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Albion Chambers INQUEST TEAM NEWSLETTER

An adversarial process?

There are potential implications for inquests involving public bodies arising out of the reports by Dame Elish Angiolini about deaths and serious incidents in police custody: 30 October 2017, and the review by Bishop James Jones of the Hillsborough families' experiences: 1 November 2017. Both reports drew on the experiences of bereaved families in formulating recommendations. Common themes were that navigating the process of the inquest was a bewildering and upsetting experience for families, and there was a desire for lessons to be learned.

An inquest is intended to be an inquisitorial process and cannot apportion guilt or blame. Dame Elish observes that, "… the reality is that inquests into deaths in police custody are almost always adversarial in character. There is nothing inherently wrong with an adversarial approach as it may be the best way to robustly test evidence in court. However, it needs to be recognised as such". On the description of inquests as inquisitorial, Bishop James Jones states that, "in a contested case such as Hillsborough, as in other inquests in which the failings of an individual or organisation may have led to or contributed to a death, the evidence I have seen while producing this report reveals it to be a fiction".

Both reports point to the supposed inquisitorial nature of the inquest as the justification for the lack of any automatic right to funding for legal representation for the family of the deceased. Dame Elish states that, "the most significant and visible example of the imbalance that can exist in the coronial process is that of the inequality of arms that accompanies many inquests", and also observes that, "the expectation that the Coroner can meet the family's interests during the inquest is wholly naïve and unrealistic, as well as unfair to families and to the Coroner". Both call for publicly-funded legal representation for bereaved families at which public bodies are legally represented. It is evident from the Hillsborough report that legal representation at the second inquests, and changes to disclosure procedures, changed both the experiences of the families involved, and the outcome.

It may be worth seeking explanations about why an adversarial atmosphere is the reality in such cases. One theory is the attitude of the public bodies involved towards the inquest process. Both reports identify a need for a cultural shift to the way in which public bodies approach inquests, and make proposals for a "duty of candour" upon public officials to be imposed. However, Dame Elish acknowledges that when one or several organisations find themselves under scrutiny, an adversarial approach is all but inevitable, given that prosecution or a finding of neglect or unlawful conduct may have very serious consequences for those held to have conducted themselves in those ways. She also gives a caveat to the duty of candour in relation to those under investigation who have a right of silence. These observations recognise that the inquest process does not operate in a vacuum away from other proceedings and interests. Where the scope of an inquest will examine wider circumstances surrounding the death, it is difficult to imagine certain individuals or public bodies naturally desisting from taking a defensive stance unless they were not at risk of, and had not already given evidence in, criminal, civil, or disciplinary proceedings.

Dame Elish also draws attention to the limited resources and investigatory powers of Coroners, and remarks that the Coroner's investigative role is largely reactive to the adequacy and outcome of the investigations of others. She states that, "the extent of the dependency of the Coroner on the efficacy of the other main participants is not acceptable and tests the viability of the Coroner's role as an inquisitorial judge".

Both reports call for the Chief Coroner to consider issuing guidance on what constitutes disclosure of relevant information. Bishop James Jones includes within his report a comment by a family member about the Coroner "picking the evidence", and he also supports a change in the Coroners Rules to widen the duty of disclosure to all documents "potentially relevant to the inquest".

Putting these issues together, it is hardly surprising that there is both an adversarial atmosphere and an inequality of arms for families, where, in practical terms, the evidence is primarily gathered by either public bodies whose conduct may be called into question, or an independent investigative body separate to the Coroner. This evidence is then further sifted by the Coroner. This may be why families can feel that they are in the dark as to what information is potentially available, and there may also be a lack of clarity within those public bodies involved as to what material to give to the Coroner. This may be an argument for disclosure lists, so that interested parties do not have the perception that other interested parties, nor the Coroner, are cherry picking the evidence.

Bishop James Jones proposes changes to inquest procedures and to the training of coroners, so that bereaved families are truly placed at the centre of the process. Dame Elish makes a recommendation for a National Coroner Service to address inconsistencies and shortcomings in local authority administered structure. This echoes previous reports, and the Chief Coroner has previously voiced support for a national service.

Prevention of Future Deaths

Bishop James Jones draws attention to the under-utilisation of PFD reports, and

Dame Elish proposes an "Office for Article 2 compliance" so that fragmented learning can be brought together from various reviews, papers and inquests. I would further suggest that related criminal, civil and misconduct hearings could also be examined, because differing evidence and emphasis may be useful in explaining why some inquest verdicts appear inconsistent with findings in other forums. It is a consistent complaint of families that lessons are not being learned, and it is plain that creation and publication of PFD reports is not enough. Even the process of analysing the PFD reports could have utility if findings were then disseminated to bodies that could use the information to change their procedures, regardless of whether or not that body had been involved in an individual inquest. For example, The Guardian recently sought to capture deaths of mental-health patients by analysing almost 2000 Coroners' PFD reports published online.

Conclusion

There is a recognition in these two reports that inquests involving public bodies are adversarial in nature. It may well be that given the current structure of the Coronial system and the way it is resourced, that this is better to be accepted and embraced to ensure that the correct facts emerge during the inquest process. Although one of the comments quoted by Bishop James Jones relates to the intensity and ferocity of questioning during the inquest, this is not something that should routinely occur with experienced advocates. He cites some disadvantages of an adversarial process: it takes longer, it is harder for the inquest to deliver on its purpose, and it increases the stress experienced by bereaved families.

Whatever process is adopted, the ability for parties to participate effectively is crucial to public confidence that the State has fulfilled its domestic and ECHR obligations. Even if a better analysis is made of PFD reports and inquest findings, without the correct evidence, and therefore the correct conclusions, there will be a diminished prospect of preventing future deaths.

Kirsty Real

"The Perpetrator Issue"

Scope shouldn't be this difficult
R (Hambleton) v Coroner for Birmingham Inquests (1974)

Cited Cases

- *R (on the application of Julie Hambleton and others) v Coroner for the Birmingham Inquests (1974)* [2018] EWHC 56 (Admin)
- *R (on the application of Palmer and another) v HM Coroner for the County of Worcestershire* [2011] EWHC 1453 (Admin)
- *R v HM Coroner for Inner West London, ex parte Dallaglio* [1994] 4 All ER 139
- *R v South London Coroner, ex parte Thompson (1982)* 126 SJ 625
- *Armani Da Silva v United Kingdom (App. No. 5878/08)* [2016] All ER (D) 26 (Apr)
- *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653
- *Jordan v United Kingdom (use of lethal force by RUC officer)* (2003) 37 E.H.R.R 2
- *Oneryildiz v Turkey* [2005] 41 EHRR 20

This article considers the recent case of *R (on the application of Julie Hambleton and others) v Coroner for the Birmingham Inquests* (1974) [2018] EWHC 56 (Admin).

Background

This case concerns the long-running inquests into the 1974 Birmingham bombings. The inquests were opened in late 1974, but were adjourned in 1975, pursuant to s.20 of the Coroners (Amendment) Act 1926, pending the outcome of criminal proceedings. These proceedings concluded in 1991 when the supposed perpetrators, the 'Birmingham Six', were released after a successful appeal and 17 years behind bars.

In June 2016, The Senior Coroner ruled that the inquest should be resumed, and Sir Peter Thornton QC was appointed to conduct the inquest.

Resuming an Inquest

As a brief recap of the law, when a death appears to stem from a criminal act, a coroner will normally adjourn the inquest until criminal proceedings are concluded. S.16(3) of the Coroners Act 1988 then permits the coroner to resume the inquest if there is "sufficient cause" to do so.

After the conclusion of criminal proceedings, the coroner must decide *"whether there is any matter outstanding that an inquest would or might be able to address"; R (on the application of Palmer and another) v HM Coroner for the County of Worcestershire* [2011] EWHC 1453 (Admin) at 98.

If there are any outstanding matters which "might" be within the coroner's scope, or if the Article 2 obligations under the European Convention of Human Rights (ECHR) have not been sufficiently discharged by the State's previous investigations, then the coroner must resume the inquest.

Scope

To address these matters it is necessary to review the existing law as to scope.

As all practitioners will know, in relation to an article 2 inquest, post the implementation of the Coroners and Justice Act 2009, section 5(2) of the Act determines that the 'how' question is to be interpreted as *"by what means and in what circumstances".*

So far so good.

Further, in *R v HM Coroner for Inner West London, ex parte Dallaglio* [1994] 4 All ER 139 at 164j, Sir Thomas Bingham MR said in relation to Jamieson on the subject of scope:

"The court did not, however, rule that the investigation into the means by which the deceased came by his death should be limited to the last link in the chain of causation… It is for the coroner conducting an inquest to decide, on the facts of the given case, at what point the chain of causation becomes too remote to form a proper part of his investigation."

The determination of the scope of an inquest, whether pertaining to Article 2 or not, therefore involves judgement on the part of a coroner. Crucially, it does not involve the exercise of discretion (see paragraph 25 R *(Hambleton)*).

The current case

An application for judicial review was brought in the case of *R (on the application*

of Julie Hambleton and others) v Coroner for the Birmingham Inquests (1974) [2018] EWHC 56 (Admin), before Lord Justice Simon and the Hon. Mrs Justice Carr.

The grounds for the JR criticised the coroner's decisions in determining scope. In summary, the coroner made the following findings/directions:

- Whether the West Midlands Police (WMP) or other state agency had prior knowledge that a bomb attack would occur was inside the scope of the inquest;
- Whether WMP or other state agency were engaged in concealing the actions of agents or informants required further information, and therefore no ruling could be made in relation to scope;
- The response of the emergency services was outside the scope of the inquest; and
- The identities of those who planned, planted, procured and authorised the bombing was outside the scope of the inquests.

However, the Coroner emphasised that the question of scope could be kept under review.

Grounds for Judicial Review

The claimants sought the following in response to the coroner's findings:

- An order quashing the coroner's decision not to include the perpetrator issue in the scope of the inquest under s.31(1)(a) of the Senior Courts Act 1981;
- A mandatory order under s.31(1)(a) of that Act, requiring the coroner to include the perpetrator issue within the scope;
- A declaration under s.31(1)(b) of that Act, that the coroner's decision (not to include the investigation of the identities of the perpetrators) was contrary to Article 2 and s.6(1) of the Human Rights Act 1998.

JR Decision

The court quashed the coroner's decision which excluded the perpetrator issue, and remitted the case back to the coroner to enable him to reconsider.

The court did not make an order in relation to the second ground as it was contingent on the first, and no declaration was made in relation to the third ground. The Justices noted that the coroner's decision to keep the scope of the inquest under review was a prudent one.

The Perpetrator Issue and Scope – Analysis

In relation to the first ground, the court said that the coroner had not posed the correct question on the scope of the inquests. The question he posed was whether the factual issue of the identity of the bombers was sufficiently closely connected to the deaths to form part of the circumstances of the death.

Unfortunately, if the writer may be so bold, the court dodged the difficult task of defining what question should have been posed. A wasted opportunity?

Nevertheless, instead, the court noted that the short reasons given by the coroner in relation to s.10(2) (the prohibition about appearing to determine any question of criminal or civil liability), and para 8(5) sch.1 (prohibition against any finding being inconsistent with the outcome of any proceedings), did not, in any event, answer the coroner's own question as posed.

Although no explanation was given, and therefore we are left to surmise, this must arguably be because the provisions quoted are not concerned with the remoteness of the identity of the perpetrator to the circumstances of the death, more to the general procedural constraints imposed upon inquests.

A dearth of 'perpetrator' case law

Case law on the issue of perpetrators in inquests does not necessarily address the issue of remoteness or causation as found in Dallaglio and Middleton, preferring, as it would seem, to look at the respective functions of an inquest and the criminal or civil justice systems.

In relation to investigating potential perpetrators as part of the scope of an inquest, in *R v South London Coroner, ex parte Thompson* (1982) 126 SJ 625: Lord Lane CJ said:

"Once again it should not be forgotten that an inquest is a fact-finding exercise and not a method of apportioning guilt […] The function of an inquest is to seek out and record as many of the facts concerning the death as [the] public interest requires."

Sir Thomas Bingham MR, provided further guidance in Jamieson at 24:

"It is not the function of a coroner or his jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame. This principle is expressed in rule 42 of the Rules of 1984. The rule does, however, treat criminal and civil liability differently: whereas a verdict must not be framed so as to appear to determine any question of criminal liability on the part of a named person, thereby legitimating a verdict of unlawful killing provided no one is named, the prohibition on returning a verdict so as to appear to determine any question of civil liability is unqualified, applying whether anyone is named or not."

These authorities demonstrate most crucially, in relation to potential criminal liability, that a possible perpetrator must not be named on the record of inquest. However, there does not seem to be a direct prohibition on this forming a part of the investigative process of an inquest, provided, one would imagine, it can be shown that there is a sufficient link to the "circumstances" of the death. The JR of *R (Hambleton)* gave the following guidance in relation to the perpetrator Issue at paragraph 35:

- S.10(2), and the fact that primary responsibility for detecting and prosecuting individuals vests with the police, are not reasons for excluding the identification of perpetrators from the scope of inquests;
- It would be inconsistent with the principle of finality in legal proceedings if those acquitted of homicide offences, should then be subjected to a full inquiry into their guilt;
- Although inquests should not become proxy trials, there may be inquests in which the identity of those involved in violent deaths may properly be within the scope of the inquest;
- Considerations regarding the difficulties of witnesses accurately recollecting events after a long passage of time, and the unreliability of hearsay from written sources, may go to the reasonableness and proportionality of an inquest;
- The fact that 43 years have passed, and several police investigations have proven unfruitful is relevant, is not an overwhelming factor for deciding whether identifying perpetrators should be within the scope;
- Limitations on financial resources should not inhibit any inquiry if the identity of perpetrators is properly found to be within the scope;
- Proportionality is a material consideration;
- S.10(2) applies to the conclusion not the investigation. A jury can plainly explore facts bearing on criminal and civil liability.

The guidance again indicates that there is no prohibition on inquests attempting to identify perpetrators, and that an inquest jury is not prevented from exploring issues which relate to criminal or civil liability. However, as bemoaned above, how the coroner should apply the legal tests in relation to scope, and balance them with the above matters, is not addressed in the judgment.

It should also be noted that no form of hierarchy is attached to the factors listed by the court; there is no weighing of importance. It seems that the limiting factors will be entirely case specific, and

it will be for the coroner in the exercise of their judgement to determine whether the identification of a perpetrator is properly within the inquest's scope.

Perpetrators and Article 2

The third ground of judicial review related to the State's investigative duty under Article 2. A useful summary of how a compliant investigation should be conducted is found in *Armani Da Silva v United Kingdom (App. No. 5878/08)* [2016] All ER (D) 26 (Apr) at 240:

"those responsible for carrying out the investigation must be independent from those implicated in the events; the investigation must be "adequate"; its conclusions must be based on thorough, objective and impartial analysis of all relevant elements; it must be sufficiently accessible to the victim's family and open to public scrutiny; and it must be carried out promptly and with reasonable expedition."

As well as being conducted as detailed above, an investigation must also:

"ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others"; per Lord Bingham in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at 31.

The identification of those responsible is clearly a "relevant element", and forms part of the "full facts". Case law has established that it is an important part of the State discharging its investigative duty under Article 2, whether that be by way of a police investigation, criminal or civil proceedings, or an inquest:

"…the investigation must be capable of leading to … the identification and punishment of those responsible. This not an obligation of result, but of means. The authorities must have taken reasonable steps […] Any deficiency in the investigation which undermines its ability to establish … the person or persons responsible will risk falling foul of this standard"; *Jordan v United Kingdom (use of lethal force by RUC officer)* (2003) 37 E.H.R.R 2 at 107.

The phrase "capable of" means that we must consider the quality of the investigation, not the actual result, indicating that the Article 2 obligation can be discharged whether or not those responsible are identified. Surely this is the correct stance; compelling the State to find the perpetrator in every investigation would set the bar far too high, and mean that the State were often bound to fail.

The court in the JR portion of *R (Hambleton)* also made the following useful observations on this issue:

- that the State can discharge its procedural obligation under Article 2 in a number of ways, shared between a number of authorities, provided that they are procedurally effective in totality; and
- neither domestic nor ECtHR authorities lead to the conclusion that procedural requirements under Article 2 require inquests to investigate the identities of the persons responsible for the bombings, and there is no rule that if the police fail to identify the perpetrator an inquest must take on that role.

The court highlighted that what is important is the extent to which the courts "in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2"; *Oneryildiz v Turkey* [2005] 41 EHRR 20 at 96.

The court in R (Hambleton) concluded that "although the identification of the perpetrators has so far been unsuccessful, it has not been through apparent want of resources, effort or expertise" [58].

Therefore, there had been sufficient "careful scrutiny" to satisfy the State's Article 2 obligations without necessitating the inclusion of potential perpetrators in the scope of the inquest. This further emphasises that discharging the obligation under Article 2 is not contingent on success.

Conclusions

Taken at face value, in a case of probable unlawful killing such as *R (Hambleton),* it is difficult to envisage that investigating potential perpetrators would be too remote from the circumstances of death, especially considering that "a full, fair and fearless investigation" is required.

However, the failure of the JR court to indicate what question should be posed by coroners in these circumstances, demonstrates that the perpetrator issue necessitates much greater nuance than other issues which may potentially fall within the scope of the inquest. The guidance provided by the court indicates requirement for significant judgement and consideration by the coroner of a number of factors, which reach far beyond the statutory definitions of scope. They involve an analysis of the State's own investigative processes, prior to setting the boundaries of scope.

It should be remembered that it is not the role of The High Court to impose its own judgement on the coroner; and in this case it was correct not to do so given the breadth of factual knowledge the coroner will have had on the specific issues at hand. However, it may be when considering this judgment that other, less experienced, coroners would have benefitted from a better road map in this complicated area, highlighting more effectively how scope and other factors interact, to aid them in their decision making.

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