

PE1699/E

Law Society of Scotland submission of 15 October 2018

Our Criminal Law Committee is made up of members from the Crown and defence as well as academics. The involvement of the Committee in relation to post mortems therefore covers both the interests of the Crown and the defence.

At the outset, the members of the Committee are aware of the concerns expressed from families where a family member has been the victim of a homicide. Not only are the family facing the future without the family member, but in the short term they are unable to deal with the practicalities of the bereavement and may face delays for example in making funeral arrangements until the body is released. We recognise that these trying circumstances are played out quite often in the light of intense press coverage and speculation. We would like to take this opportunity to express our sincere sympathy to those that have found themselves involved in such cases.

We would consider that it would be problematic if attempts were made to try to introduce a similar system in Scotland to that of the coroner, due to the fundamental differences between the two legal systems and there not being an equivalent to the Procurator Fiscal in England & Wales.

In our response below, we set out the background to deaths and homicide in Scotland, the current practices and contrasts with the English coroner's system, and then consider how all involved could explore how to improve the current system.

Background to Deaths and Homicide in Scotland

When there is a sudden, unexpected, unexplained or suspicious death in Scotland, that death falls to be reported to and investigated by the Crown Office and Procurator Fiscal Service (COPFS), in terms of Article 2 of the European Convention of Human Rights where the State (in Scotland, this duty is discharged by COPFS) has certain obligations to undertake an effective investigation. In addition to their role in relation to such deaths, COPFS is also responsible for prosecution of crime in Scotland.

A body in connection with any such death under investigation remains the responsibility of COPFS until it is released to the family members to make funeral arrangements. COPFS are therefore solely responsible for taking that decision as is appropriate in the circumstances of each case.

A post mortem will be necessary to ascertain the cause of death as no funeral can proceed until a death certificate with a cause of death has been issued. Where a death is suspicious, it will be investigated as a potential homicide which could include charges of either murder or culpable homicide.

In these cases, a two-pathologist post mortem will be instructed by COPFS (other deaths will tend only to require a one-pathologist post mortem). This is due to the need for corroboration in potential criminal prosecution cases in Scotland. Corroboration as to the cause of death will be an essential fact in any prosecution.

The two pathologists will undertake the post mortem examination at the same time and issue one report, but the report will be provided by two pathologists who both will speak to the report at court.

It will take time for any post mortem to be carried out and this will inevitably cause upset to the family. There are, as we understand, liaison roles for Police Scotland and COPFS when a homicide arises to discuss the processes and timescales involved, which may help provide some degree of comfort for those affected, but ultimately this is a matter for the Police and COPFS.

Once the initial post mortem has been completed, the decision over whether to release the body lies with COPFS. COPFS may consider it prudent to delay the release until a defence post mortem can be carried out, for example in the circumstances set out below.

Current practices

There are two situations to consider with regard to a defence post mortem.

Where an accused is identified immediately following the death:

A solicitor should be instructed immediately. It should be relatively straightforward to discuss the case with the Crown and to expedite any defence post mortem that may be required. However, there may be delays in locating a specialist pathologist or a pathologist prepared to undertake a post mortem from outside the jurisdiction where the homicide has occurred.

Since Petition PE01699 was lodged, we understand a Protocol has been issued to facilitate communication between Crown pathologists and any pathologist instructed by the defence. That is to share information, so any pathologist instructed by the defence can consult Crown pathologists to ensure that any evidential aspects required by the defence have already or can be undertaken. The Protocol includes provision for making the draft post mortem report and photographs available immediately will be helpful to the defence to ascertain if there is any merit in carrying out a further post mortem. Defence post mortems should not be carried out unless there is an evidential purpose.

However, to fail to fully investigate the accused's defence could potentially lead to an appeal. Thereafter there may be professional consequences such as an *Anderson*¹ appeal for defective representation. **Where an accused is not identified immediately following the death:**

Where no one is identified in connection with the homicide, there will be no defence solicitor. As the authority in charge of the criminal investigation, COPFS will require to assess the circumstances and decide when the body can be released. If the post mortem is completed and all samples/photographs obtained, the Crown may be satisfied that the body can be released as all evidential requirements as to best evidence can be satisfied for the future.

England and Wales

We understand in England and Wales (where of course the evidential requirements are different) that a second autopsy can be undertaken at the request of the defence where the

¹ *Anderson v HMA 1996 SCCR 114*

body of the victim is to be used as primary evidence. The Home Office Circular No.30/1999, notes:

“...The need in the interests of justice, to offer a defendant the opportunity to arrange an independent examination of the body ...”

“... the right of a defendant to have the opportunity for the primary evidence to be examined on the directions of his legal advisers needs to be respected”.

As highlighted above, in Scotland the post mortem already involves two pathologists in examining the body. There then would seem no advantage for the Crown instructing routinely a third pathologist report. COPFS has discretion and can decide to release the body once satisfied that the necessary evidence has been ingathered.

Conclusion

We recognise that highly emotive issues arise in relation to any post mortem. In considering the current position, there does seem merit in better public information being made available in an independent forum in addition to that already available on COPFS and Police Scotland websites. We have located *Information for Bereaved Family and Friends Following Murder or Culpable Homicide*² which might well be the best place for additional information to be posted. This may also provide a better route for the sharing of any cultural wishes that the bereaved family may have in relation to funeral arrangements.

We wondered too about exploring the role of new technology in relation to the holding of post mortems in the future. There is inevitable upset to any family by the fact of holding a post mortem. Using digital procedures which are less invasive may speed up the process, obtain the relevant evidence and improve the position in relation to post mortems for families. For instance, we understand that the concept of a ‘virtual autopsy’ has been developed abroad. Forensic pathologist Guy Rutty has called for cross-sectional autopsy imaging to be available, as he indicated that ‘there

² <https://www.gov.scot/Publications/2014/08/1338/1>

are important religious cultural and humanitarian benefits offered non-invasive autopsies³”

Taking these suggestions forward may encourage some practical measures to assure to the public that all those involved are committed to considering how to improve the current system.

³ <https://www.theguardian.com/science/2013/feb/23/virtual-autopsy-virtopsy-forensic-science>