# Scots law and the Tay Bridge disaster of 1879

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***S.L.T. 271** *The pathos of the great disaster in 1879, a matter of international interest and engineering concern, still attracts interest but the legal aspects have been wholly overlooked.*

The modern mind probably contemplates immediately on hearing of a disaster or similar event that there may be a prosecution, or that there probably will be an inquiry of some sort, or civil litigation. The idea that a major catastrophe can occur in Scotland without consequential recourse to Scots law in a public forum seems remarkable but that is what happened in 1879. To see how that point can be made it is necessary that the surrounding law as it was at the time is considered: see e.g. Handford, "Lord Campbell and the Fatal Accidents Act" (2013) 129 L.Q.R. 420.

On the evening of Sunday 28 December 1879 the Tay Bridge collapsed during a storm, and a train and carriages with crew and passengers then on the bridge and approaching Dundee station fell into the River Tay. The actual number of deaths remains uncertain, although it may have been about 72. The collapse of a bridge near Dundee on a Sunday evening was dealt with by the Board of Trade by immediately appointing a statutory Court of Inquiry, with a commissioner and others from London travelling to sit initially on Saturday 3 January 1880.

## Scots law

There remains an unsettled debate on the quality of the workmanship of the crucial parts of the bridge, and certain purported failures of design. The legal aspects of the disaster have hitherto not been considered. There are, it would seem, at least four principal headings under which the legal aspects of the collapse might be considered, but there may be others.

### 1. Public inquiries

The causes of the deaths required to be investigated by the procurator fiscal as part of his ordinary duties, there being no coroner in Scotland. The established practice was to investigate deaths and accidents resulting in deaths with a view to detecting or excluding criminality. The duties of the procurator fiscal had been contained in instructions sent out periodically from the Crown Office in Edinburgh. The duty placed on the procurator fiscal to investigate sudden deaths was revised and then issued in a book of regulations, the new version of which had been issued by the Crown Office in Edinburgh to all procurators fiscal in 1868 (a copy is at National Archives of Scotland, A.D. 5/11).

 

There was a distinction in practice between a known death from an accident and a sudden death, as contrasted with the discovery of a dead body. In the latter category, where the discovery of a dead body came to the knowledge of the procurator fiscal it was the duty then to obtain from a qualified medical practitioner a written report relative to the cause of death. The procurator fiscal was then to make such further inquiry, or, if deemed advisable by the procurator fiscal, to take such precognition, in regard to the facts connected with the discovery of the body and the death of the individual: Book of Regs 1868, Pt I, title II, reg.5.

The law then envisaged a *private inquiry* by a *public official* albeit with interviews with nearest relatives and thereafter a report would be sent to the Crown Office in Edinburgh. H. Brown, "The Procedure in Accident Inquiries and Investigations" (Edinburgh, 1897) p.15 describes the practice at a later period although it was probably then well entrenched and followed long practice. The police might have provided witness statements, or at least some sort of briefing, but it was the business of the procurator fiscal to provide precognitions.

There was then in Scotland in regard to sudden, suspicious and unexplained deaths no authority in common law for a public hearing in open court. The recent exception was the need for public inquiry in a public forum when a prisoner died in legal custody: s.53 of the Prison (Scotland) Act 1877 (c.53). The Court of Inquiry that sat so soon after the collapse of the Tay Bridge had been authorised by the Board of Trade under s.7 of the Regulation of Railways Act 1871 (c.78). The remit in law of such a tribunal was to consider the causes of and circumstances attending the incident. That broader approach was doubtless supported by a Treasury budget from the Imperial government and exceeded the scope of any inquiry that procurator fiscal might reasonably conduct.

The procurator fiscal thus required only to consider the medical causes of death for registration. Crown counsel did not appear at the Court of Inquiry but the procurator fiscal was ***S.L.T. 272*** represented. The responsible official in 1879 was the procurator fiscal for Forfarshire, which included the city of Dundee. The office holder was J Boyd Baxter, assisted by Wm Dunbar. The latter attended to "watch the case" for the Lord Advocate but he did not ask any questions: Court of Inquiry [C-2616] HMSO 1880, appendix minutes of evidence, first day.

## 2. Causes of death

The court of inquiry noted the deaths but the number of people who died was considered merely as a factor in calculating the weight of the train and carriages and thus the pressure on the bridge at the time of the collapse: minutes of evidence Q and A 12,803. Beyond that the attention of the inquiry was directed by the commissioners to the technical aspects of the engineering failures that led to the collapse.

The Registration of Births, Deaths and Marriages (Scotland) Act 1854 (c.80) placed a duty, by s.40, on the procurator fiscal in every case in which a precognition "touching the death of any person" was taken. The relevant registrar was to be informed of the particulars of the deceased person and the registrar had to make the entry, without requiring the procurator fiscal to sign the register, and also state that the procurator fiscal was the informant. By s.76 of the 1854 Act the term "procurator fiscal" referred to the procurator fiscal of the county or division of a county of which the person was procurator fiscal.

The Tay Bridge collapse during a great storm would in the first instance have suggested to the procurator fiscal and the police that the deaths resulted from an accident, or an occurrence then known generally as "an act of God": Brown, above, (1897) at pp.2, 21 and 109. On that footing it was the duty of the procurator fiscal "to make inquiry, or if deemed advisable by him, to take a precognition, relative to the facts connected with the accident and the death of the individual": Book of Regs 1868, Pt I, title II, reg.2. The "and" in the duty was probably regarded as disjunctive, so that two points arose, distinct but dependent on each other: an accident had to be investigated *et seperatim* the death required to be looked at.

In regard to the deaths, the national statutory inquiry left the procurator fiscal with only the deaths to consider, but to what extent? The next relevant rule was then: "Wherever, in the opinion of the Procurator Fiscal, a written medical report is necessary for the due consideration of any of the cases aforesaid, he shall obtain such a report from a qualified medical practitioner": Book of Regs 1868, Pt I, title II, reg.4. The nature and extent of the discretion left to the procurator fiscal can be understood more fully in the context of two further instructions.

 

First: "Where in any case the medical practitioner employed can, without opening the body, satisfy himself, and certify in usual form that the deceased died from natural or from ascertained causes, his written report to that effect will be taken as sufficient compliance with the foregoing Rules": Book of Regs 1868, Pt I, title II, reg.7. Secondly; "There may be cases of sudden death, or of violent death, by suicide or shipwreck, or the like, in regard to which no formal precognition is necessary; and there may be cases in which, although at first doubtful, it may be discovered, before incurring much expense, that it is unnecessary to pursue the investigation further": Book of Regs 1868, Pt I, title II, reg.9.

If there were ever files of the correspondence between the procurator fiscal at Dundee and the Crown Office concerning the collapse of the bridge in 1879 they are not available now: none is listed in the National Archives of Scotland. The reality is probably that the procurator fiscal followed closely the Book of Regulations in regard to the deaths and left everything else to the Board of Inquiry. In any event, the procurator fiscal with or without police assistance never made an investigation for the purpose of ascertaining "a scientifically accurate cause of death"; as soon as they were satisfied that there was no criminal aspect no further proceedings were taken on their part: Brown, 1914 S.L.T. (News) 66.

In the present context, each person identified as having died in the disaster had their death certified as "accidentally drowned from fall of railway train and portion of the Tay Bridge into the River Tay" and the person registering the death was William Dunbar, from the procurator fiscal's office: Nicoll, Nicoll and Buttars "Victims of the Tay Rail Bridge Disaster" (Dundee, Tay Valley Family History Society, 2005) p.76. The precise description of the cause of death given by the informant seems on balance to be directed more at the event itself rather than what might be said to be a precise medical cause of death for each individual.

In short, the cause of death as registered for each individual although informed by medical advice was probably not dependent on a full ***S.L.T. 273*** post mortem examination but it was rather based on external examination in the knowledge of the surrounding circumstances. All the known deaths were registered on the same date with the same cause of death: Nicoll, *et. al.,* above, p.76. It would seem highly unlikely that nobody died of crushing or other dislocating types of injuries given their presence at the fall from a height of a vast tonnage of metal into water. Similarly, the view that the missing passengers whose bodies were never recovered are "presumably buried in the silt" is at best optimistic: Lewis, "The Beautiful Bridge of the SilveryTay" (Stroud 2005) p.75.

### 3. Civil litigation

There was *no* civil litigation following the disaster. Sir Thomas Thornton, a partner in the firm of Patullo and Thornton and solicitor since 1851, was "Promoter and Solicitor of the Tay Bridge Railway": "Who Was Who? Vol.1 1887-1915" (London, 6th edn, 1988) p.520. It was said in one obituary that Thornton "effected such compromise on a gigantic scale on behalf of the railway company in the Tay Bridge disaster, where some eighty lives were lost, and yet no claim arising from the accident found its way to Court. The total compensation paid was probably less than the expenses of a few litigations would have reached" (1895-1896) 3 S.L.T. 89.

The causes of death for those on the train were of interest to the solicitor for the company because of the law then. Patullo and Thornton, solicitors, instructed Dr David Greig of Dundee to inquire about the state of the bodies recovered (Dundee City Archives GD/TD/1/23). His report comprised of what he saw of the bodies and what he was told about others by the mortuary staff. In his 30 visits he saw 16 bodies and he was of the view that death for all had been caused by drowning. Some of the remains showed signs of superficial injuries and a few had broken limbs: there was a recurring reference to "no wounds" as the bodies were specified by Dr Greig.

One of the few legal publications in Scotland in 1880 carried a timely note on accident insurance. Reference was made to the various definitions of what constituted an "accident" for the purposes of insurance: Anon, "Accident Insurance" (1880) 24 Jo. of Juris. 645. Several definitions were available from legal cases and an example was given: Anon, above, p.647 "Suppose some malicious person were to place an obstruction on a railway line by which the train was thrown off track and a passenger was injured, no doubt there was design and the result foreseen and foreknown; but what man in his senses would say that this was not an accident to the train and to the passenger?"

The word "accident" is not susceptible to any precise definition: "MacGillivray on Insurance Law" (London, 2003, 10th edn) p.729. Several elements of the definition have been identified and one is the contrast with an event that happens naturally: *Sinclair v Maritime Passengers' Assurance Co,* 121 E.R. 521; (1861) 3 El. & El. 478. The deceased in that case was at sea

 

and there was discussion of an "accident" in that context. Oddly, the cause of death by drowning had itself featured in English litigation, possibly because of the difficulty of proof of the events immediately prior to the terminal event: there was authority that death by drowning was a death by "accident" within the meaning of a particular insurance policy: *Trew and Hiorns v The Railway Passengers' Assurance Co,* 157 E.R. 1161; (1860) 5 Hurl. & N. 211, overruled later on appeal: *Trew and Hiorns v The Railway Passengers' Assurance Co,* 158 E.R. 346; (1861) 6 Hurl. & N. 839. The relevant point in that litigation was that no claim was to be made, or if made accepted, in respect of any death from injury unless that injury was caused by accident or violence and the injury was caused by "some outward and visible means, of which satisfactory proof was provided for the company". The court held that the "external and visible means" referred to the cause or agency, not the effects on the body.

Death caused by drowning will usually be held to be accidental, or a death caused by violent accidental and visible means. That is so even if the accident is caused by some disease such as an epileptic fit: *Winspear v Accident Insurance Co Ltd* (1880) 6 Q.B.D. 42. However, in one case prior to the collapse of the Tay Bridge, the facts showed that the deceased died "from some unexplained cause, became suddenly insensible and fell into the water and was drowned". The insurance company was held liable under the policy as the fact of the deceased falling in the water from sudden insensibility was an accident: *Reynolds v Accidental Insurance Company* 22 L.T. (N.S) 820, cited in *Winspear.*

If nothing is known except that the body of the assured has been washed up, there is a presumption of accident: "MacGillivray on Insurance Law", above, p.740. If the insurers wish to suggest that there was some intervening factor than the burden is on them to show how the assured died. It ought to be recalled that in the ***S.L.T. 274*** immediate aftermath of the disaster, and to some extent even today, the precise cause of the collapse was unknown. The question of an intervening factor that broke the chain of causation seems to have been excluded (such as an explosive device) but while the true cause was an engineering failure the nature remains unclear.

Sir Thomas Thornton is likely to have known of a minor claim against the railway company, less than two years before the collapse: a 60 year old lady fell when alighting from the railway carriage at Abernethy, the train in length extending beyond the platform. She suffered minor facial injuries and a sprained ankle. The court observed: "Railway companies, having almost a monopoly of transit, are held very strictly to obligations for public safety. Their obligation is not for mere transit, but for safe access and egress from their stations and carriages…" *Niven v The North British Railway Co* (1877) 21 Jo. of Juris. 580, p.581.

### 4. Criminal prosecution

Who was there to prosecute? The train driver had died but had he lived the Crown *might* have considered a charge of involuntary culpable homicide depending on the circumstances discovered after investigation: Macdonald, "Criminal Law" (1877, 2nd edn) pp.136 and 139. Those individuals in charge of the construction and maintenance of the bridge *might* have been answerable for culpable conduct causing loss of life where their actions were negligent: Macdonald, above, pp.136-138. The difficulty with any suggestion of corporate liability, in a broad sense that includes company officers, was the existence of a safety certificate issued after close physical inspections and testing not many months before the collapse. The representatives of the Crown in Scotland may have had a few anxious moments immediately on hearing of the disaster. The swift news thereafter of a court of inquiry with commissioners who were, principally, engineers inquiring into the state of the professional standards and practices would have removed at a stroke any requirement to consider a prosecution given the law as it was then.

### Concluding remarks

The disaster of 1879 reveals something of the government of Scotland in the mid-Victorian era. The procurator fiscal, with minimal police or medical assistance, could not deal with such a monumental event. The political axis was London and Dundee immediately, but thereafter the focus was London: the limited administration in Edinburgh had little to contribute. There seems to have been no subsequent demand for a reconsideration of the existing practices for the investigation of deaths until around 1895. The report and minutes of evidence for the Court of Inquiry were published towards the end of 1880 but these were essentially complex studies in engineering. The constant theme of the Victorian era was that of progress. The Court of Inquiry was concluded within six months of the disaster, there was no other public hearing, no criminal prosecution and claims by dependents on the railway company were settled privately thus enabling a start to be made on building a new Tay Bridge.

 

 