

Compass Chambers



Fatal Accident Inquiries: Preparation, Presentation and Pitfalls

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Fatal Accident Inquiries: Preparation, Presentation and Pitfalls

- Crown Disclosure of information
- Agreement of information
- Use of statements/affidavits as evidence





Preparation: Crown Disclosure (1)

- Crown disclosure will usually comprise witness statements, productions and labels.
- The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 and the Act of Sederunt (Fatal Accident Inquiry Rules) 2017 do not contain a statutory scheme for disclosure of evidence.
 - Rule 2.6(1)(a)(ii) and (iii)
 - The sheriff may make any order necessary to further the purpose of an inquiry, including...
 - an order requiring participants to disclose the existence and nature of any information they hold relating to the inquiry; or
 - an order requiring participants to lodge particular documents or other items, or to lead witnesses



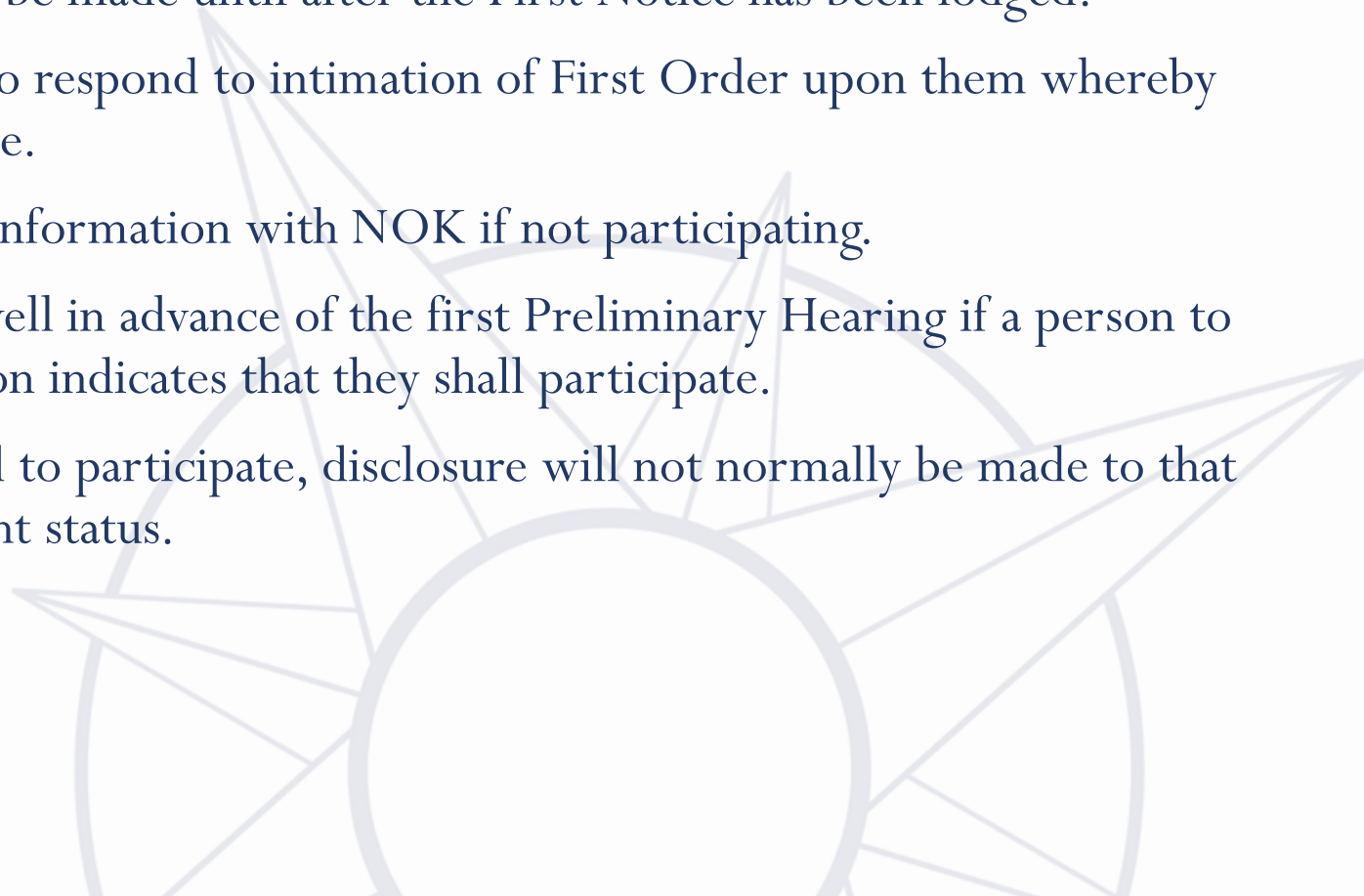
Preparation: Crown Disclosure (2)

- The Crown will approach disclosure based on the First Notice and, later, Rule 3.7 Notes.
- Material will be disclosed where:
 - (a) the Crown intends to lead at the FAI; and
 - (b) any other material which the Crown considers may otherwise be material to the purpose of the inquiry.
- Therefore, the Crown is applying a different test from that which is applied in criminal cases.



Preparation: Crown Disclosure (3)

- Crown Disclosure will not normally be made until after the First Notice has been lodged.
- Disclosure will be made to those who respond to intimation of First Order upon them whereby they indicate that they will participate.
- Crown may choose to share certain information with NOK if not participating.
- Crown Disclosure should be made well in advance of the first Preliminary Hearing if a person to whom the Crown has given intimation indicates that they shall participate.
- If permission of the court is required to participate, disclosure will not normally be made to that person until they are given participant status.





Pitfalls: Crown Disclosure (4)

- Material disclosed for a criminal prosecution can only be used for those proceedings: Criminal Justice and Licensing (Scotland) Act 2010, section 162(2))
- To knowingly misuse criminal disclosure material for other purposes is an offence: section 163.
- For FAI purposes, if prior prosecution, much of the criminal disclosure will be re-disclosed for use in the FAI proceedings (it may be renumbered or reformatted in any event to reflect the nature of the FAI proceedings)
 - If prior criminal proceedings, those who acted in the criminal proceedings will have advance notice of the evidence over other participants and may end up with two sets of disclosure.
- Disclosure Undertaking will be sought that the FAI disclosure material will only be used for the purpose of the FAI during the currency of the FAI proceedings.
 - Sensitive personal data (eg. medical records)



Pitfalls: Crown Disclosure (5)

- A participant may seek additional disclosure from the Crown, or seek an order from the sheriff that it be produced.
- Under Rule 2.6, the sheriff can make a disclosure order against any participant, not just the Crown.
 - Letter of instruction to expert witness and source material provided (*Kennedy v Cordia (Services) LLP* [2016] 1 WLR 597) (Rule 4.15(2)(c))
 - Minutes of Crown consultation with experts
 - Material still held by reporting agencies – are Crown aware? (PSoS, HSE, local authorities etc.)
 - Previous non-spent convictions
 - Only if relevant to credibility of a witness/stance of an organisation or to the subject matter of the FAI more widely
 - (*Yuill & Bell FAI* [2024] FAI 18 (M9 FAI) - previous conviction of the Office of the Chief Constable of the Police Service of Scotland)



Presentation: Agreement of Information (1)

- Rule 4.10
 - Not necessary to present information concerning facts or productions which are agreed by all participants
- Rule 4.11
 - Participants must identify information which they would present and which they consider unlikely to be disputed; they must then take all reasonable steps to agree that information. (*Yuill & Bell FAI* [2024] FAI 18 (M9 FAI – 5 joint minutes; example to follow))
- Rule 4.12
 - Notices to admit information (*Arthur & Ors (“Clutha”) FAI* [2019] FAI 46: 3 significant Notices to Admit Information, from BALPA and CAA, unchallenged and accepted by the Sheriff Principal)



Presentation: Agreement of information (2)

Bell did not hold a driving licence. The rest of the group were asleep and unaware of their departure.

- (10) At around 0531 hours on Sunday 5 July 2015, NU05LVN was captured by a speed camera situated on the A9, between its junction with the unclassified road leading to Tibbermore and the Broxden roundabout, Perth ("the Speed Camera"). At this point on the A9 the speed limit for motor cars was 70mph. The speed camera photographed NU05LVN and recorded it as travelling at 91mph northbound, towards the Broxden roundabout¹³. CP119 is the Offence Case History produced by the North Safety Camera Unit relative to NU05LVN being captured by the Speed Camera on 5 July 2015 at around 0531 hours. CP121 and CP123 are the photographs captured by the Speed Camera on 5 July 2015 at around 0531 hours.
- (11) The information from the speed camera was processed by the North Safety Camera Unit ("NSCU"), Dundee. NSCU processes speed camera images within 14 days of capture. NSCU began processing the capture of NU05LVN at 1020 hours on Monday 6 July 2015 when an "offence detail" was uploaded to their computer system. At 0942 hours on Wednesday 8 July 2015, (non-witness) Fiona Turgull, an NSCU administrator, carried out a check of NU05LVN on the police national computer.¹⁴ At 1420 hours same date, a Notice of Intended Prosecution was issued by first class post to CW44 Kara Yuill in respect of this speeding offence.¹⁵ On or about Thursday 9 July 2015 CW44 Kara Yuill received the Notice of Intended Prosecution.¹⁶ At 1330 hours, on Thursday 9 July 2015, Gordon Yuill contacted Police Scotland to advise them that CW44 Kara Yuill had received the notice of intended prosecution. At 1513 hours on Thursday 9 July 2015, NSCU was advised by Police Scotland of the circumstances in which NU05LVN had been found, following which NSCU closed the case.¹⁷

¹³ CP119 p01426; CP121 p01438; and CP123 p01447

¹⁴ CW42 S302 p09622; and, CP121 p01438

¹⁵ CP120 p01434

¹⁶ CW44 S109 p09645

¹⁷ CW42 S302 p09624



Pitfalls: Agreement of Information (2)

- Beware: the sheriff is not obliged to accept the agreement of information among the participants by way of joint minute of agreement, or unchallenged notice to admit information, as binding upon them.
- *Darren Smith FAI* [2018] FAI 40 at [5]-[6] (Sheriff Foulis)
 - The role of the sheriff in an inquiry is different from that played in adversarial proceedings
 - Joint minute of agreement does not constrain sheriff from seeking information to ensure there are not matters upon which evidence should be presented
 - The court's role in an inquiry is inquisitorial; when understandable emphasis is placed on agreement of matters and attempts to avoid unnecessary use of court resources, there may be a danger that the requirements of an inquisitorial role are overlooked



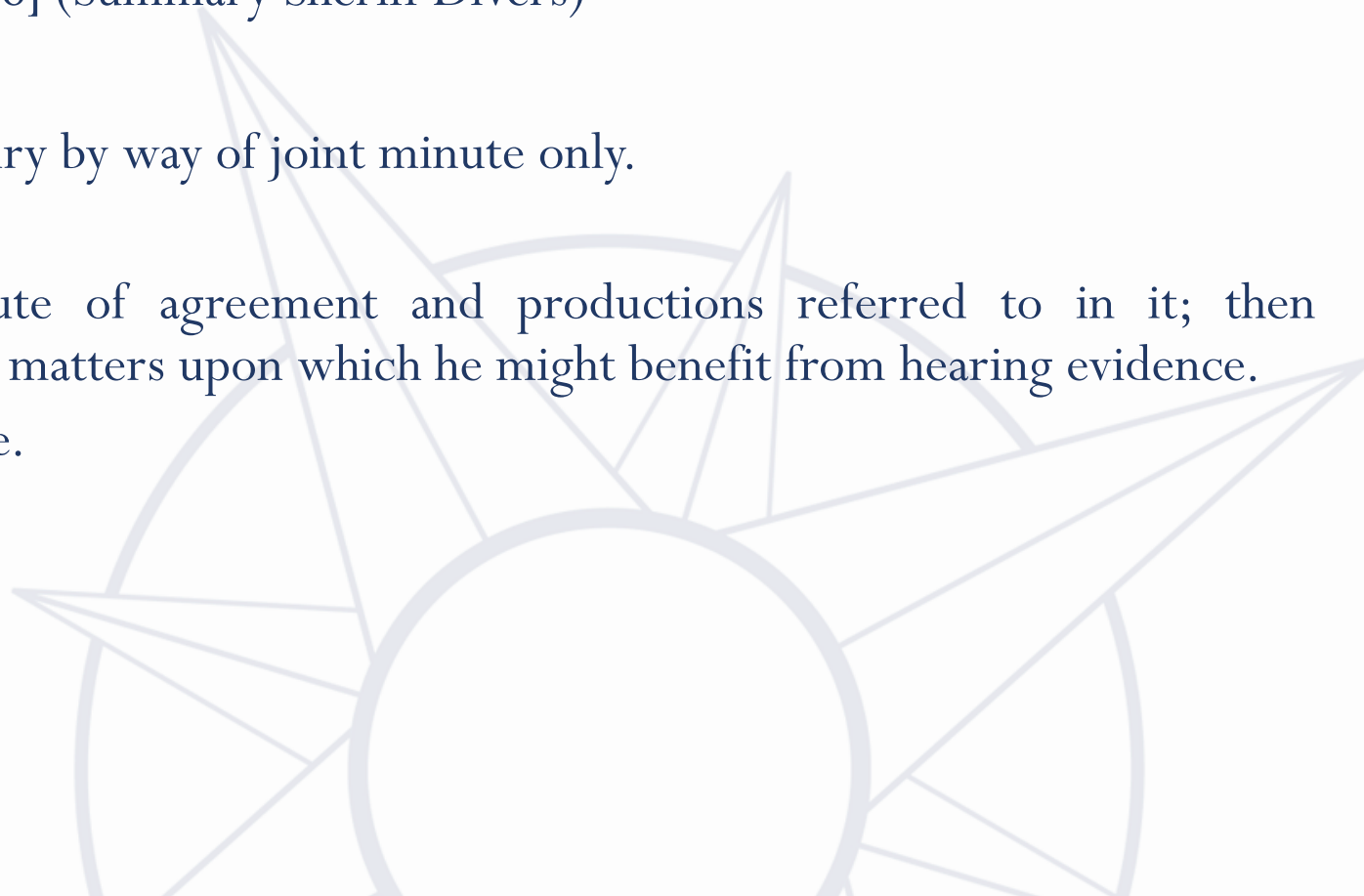
Pitfalls: Agreement of information (3)

- *Mark Allan FAI* [2020] FAI 8 (Sheriff Wade QC)
 - Custody death; indication from participants that would proceed by joint minute of agreement only.
 - Sheriff not content with joint minute which simply sought to agree certain SPS policies and protocols but not how they had been implemented.
 - JM contained “bland assertions” (ie. not facts).
 - Sheriff was “not satisfied in relation to the evidence which the inquiry was being invited to accept”
 - Parties had not properly applied their minds to the evidence which was required to address the issues identified in the First Notice and were treating the proceedings as something of a formality – this is not a practice which can be allowed to develop.
 - Parties reminded of their duty to the court and in terms of the 2016 Act to ensure that adequate evidence is furnished to support any findings which the inquiry might be asked to make.



Pitfalls: Agreement of information (4)

- *Hugh Baird FAI* [2021] FAI 6 at [4] – [6] (Summary Sheriff Divers)
 - Sheriff invited to deal with inquiry by way of joint minute only.
 - *Smith* applied.
 - Sheriff considering joint minute of agreement and productions referred to in it; then considering whether there were matters upon which he might benefit from hearing evidence.
 - Sheriff deciding to hear evidence.





Pitfalls: Agreement of information (5)

- *Alistair Findlay FAI* [2024] FAI 28 (Summary Sheriff Guy)
 - Sheriff invited to deal with inquiry by way of joint minute only.
 - Sheriff not prepared to do so;
 - *Smith* applied.
 - “There was surprise on the part of the procurator fiscal depute when I indicated that I was not prepared to conclude the inquiry on the basis of the joint minute of agreement”.
- Perhaps curiously, the procurator fiscal depute emailed the court seeking guidance from the sheriff on the appropriateness of the investigations she proposed to instruct. The sheriff issued an order setting out the questions the relevant expert witness should be asked to answer.



Preparation & Presentation: Use of statements (1)

- It is not enough to just lodge a statement – the inquiry must make an order which gives it evidential status:
 - A joint minute of agreement can record that a statement forms part of the evidence to which regard may be had by the sheriff in determining the issues in this Inquiry.
 - An order may be sought under Rule 4.2(b) which allows the sheriff a wide discretion to make orders about the manner in which information is to be presented to the inquiry, whether by oral presentation, written statement etc.
 - An order may be made under Rule 4.13 that, in effect, a statement may form part or all of a witness' evidence in chief.



Pitfalls: Use of statements (2)

- Rule 4.13
 - The witness needs to see the statement before giving evidence, and/or have it available to them while they are giving evidence.
 - Any statements lodged under this rule must be signed
 - Self-generated police officer statements are usually unsigned
 - The statement must be made available for inspection by the public during the inquiry
 - For public, this usually means the press – careful drafting (though not coaching)
 - Is redaction or anonymisation required?
 - *Sophie Parkinson FAI* [2020] FAI 32 – redaction from witness statements of names of classmates of the deceased, who were children when the fatality occurred.

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