

## CHAPTER 5 - PRODUCTIONS

### 5.01 DISTINCTION BETWEEN DOCUMENTARY AND LABELLED PRODUCTIONS

Documentary productions are articles such as reports, books, etc, whose evidential value is intrinsic eg a report by an expert witness. Labelled productions are articles which require to have a label attached to them to assist in their identification by witnesses at the trial. Some documents may require to be labelled depending upon the nature of the case. In a case of embezzlement books of account would be documentary productions. In a case of theft from an office the same books of account when recovered by the police would be labelled productions. Occasionally an article which by definition is a documentary production requires to be labelled to assist identification. In such cases it should be treated as a labelled production.

### 5.02 LABELLED PRODUCTIONS

All articles (other than documentary productions) which may require to be produced in any proceedings should have labels affixed to them with the name of the case, the place of finding and description of the article written on the label. The label must be signed by the witness or witnesses whose evidence relates to the article. Labels should be fixed to articles by the police or other investigating officers as soon as possible and sealed in such manner that the label cannot be removed from the article without breaking the seal. The witnesses should sign the label immediately. If a witness identified or otherwise speaks to a production for the first time at precognition the witness should sign the label then and this fact should be made clear in the precognition. It is the duty of the officer taking the precognition to ensure that labels have been properly signed. Witnesses should be encouraged to prepare a list of articles stolen. This should be signed by the witness and lodged as a documentary production in order to assist the memory of the witness at the trial.(See also Chapter 4 generally on Precognition).

### 5.03 DOCUMENTS TO BE NUMBERED

Documentary productions should not normally be labelled. The various witnesses speaking to them however should sign or initial them where this is necessary to ensure identification. Care should be taken that the signature or initials of the witnesses do not encroach upon or interfere with the writing on the document itself. In most cases it will be found expedient to use the back of the document for such signatures or initials.

For detailed guidance in respect of certification of copy and business documents Procurators Fiscal should refer to the section on Proof of Documentary Productions in the Precognoscer's Handbook.

### 5.04 LABELS TO BEAR DISTINCT NUMBERS AND MARKS

The labels attached to the productions should be numbered consecutively in the order in which they are referred to in the precognition. Where it is necessary to label two or more articles

together there ought, for facility of references and identification at the trial, to be a letter or some other distinctive mark attached to each article in addition to the label. The paper on which such letter or distinctive mark is written need not be signed by the witnesses unless these witnesses speak only to some of the articles secured by the label.

### **5.05 PROVISIONAL NUMBERING OF PRODUCTIONS**

It is sometimes an advantage in the course of precognition to mark the numbers of documents and labelled productions in pencil. If certain charges are not pursued or certain productions are later dropped from the proceedings this will facilitate the alteration of the numbers which are to be marked on the documents and labels prior to the lodging of productions for trial. The decision as to which articles are to be produced must be made before the Indictment is finally prepared and the permanent numbering should be done by then. Similarly the marginal references to production numbers in the precognitions may be entered in pencil where there is cause for doubt as to which charges will be pursued.

### **5.06 SEPARATE NUMBERING OF DOCUMENTARY PRODUCTIONS AND LABELLED PRODUCTIONS**

Documentary productions and labelled productions are not to be numbered in single sequence. Documentary productions must be numbered consecutively from production number 1. Label productions must be numbered consecutively from label number 1.

### **5.07 PRODUCTION OF ARTICLE AT TRIAL**

It is proper practice to produce any article referred to in the indictment or complaint where there is no practical difficulty in doing so. There are, however, many cases where it is inconvenient, though not wholly impossible, to make articles productions in the case because of the size or nature of the articles. Motorcars, livestock and perishable goods are examples of articles where production would normally be impracticable and inconvenient. In such cases the article need not be produced. (*See Maciver v Mackenzie 1942 JC 51 and MacLeod v Woodmuir Miners Welfare Society Social Club 1961 JC 5*). The fact that it might not be reasonably practicable or convenient to retain articles as productions does not mean that the prosecution has an unrestricted right to dispose of these productions and lead secondary evidence. Failure to give the accused an opportunity of examining an article may prejudice him. (*See Anderson v Laverock 1976 SLT 62, Miln v Maher A36/78, Jespers v Belgium 27 DR 61(1982), Kremzow v Austria (1993) 17 EHRR 322 and Foucher v France (1998) 25 EHRR 234*). In order to be effective, this opportunity should, wherever possible, be given to the accused before the production is released to its owner or otherwise disposed of. Particular care is required in relation to vehicles which have been involved in fatal road traffic accidents. Paragraphs 5.15 and 2.20.4 refer.

### **5.08 ARTICLES NEED NOT BE PRODUCED - REASONS**

The mere fact that an article can be conveniently produced in court is not the only factor to be taken into account in deciding whether it is necessary to produce the article, the question in each case being whether the real evidence is essential for the proof of the case. If the actual production of the articles themselves is not essential to the proof of the charge then these articles need not be produced (*See Hughes v Skeen 1980 SLT 13*). Production will not normally be necessary where an article is indistinguishable from other articles of the same kind, for example cigarette packets, newspapers, bottles, etc. In such cases the witness is not usually called upon to speak to the characteristics and appearance of the article in question. Where however the article is something specifically associated with the scene of the crime and identifiable as such, it should be produced unless there is a practical difficulty in doing so. In deciding whether to return articles, procurators fiscal must consider whether the non-production of articles will prejudice the defence. The possibility of prejudice may be removed if an opportunity is given to the defence to examine the productions. Photographing a production may also avoid difficulties, although it should be noted that a party seeking to lead secondary evidence is not bound to produce photographs or labels, which have the effect only of strengthening the secondary evidence proper, ie the oral evidence of witnesses.

### **5.09 NUMBERS OF ARTICLES OF SAME KIND - PRODUCTION**

Where a number of articles of the same general kind have been stolen it will generally be sufficient to prove them by producing samples. This should be done in cases involving extensive thefts of jewellery or other articles stolen from shops such as clothing. In cases of shoplifting, consideration should also be given to the question of whether it would be sufficient to retain the wrapper around goods as the article itself may not have features of value for identification. Procurators Fiscal should bear in mind the great inconvenience which might be caused to shop keepers if all the articles are retained for production and also the Convention right of shopkeepers to peaceful enjoyment of their possessions. The possibility that hardship may be caused to the owner of an article by its production may provide sufficient ground for arguing that it is not convenient to produce the article.

As a general rule, every article which has been stolen should be returned to the owner except where the article has special features such that a witness may be called upon to speak to the characteristics and appearance of the article in evidence.

### **5.10 INFORMATION ON PRODUCTIONS TO BE SUPPLIED BY POLICE**

It has been agreed with Chief Constables that in appropriate cases when a report is submitted to the Procurator Fiscal, full details of any articles which the Police have taken possession of, should be given in the report to enable an early decision to be taken as to whether an article should be returned to the owner. It is suggested that the report should provide the following information:

- (a) a full description of the article;
- (b) details of those witnesses who can identify the article;
- (c) a brief outline of the method by which witnesses identify the article (eg by reference to a serial number, packaging or marks on the article, etc);
- (d) details of ownership including reference to any dispute over ownership;
- (e) a note of any special difficulties which might arise if the article has to be retained; and
- (f) details of the extent to which the owner of the article or any other party will be inconvenienced by the retention of the article.

Procurators Fiscal will discuss with the Chief Constable or his representative the type of cases where such reports are appropriate and the information on the article(s) to be included in the report.

### **5.11 RETURN OF PRODUCTIONS BEFORE TRIAL**

As soon as possible after receiving a report a decision will be taken by the Procurator Fiscal on whether an article may be returned. This will normally depend on whether it is thought essential to the proof of the case that the article be produced in court and on whether it is practicable and convenient to produce the article in court (see paragraphs 5.07, 5.08 5.09 above). In some cases articles will also have to be retained where there is reason to believe that there are competing claims which might result in civil litigation, or if there is a reasonable likelihood of forfeiture. Articles which themselves give rise to the charge (eg possession of controlled drugs or offensive weapons) should not, of course, be returned.

### **5.12 PHOTOGRAPHING OF PRODUCTIONS**

In appropriate cases before an article is returned it should be photographed. The photograph should show the article and the label signed by all the witnesses who are likely to give oral evidence concerning the article. The photograph(s) should be taken by the reporting officer or in his presence, to avoid the necessity of a police photographer having to give evidence. In some cases it is essential to allow the defence an opportunity to examine an article before it is returned (*see Anderson v Laverock 1976 SLT 62 and Miln v Maher, A36/78*).

### **5.13 STAGE AT WHICH DECISION ON RETURN TO BE TAKEN**

The decision on whether to return an article should always be made as soon as possible. In most cases it will be possible to make this decision even where full statements have not been

received from the police. In petition cases, however, a decision should not be taken until the case has been precognosced except where hardship is likely to be caused to the owner and it is clear that no possible prejudice will be caused to the accused by the non-production of the article.

#### **5.14 LETTERS OF UNDERTAKING**

Even where it is thought that an article should be produced for evidential purposes, every effort should still be made to return the article to the owner. In some cases it might be possible to return the article on an undertaking that it will be made available if required. (A style of letter of undertaking which should be obtained from the owner is attached). The production label should be removed before return of the article. This label should then be attached to the letter of undertaking and retained. If the article is subsequently lodged in court the label and letter should be produced and (in Indictment cases) listed separately.

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#### **5.15 VEHICLES AS PRODUCTIONS**

The cases in which a vehicle is an essential production are relatively few. Hardship has sometimes been imposed on owners in respect of vehicles which have been stolen or involved in accidents being retained by the authorities as productions for possible proceedings. Procurators Fiscal may therefore as soon as a vehicle has been examined by an expert on behalf of the Crown and a Report obtained and/or photographs taken proceed to give the accused an opportunity to examine, or have examined the vehicle and thereafter return the vehicle to the owner. Should the Procurator Fiscal consider that this course ought not to be followed he will immediately report the whole facts for the instructions of Crown Counsel.

Where the vehicle concerned has been involved in a fatal road traffic accident, particular care should be taken to ensure that the opportunity to examine the vehicle afforded to the accused is, in all the circumstances, an effective one.

#### **5.16 PROCEEDS OF CRIME (SCOTLAND) ACT 1995, SECTIONS 21 AND 23 SEIZURE AND RETENTION OF ITEMS WITH A VIEW TO FORFEITURE FOLLOWING CONVICTION**

Procurators Fiscal should not instruct the seizure of property merely for forfeiture without first obtaining the appropriate warrants authorising such seizure.

The attention of Procurators Fiscal is drawn to the opinion of the High Court of Justiciary in the appeal of *Shaw v Colley 1998 SLT 17*.

The High Court considered the lawfulness of the seizure and retention of a motor vehicle

belonging to an accused person after he had allegedly used the vehicle in the commission of a number of road traffic offences. The vehicle was seized and impounded by the Police without a warrant, and the Procurator Fiscal sought to retain possession of the vehicle pending an application for forfeiture in the event of conviction. The accused person appealed against its retention by the Procurator Fiscal by Bill of Advocation contending that the Procurator Fiscal had acted unlawfully and seeking an order ordaining him to release the vehicle. It was conceded by the Crown that the vehicle had no evidential value in relation to the pending proceedings against the accused. The court held that in the absence of a successful application by the Procurator Fiscal for a warrant for seizure of the vehicle, there was no implied power on the part of the prosecutor, or the Police, to seize and retain the complainer's vehicle until the trial against the complainer had been concluded.

Procurators Fiscal are reminded of the provisions of section 21 of the Proceeds of Crime (Scotland) Act 1995 which provides in specified circumstances for the making of a suspended forfeiture order in respect of property in the ownership or possession or under the control of the accused. Section 23(1) of that Act deals with circumstances in which a sheriff may grant a warrant for the search for and seizure of property liable to forfeiture. For further guidance in relation to suspended forfeiture orders and forfeiture generally Procurators Fiscal should refer to Chapter 9 at paras 9.20 to 9.28.

The position in respect of motor vehicles is also covered by section 33A of the Road Traffic Offenders Act 1988. Sub-section (4) of section 33A provides that in certain circumstances the court may grant a warrant to search for and to seize a vehicle liable to forfeiture in terms of that section. Notwithstanding the reported concession by the Advocate Depute in the case of Shaw, **Crown Counsel are satisfied that section 33A of the Road Traffic Offenders Act 1988 does apply to summary proceedings.**

In the light of the Court's judgement in this case, Procurators Fiscal should not instruct the seizure of any property, including a motor vehicle, which is not required for any evidential purpose but rather is liable to forfeiture, without first obtaining a warrant authorising such seizure under section 23(1) of the Proceeds of Crime (Scotland) Act 1995 or section 33A(4) of the Road Traffic Offenders Act 1988.

Where property has already been seized by Police Officers, and it is intended to seek forfeiture in due course, Procurators Fiscal should seek warrant in terms of the appropriate statutory provision. For guidance in relation to confiscation as governed by the Proceeds of Crime (Scotland) Act 1995 and the Criminal Law (Consolidation) (Scotland) Act 1995 Procurators Fiscal should refer to Chapter 20 on confiscation.

## 5.17 LIVESTOCK AS PRODUCTIONS

In any case where it is necessary to take possession of sheep or other livestock and place them for safe keeping in the hands of a third party, it is essential that a definite agreement should be

entered into as to the charges for keeping the livestock. The agreement should be between the police acting on behalf of the Procurator Fiscal and the third party, the police being responsible for the selection of a suitable third party from the point of view of safe keeping and for fixing the appropriate charges in agreement with the third party. On the case being reported to the Procurator Fiscal he should at once report the matter to the Regional Procurator Fiscal, giving details as to the rate charged, stating whether the charge is a reasonable one and whether the police have taken possession of the livestock on his instructions. Where no proceedings are to be taken the charges will be met by the police authority.

### **5.18 PERISHABLE GOODS AS PRODUCTIONS**

The above instructions in relation to livestock apply *mutatis mutandis* to perishable goods. In the case of perishable goods stolen from a shop, the shop keeper may agree to retain the goods in cold storage for production at the trial. In most cases perishable goods should be returned (See paragraph 5.07). Consideration should be given to the question of whether it would be sufficient to retain the wrapper around perishable goods as the article itself may not have features of value for identification.

### **5.19 DISPOSAL OF CONTAMINATED PRODUCTIONS**

In order to minimise the risk of infection to which investigating officers and others may be expose while handling samples the following arrangements for disposing of blood and saliva samples, swabs and other biological samples in criminal cases should be observed. (See also Annex 1 to this Chapter for the procedure for handling contaminated productions).

When the initial examination has been completed, the sample should be retained at the laboratory (or by the reporting officer if the analyst does not have facilities for retaining the sample) and the accused or his legal representative should be informed, by means of a letter from the Procurator Fiscal in the form set out below, that the sample will be available for examination by another expert for a period of 21 days, after which the sample will be destroyed unless a request for an extension of this period is received. The letter should be sent by ordinary post to the accused's solicitor where he is known to be legally represented or by recorded delivery to the accused's last known address.

Since the purpose of this arrangement is to ensure that contaminated specimens do not remain in store at the laboratory for long periods, it is essential that the decision as to whether specimens can be disposed of should be made as soon as possible. This applies particularly to toxicological post mortem samples in criminal cases as these must remain in laboratory storage until destruction is authorised. Such a decision should not be taken until the full extent and nature of the evidence available is known.

Where no request for an extension of the 21 day period is made the Procurator Fiscal should inform the laboratory concerned (or the reporting officer) that certain samples may be destroyed. Wherever possible the Procurator Fiscal should deal directly with the laboratory concerned.

### **5.20 CONTAMINATED PRODUCTIONS – IDENTIFYING IN COURT**

It is considered that witnesses involved in any particular case will be able to give evidence sufficiently identifying a sample without it being produced in court. The labels attached to the samples should be retained and the analyst or the reporting officer should endorse the label with a note detailing the date when the sample was destroyed on the instructions of the Procurator Fiscal.

In any case where it might be of substantial importance or where the accused or his agent object the sample should not be disposed of but should be retained for production in court.

### **5.21 SAMPLES OBTAINED IN CONNECTION WITH DEATH**

The instructions in the last few paragraphs apply mutatis mutandis to samples obtained in connection with deaths which may be the subject of enquiry at a Fatal Accident Inquiry. Procurators Fiscal should consider whether intimation that certain samples are to be destroyed should be given to interested parties who are likely to be represented at the Fatal Accidents Inquiry.

### **5.22 FORM OF LETTER FOR SERVICE UPON ACCUSED OR HIS AGENTS**

"It has been decided that blood samples and other biological samples in criminal cases will not be produced at court unless specifically required by the defence.

The blood sample(s)/saliva sample(s)/biological swab(s) taken in connection with the above case has/have been examined in the laboratory and will be destroyed on ... that is, at the expiration of 21 days from the date of this memorandum unless you give notice in writing to me before the expiration of that period you may wish for an independent examination of the sample(s) or swab(s); or you object to its/their destruction. Reference to the blood sample(s)/saliva sample(s)/swab(s) may be made in evidence.

Biological samples may deteriorate rapidly and delaying the examination of a sample or swab could render any results obtained unsatisfactory and unreliable. This arrangement has been designed to obviate unnecessary handling and so reduce the risk of infection."

### **5.23 LODGING PRODUCTIONS**

In Indictment cases the accused is entitled to see all the productions in the office of the Sheriff Clerk of the District in which the court of the trial diet is situated or in the Justiciary Office in

accordance with section 68(2) of the 1995 Act. Procurators Fiscal shall see that all productions libelled are timeously lodged to meet this requirement. As a general rule productions should be lodged at the time of service of the indictment or as soon as thereafter as possible. In High Court cases the documentary productions forwarded to the Crown Office will be lodged by that office on service of the Indictment.

#### **5.24 SUMMARY PRODUCTIONS**

The Scottish Court Service has agreed with Crown Office that formal handover procedures for summary productions should be introduced between Procurators Fiscal and Sheriff Clerks at courts where no such procedures are in place. At present there would appear to be a considerable variation in practice, with responsibility for the productions and their transport to and from court being shared by staff from the Procurator Fiscal Service, police and/or court officers. In some offices there is no formal handover procedure with the Procurator Fiscal retaining physical control or responsibility for productions throughout.

It has now been agreed that there should be a formal handover procedure with court officers signing receipts for summary productions, either at the sheriff court or at the Procurator Fiscal's Office depending upon existing local practice/agreement. The Procurator Fiscal's staff must also sign for the uplift of returned productions at the end of the day/trial. There is no need for a formal handover if the productions are always under the control of the Procurator Fiscal or Depute who takes them to court and back again at the end of the day. However, where the productions are passed to the Sheriff Clerk's control there is a need for a formal handover procedure and a record of what was handed over.

Procurators Fiscal are requested therefore to determine whether formal procedures on the lines agreed already exist and, if not, to liaise with the sheriff clerk to implement a system of formal handover of summary productions.

#### **5.25 INDICTMENT CASES**

In High Court cases the following copies of documentary productions will be obtained.

(a) Photographs, plans and any other productions which Crown Counsel decide will have to go before the Jury -

1 copy for Judge,  
10 copies for Jury,  
1 copy for Crown Counsel  
1 copy for each Defence Counsel.

Procurators Fiscal should refer in this regard to para 5.42 to this Chapter which contains the instructions for ordering copy colour photographs.

(b) All other readily copied productions -

- 1 copy for Judge,
- 1 copy for Crown Counsel,
- 1 copy for each Defence Counsel,
- 1 copy for Procurator Fiscal.

(c) Books, files, maps, hospital records etc, which are difficult or bulky should not be copied at all unless specifically instructed by Crown Counsel who will consider whether part only and if so which part should be copied.

The copy productions, apart from Procurators Fiscal and Jury copies, will be forwarded to Crown Office immediately after service of the Indictment. If for any reason there is a delay, at least one copy must be sent for the use of Crown Counsel who will be taking the trial. If it appears that the accused may plead guilty at the trial diet Crown Counsel's instructions should be sought as to whether the productions should be copied.

## **5.26 DISCRETION IN NUMBERS OF PHOTOGRAPHS AND DOCUMENTS**

In Sheriff and Jury cases Procurators Fiscal should use their discretion as to the number of copies of photographs and documents which are required depending upon the particular circumstances of the case.

## **5.27 EXAMINATION OF PRODUCTIONS BY DEFENCE**

As a general rule up to the time of service of an Indictment the Crown has the exclusive right of inquiry into a crime (*See Smith v HMA 1952 SLT 286, Stirling v Associated Newspapers Ltd and another 1960 SLT 5 and Hall v Associated Newspapers Ltd and others 1978 SLT 241*). Access to productions seized in connection with the inquiries should not normally be allowed to the defence before Crown Counsel have decided to institute proceedings and the Indictment has been drafted. It may, however, be appropriate or necessary in certain cases to allow the defence access to a Crown production, for example, it may be necessary for the defence to secure the examination of a motor vehicle in support of the accused person's version of an accident. In the case of perishable goods which cannot be preserved as productions the defence must be given an opportunity to examine them before they are allowed to be destroyed. (See paragraph 5.07)

## **5.28 PRODUCTIONS UNDER CONTROL OF COURT**

After the productions have been lodged they are within the control of the court and only the court may allow their removal for examination on behalf of the defence. (*See William Turner Davies Petitioner 1973 SLT (Notes) 36*). The attitude of the Procurator Fiscal to an application by the defence for such an order will depend upon the particular circumstances of the case, the overriding consideration being the preservation of the production as evidence. Provided he is satisfied that the safeguards proposed are sufficient to ensure that the production will not be

materially altered or destroyed by the further examination he should not object. It may be necessary to suggest that a Crown witness be present during the examination. The productions will normally be lodged at the time of service of the Indictment. If there is a request by the defence for access to the productions not yet lodged the Procurator Fiscal should lodge them with the Sheriff Clerk forthwith so that the defence may apply to the Sheriff or to the High Court as the case may be for the authority to examine them.

### **5.29 PRODUCTIONS IN SUMMARY CASES**

Productions in summary cases are not under the control of the court until produced at the trial. Before then they are within the control of the Procurator Fiscal as in solemn procedure before the service of the Indictment. Procurators Fiscal will however afford to the defence the opportunity to examine productions in summary cases if they consider that it would be in the interest of justice to do so. In making this judgement, Procurators Fiscal should bear in mind the Convention right of the accused to adequate facilities for the preparation of his defence (Article 6(3)(b) ECHR).

### **5.30 SAFE CUSTODY OF PRODUCTIONS**

The responsibility for the safe custody of productions during the preparation of the case and until the productions are lodged or produced in court rests with the police or the Procurator Fiscal depending on who has actual possession of the article. When the productions have been lodged or produced in court the Clerk of Court has the responsibility for their safe custody.

### **5.31 STORAGE OF BULKY PRODUCTIONS**

Procurators Fiscal must be vigilant when dealing with cases involving productions which are so unusual that they require special storage arrangements to be made, whether because of their bulk or other reason.

If a Procurator Fiscal receives a report in connection with which items have been seized by the Police and they require special storage arrangements, he should give early consideration to the question of whether it is necessary to retain those items for production in court.

If ownership of the property is not in dispute, immediate consideration should be given to whether or not it can be returned to its owner.

If either (a) ownership of the property is in dispute, or, (b) it is considered necessary to retain the property for evidential reasons, the Procurator Fiscal must make enquiry to ascertain both the suitability and cost of the storage arrangements which have been made. In particular, Procurators Fiscal should, so far as is possible given other priorities, expedite the investigation and prosecution of such cases; in the past it has been necessary to make *ex gratia* payments to compensate owners of property which has deteriorated or been damaged while stored on the authority of the Procurator Fiscal, either because the storage arrangements were unsuitable or because the property was in storage for an excessive period of time (or both). From the entry into force of the Human Rights Act 1998, this state of affairs may give rise to action in the civil courts. It is also possible that the Crown may be asked to contribute to storage costs, where property is stored by a contractor.

Prior to cases being reported to the Procurator Fiscal, productions and arrangements for their storage are the responsibility of the Police. If, however, the question of arranging suitable storage arises at the time of or after the submission of a Police report, Procurators Fiscal should consult with their Regional Procurator Fiscal prior to entering any financial agreement for storage.

### **5.32 LOSS OR DAMAGE OF PRODUCTION**

If any production is lost or damaged and the owner makes a claim for reimbursement the Procurator Fiscal will send a report to Crown office explaining how the loss or damage occurred with a note of his estimated value of the article and the extent of the damage. The Procurator Fiscal will be advised whether the claim is to be met.

For special rules regarding safe keeping of cash and valuables see the Finance Manual.

### **5.33 SAFE CUSTODY OF PRODUCTIONS BY THE OWNER**

It is sometimes the case that shop owners and others sustain considerable losses because of the length of time during which productions are retained resulting in the goods in many cases going out of fashion. If however it is necessary to produce an article in court there is nothing which can be done to alleviate this loss. In addition however many articles sustain damage while in the hands of the Procurator Fiscal or the police rendering them unsaleable.

### **5.34 RETURN OF PRODUCTIONS ON COMPLETION OF PROCEEDINGS**

On the completion of the proceedings where the court does not order forfeiture or destruction or other disposal of the articles the Procurator Fiscal, with such aid as he may require from the police, will ensure that they are returned to the owner and if the owner cannot be found after exhaustive enquiry the Procurator Fiscal will take action to have the article sold by public auction and deposit the proceeds with the Sheriff Clerk. If, however, the Court makes an order for forfeiture, the responsibility for disposal of the forfeited article rests with the Sheriff Clerk.

When the proceedings have been concluded and the time in which an appeal may be taken has expired, and in death cases when no proceedings are to be taken, Procurators Fiscal should ensure that all productions, including documentary productions, letters, etc., are returned to the owners without delay. Suicide notes should be retained unless the next of kin specifically request that they be handed over. Where there are competing claims of apparent substance to the ownership of productions the Procurator Fiscal will not adjudicate upon the claims but will inform the competing claimants that he will retain the productions until agreement among the claimants or resolution of the claims by civil process. Particular care should be taken in the case of money productions which often cannot be positively identified.

Procurators Fiscal should give careful consideration both before trial where appropriate and after trial as to whether productions may be returned to their owners without prejudice to the proof of the case. In the case of vehicles, loss of use can be expensive for the owners and they should only be retained as productions where absolutely necessary. There is a helpful article reviewing the case law on the subject in 1988 SLT at page 173.

Where a person is convicted of any offence in relation to the theft of a pawn or of any offence in relation to the obtaining of a pawn by fraud or of an offence under Section 119(1) of the Consumer Credit Act 1974 in relation to a pawn, the court by which that person is so convicted may order delivery of the pawn to the owner or the person otherwise entitled to it (Consumer Credit Act 1974 Section 122(1)).

A court making such an order in respect of a pawn which has been stolen or obtained by fraud may make the order subject to such conditions as to payment of the debt secured by the pawn as it thinks fit (Consumer Credit Act 1974 Section 122(2)).

### **5.35 PROCEEDS OF SALE OF STOLEN PROPERTY**

Money taken from a thief which is the proceeds of the sale of stolen goods is not the property of the victim of the theft. Procurators Fiscal should instruct the police to endeavour to obtain a note of disclaimer from the thief. If this is obtained the money may then be offered to the victim of the theft. If a note of disclaimer cannot be obtained the money should be retained. The Procurator Fiscal should then seek to persuade the victim of the theft to take civil action against the thief, arresting the money in the hands of the Procurator Fiscal on dependence of the civil action. Similar action should be taken in the parallel situation where goods taken from the thief have been purchased with stolen money or stolen money has been exchanged for other money.

### **5.36 NOTE OF DISCLAIMER**

Where a plea of not guilty is to be accepted by the Procurator Fiscal consideration should be given in appropriate cases as to whether a note of disclaimer should be obtained from the accused before the plea is accepted.

### **5.37 RESPONSIBILITY FOR COSTS**

Storage and maintenance charges, in cases where for want of suitable accommodation the articles are kept other than by the police authority or by the Procurator Fiscal, are met by the Crown in cases where a prosecution takes place and by the police authority where there is no prosecution (See also the Finance Manual).

### **5.38 RETURN OF PRODUCTION WHEN ACCUSED HAS NOT BEEN FOUND**

In cases where no accused person is found the retention of an article seized as a production may

be for a lengthy period of time. This can cause hardship or inconvenience to the owner of the article. In order to minimise as much as possible such hardship or inconvenience it has been agreed with the police that in cases where possession has been taken of an article and an accused has not been found they may, after receiving the agreement of the appropriate Procurator Fiscal, return the article to the owner.

The length of time during which the production should be retained pending the possible arrest of an accused will vary from case to case and it will be at the discretion of Procurators Fiscal when productions should be returned or whether, in certain cases, they should be returned at all. In exercising this discretion, Procurators Fiscal will bear in mind the Convention right of the owner to the peaceful enjoyment of his possessions.

The above applies also to articles which have been retained by the police after fingerprint impressions have been lifted from them.

In some cases it may be possible to return a production on an undertaking from the owner that he will produce the article in court if called upon to do so subsequently.

### **5.39 DAMAGE TO PROPERTY THROUGH FORENSIC EXAMINATION**

In order to avoid unnecessary claims for compensation Procurators Fiscal should instruct the police in their districts that normally, in any case in which it is proposed to carry out the forensic examination of property where this would entail damage to the property, such examination should not be carried out until the police have obtained the approval of the Procurator Fiscal. The only exceptions to this rule will be cases in which essential evidence might be lost by the delay involved in obtaining prior approval.

Normally approval will be granted by Procurators Fiscal for forensic examination entailing damage to property where the evidence which may be obtained thereby is essential to proof of the case and the case is not trivial. If a Procurator Fiscal is in doubt as to whether or not to grant approval he should obtain the instructions of Crown Counsel, if necessary by telephone.

### **5.40 WARRANTS OF COMMITMENT**

Difficulties have arisen from time to time when Procurators Fiscal have required Prison Governors to hand over, for use as productions, the originals of warrants of commitment. The Scottish Prison Service has taken the view that, as such warrants are their only authority to hold the prisoners, they must not let the warrants out of their hands. However, there are obvious reasons why, in the past, original warrants would have been required for use in trials.

In future, Prison Governors will not release the originals of such warrants to Procurators Fiscal but will supply copies authenticated for the purposes of Schedule 8, paragraph 1 of the Criminal Procedure (Scotland) Act 1995, and that provision should be employed to have the authenticated copy treated for evidential purposes as if it were the original warrant. In relation

to the drafting of the appropriate certificate of authentication Procurators Fiscal should consult the Precognoscer's Handbook (Annex to Chapter 4 of the Book of Regulations) and the section dealing with Proof of Documentary Productions.

#### **5.41 HANDLING OF CONTAMINATED AND HAZARDOUS PRODUCTIONS**

Concern has been expressed about the protection of persons involved in the criminal justice system when dealing with cases involving infectious conditions such as AIDS and Hepatitis B. The guidelines have been framed with larger offices in mind but should any Procurator Fiscal have difficulty in implementing any part of the guidelines in relation to his office, local arrangements may be made which, although departing from the guidelines, correspond as closely as possible thereto. Any substantial local derogation must be notified to Crown Office.

Where a Procurator Fiscal receives information which indicates that any case involves persons who are carriers of AIDS or Hepatitis B viruses or involves contaminated or hazardous productions, he shall inform the Clerk of the appropriate court in writing of that fact using the style of notice contained in Annex 1.

The guidelines, also contained in Annex 1, do not make reference to District Courts but Procurators Fiscal should nevertheless make arrangements to introduce similar measures in District Courts within their jurisdiction.

As the guidelines indicate, they will be subject to continuous review in the light of the developing state of scientific and medical understanding of the hazards involved.

#### **5.42 INSTRUCTIONS FOR ORDERING COPY COLOUR PHOTOGRAPHS**

1. The Police will provide the original book of photographs which will be used to make the copies before being lodged as a production.
2. Requests for copies should be sent to In-house Printing Department, Crown Office, using the appropriate form - the Police must not be asked for copies.
3. Requests should be submitted four weeks before they are required.
4. A copy of the order form should be kept with the case papers for reference.
5. Each book should, where possible, have the production number clearly identified.
6. In High Court cases, the number of copies to be ordered is fifteen plus one for each additional accused.
7. In High Court cases only, three copies will be retained at Crown Office for use by the Judge, Crown Counsel and Crown Junior. The original and all other copies will be

returned to the PF office.

8. In all other cases, the number of copies to be requested is the responsibility of the PF office. The original and all copies will be returned.
9. Photographs included with a report sent to Crown Office will be returned to the PF office for ordering in the normal way.
10. Supplies of forms for High Court, Sheriff Court and FAI can be obtained from In-house Printing Department.
11. Any failure to comply with the instructions should be explained on the form or in a letter attached thereto.

### **5.43 FORGERY AND COUNTERFEITING ACT 1981**

#### **DISPOSAL OF COUNTERFEIT CURRENCY**

The attention of Procurators Fiscal is drawn to the provisions of Section 24(5) of the Forgery and Counterfeiting Act 1981 which allow the court to direct that, *inter alia*, counterfeit notes which have been forfeited by the court shall be passed to the appropriate authority, namely the bank which has power to issue the genuine notes.

Such counterfeit notes are required by the appropriate authorities for, amongst other things, experimental purposes.

Accordingly Procurators Fiscal should take care that the motion for forfeiture is made in terms of Section 24(5) of the Act.

#### **PRODUCTION OF MEDICAL RECORDS**

##### **5.44 INTRODUCTION**

In general communications between medical practitioners and patients are confidential. There is, however, no privilege against disclosure where confidential information or communications of this nature are relevant evidence in criminal proceedings. The public interest in preventing, detecting and prosecuting crime has been held to outweigh any right of confidentiality: *Hunter v Mann* [1974] 2QB 767; *W v Egdell* 1989 2 WLR 689. The principle that public interest can outweigh a duty of confidentiality is recognised by the European Convention on Human Rights. While Article 8(1) provides a right to respect for private and family life, Article 8(2) permits interference with this right if it is in accordance with the law and necessary for, *inter alia*, the prevention of disorder or crime: *Z v Finland* 25 EHRR 371. Any interference must accord with the principle of proportionality.

The General Medical Council issued guidance in September 2000 on Confidentiality for the Medical Profession. The guidance provides that the disclosure of personal information without consent may be justified, *inter alia*, where disclosure may assist in the prevention or detection of serious crime. Examples of offences that constitute serious crime include crimes against the person and abuse of children.

#### **5.45 PROVISION OF MEDICAL RECORDS**

In practice the majority of requests for medical records concern solemn proceedings. In such circumstances the petition warrant authorises the production of the records. In all other cases, medical records should only be obtained for Sheriff summary proceedings where the production of medical records is necessary for the proof of the charge. Examples of cases where it is appropriate to obtain medical records for Sheriff Court proceedings include assaults of non- accidental injury (see *Precognoscer's Handbook – Corroboration and sufficiency of evidence*) or assaults where evidence of the mechanism of the injury is essential.

Medical records should not be obtained for any proceedings in the District Court. If necessary, records may be requested for stipendary cases.

#### **5.46 SOLEMN PROCEEDINGS**

In any case where a petition warrant has been granted and the Procurator Fiscal is seeking medical records the request should refer to the fact that proceedings have commenced and the Court has granted a warrant entitling the recovery of all relevant productions.

#### **5.47 SUMMARY PROCEEDINGS**

In summary proceedings when requesting medical records reference should be made to the fact that the records are necessary for the proper investigation and prosecution of the case and the nature of the charges.

If any difficulties are experienced with obtaining medical records for the purposes of summary proceedings or for any other purpose including, for example, an investigation into a complaint against a police officer, Procurators Fiscal may seek to obtain the records by making an incidental application for a warrant in terms of Section 134 of the Criminal Procedure (Scotland) Act 1995.

#### **5.48 DEATHS AND FAI'S**

The General Medical Council's guidance specifically allows disclosure of records of deceased persons to assist the Procurator Fiscal in connection with a Fatal Accident Inquiry or any inquiry into a patient's death.

**5.49 USE OF MEDICAL RECORDS AT COURT**

Procurators Fiscal should ensure that only the part of the medical records relevant to the court proceedings is available for examination. This includes material that is relevant to the defence. Care should be taken to ensure that any parts of the medical records that are not relevant to the proceedings remain confidential. This applies to medical records of both an accused and a witness.