

Justice Committee

Civil actions for rape and other serious crimes

Written submission from the Crown Office and Procurator Fiscal Service

I refer to the email of 18 January from the Committee Clerk. Answers to the questions posed in the email are set out below. As you will appreciate, as COPFS is responsible for the investigation and prosecution of crime and the investigation of deaths, my answers reflect the particular responsibilities of the Service.

How common it is for a rape victim in Scotland to raise a civil action where there has not been a successful prosecution.

The Committee will be aware of the opinion of the Court in DC v DG and DR [2017] CSOH 5, an action of damages for rape and that the case has been spoken of as being the first of its kind, including by those acting for the pursuer.

This action was related to a case which was reported to the Procurator Fiscal in 2011. That case was investigated thoroughly by the police and by the Procurator Fiscal. Crown Counsel instructed that there should be no criminal proceedings on the basis that there was insufficient admissible evidence to support a charge of rape. As the Committee may be aware, the Crown reviewed the case in light of the outcome of the civil action. Crown Counsel remained satisfied that the decision to take no proceedings was the correct one and that the civil action did not raise any matter that required further investigation by the police.

Last month we learned from the legal press of a further action of damages for rape that has been raised in the All Scotland Sheriff Personal Injury Court. It is understood the case will call on 6 March for proof. This action is related to a case reported to the Procurator Fiscal in 2014. The case was investigated fully and Crown Counsel instructed that the accused person was to be indicted to the High Court. He was acquitted in December 2015 after trial. The case was found to be not proven by a majority.

We know of no other civil proceedings for personal injury by rape complainers in recent times in Scotland. The most recent such action before DC v DG and DR, which we have been able to identify, was an action brought in 1924¹.

The ongoing Sheriff Court action shows that COPFS will not necessarily know when a complainer (or next of kin) has raised a civil action connected to the facts of a criminal case or a death investigation in which they are involved. COPFS may discover that there is civil litigation because the complainer or next of kin makes their intention known to a Victim Information and Advice (VIA) officer or the case preparer, or from press reporting.

The most common way for civil litigation to come to the attention of COPFS is when solicitors for the complainer or next of kin, or solicitors or insurers acting for the

¹ Black v Duncan 1924 SC 738

accused person, write to us seeking information about the case or production of documents; or when an application to the civil court for recovery of documents from a criminal or deaths investigation is intimated to us, as happened in DC v DG and DR. We cannot be certain that there are no other ongoing civil cases in relation to rape.

The information that we have suggests that there have been few civil actions for rape in recent times in England.

How common it is for a victim in Scotland of another serious crime to raise a civil action for damages.

COPFS cannot offer a definitive view as to how common it is for complainers or next of kin in cases of serious crime to raise civil proceedings. As I have said, COPFS will not always find out that these proceedings have been taken.

On a daily basis we receive intimation of applications to the civil court for orders for recovery of documents in respect of criminal or death investigations for use in civil actions. Dedicated legal staff identify whether the action relates to a case which has been reported to the Procurator Fiscal. Many actions intimated to COPFS in this way relate to injury or death as a result of a road traffic accident or an accident at work. Some others are grounds of referral proceedings involving the care of children, or similar family proceedings before the court in England. In some of these grounds of referral cases the related criminal case may concern sexual or other serious offending.

We are aware of one very high profile civil action for damages from 1995. This related to a 1992 High Court murder prosecution that resulted in the acquittal of the accused person. The murder had a sexual element. It is understood that the action was successful, the Court being satisfied on the balance of probabilities that the defender was responsible for killing the daughter of the pursuers. This case was re-investigated as a “cold case” and the Crown applied to the Court in terms of the Double Jeopardy (Scotland) Act 2011 for permission to bring a fresh prosecution. The application was refused.

The main reasons why a victim of rape or other serious crime might wish to raise a civil action for damages.

COPFS cannot offer authoritative comment on the reasons why a victim of rape or other serious crime might wish to raise a civil action for damages; the question would be better answered by solicitors who act for pursuers in such cases. We are aware that in some cases that have not resulted in criminal prosecution, some complainers may wish to be able to give their account of what happened to them in a public forum. Obtaining a judicial determination favourable to them can be seen by complainers as a vindication of their account of what happened and a means of having the person they consider responsible for harm held accountable for their actions. We have experience which suggests that complainers may feel that having the matter determined by a court allows them to obtain closure and to move on positively with their lives. We have been told that obtaining damages is often not the focus of the action, although, particularly in cases involving injury or the death of a

loved one who may have been the breadwinner of the family, obtaining financial recompense can be important.

Current barriers to a victim bringing a civil action for damages (including financial and evidential considerations) and whether those seeking to bring civil actions should have more help to do so.

There is little that COPFS can contribute on this point without speculating because our responsibility is for the investigation and prosecution of crime and the investigation of deaths rather than access to civil justice.

Any lessons criminal justice bodies should take from instances where there has been a successful civil case but no criminal prosecution. The Committee is, of course, aware that there are important differences between the two systems (e.g. in relation to the standard of proof).

There are, as the question recognises, material differences between the prosecution of crime and civil proceedings. The standard of proof is different, with proof beyond reasonable doubt required for a criminal conviction and proof on the balance of probabilities sufficing in a civil case. The requirements of proof are also different. In a prosecution, the essential facts must be established by corroborated evidence, a requirement which does not apply in a civil case. There are many other rules of evidence, including the general rule against reliance on hearsay evidence, which apply to criminal trials, but do not apply in civil proofs.

These differences reflect the different consequences of a finding in each type of proceedings. In criminal proceedings, the accused is at risk, in the context of rape and other serious crimes, of imprisonment. In civil proceedings, the defender is at risk of a finding of liability to pay damages. Rightly, the law imposes more rigorous demands on the prosecutor and on the fact-finding tribunal than those which apply in civil proceedings.

It is also important to note that, although prosecutors take into account the views of complainers and next of kin, they act independently in the public interest. The Crown must consider each case on its own merits and consider all of the circumstances including those favorable to the accused person. Prosecutors have a duty to adhere to the rule of law. They must consider in every case whether there is sufficient evidence and, if there is, what action is required by the public interest. If there is not sufficient evidence (applying the criminal rules of evidence), no prosecution may properly be brought.

The DC v DG and DR case demonstrates that COPFS is open to reviewing cases and assessing whether there are further investigative opportunities following successful civil action in cases where no criminal prosecution was ever brought. Whether a case requires to be reviewed will be dependent on the circumstances. As demonstrated by the case in which a double jeopardy application was made, we are always open to considering whether there is new information that should be investigated in the most serious cases and to bringing fresh proceedings before the court where appropriate.

As the Committee is aware, sexual offence cases are now investigated by specialist teams and we continue to update training that prosecutors must have to prepare and prosecute sexual offences cases. As I said to the Committee in December, we are looking to simplify our processes and reallocate resources in response to what we have learned from our experience of dealing with these cases and to the marked increase in reporting of sexual crime.

The support available to victims of rape and other serious crimes where there is no criminal prosecution.

The police offer the support of liaison officers to every complainer in serious sexual offence cases and to next of kin in murder cases. When a case is reported to the Procurator Fiscal and no action is taken this decision is intimated to the police so there can be ongoing support to the complainer by liaison officers. COPFS write to the complainer advising them of their right to request a review of the decision to take no action (VRR). No proceedings markings at the outset in rape and other cases of serious crime are relatively rare. If proceedings are taken or a decision is taken that there should be further investigation, then VIA will make contact with the complainer in terms of our Victim Strategy. If, following investigation, the decision is to take no action then either VIA or the case preparer will advise the complainer of the decision and their right to a review. In any circumstance VIA make complainers aware of the support available to them from third sector agencies such as Rape Crisis Scotland and Scottish Women's Aid, though they sometimes find that the complainer has already been referred to these agencies by the police.

I should perhaps add that the Crown will, so far as it may properly and lawfully do so, respond to applications for the production of relevant documents required for civil proceedings which are associated with criminal or death investigations. COPFS will generally seek to reach agreement with solicitors about the scope of the court order for production of documents which are relevant to civil proceedings. COPFS legal staff obtain papers for the related criminal or death case and produce material promptly in response to court orders.

In the DC v DG and DR case, from late 2013 until the proof in the civil action began in October 2016, COPFS dealt with a number of specifications (applications to the civil court) for recovery of documents and with queries from the pursuer's solicitors arising from their examination of the documents which COPFS had produced. COPFS ingathered evidence from the police and ensured that medical samples were preserved by the police. Detailed and prompt written responses were provided. The solicitors have acknowledged publicly that the pursuer in that case was assisted by the detailed investigation that had been carried out, the fact that evidence had been preserved and was able to be used in the civil proceedings.

Complainers may wish to apply to the Criminal Injuries Compensation Authority (CICA) for criminal injuries compensation whether or not there is a prosecution. There are occasions where CICA have questions about the criminal case and we have staff dedicated to dealing with these enquiries.

I trust this is helpful.

David Harvie
Crown Agent
14 February 2018