

Justice Committee of the Scottish Parliament

**Inquiry into the role and purpose of the Crown Office and
Procurator Fiscal Service**



Written evidence from the Association of Personal Injury Lawyers

October 2016

APIL has a long history of campaigning to promote the safety and wellbeing of members of the public, including those who work. The Crown Office and Procurator Fiscal Service (COPFS) provides a vital service for bringing rogue employers who break the law to account.

Whilst the majority of employers adhere to the law and are committed to ensuring a safe workplace for employees there are those that do not. Every employee has the right to go to work knowing that they will be safe.

Whilst the majority of the call for evidence is outside our remit, we do have a number of concerns about whether the COPFS has the resource needed to carry out its role effectively. Since 2009 the Health and Safety Division of the COPFS has been an important addition, its remit being to investigate and prosecute all health and safety cases. There are a number of issues that we wish to draw to the attention of the committee, these include:

- The extremely low number of prosecutions for failure to hold employers' liability (EL) insurance and the need for greater investigation and prosecution.
- The failure of the COPFS to ensure timely prosecutions for health and safety breaches.
- The continuing unsatisfactory delays with fatal accident inquiries.

Overview

In the year 2014-2015 there were 6,795 injuries to employees in the Scottish workplace which were reported under RIDDOR¹. This included 1,724 reported major injuries and 13 fatalities. In the same year only 80 prosecutions were instituted by the Crown Office². All workplace injury has an economic cost to society. The Health and Safety Executive (HSE) estimated that the cost to Britain was £4.9 billion³ and the cost to Scotland alone was in the region of £541 million⁴.

¹ Not all work place accidents are reported under Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR).

² It is important to note that the accident figures have remained broadly static over the last three years. And those cases where proceedings were instituted in 2014-2015 are unlikely to be those where the accident occurred in the same year. The Procurator Fiscal heard 90 offences in Scotland in 2014/15 and secured 80 convictions. Health and Safety Statistics Annual Report for Great Britain 2014/15

³ HSE Costs to Britain of workplace fatalities and self-reported injuries and ill health 2013/14 page 2.

⁴ Figure 10 HSE Costs to Britain of workplace fatalities and self-reported injuries and ill health 2013/14 page 14.

These figures show clearly the importance of protecting the workforce both in terms of the impact on the individual employee (for example the effect on the individual's income and quality of life), repercussions on business (including loss of productivity, reduced capacity in the workplace and damage to reputation) and the wider cost to society (medical treatment, rehabilitation and social benefit costs). The HSE and COPFS have an essential role in ensuring that employers who breach health and safety regulations are investigated and prosecuted. It is important that those that breach the law are punished, but also that there are sufficient deterrents to prevent companies committing similar breaches in the future.

Compulsory Employers Liability Insurance

One important role of the COPFS is to prosecute companies who fail to take out compulsory insurance. The Employers' Liability (Compulsory Insurance) Act 1969 (the Act) requires all employers in the UK to have at least a minimum level of insurance cover to provide compensation to employees who may be injured or suffer illness at work. All companies who meet the criteria within the Act are required to have at least £5 million cover in place. Latest research from the HSE⁵ shows that 94.3% of companies required to have insurance do, but there is still 4.6% who fail in their obligations. The HSE estimates that this equates to around 164,103 employees who are working for employers in Great Britain but who are not protected by a valid insurance policy.

The consequences of not holding compulsory employers' liability insurance may not at first seem severe however, consider the case of *Campbell v Peter Gordon Joiners Ltd*⁶. In this case the employee suffered a serious injury during the course of his employment. He was operating an unguarded woodwork machine when he was injured. The employer company had an employers' liability policy which specifically excluded the type of business they were responsible for, meaning Mr Campbell could not claim against the policy. In addition the company went into liquidation preventing Mr Campbell from being able to sue the company directly. Mr Campbell sought to bring an action for personal injury against the Director of the company but the Supreme Court recently held that he had no right in law to claim damages from the company director under the Act. As a result of the company's failure to obey the law Mr Campbell has suffered an injury at work for which he is unable to claim compensation.

⁵ An assessment of the level of compliance with the statutory duty to obtain insurance under the Employers' Liability (Compulsory Insurance) Act 1969 RR844 page v.

⁶ [2016] UKSC 38.

Under the Act a company who fails to insure in accordance with law can be punished by fine. In the ten years (2004/5-2014/15) for which data is available there have only been two successful prosecutions by the COPFS for failure to hold valid insurance, this was in 2004/5⁷. Given the data from the HSE research⁸ it is both surprising and deeply worrying that there have not been more prosecutions during this ten year period. There needs to be a more joined up approach between the HSE and COPFS. The HSE must be proactive in its approach to investigate companies' failures rather than waiting for others to report a company for wrongdoing they may be encouraged to do this if the COPFS were more willing to instigate proceedings. Those companies failing to obtain EL insurance are put at a short term financial advantage over those that do. Consider for a moment a motorist who fails to hold insurance. That motorist will be proactively investigated and prosecuted by the police. Failure to hold EL insurance should be no different. It is essential that more resources are put into prosecuting those companies who ignore the law. This is not a victimless crime. There is a cost to the employee, the company itself and to society in general.

It would be fair to conclude that those who fail to take out EL Insurance are likely to be less-scrupulous employers. They are also likely to be failing in their health and safety requirements which in turn will lead to injury, serious injury and/or fatality. We would welcome steps to ensure that COPFS brings more prosecutions against companies for failing to hold a valid EL insurance policy.

The tragic case of Graeme Mackie illustrates the importance of employer's liability insurance. Mr Mackie died on 11 June 2011 during the course of his employment. He was employed as a diver responsible for fishing for shellfish. The defender was charged with a series of health and safety breaches but eventually pleaded guilty to one charge of failing to have a stand-by diver. He was sentenced to a maximum community payback order of 300 hours with restraint of liberty for 6 months from 7pm to 7am. The defender did not have any insurance in place at the time of the accident and he was not charged in relation to this offence. The Sheriff in the criminal trial specifically made no financial penalty because it would reduce the defender's ability to pay compensation to Mr Mackie's family.

⁷ Freedom of Information Request Judicial Analytical Services.

⁸ An assessment of the level of compliance with the statutory duty to obtain insurance under the Employers' Liability (Compulsory Insurance) Act 1969 RR844.

A civil claim for damages was brought by his partner Kelly Stewart as an individual and as the parent of their son, Daniel Mackie, who was one month old at the time of Graeme's death; George Mackie, the deceased's father; and Neil Mackie, his brother.

The defender did not have any insurance in place at the time of the accident and he failed to respond to the civil court action raised against him. Decree was obtained and a charged served but there has been no communication from the defender. The pursuers have received no compensation in respect of their losses to date. Had there been insurance in place Mr Mackie's family would have received compensation to assist them following his death.

We believe a fund of last resort in these circumstances should be implemented as a matter of urgency. Whilst the Employers' Liability (Compulsory Insurance) Act 1969 requires all employers to take out insurance, there remain occasions when employers do not take out insurance. Others may take out insurance that does not cover all the activities undertaken by their employees and some fail to co-operate with their insurer invalidating the policy. If valid insurance cover is not in place an injured employee cannot claim the much needed compensation that they need. Establishing a fund of last resort similar to the MIB and paid for through a levy on all EL insurers would provide justice for injured and vulnerable people.

Workplace incidents

The number of reportable injuries and fatalities has remained broadly static in Scotland over the last 3 years. We also know that the COPFS has made some positive steps in recent years and the prosecution rate for health and safety offences have increased by nearly 50%⁹. However, this must be considered in the round. In 2014/15 90 prosecutions were initiated and 80 convictions were secured in by the COPFS. However, in the same year there were 6,795 reported injuries which amounted to a prosecution rate of only 1.03 percent. It is important that better checks and balances are put in place to ensure that there is a proactive investigation and that files are passed to the COPFS swiftly for active prosecution.

⁹ Health and Safety statistics annual report for Great Britain 2014/15 page 20

The 2013 Health and Safety Division Thematic Report shows that there are repeated failings within the COPFS. For example there are cases where prosecution is not swift enough and companies cease trading before a conclusion can be reached¹⁰. The latest report¹¹ confirms that whilst there has been an increase in the number of cases being passed to the COPFS from the HSE there has not been a corresponding increase in case load, meaning that there are still significant failings with the COPFS and further resources must be invested in the service to ensure that there are timely prosecutions. We would welcome steps to ensure that COPFS brings more prosecutions against companies breaching health and safety regulations. It is paramount that workers are protected.

Fatal accident inquiries

Every workplace fatality that occurs in Scotland is required by law¹² to be investigated. In the period 2012/13 to 2014/15 there were 34 fatal accidents recorded by the HSE. A fatal accident inquiry (FAI) plays a key role in ensuring safe working practices and in identifying changes which need to be implemented to ensure that similar incidents do not occur in the future. The average time for a FAI in work related cases is 446 days¹³. Delays in investigation into the death of a worker has significant impact on the families and relatives involved. Despite some attempt by the COPFS to address the delays in holding FAIs – through judicial education, and providing reasons for delays, for example - the state of the Fatal Accident Inquiry system is still deeply unsatisfactory.

Whilst it is impractical to make it mandatory that an FAI must open within a certain period of the date of the death of the deceased we would welcome steps to ensure that Fatal Accident Inquiries are quicker and more efficient. Arbitrary time limits would result in FAIs being opened on a mandatory date, but then postponed. It is important to ensure that there is an appropriate allocation of time to the inquiry at the outset. It is not acceptable for delays to be the norm as bereaved relatives deserve for there to be a prompt investigation and decision into their loved ones death. Examination of the cases on the Scottish Courts and Tribunal Service website show that delays are still all too common on cases especially in workplace accidents. The most recent reported case Gary Daniel Forbes [2016] FAI 13 shows a delay of two years and three months.

¹⁰ Thematic Report on Health and Safety 2013 Page 26

¹¹ Thematic Report on Health and Safety division follow-up August 2015 page 15

¹² Fatal Accidents and Sudden Deaths Inquiry (Scotland)

¹³ Thematic Review of Fatal Accident Inquiries August 2016 page 20

It is essential that there are also proper mechanisms whereby the Crown or HSE checks whether there has been compliance with any recommendations made during the course of the Inquiry. We also suggest that if one of the parties causing the accident is regulated by a professional body, that professional body should be alerted to the findings.

We hope that these observations assist the committee.

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