

SUDDEN DEATHS AND FATAL ACCIDENT INQUIRIES

SCOTS LAW AND PRACTICE

SECOND EDITION

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INTRODUCTION

by
Lord Mackenzie-Stuart

No one is exempt, said Shelley, "From chance, and death and mutability." Yet it is surprising how seldom the legal practitioner, except for specialists in the law of the work-place, finds himself dealing with sudden and unexplained death. When such a situation does arise the need for prompt and correct action is obvious. Have the appropriate authorities been alerted, have the next of kin been given an adequate explanation of the procedures which must follow? Have their interests been fully protected? For this reason this is a book that should be in every practitioner's library.

Sudden Deaths and Fatal Accident Inquiries, however, is much more than a *vade mecum* for the generalist. For here is assembled in one volume the many aspects of the law relating to the civil consequences of an unusual death, and one written by a specialist for fellow specialists.

Particular mention must be made of the chapter on the law and practice relating to sudden deaths which occur in the other member states of the European Community. Tourism and, increasingly, the right to work anywhere within the Community take thousands of Scots abroad every year. It is vital that in the event of a death in mainland Europe the lawyer in Scotland should know what to expect by way of local inquiry and procedure.

There is, in addition, much in this book of wider concern. For those of us who knew only the imperfections of a fatal accident inquiry conducted before a jury, it is evident that the modern inquiry held before a sheriff alone is a vast improvement both as regards efficiency and flexibility. Is it yet the best forum to inquire into a major disaster such as Lockerbie? Mr Carmichael, drawing on documentary research and his own considerable experience has done much to advance informed debate on this question. This is a work to be welcomed and applauded and we are all grateful to Mr Carmichael for his skill in presenting it to us.

DEDICATION

Dedicated to the memory of my father-in-law, James Davidson, F.R.I.C.S., M.I.M.E., whose uncompromising respect for the truth made him an expert witness at all times, and to the memory of those whose untimely death has caused their bereaved and bewildered relatives to become acquainted with the process of the fatal accident inquiry.

PREFACE TO SECOND EDITION

THE history of the Scottish fatal accident inquiry since 1976, and more especially since 1986, has disclosed developments in the nature and scope of the fatal accident inquiry, developments which could scarcely have been envisaged by those responsible for the 1976 Act. Nonetheless, looking back, one can see that the seeds of that development and the mechanics rendering it possible are contained in the Act and the Rules following on it. One has to mention only the inquiry in 1987 into the deaths of 45 persons in the Sumburgh helicopter disaster and the inquiry into the Lockerbie air crash to appreciate that fact.

In addition there have been developments in medicine and surgery and diagnostic techniques, a new Coroners Act has been passed in England, a new Legal Aid Act has come into operation, and the Single European Market is with us. In this edition an attempt has been made to reflect and deal with all of these. The "medical" chapter has been extended; the "coroners" chapter has been largely rewritten to take cognisance of the new Act and of developments in the English judicial review process as they affect coroners; an attempt has been made to provide a comparative résumé of the practices of the investigation of sudden deaths in the other member states of the European Community; and an attempt has been made to deal with matters raised by, and implicit in, the Lockerbie inquiry, the determination of which contains the most up-to-date judicial reflections on the aims and objects of the fatal accident inquiry. It is hoped that these extensions, additions and amplifications will prove informative and helpful.

Experience of fatal accident inquiries from, as it were, the other side of the table, has been useful and, in some instances, salutary. One matter which has been highlighted and which gives cause for concern is the restriction of the scope of legal aid in the context of the fatal accident inquiry. The financial regulations regarding eligibility are due to be altered to the detriment of the ability of a very large proportion of the population to obtain access to court to participate in an inquiry. I refer to those persons of moderate means, or of no means, for whose benefit civil legal aid was introduced. The scheme was intended to enable such persons to vindicate in the civil courts any rights which they might have. The right as relatives of the deceased to appear, be represented by solicitor, counsel, or with leave of the court by any other person, and to lead evidence at a fatal accident inquiry is one which has never been sufficiently covered, being restricted in practice to appearance at the inquiry plus a copy of the transcript of the notes of evidence. The obtaining by the relatives of sanction for anything more than that basic cover, such as, for example, the employment of an expert, is extremely difficult and is not infrequently withheld, the Legal Aid Board,

apparently, being of the opinion that this should not be necessary in view of the duty laid upon the Crown to investigate thoroughly and to present all the facts fully and dispassionately. The result is to emphasise and increase the effect of the disparity of resources available to, on the one hand, individuals such as next of kin, many of whom, because of the proposed new financial limits, will be unable to afford even the limited representation currently available, and on the other hand public bodies, such as health boards, and large corporations, often backed by insurers. The future development of the fatal accident inquiry as a forum for fair and impartial investigation will, it is submitted, depend on a reduction in such disparity.

I now render my grateful thanks to the following persons and institutions for their help in preparing this edition; to Professor Antony Busuttil, of the Regius Chair of Forensic Medicine in the University of Edinburgh for revising the "medical" chapter, and for his help in obtaining material for the chapter on European Community practice; to the Ministries of Justice in Germany, Portugal, Denmark and The Netherlands, and to Professors John Harbison (Dublin), Guy de Roi (Brussels), Jørn Simonsen (Copenhagen), Bernd Brinkmann (Munster), Antonio Farneti (Milan), Michel Durigon (Paris), Robert Wennig (Luxembourg), Luis Frontela Carreras (Seville) and Lesseps L. Reys (Lisbon) for providing material for that chapter; to my daughters Ailsa and Heather for preparing the illustrative diagrams and to Heather for assistance with the typing of the manuscript; to Hugh Findlay, regional sheriff clerk at Airdrie, and to Messrs. Peter Anderson and Michael Wood, solicitors, Edinburgh, for assistance relating to the Lockerbie inquiry; to members of the Crown Office staff and the procurator fiscal service for material used in the process of updating; to Lord Mackenzie-Stuart for a thought-provoking and generous introduction; and to the staff of Greens for their assistance in preparing the material for publication.

FOREWORD

by

The Right Hon. Lord Cameron of Lochbroom, Q.C.,
Her Majesty's Advocate

THIS book deals with a somewhat arcane corner of administrative law, one which, while resting upon the old common law responsibility of the procurator fiscal to investigate sudden or suspicious deaths, has been more fully developed by statute in modern times. It is a jurisdiction the exercise of which has been beneficial in so many ways, more especially in allaying public concern about the cause of particular incidents where loss of life has occurred, whether it be at the work place, in the prison or police cell, during a fire at a whisky bond or a gas explosion in a shopping centre or in the course of organised outdoor activities. The recommendations made after such inquiries by juries and now by sheriffs have led in numerous cases to the introduction of precautions to minimise the risk of similar accidents occurring in future.

The public gaze is inevitably focused upon the inquiry itself, so that the hard and unrelenting work of preparation by the procurator fiscal service, to whom falls the responsibility for initiating and carrying through the necessary preliminary investigations, is not always fully appreciated. But without such preparation the inquiries themselves would be of little value. Public confidence in the system, demonstrated by the many calls for such inquiries in a wide variety of cases, is a tribute to the impartiality and dedication of the men and women in the procurator fiscal service who have served the system so well throughout the years.

The author is himself one who during his service in the procurator fiscal office in Glasgow has made a notable contribution in this field. The knowledge which he has gained from that experience is now made available in this book. Its value to the practitioner is obvious. But it will serve, I am certain, to shed light upon an important area of public law for the general reader also, and be of both practical and historical interest, not least in the comparison to be made between the systems which operate to the same purpose in the different jurisdictions of the United Kingdom.

I applaud the author for illuminating this corner of law and commend the book to his public.

July, 1986

CAMERON OF LOCHBROOM

PREFACE TO FIRST EDITION

THE genesis of this book was a suggestion made to me by Sheriff Marcus Stone after a fatal accident inquiry in Glasgow. The subject under investigation was an alleged medical mishap, and Sheriff Stone's remark brought home to me two facts. The first was that there was no practical manual dealing with this, the most important of the civil functions of the procurator fiscal. The second was that there had been over the years a great development in medical, surgical and diagnostic skills and technology, running parallel with an increasing number of fatal accident inquiries involving investigation of and inquiry into *inter alia* these skills and that technology. There was, therefore, a need for an attempt to bridge a potentially if not actually increasing gap between, on the one hand, the legal discipline and, on the other hand, the ever-developing medical and scientific disciplines. An increase in the mutual understanding by lawyers of the medical and scientific attitudes and problems, and by doctors, scientists and others of the legal ethos and outlook is essential, not only as regards the criminal law, but the civil law also. It is the object of this book to initiate the bridging of that gap as well as to provide a manual which will assist lawyers and medical, scientific and other persons who may be involved in preparation for and participation in fatal accident inquiries in whatever capacity.

It became apparent as the idea developed that the fatal accident inquiry had to be placed in its proper setting as a facet of the duty of the procurator fiscal to investigate sudden, *i.e.* unexpected, deaths. It also became obvious that in a United Kingdom context that function had to be considered in relation to the parallel and similar function exercised in England by the coroner. It is hoped that Scottish readers will be assisted in an understanding of the up-to-date functions and duties of that ancient and honourable office, that English readers will benefit from being introduced to the functions of the procurator fiscal, that lawyers will appreciate the similarities and differences of the Scottish and English traditions and development, and that Scottish trained medical personnel will find it helpful to be introduced, however briefly and summarily, to the English system, especially in the event of their one day being required to assist in its operation because of a move to an appointment south of the border.

It is a matter of regret that the new Legal Aid (Scotland) Bill received the Royal Assent too late for its provisions to be incorporated in this book. A reading of the Bill, and some conversations with interested parties, have led me to the conclusion that for at least the immediate future, if not, indeed, the foreseeable future, the general principles set forth in Chapter 5 will hold good. The new Act is an enabling statute and much flesh remains to be put on its skeleton by way of statutory

instrument by the Secretary of State. It will, therefore, not be possible to update matters until the regulations are published. Under the Act the Secretary of State has powers (see cl. 6(1) of the Bill) to enable "assistance by way of representation" to be provided to a person by the taking on his behalf of any step in instituting, conducting or defending proceedings in connection with a statutory inquiry as defined by s.19(1) of the Tribunals and Inquiries Act 1971. It remains to be seen when and to what extent that power will be exercised and what effect that will have on legal aid for inquiries under the 1976 Act.

I should like now to acknowledge my grateful thanks, firstly, to Sheriff Stone for providing the initial impetus toward the writing of this book, and for continuous encouragement; to the sheriffs principal and members of the shrieval bench who have supplied ideas and material; to Professor Alan Watson of the Regius Chair of Forensic Medicine at Glasgow University for revising the chapter on "Matters Medical"; to the many physicians, surgeons and other specialists who have, albeit perhaps unknowingly, assisted me by opening my mind to their skills, knowledge and problems; to Mr Ian Morton, H.M. Coroner at Carlisle for demonstrating to me the practical aspects of the coroner's functions, and for indicating where source material might be found; to my daughter Ailsa for providing the illustrative diagrams; to the Crown Agent and members of the Crown Office staff for advice and material; to my former colleague Mr J.M. Tudhope, Regional Procurator Fiscal of Glasgow and Strathkelvin for his support and generous assistance; to the Lord Advocate, the Rt. Hon. Lord Cameron of Lochbroom, for a stimulating, thoughtful and generous foreword; and finally to the publishing staff of Messrs. W. Green & Son Ltd., and especially to their Legal Editor, Mr Peter Nicholson, for much kindness, advice and hard practical help in the preparation and presentation of the text and index.

July, 1986

IAN H.B. CARMICHAEL

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