal is restricted by the time and resources available to them. This can mean that the quality of the investigation and expert evidence suffers, and patterns between incidents leading to harm can go unacknowledged by the relevant authorities. There may be similar accidents occuring in various different locations, involving the same piece of work equipment, for example, but due to a lack of resources, these patterns may go unnoticed and uninvestigated by the relevant authorities. If the quality of the expert evidence put forward by the procurator fiscal improved, and the process was more inquisitorial, then families would not feel that they needed to obtain their own expert evidence or be worried that they were unable to afford their own expert evidence.

We are also concerned that the rules focus only on an expert witness statement, and there is no mention of the expert's report. There must be a full signed report disclosed to the parties, giving expert opinion on what happened.

Q17) Do you have any comments on the content of any of the forms?

Lay representatives – Form S4.21

While lay representatives cannot accept payment and at schedule 4 18(5) it is stated as such, there is no requirement in the rules for the lay representative to tell the court that he is unpaid. In form S4.21, the lay representative should have to declare that he is carrying out the work unpaid.

Q18) Do you have any comments on the technical provisions contained in the schedules?

Schedule 2 - Intimation

We note that at part 6 of schedule 2 on intimation, email is not mentioned as an additional method of intimation. This is out of step with the modern world. We suggest that the methods of intimation should be brought in line with the compulsory protocol for personal injury which requires intimation by email or recorded delivery, stating at paragraph 7:

“Documents that require to be intimated or sent under the Protocol, should, where possible, be intimated or sent by email using an email address supplied by the claimant or defender. Alternatively, such documents are to be sent or intimated using a next-day postal service which records delivery.”