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Number 9 December 2018

Albion Chambers INQUEST TEAM NEWSLETTER

An adversarial process?

For a long time it appeared to be a settled understanding by practitioners that two of the possible short form conclusions at an inquest required to be proved to the criminal standard. Those being 'suicide' and 'unlawful killing'. It transpires that the former does not require such conviction on the part of the decision maker. What of the latter?

R (on the application of Thomas Maughan) v Her Majesty's Senior Coroner for Oxfordshire v Kelly Shakespeare, Secretary of State for Justice, Care UK, South Staffordshire and Shropshire NHS Foundation Trust [2018] EWHC 1955 Admin.

This was an Article 2 Inquest engaged as the deceased was incarcerated in prison at the time and suffered from mental health problems.

In essence, the coroner decided that there was insufficient evidence to leave to the jury a short form conclusion of 'suicide' and that conclusion was withdrawn from their deliberations. However, the Coroner invited a short narrative conclusion which, if the jury found all elements proved, would in effect amount to suicide.

The Coroner directed the jury that:

"the Standard of Proof you should apply when considering these questions is the balance of probabilities".

The jury duly returned and stated that they found that the deceased deliberately tied a ligature around his neck and suspended himself from the bedframe and, that on the balance of probabilities, it is more likely the deceased intended to fatally hang himself.

On Appeal, it was argued that in order to determine the deceased had committed suicide, the decision maker had to be convinced to the criminal standard.

For the Coroner it was submitted that the decision of the jury was an expression of the (wider (Article 2)) events short of a formal 'conclusion'.

The High Court, unsurprisingly, saw a flaw in the Coroner's argument in that it would be sophistry to have a decision whereby there is a conclusion that a person decided to end his own life for the purposes of deciding whether the death at his own hand was preventable at the same time as a decision that the deceased did not intend to end his life.

The Court scrutinised the Guidance from the Chief Coroner and the Coroner's Bench Book on the point, both of which (it appears to this writer) expected the decision to be made to the criminal standard of proof and gave examples of narrative decisions to explain when an element or two were not present.

The High Court decided that the way the guidance was written did not give statutory effect to the presumption of a criminal standard of proof. Secondly, an analysis of the caselaw did not support the contention that suicide required a higher standard of proof than the normal civil standard.

The ramifications of this decision could be far reaching, not just for suicide cases and for those arms of the state which are caught up in Article 2 cases such as police, prisons and those providing medical and mental health care. There are likely to be some carefully constructed arguments around how the rationale of this decision affects inquest conclusions on 'unlawful killing'. It is possibly a fertile ground for argument.

David Sapiecha

Funding for inquests arising from a custodial setting

Over the past few years there has been an ever-increasing rumble of discontent regarding funding structures for inquests. These issues become particularly acute where the coroner, for example, has the resources to defend their decisions from challenge, or a NHS trust seems from the family's perspective to 'lawyer up' against them whilst they, due to lack of finance, have to navigate tricky issues surrounding Art 2, Middleton, Jameson etc., all on their own. There is a disparity of arms, an imbalance that doesn't sit comfortably.

Looking at Inquest funding generally, the current government has indicated that it is about to begin an evidence-based review in relation to inquests, however, the purpose of this article is to sign-post recent changes about funding for custody-related inquests.

The issue

From personal experience (working through a funding claim for elderly-care provision for a relative of mine) I recognise the feeling (whether accurate or not) that the system is closing ranks, that the lawyers engaged on behalf of the various bodies concerned were seeking to deflect, and to hide behind impenetrable regulations of dubious quality in their drafting.

But were the feelings just because, notwithstanding my legal training, I was out of my comfort zone, that the unfamiliar made me nervous and cautious and, as a result, I perceived otherwise reasonable correspondence as somehow 'suspect'?

Whatever the cause, if that is how I felt in relatively low stakes quasi-litigation, what is it like for a family of the deceased, grieving, looking for answers, when they begin to receive and read legal letters from a firm representing a public body? What is it like for them to be met in court with a gaggle of lawyers describing one another as 'learned friend'?

Now, imagine if the death occurred behind closed doors, where the deceased was imprisoned or in custody, how would I feel then about the litigation with that extra layer of opacity?

When the coroner asks, do you have any questions? Well yes, but what should I ask, am I asking the right questions, what if someone disagrees and tells me off? How are families meant to navigate this complicated, unwieldy, somewhat archaic process?

Funding

As practitioners will be aware, legal-aid funding for inquests has been a vexed issue for many years. As a starting proposition, it is incredibly difficult to secure legal aid funding for families in an inquest. However, a number of campaign groups have been diligently and passionately chipping away at the walls around the vault.

Most recently changes were made to funding provision for families of a deceased who died while in custody. Funding is granted under the 'Exceptional Funding Guidance' of the Lord Chancellor, from 15 June 2018, where the deceased has died in custody. Taken from the missive published by the MoJ it stated:

*"The guidance now makes it clear that legal aid is **likely** to be awarded for representation of the bereaved at an inquest following the **non-natural death or suicide** of a person detained by police, in prison or in a mental health unit."*
[emphasis added]

The new guidance shifts the emphasis; whereas before it was for the family to establish that funding was necessary (by meeting a number of very high hurdles), now there is an assumption that funding will be granted in such circumstances (see para 12 of the guidance).

This is welcome news 'if', and it is a big 'if', the guidance is implemented in such a way as to meet the changes.

Only time will tell.

The latest guidance covering all legal aid funding for inquests can be found **here**: (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715441/legal-aid-chancellor-inquests.pdf).

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