Justice Committee

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill

Supplementary written submission from Flt Lt James Jones, RAF (Rtd)

I understand that the taking of evidence officially concluded on 26th May 2015, but I respectfully ask that I be afforded the opportunity, granted to others, to raise observations on past evidence which I believe should be brought to the attention of the Justice Committee. Only now do I have a copy of the transcript of the evidence given on 26th May, and a copy of Mr Stephen McGowan’s important letter. I think that it is worth noting that had the COPFS evidence been presented on 12th May, as originally planned, I would have been making these comments earlier. I confine my observation to “errors in fact”.

The reference in Mr McGowan’s letter to the 3rd Edition of Carmichael on Sudden Deaths and Fatal Accident Inquiries is a misquote. Paragraph 2-07 actually states, “It must be borne in mind that deaths of police officers on duty and deaths of members of the forces, regular or part-time and including visiting forces, while on duty, do not count as deaths in the course of employment for the purpose of s.1(1)(a)(i)”. No explanation is given as to why it should be borne in mind. So if Carmichael is an authoritative book on the law of Scotland, then any FAI Bill amendment needs to cover more than just the military. Having said that, paragraph 2-55 of Carmichael claims that a discretionary FAI was held for the Mull of Kintyre accident because all those on board were members of the armed forces. This is not correct as there was a mixture of civilian and military personnel. According to Lord Philip’s 2011 review the FAI was held because the Lord Advocate concluded that some on board were engaged in the course of their employment. The accuracy of Carmichael therefore becomes questionable.

Mr McGowan’s reference to section 1A of the 1976 Act is a further misquote. This section refers to a referral being made under section 12 of the Coroners and Justice Act 2009 by the Secretary of State, or Chief Coroner, because it is thought that it may be appropriate for the circumstances a death to be investigated under the Fatal Accident and Sudden Deaths Inquiry (Scotland) Act 1976. The paragraph in question actually states “Subsection (4) applies where the Lord Advocate decides it would be appropriate in the public interest for an inquiry under the Act to be held in the circumstances of the death, and does not reverse that decision”. The Act, in this case, refers to the Coroners and Justice Act 2009, and the Lord Advocate, who is always acting in the public interest, has a choice of accepting the referral or “reversing it”; in other words rejecting it and sending it back under section 13 of the 2009 Act (see attached). The Lord Advocate exercises his discretion in determining whether or not the case should be held in Scotland or not; this is not the same as a discretionary FAI referred to in section 1(1)(a)(ii) of the 1976 Act. It is noted that Section 7 of the new Bill does not comply with section 50 of the Coroners and Justice Act 2009, in its entirety. It removes mandatory requirements on Procurator Fiscals, subsection (4), and inserts the word “if”, which gives the impression of a discretionary FAI.
Finally, I would like to address the Lord Neuberger issue. Yes it is true that Lord Neuberger did not actually draw up the Judgement that was done by Lord Justice Moses. However, all three judges agreed with the judgement and because Lord Neuberger was the senior judge he was given the credit by the media. But who drew up the judgement is not the issue it is the confirmation of the employer/employee relationship between members of the armed services and MoD. I attach extracts from the 2012 agreed ruling for perusal by committee members. There was no need for consideration in detail by the Supreme Court because the relationship was historically well established for UK forces deployed in the UK. I sense from Mr McGowan’s letter that the Crown Office seems to accept the employer/employee relationship in terms of duty of care and negligence, but is that not what section 1(1)(a)(i) is about? Isn't that the reason why the employer is invited to attend the inquiry; section 4(3)?

Having brought this issue to the table I firmly believe that the problem simply exist because the interpretation of “employee”, adopted by the Crown Office, is not in keeping with that of a “reasonable person”, in the legal sense. Any future FAI bill should try and incorporate the phrase used by Lord Cullen in his recommendations, namely “work related deaths”, with a clear definition of intent as to what that means.

James Jones
30 May 2015
Court of Appeal

Hearing dates: 25th-27th June, 2012

Before

LORD NEUBERGER, MASTER OF THE ROLLS
LORD JUSTICE MOSES
and
LORD JUSTICE RIMER

Judgment, As Approved by the Court

38. It is beyond dispute, and the MOD did not purport to dispute, that it owed a duty of care at common law to members of the armed forces as their employer. Nor was it disputed that health and safety provisions contained in Sections 2-4 and 6-7 of the Health and Safety Act 1974 and in Regulations made under Section 15 imposed statutory duties on the MOD. For example, it is required to secure suitable personal protective clothing and adequate information, instruction and training about such equipment under the Personal Protective Equipment at Work Regulations 1992, to construct or adapt work equipment so that it is fit for purpose under the Provision and Use of Work Equipment Regulations 1998, to make a suitable and sufficient assessment of risks to health and safety, and to secure adequate health and safety training on recruitment, or when exposed to new or increased risks, under the Management of Health and Safety Regulations 1999. The territorial scope of those Regulations is limited to Great Britain (Section 84(1), extended to Northern Ireland by Order in Council under Section 84(3) of the 1974 Act).

39. The employer’s duty of care, at common law and statutory duties imposed under Regulation, have been deployed against the MOD in numerous previous cases: in Chalk [2002] EWHC 422 (QB) (injury caused by avalanche to member of a RAF rescue team on training exercise), Fawdry [2003] EWHC 322 (QB) (ill-fitting helmet causing injury on exercise to trainee at Sandhurst), Hanks [2005] EWHC (injury to neck caused by breach of the 1992 Regulations during naval flight training exercise), Hopps [2009] EWHC 1881 (QB) (electrical engineer, working under the protection of the MOD in Iraq, injured by IED due to failure to provide suitable armoured vehicle). Most of these cases failed on their facts, but their significance lies in the MOD’s acceptance of the duties alleged.

46. But in the instant cases, the claimants have no need to make any such assertion. The duty of care owed by the Ministry of Defence, as employer, to the members of the armed forces, as employees, does exist and has been recognised, without demur, by the courts. It includes a duty to provide safe systems of work and safe equipment, as I have demonstrated. There was no suggestion that the courts were ill-equipped to deal with such issues, or that the resolution of the claims would be detrimental to the troops. The question whether a duty of care owed by the MOD to armed forces should be recognised has long since been answered. There is no basis for asking it in the instant appeals.
52. The fact that policy considerations and the scarcity of resources will arise in relation to allegations of negligence against the Ministry of Defence provides no basis for distinguishing the MOD from any other public body in relation to the duty it owes to its employees. That no such distinction is to be drawn is further underlined by the absence of any statutory prohibition against making claims for negligence.

55. It is not possible to distinguish consideration by the courts of the duty of care owed by the MOD to its employees, the armed forces, from the duty owed by other public authorities, save in one well-recognised respect: combat immunity. But the very existence of that immunity fortifies the view that in respect of actions or omissions outside its scope there is no reason to preclude an action in negligence.

Coroners and Justice Act 2009

13 Investigation in England and Wales despite body being brought to Scotland

(1) The Chief Coroner may direct a senior coroner to conduct an investigation into a person's death if—

(a) the deceased is a person within subsection (2) or (3) of section 12,

(b) the Lord Advocate has been notified under subsection (4) or (5) of that section in relation to the death,

(c) the body of the deceased has been brought to Scotland,

(d) no inquiry into the circumstances of the death under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c. 14) has been held (or any such inquiry that has been started has not been concluded),

(e) the Lord Advocate notifies the Chief Coroner that, in the Lord Advocate's view, it may be appropriate for an investigation under this Part into the death to be conducted, and

(f) the Chief Coroner has reason to suspect that—

(i) the deceased died a violent or unnatural death,

(ii) the cause of death is unknown, or

(iii) the deceased died while in custody or otherwise in state detention.

(2) The coroner to whom a direction is given under subsection (1) must conduct an investigation into the death as soon as practicable.

This is subject to section 3.