



# Albion Chambers INQUEST TEAM NEWSLETTER

## How remote an inquest?

**P**aragraph 6 of the Chief Coroner's Guidance Number 39<sup>1</sup> states: "The coroner service in England and Wales should now be moving towards routinely conducting hearings again".

Number 39 is the latest Guidance document produced on the impact of the Covid pandemic on the ability to hold inquests.

Coroners have been encouraged to adapt and vary procedures to enable inquests to take place where safe to do so.

Chief Coroners Guidance Number 38<sup>2</sup> provides information and encouragement on the use of technology and pragmatic adaptations to unblock the process of inquests, while reminding coroners of the limits to their ability to alter the system.

### Paragraph 8 of Guidance 38:

"The current Pandemic has increased the need to use technology to facilitate remote participation in hearings... remote hearings should take place wherever possible, if the technology allows, it is in the interests of justice and its use is consistent with the administration of justice".

### A. Inquests must still be held in public

Paragraph 4 of Guidance 38<sup>3</sup>:

"Open justice, meaning public access to justice, is the fundamental principle underpinning the way in which all courts deal with any remote hearing".

See Rule 11 The Coroners (Inquests) Rules 2013 where the Coroner's ability to exclude the public from the main hearing (R11(4)) only in the interest of national security.

There is case law which holds that where the press is afforded access proceedings are deemed to be in public.

### B. The Coroner must be present in the court:

Paragraph 9 of Guidance 38:

"The coroner must be present in court for all hearings and to satisfy the principles of open justice".

### C. Inquests and preliminary hearings must not be broadcast:

Section 41 Criminal Justice Act 1925 prohibits the taking of any photograph, screenshots, video recordings or broadcasts of hearings.<sup>4</sup>

### What pragmatic solutions are possible?

1. Low-tech solutions. Sourcing suitably-sized buildings to hold inquests to allow for social distancing and the attendance of the press and others safely, even if in smaller numbers than would wish to attend.

2. Partially remote hearings. The Chief Coroner uses this term for hearings where the coroner is physically present in court but others participate remotely via electronic media.

i. Coroners have an inherent power to manage their own proceedings under the common law; this allows for remote participation including for interested persons, representatives and witnesses. The latter are also specifically provided for by Rule 17 Coroners (Inquest) Rules 2013, if the method of giving evidence to be adopted would, in the opinion of the coroner, improve the quality of the evidence given by the witness or *allow the inquest to proceed more expeditiously*. Therefore, live linking is permissible and to be presently encouraged.

ii. The proceedings can be relayed by live feed to another courtroom where participants, press and public can be accommodated.<sup>5</sup> The second venue is

seen as an extension of and part of the court itself.

iii. The proceedings can be relayed by telephone. This, for obvious reasons, falls lower down in the hierarchy of possible adaptations, as its lesser ability to meaningfully participate is likely to limit it to press and public use when there is no better alternative. In order to legitimately utilise telephone participation, the coroner must expressly disapply section 9 Contempt of Court Act 1981. Otherwise, a contempt of court will occur by using this method.

iv. Even with partial remote participation, numbers can and will be limited in line with the need for safety during the heightened period of the pandemic.

v. The proceedings still must not be visually broadcast either live or a recording. That includes any pre-inquest hearing. The platform by which a broadcast is made, be it social media, internet, television or other is irrelevant there remains a general and absolute prohibition on broadcasting proceedings or any part of them. S41 of the Criminal Justice Act 1925 is the source of this prohibition. This statutory restriction cannot be overturned by inherent jurisdiction to manage proceedings and where it has been altered, for example Supreme Court proceedings are televised, it has been done so by express primary legislation.

### Summer 2020

With an understanding of the provisions espoused in Chief Coroners Guidance Number 38, one can then see the

1. 29 June 2020 "Recovery from the Covid-19 Pandemic".
2. 11 June 2020 "Remote Participation in Coronial Proceedings via video and audio Broadcast".
3. Rule 4 Coroners.
4. S41(2)(a) expressly refers to coroner's courts.
5. *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 528 (Admin).

momentum to get inquests moving and thoughts of extending the throughput to jury inquests, as laid out in Chief Coroners Guidance Number 39. It is optimistically entitled: “*Recovery from the Covid-19 Pandemic*”.

The backdrop was the Government’s announcement of a gradual process of lifting the measures of the lockdown in May 2020 and the Lord Chief Justice announcing that jury trials would begin again.

The guidance points out that of approximately 30,000 inquests in an average year only 500 are jury inquests.

It lays out that: partially remote hearings should be actively pursued. Adjustments should be made to allow for physical participation in hearings. Juries should be carefully planned for and for short cases 8-9 jurors would be optimal. It then discusses the practicalities of travel to and from inquests and documents for individual jurors rather than having to share as well as other considerations.

### Early 2021

The Chief Coroner’s Covid Guidance documents refer to other jurisdictions and their attempts at holding hearings. For example, the criminal jurisdiction managing hearings and jury trials. Unfortunately, since Number 39 was produced all proceedings have again stuttered and slowed. There was no reference to any expectation of a third lockdown when it was written. It

reflects an attitude of hope and expectation that momentum would soon be regained, and could be helped along by sensible changes. Coroners are now having to deal with more deaths. Albeit that Covid as the simple cause of death is not an unnatural death and does not of itself require an inquest. Necessarily though, more deaths are occurring as society and its infrastructure struggles to cope. Those categories of society who frequently play a part in inquests such as medical witnesses, pathologists and others are bound to have less availability and their own backlog to cope with. In March 2020<sup>6</sup> The Chief Coroner encouraged coroners to look to extending deadlines for pathologists’ reports and for reports aimed at preventing future deaths, to take this into account.

### Future

The system may have taken a few steps backwards since the autumn, but one can see from the above guidance the shape of the system once those steps have been regained. Pragmatic, sensible adaptations accompanying an energetic commitment to efficiency. All properly constrained where necessary by principles of open justice.

### David Sapiecha

6. Chief Coroners Guidance - Covid-19 (Unnumbered).

Inquests are civil proceedings, that the “balance of probabilities” is the standard of proof in civil proceedings and that the Coroners’ Rules did not have the power to overturn this established common-law principle.

The Supreme Court, in discussing suicide, specifically referred to the fact that suicide is no longer a crime and that society’s understanding of and attitudes towards suicide has significantly changed. That same reasoning cannot be applied to unlawful killing. Whilst it is true that an inquest is no longer concerned with criminal justice, the conclusion of unlawful killing is only available in cases of murder, manslaughter or infanticide, all of which are most definitely crimes and probably don’t produce much sympathy or understanding from the general public.

Two of the concerns which may arise for the person(s) implicated (albeit not named) in an inquest considering a potential unlawful killing, are:

1. The re-opening of any criminal investigation and subsequent charge; and
2. The conclusion that implies a crime has been committed.

The first of these, on examination, is surprisingly probably of lesser concern. Schedule 1 of the Coroners and Justice Act 2009 still requires a coroner to suspend an investigation and adjourn an inquest where a person either has been or may be charged either with a homicide offence involving the death of the deceased or an offence alleged to be a related offence. Where there is a resulting criminal trial, it is rare that there would then need to be an inquest, since there would have been a public airing of the issues relating to death.

If a person(s) is not charged with any offence, whilst a conclusion of unlawful killing in the inquest will almost inevitably mean that the prosecuting authority will look at the case again, the test which a prosecutor must satisfy before bringing criminal proceedings will not change. Further the conclusion of the coroner/coroner’s jury is not admissible in criminal proceedings.

The second point may be significant. The evidential rules within civil proceedings are generally less robust than those used in the criminal jurisdiction and coronial proceedings are inquisitorial rather than adversarial. Murder, manslaughter and infanticide are significant crimes which attract significant stigma. Whilst never named in the conclusion and remembering S.10(2) Coroners and Justice Act 2009, it is naïve to believe that an inquest which results

## More likely than not, and unlawful killing

In November 2020, The Supreme Court delivered its judgment in the case of *R (on the application of Maughan) v Her Majesty’s Senior Coroner for Oxfordshire* [2020] UKSC 46. By a majority of 3:2, The Supreme Court ruled that the civil standard of proof (balance of probabilities) applied to the conclusion of suicide and of unlawful killing, whether as a short form or narrative conclusion.

In the original inquest and when reviewed by the Divisional Court, the case of Maughan concerned the standard of proof required for a finding of suicide in coronial proceedings. However, both the Court of Appeal and the Supreme Court also considered the standard of proof applicable to the conclusion of unlawful

killing. The Court of Appeal was bound by the decision in *R v Wolverhampton Coroner, Ex p McCurbin* [1990] 1 WLR 719 in determining that the criminal standard of proof should apply to the conclusion of unlawful killing, but of course the Supreme Court was not so restrained.

The majority of the Supreme Court stressed the potential for inconsistency which could arise on the same facts, depending on whether one used a short form conclusion (criminal standard for both suicide and unlawful killing) or a narrative conclusion (balance of probabilities). See Note iii to Form 2 Coroner (Inquests) Rules 2013.

Further, and more importantly, the majority of the Court, concluded that

# Albion Chambers Inquest Team

**Team Clerk**  
Nick Jeanes



**Kate Brunner QC**  
Call 1997 QC 2015  
Team Leader, Recorder  
Upper Tribunal Judge



**Fiona Elder**  
Call 1988



**David Sapiecha**  
Call 1990



**Giles Nelson**  
Call 1995



**Kannan Siva**  
Call 1996



**Richard Shepherd**  
Call 2001



**Tim Baldwin**  
Call 2001



**Darren Stewart**  
Call 2002



**Anna Midgley**  
Call 2005  
Team Leader



**Alexander West**  
Call 2011



**Charley Pattison**  
Call 2013



**Emily Heggadon**  
Call 2017



**Simranjit Kamal**  
Call 2018



**Ehsanul Oarith**  
Call 2019

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in a conclusion of unlawful killing will not have revealed the identity of the person(s) at fault. Without having the advantage of any of the safeguards present in a criminal trial (including the standard of proof), an interested party to an inquest may find themselves labelled as a murderer. Whilst retaining the criminal standard of proof for unlawful killing does not preclude that same outcome, it may make it a good deal less likely.

As a result of the Supreme Court's judgment in *Maughan*, the Chief Coroner, on 13 January 2021, produced Law Sheet 6 (<https://www.judiciary.uk/related-offices-and-bodies/office-chief-coroner/guidance-law-sheets/coroners-guidance/law-sheet-no-6-maughan/>). The Law Sheet refers to the fact that unlawful killing features in relatively few inquests and the decision in *Maughan* is unlikely to make a significant impact on those figures. A conclusion of unlawful killing can only be returned by a coroner or jury if each element of the relevant offence (murder, manslaughter

or infanticide) has been established to the civil standard. Save for the change in the standard of proof, the considerations for the Coroner remain the same.

**Fiona Elder**