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5 ESSEX COURT

INSIGHT

INQUESTS AND INQUIRIES

IN THIS ISSUE

"5 Essex Court has developed an enviable team for inquests and public inquiries work"

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Welcome from the Editors

Alison Hewitt
& Jonathan Dixey

It has been just over a month since the Supreme Court handed down its judgment in *R (Maughan) v HM Senior Coroner for Oxfordshire* [2020] UKSC 46. As readers will be aware, by a majority the Court concluded that in inquests the standard of proof for all short form and narrative conclusions is the balance of probabilities, i.e. the civil standard of proof. The impact of this judgment has been felt already: in the last month alone, we are aware of dozens of inquests where the 'new' lower standard of proof for the conclusions of suicide and unlawful killing has resulted in findings that would previously have been rapidly discounted.

In this special edition, we bring together eight articles focusing on what *Maughan* is likely to mean for coroners' investigations and inquests. Firstly, we review *Maughan* itself and how it was that a majority of the Supreme Court determined that in inquests, the conclusions of suicide and unlawful killing may be established to the civil standard of proof, and whether there may be reason to revisit the decision.

As many inquest practitioners will now need to consider the possibility of a conclusion of unlawful killing, we examine the three manslaughter offences which may give rise to such a conclusion: unlawful act manslaughter (Fiona Barton QC and Emma Price), gross negligence manslaughter (Alison Hewitt) and corporate manslaughter (Jonathan Dixey).

Jonathan Landau – who joined 5 Essex Court this month – explores the implications of *Maughan* for healthcare professionals. We are delighted to welcome Jonathan to 5 Essex Court. He brings a wealth of knowledge and expertise with him, having been a partner at two top ranked regulatory and healthcare firms, and having acted as an advocate in many significant inquests. He has particular expertise in inquests and healthcare regulation. He advises in respect of all healthcare regulatory matters including all levels of CQC and Ofsted enforcement, safeguarding investigations, commissioning disputes, contract monitoring, and mental capacity. You can view Jonathan's profile here.

Next, in a timely reminder of the approach to be applied when considering whether a particular conclusion should be left to a jury, Amy Clarke revisits the '*Galbraith Plus*' test and its post-*Maughan* use. Cicely Hayward considers the effect of *Maughan* on prosecutorial decisions and regulatory proceedings, and in particular whether the CPS' current commitment to review cases following an unlawful killing conclusion will need to change.

Finally, Bilal Rawat offers his predictions on how *Maughan* will influence the preparation for an inquest.

We hope you find these articles informative and of assistance in working your way through the issues raised by the Supreme Court's judgment. Finally, as this most difficult of years draws to a close, may we wish you happy and healthy 2021.

Alison Hewitt

R (Maughan) v Her Majesty's Senior Coroner for Oxfordshire [2020] UKSC 46

In many ways *Maughan* is an extraordinary case. When it started in the Divisional Court the claim was concerned only with the inquest conclusions of Suicide and Narrative Conclusion, and Unlawful Killing was of no relevance; further, both parties to the judicial review (the family of the deceased and the coroner) treated as uncontentious the proposition that Suicide must be established to the criminal standard of proof (beyond reasonable doubt). Two years on, in a decision which is expected to have extensive ramifications for coroners and those involved in their inquests, the Supreme Court has ruled that both the Suicide and Unlawful Killing conclusions must be considered on the lower, civil, standard of proof (the balance of probabilities).

It was the Divisional Court itself (Leggatt LJ and Nicol J) which challenged the parties' joint view and decided that the universally accepted position, that Suicide and Unlawful Killing conclusions were subject to the higher standard, was without sound legal basis, and that judgment was upheld by the Court of Appeal. In relation to Unlawful Killing, however, both Courts were bound by the earlier Court of Appeal decision in *R v HM Coroner for Wolverhampton, ex parte McCurbin* [1990] 1 WLR 719, in which Woolf LJ made it plain that the criminal standard must apply.

The Supreme Court decision

In contrast to the courts below, the Supreme Court was particularly interested in the effect of Note (iii) on Form 2 (the Record of Inquest form which must be used to record the outcome of an inquest further to the Coroners (Inquest) Rules 2013). Note (iii) states that:

> *"the standard of proof required for the short form conclusions of 'unlawful killing' and 'suicide' is the criminal standard of proof. For all other short form conclusions and a narrative statement the standard of proof is the civil standard of proof"*

The majority of the Supreme Court (Lady Arden - giving the leading judgment - and Lords Wilson and Carnwarth) held that Note (iii) was no more than a statement of the common law position, and it did not act to take away the power of the courts to develop the common law (§56), whereas the minority (Lords Kerr and Reed) considered that it created binding law. Lady Arden therefore went on to consider what standard of proof should apply to the Suicide and Unlawful Killing conclusions. In respect of suicide she found that the civil standard should apply as adopting different standards of proof between short form and narrative conclusions would lead to an internally inconsistent system of fact-finding (§71), the higher standard would make it harder for the prevalence of suicide to be accurately recorded (§§73-74), and the plea for special treatment for suicide was not compelling as the legal and social implications of suicide had changed and it was no longer a crime (§§75-81).

> Surprisingly, however, when it came to consideration of the appropriate standard of proof for Unlawful Killing, Lady Arden dealt with the matter very briefly, stating that the civil standard should apply for reasons of consistency (§96) and that she was not convinced that this would materially affect persons who may face criminal proceedings as a result of such an outcome (§§93-94).

The case against the lower standard for Unlawful Killing

Given its ramifications, it is regrettable that the Court did not give greater consideration to the arguments as to whether the lower standard should apply, not least because of the comprehensive and powerful submissions made on behalf of the Chief Coroner (who had become an Intervener in the proceedings, partly because of the respondent coroner's necessarily neutral position). He suggested that there were reasons to justify retaining the criminal standard for Unlawful Killing, even if it was lowered for Suicide. These reasons included the following:

- Unlawful Killing is a conclusion that a homicide offence has been committed and therefore amounts to more than the factual findings upon which it depends; in some instances it involves a value judgement (e.g. gross negligence manslaughter).
- The Unlawful Killing conclusion includes legal principles and concepts which are peculiar to criminal law and practice (such as the criminal legal test for self-defence and not the civil one (see *R (Duggan) v Her Majesty's Assistant Deputy Coroner for the Northern District of Greater London* [2017] EWCA Civ 142 (as discussed in Fiona and Emma's article)).

Alison Hewitt

R (Maughan) v Her Majesty's Senior Coroner for Oxfordshire [2020] UKSC 46 (continued)

- In all other respects, the function of an inquest is to establish the facts without even appearing to determine any form of legal liability and the Unlawful Killing conclusion is the exception to that principle, which Parliament chose to retain.
- Despite the prohibition on any inquest conclusion determining criminal liability on the part of a named person, it will often be obvious who is considered to have committed the offence (and in *R (Anderson) v HM Coroner for Inner North Greater London* [2004] EWHC 2729 (Admin) Collins J said that this consideration justified the application of the criminal standard); it can be said to be very undesirable for a person effectively to be branded a killer by a process which does not offer the safeguards of a criminal trial (more restrictive rules of evidence, a right to call witnesses and a right to make an address on the facts).
- An Unlawful Killing conclusion may result in a prosecution, given the CPS' commitment to review contained in its standing agreement with the National Police Chiefs' Council and the Chief Coroner and Coroners' Society (see Cicely's article).
- Some of the statutory materials tend to indicate that Unlawful Killing is subject to the criminal standard, including s.10(2) of the Coroners and Justice Act 2009 and para.8(5) of Schedule 1 to the Act.
- Retaining the criminal standard would not create the practical problems and logical anomalies that result from its use for the conclusion of Suicide.
- Those involved in inquests and the wider public may already find it difficult to accept that an inquest can end in an Unlawful Killing conclusion and a later criminal trial in an acquittal, and the prospect of this is materially increased if the standard of proof is lowered.

It is unfortunate that the Court did not consider and address these issues raised by the Chief Coroner because they do reflect real areas of concern. Many of the potential consequences, particularly for individuals and organisations directly affected, are considered in more detail in the articles below. There are, potentially, wider ramifications also:

- It is likely that Unlawful Killing will now be raised and considered in more inquests, and that those inquests may become more adversarial in tone, and longer and more complex.
- This will have an impact on the already stretched and back-logged coroners' courts, and the costs for those attending with legal representatives.
- If the Unlawful Killing conclusion is not on a par with the criminal standard for the offence in question, there is a real risk that it will become confusing or even meaningless, and consequently devalued.
- Currently, the inquest process, and its use of the Unlawful Killing conclusion, fulfils the useful function of identifying potentially missed prosecutions; there is a risk that this function will be blunted or lost altogether, as it will not be apparent which of the Unlawful Killing conclusions would also have met the higher standard of proof and may genuinely warrant a CPS review.

Is there any prospect of further change?

The change to the standard of proof for the Suicide conclusion was made by the Divisional Court and has been adopted in coroners' courts ever since, without issue. There is no difficulty in applying the lower standard and it seems likely that it is here to stay.

> For the time being at least, there also seems little prospect of further change so far as the standard of proof for the Unlawful Killing conclusion is concerned. Although, strictly speaking, the Supreme Court's decision concerning the Unlawful Killing conclusion is obiter, coroners will have no choice but to follow it and to work through any legal complexities arising; and it is likely that the Chief Coroner will provide guidance on a number of issues over the coming months and beyond.

If, however, there are significant consequential problems which are not resolved, or if there is one or more Unlawful Killing conclusion which is recognised as being particularly harsh or unjust, it may be thought that the issue should be revisited. If so, there would seem to be only two routes to such revision :

1. By means of a further judicial review claim being appealed to the Supreme Court; as the decision in *Maughan* was obiter so far as Unlawful Killing is concerned, the Supreme Court could re-visit the issue and, in a sufficiently serious case, may be willing to do so given the brevity of the judgment in this regard, or
2. Through legislative change, to restore the criminal standard of proof for the Unlawful Killing conclusion, or to end its use altogether.

Fiona Barton QC & Emma Price

Unlawful Killing I: Unlawful act manslaughter

The change in the standard of proof is likely to mean that unlawful killing conclusions will be considered by coroners more frequently than has previously been the case. This article considers the first of three manslaughter offences covered in this newsletter: unlawful act manslaughter. This is of particular relevance in relation to inquests into deaths following the use of force by the police, prison staff, security personnel, mental health workers and care home staff.

An overview of the legal test

The elements of unlawful act manslaughter are as follows:

- There must have been an unlawful act, in the sense that it constitutes a criminal offence in its own right (for example, an assault or other offence against the person). The requisite mens rea for the offence must be present;
- The act must have been a dangerous act in that it is, from an objective standpoint (*DPP v Newbury (Neil)* [1977] Crim. L.R. 359), one which a sober, reasonable and responsible person of the perpetrator's age and gender (*R v Watson* [1989] 2 All ER 865, *R v Dawson* (1985) 81 Cr App R 150) would inevitably realise is an act which was likely to cause the deceased "some" physical harm, albeit not serious harm (*R v Church* [1966] 1 QB 59; *R v JM and SM* [2012] EWCA Crim 2293); and
- The unlawful, dangerous act must cause death (even though death or harm of any kind is not intended), without an intervening act breaking the chain of causation (*R v Lewis* [2010] EWCA Crim 151).

Guidance to coroners in respect of unlawful act manslaughter is currently contained in the Chief Coroner's Law Sheet No.1 at §§21-23. As discussed below, the first limb of the above legal test is likely to act as an important limit on the application of *Maughan* in practice.

Situations in which unlawful act manslaughter may be considered

Deaths resulting from use of force by police

Whenever there has been a death resulting from a police shooting, or other use of force on the part of police, (including, for example, restraint or the use of a taser) the coroner conducting the inquest will investigate the circumstances in which the force was used.

There are certain statutory powers available to police relating to the use of force, including:

- By virtue of s.3 of the Criminal Law Act 1967, any person may use such force as is reasonable in the circumstances to prevent offences being committed or to effect or assist in the lawful arrest of offenders.
- By virtue of s.117 of the Police and Criminal Evidence Act 1984, police officers may use reasonable force when necessary to exercise any of their powers under that Act, including making arrests.

Police officers are also entitled under the common law to use reasonableforce in defence of themselves, colleagues and / or bystanders. In the criminal law context, where force is used in accordance with the statutory provisions set out above, or in self-defence or defence of others, a defence to proceedings for an offence against the person will be available.

Where there is evidence from which it could be suggested that it was not necessary to use force for the purposes provided for by statute and / or the common law, or that the degree of force used was not reasonable in the circumstances, a coroner may consider whether the evidence is sufficient to leave to the jury a conclusion of unlawful killing by way of unlawful act manslaughter.

Deaths resulting from use of force by prison staff and security personnel

The provision for the use of reasonable force to prevent offences being committed or to effect or assist in the lawful arrest of offenders under s.3 of the Criminal Law Act 1967 is not limited to police officers and is likely to be relevant to situations involving the use of force, including restraint, by prison staff and security personnel. Such individuals will of course also be entitled under the common law to use reasonable force in defence of themselves, colleagues and / or bystanders.

As with a death resulting from the use of force by police, where there is a death resulting from the use of force, including following restraint, in a prison or custodial setting, a coroner may consider whether there is sufficient evidence to leave to the jury a conclusion of unlawful killing by way of unlawful act manslaughter.

Fiona Barton QC & Emma Price

Unlawful Killing I: Unlawful act manslaughter (continued)

Deaths resulting from restraint of mental health patients and care homes residents

Unlawful killing by way of unlawful act manslaughter might also be a conclusion considered by a coroner where death has resulted from restraint of a mental health patient in a psychiatric hospital or a care home resident.

Restraint can lawfully be used by a person (D) in connection with the care or treatment of another person (P) lacking capacity, under certain conditions, pursuant to ss.5 and 6 of the Mental Capacity Act 2005 ('MCA'). The conditions are that:

1. Before restraining P, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question (s.5(1)(a));
2. When restraining P, D reasonably believes –
   a. that P lacks capacity in relation to the matter, and
   b. that it will be in P's best interests for him to be restrained (s.5(1)(b));
3. D reasonably believes that it is necessary to restrain P in order to prevent harm to P (s.6(2)); and
4. Restraining P is a proportionate response to –
   a. the likelihood of P's suffering harm, and
   b. the seriousness of that harm (s.6(3)).

If a person is detained under the Mental Health Act 1983 ('MHA') and is a hospitalised inpatient then staff are entitled to exercise a degree of control over that person, for example preventing that person from leaving the hospital or requiring them to leave a public area of the hospital. Force may be used to achieve this if it is necessary, but it must be reasonable and proportionate. Restraint of a mental health patient or a care home resident done in self-defence or defence of others would be lawful under the common law if such restraint were necessary for that purpose and reasonable in degree.

Does *Maughan* herald an examination of whether the civil test for self-defence / reasonableness under s.3 of the Criminal Law Act 1967 should apply in the inquest context?

There are a number of differences between the criminal law and the civil law when it comes to the defences at common law of self-defence or pursuant to s.3 of the Criminal Law Act 1967. One is the standard of proof. Another is the difference between the criminal law and civil law as to the relevance of reasonableness to the issue of the defendant's honest and genuine belief of the circumstances giving rise to the use of force.

Pursuant to s.76(3) of the Criminal Justice and Immigration Act 2008, which codified the criminal law test under the common law, the question whether the degree of force used by an officer in self-defence or under s. 3 of the Criminal Law Act 1967 was reasonable in the circumstances (an objective question for the jury) is to be decided by reference to the circumstances as the officer using the force believed them to be. This is to be determined by reference to s.76(4):

"If D claims to have held a particular belief as regards the existence of any circumstances –

a. the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
b. if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not– (i) it was mistaken, or (ii) (if it was mistaken) the mistake was a reasonable one to have made."

In contrast, for civil law purposes, the defendant must not only hold the belief but it must also be objectively reasonable (*Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962).

Whether the criminal or civil law test is applied in the inquest context will have a material impact upon the likelihood of the first limb of the test for unlawful act manslaughter, the commission of an unlawful act, being made out.

Which test should be applied was considered in the context of self-defence in *R (Duggan) v Her Majesty's Assistant Deputy Coroner for the Northern District of Greater London* [2017] EWCA Civ 142. The Court of Appeal rejected the argument that the test to be applied at an inquest was the civil law test. In doing so, the Court of Appeal made the following observation (at §93):

> *"…it has never been the function of an inquest to concern itself with civil liability for a death, and the conclusion of lawful killing has always been understood to have been linked to crime and amounted to a statement that the jury believed that the deceased was probably not the victim of a homicide."*

The Court of Appeal also drew on the European Court judgment in *Da Silva v United Kingdom* (2016) 63 EHRR 12 in which it was decided that, for the purposes of art.2, the criminal law of self-defence in England and Wales was a sufficient justification for killing where the belief in an imminent threat was both mistaken and not objectively reasonable. This was the European Court implicitly, if not explicitly, deciding that art.2 does not require an investigation into the objective reasonableness of the belief which might found a civil action (see §§94-97 in *Duggan*).

The difference between the criminal and civil tests for self-defence has recently been considered in the context of police misconduct proceedings in the case of *R (Officer W80) v Director General of the Independent Office for Police Conduct* [2020] EWCA Civ 1301.

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Unlawful Killing I: Unlawful act manslaughter (continued)

In that case, a specialist firearms officer brought judicial review proceedings against the IOPC after it investigated the circumstances in which he had fired a shot into a vehicle, killing one of its passengers, and had found that the officer had a case to answer for gross misconduct. The officer said that he believed the passenger was reaching for a firearm, and that his and his fellow officers' lives were in danger. The officer argued that §4.4 of the College of Policing's Code of Ethics contained the applicable test, namely whether an officer could justify the use of force based upon an "honestly held belief at the time"; that meant that the correct test was the criminal law test for self-defence, namely whether he had had an honest albeit mistaken belief that his life was in danger. The IOPC, he said, had incorrectly applied the civil law test for self-defence instead.

The Divisional Court held that the criminal law test applied. The IOPC had, therefore, used the wrong test and its decision was quashed (see [2019] EWHC 2215 (Admin)). In reaching that conclusion, the Divisional Court considered Da Silva and observed that there would be a potential tension if the state was not held accountable under art.2 because of the state actor's honest belief, but the state actor himself was judged by a more stringent civil law standard in determining whether his actions amounted to gross misconduct (see §§65-75 of the Divisional Court's judgment).

The Court of Appeal allowed the IOPC's appeal; the Divisional Court had centred on the distinction between the criminal and civil law tests for self-defence when the focus should have been on the proper meaning of the applicable conduct standard and the College of Policing's Code of Ethics. The question was not whether the standard of professional behaviour, as explained by the Code, was more consistent with either the civil or the criminal test for self-defence. Those tests were important but did not dictate the proper meaning of the statutory standard contained in the Police (Conduct) Regulations 2012.

Notwithstanding the outcome in the Court of Appeal, the Divisional Court's observations, particularly those relating to the tension that might arise if the state was not held accountable under art.2 because of a state actor's honest belief, but the state actor himself was judged by a more stringent civil law standard (the correctness of which was not considered by the Court of Appeal), might be thought equally applicable in the inquest context. A submission to this effect was accepted by the Court of Appeal in *Duggan* (at §98)). They might also be thought to be supportive of the retention of the status quo post-*Duggan*.

One of the notable features about Lady Arden's judgment in *Maughan*, however, is her rejection of the idea that criminal law concepts apply to unlawful killing conclusions in the inquest context; this was a proposition which the Court of Appeal in Maughan considered underpinned the decision in *Duggan* (see Lady Arden's judgment at §84; and also Davies LJ's judgment in the Court of Appeal at §93(6)). Lady Arden considered that, whilst coronial proceedings used to be a means for finding criminal liability, s.56(1) of the Criminal Justice Act 1977 now provides that a coroner's conclusion shall not make any finding that any person is guilty of murder, manslaughter or infanticide or charge any person with any of these offences. On that basis, the criminal standard for unlawful killing "has lost at least some of its historical purpose" (§§88 and 89).

Whilst Lady Arden noted that Davies LJ was "rightly concerned about the protection for a person implicated in any conclusion of unlawful killing", this concern was disposed of by Lady Arden with two short observations:

> At §94: "… if there appears to be a risk that criminal proceedings will be brought before an inquest has been completed, the inquest can be adjourned, and in some circumstances must be adjourned (see the 2009 Act, Schedule 1). In that way the person who is at risk of prosecution is protected against a short form conclusion reached on a civil standard which is unfavourable to him".
>
> At §95: "The person implicated in the conclusion of unlawful killing is equally liable to suffer prejudice from the findings by way of narrative statement, which can be found on a balance of probabilities. They may equally point a finger at him. In addition, as Mr Straw points out, the accused would be in the same position in an inquest as he already is if civil proceedings are brought against him".

The majority decision of the Supreme Court in *Maughan* might be seen as opening the door to the argument that it is no longer appropriate to apply the criminal law test for self-defence / reasonableness under s.3 of the Criminal Law Act 1967, now that the rationale for the application of the criminal standard of proof has been rejected. It is highly likely that this issue will arise with increasing frequency. However, this is to misunderstand the essential conclusion of *Maughan*, which is directed at the standard of proof to be applied to each limb of the legal test for unlawful killing. The first limb of that test, as the Court of Appeal in *Duggan* made clear when directly considering the issue, requires the application of the criminal test.

The likely consequences of *Maughan*

The change in the standard of proof means it is likely bereaved families will invite coroners to leave unlawful killing

Fiona Barton QC & Emma Price

Unlawful Killing I: Unlawful act manslaughter (continued)

conclusions more frequently - and coroners may do so more readily. Where the conclusion is left to the jury, the lower standard of proof will of course more easily be met. It is likely, therefore, that there will be an increase in the consideration and recording of unlawful killing conclusions.

In the context of unlawful act manslaughter, it will be crucial to rapidly identify vulnerabilities which may lead to unlawful killing being left to the jury, and to consider at the outset whether individuals may need separate representation from their employing organisation (see Bilal Rawat's article).

Where a coroner is considering whether to leave a conclusion of unlawful killing by way of unlawful act manslaughter, it will be important to stress in submissions that there must be sufficient evidence in relation to all three limbs of the unlawful act manslaughter test before the conclusion can safely be left to the jury (see Amy Clarke's article). In respect of the last limb of the test, any intervening events that might break the chain of causation should be highlighted. Unless and until there is authority that reverses the decision in *Duggan*, the correctness of the application of the criminal law test of self-defence / reasonableness under s.3 of the Criminal Law Act 1967, as set out in s.76(3) of the Criminal Justice and Immigration Act 2008, can properly be – and should be – maintained in submissions made on behalf of individuals who have used force that caused, or may have caused, the death. In practice this will limit the impact of *Maughan*.

Will the increased consideration of unlawful killing by way of unlawful act manslaughter lead to a more difficult and stressful inquest process for individuals who have used force that caused, or may have caused, the death? Almost certainly. Individuals will need to be supported through the process from an early stage and legal support should be engaged at the outset.

The wider implications of *Maughan* – both corporate and individual - remain to be seen. Will the increased risk of a conclusion of unlawful killing by way of unlawful act manslaughter affect the willingness of police officers to volunteer for an armed role? Will there be an impact on the willingness of the police to intervene and restrain an individual who has committed no crime but might pose a danger to themselves? Will mental health workers and care home staff be more reluctant to use restraint where a psychiatric patient who has been detained under the MHA, or a care home resident whose liberty is restricted under a Deprivation of Liberty Safeguards authorisation under the MCA, seeks to abscond from a psychiatric hospital or home? Will this in turn lead to more individuals in these situations managing to abscond and harming themselves, as well as a greater call on police to assist with the location and safe return of such individuals? These are all unknowns but the possibility of wider implications such as these only serves to highlight the paramount importance of employers providing adequate training and support to employees in such roles, as well as adequate support from the outset in relation to the inquest process.

It may be suggested that *Maughan* will result in greater accountability of the State. However, close analysis of the judgment suggests that this is unlikely. Firstly, and perhaps most importantly, one must not lose sight of the fact that inquests are inquisitorial proceedings, expressly prohibited from determining civil liability or criminal liability on the part of a named person, and are thus not an appropriate vehicle for the legal accountability which the bereaved so often understandably seek. Secondly, the elements of unlawful act manslaughter remain the same after *Maughan* - it is the standard of proof which has changed. Thirdly, in practical terms, is there any real difference between a short form conclusion which says 'unlawful killing' and a narrative conclusion in art.2 cases which essentially says the same |thing but without using those two words?

Perhaps the biggest uncertainty is whether *Maughan* will be viewed as an encouragement to develop the argument that *Duggan* should be overturned and that the civil law test applicable to use of force should be used in inquests. To that extent, *Maughan* can be seen as a seminal decision.

> "…it has never been the function of an inquest to concern itself with civil liability for a death, and the conclusion of lawful killing has always been understood to have been linked to crime and amounted to a statement that the jury believed that the deceased was probably not the victim of a homicide."

Alison Hewitt

Unlawful Killing II: Gross negligence manslaughter

This article deals with the second of the three manslaughter offences considered in this newsletter: gross negligence manslaughter. Historically it has been relatively rare for an unlawful killing conclusion to be recorded in a coroner's court on the basis of gross negligence manslaughter but, as with unlawful act manslaughter, it seems inevitable that the lowering of the standard of proof by *Maughan* will result in it being raised and considered more frequently. Whether driven by the family of the deceased person, or by the coroner, an inquest concerned with a death which has resulted from a serious breach of a duty of care is now more likely to involve greater scrutiny of the breach and its circumstances, in order to investigate whether the elements of the offence of gross negligence manslaughter are established to the civil standard.

This development should be of particular concern to individuals (and their employers) whose profession or employment involves their exercising a duty of care on a regular basis; doctors and other clinical staff, and police and prison officers, are prime examples of those likely to be affected. The ramifications of an unlawful killing conclusion on the basis of their gross negligence, even if reached on the balance of probabilities only, could be wide-ranging and, at the very least, would result in reputational damage.

Set out below is a review of the elements of gross negligence manslaughter. As can be seen, it is a legally complex offence which is far from straightforward to prove in the criminal courts. Although coroners and their juries will now apply the civil standard of proof, the legal requirements remain the same; it will be important to emphasise this and to resist any suggestion that the introduction of the lower standard of proof has resulted in a simplification of the legal hurdles to be met or a lessening of the seriousness of the offence.

The legal test for gross negligence manslaughter

Guidance to coroners in respect of gross negligence manslaughter is currently contained in the Chief Coroner's Law Sheet No. 1 at §§12-17.

The offence of gross negligence manslaughter is committed by an individual person if each of the following elements is proved (*R v Adomako* [1995] 1 AC 171):

1. The individual owed an existing duty of care to the deceased;
2. The individual negligently breached that duty of care (by an act or omission);
3. The breach of duty gave rise to a serious and obvious risk of death (not just serious injury) and, at the time of the breach, this risk of death was reasonably foreseeable;
5. The identified breach caused the death; and
6. Having regard to all the circumstances, the misconduct was gross and so truly, exceptionally bad as to be criminal.

The above elements must be considered in relation to the conduct of one identified individual, and by reference to an

"The ramifications of an unlawful killing conclusion on the basis of ... gross negligence, even if reached on the balance of probabilities only, could be wide-ranging and, at the very least, would result in reputational damage."

Alison Hewitt

Unlawful Killing II: Gross negligence manslaughter (continued)

identified duty and breach. At an inquest, if any one or more of the above elements cannot be established, then an unlawful killing conclusion by reason of gross negligence manslaughter cannot be recorded. Each of the elements must, therefore, always be carefully considered in the light of the evidence and the particular facts of the case. Each is analysed further below.

(a) Duty of Care

The questions to be considered are whether a duty of care was owed by the individual in question to the deceased and, if it was, what was the scope of that duty; these are questions of law, applying the ordinary principles of negligence, based on the facts.

Whilst the existence of a duty of care is well established for certain relationships (such as doctor and patient), in other scenarios it should not be presumed; for example, where the allegation involves a breach of duty by omission, such as a failure to rescue a person whose life is in danger, it must be established that a duty to act was owed. If necessary, the three-stage test set out in *Caparo Industries PLC v Dickman* [1990] 2 AC 60 must be considered, namely (as per Lord Bridge) that (i) injury is reasonably foreseeable as a result of the individual's conduct, (ii) there exists "between the party owing the duty of care and the party to whom it is owed, a relationship characterised by the law as one of "proximity" or "neighbourhood"", and (iii) "the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

The scope of a duty of care may also be fact dependent; in *R v Kuddus* [2019] EWCA Crim 837, in the context of suppliers of food to the public, Sir Brian Leveson P explained this by stating (at §39):

> *"The scope of the duty owed to any individual will be determined by the circumstances (…the factual mix). Thus, a restaurateur must obviously take reasonable steps not to serve food to a customer that is injurious to all and any members of the public. In relation to allergens (such as peanut protein) which may have an adverse effect on a sub-set of the population, the scope of the duty owed to members of the class (or sub-set) of allergy sufferers may well extend to identifying by warning in a menu or otherwise the presence of such allergens in food with the request that notice be given to the restaurant if, in a particular case, such an allergen is likely to cause harm".*

(b) Breach

The question of whether an act or omission should be seen as a negligent breach of a duty of care will, in many cases, be dependent upon the standards of conduct or performance to be expected of the person complying with the duty. The relevant standards may be found in many sources including, for example, statute, a professional code of conduct, or working practices established by custom. The issue may, therefore, be a complex one, and it should be noted that expert evidence may be needed to identify relevant standards and, if complex or technical, to provide expert opinion as to whether such standards were breached and, if so, to what extent.

(c) Risk of Death / Reasonable Foreseeability

This element of the offence is multi-layered and each and every aspect must be established. The requirements are that:

First, the breach of duty identified must have given rise to a risk of death that was both obvious and serious. The risk must be one of death and not merely serious injury, harm or illness. An 'obvious' risk means "one that is present, clear and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation" (see *R v Broughton (Ceon)* [2020] EWCA Crim 1093, *R v Rose* [2018] QB 328, and *R v Sellu* [2016] EWCA Crim 1716). These are objective facts which are not dependent upon the state of mind or knowledge of the individual who owes the duty. In *Kuddus* Sir Brian Leveson P said (at §53) that if there is any real issue as to their existence "each must be proved by relevant and admissible evidence".

Second, at the time of the breach, the risk of death must have been reasonably foreseeable to the individual owing the duty of care, taking account of his role; the question arising is whether an objective informed observer would say that, on the relevant facts, an individual in that role and position (whether a surgeon, outward-bound instructor or whatever) should have foreseen the risk of death at the time of the breach.

(d) Causation

The identified breach (act or omission) must have caused the death. In accordance with the usual principles, the breach need not be the sole or even principal cause, but it must at least have significantly contributed to the death.

It is noteworthy that if the breach relied upon is a failure to obtain or provide potentially life-saving assistance, causation will be established only if the evidence shows that, at the time when the deceased's condition was such that there was a serious and obvious risk of death, such assistance would have saved the deceased person's life (see *Broughton (Ceon)*).

Alison Hewitt

Unlawful Killing II: Gross negligence manslaughter (continued)

(e) Grossly Negligent so as to be Criminal

The final element involves the coroner or jury considering whether, having regard to all the circumstances, the negligent conduct was so truly, exceptionally bad and reprehensible as to justify the conclusion that it amounts to gross negligence and deserves to be condemned as a crime. It has been recognised in many cases that this is an extremely high threshold; in the much quoted case of *R v Misra* [2004] EWCA Crim 2375, the Court of Appeal approved the following:

> *"Mistakes, even very serious mistakes, and errors of judgment, even very serious errors of judgment, are nowhere near enough for a crime as serious as manslaughter to be committed."*

It is noteworthy that this element does not relate to a finding a fact but, rather, to an assessment and an exercise of judgement on the part of the decision-maker; arguably, therefore, a "standard of proof" is not directly relevant. That said, case-law from the criminal courts makes reference to the jury having to be "sure" of their assessment of criminality, and so it may be that a coroner or jury will now simply need to be satisfied on balance that the conduct was sufficiently bad as to be criminal.

> *It remains to be seen whether the concept of "probably criminal" will be clarified in guidance from the Chief Coroner or by the High Court in due course.*

But whatever the relevance of the standard of proof may be, it does seem that the unwavering threshold which must be met by the misconduct in question is one of criminality.

Conclusion

As most of the elements of gross negligence manslaughter (though not all of them) concern findings of fact, there can be no doubt that the lower standard of proof will make it easier for an unlawful killing conclusion to be reached. However, the complexity of the offence and the need for a finding of criminality (even on the balance of probabilities), ought to mean that it will still not be easy to do so. Nevertheless, those representing an individual affected (and separate representation for individuals is likely to be needed more often) or the employing organisation, will need to prepare for the inquest carefully from an early stage, and obtain expert evidence as necessary, in order to ensure that an unwarranted unlawful killing conclusion is avoided. The wider impact of a pre-inquest admission of liability in any civil proceedings arising out of the death, which can provide important protection against costs in the claim and from the inquest itself, will also need to be carefully considered.

"Mistakes, even very serious mistakes, and errors of judgment, even very serious errors of judgment, are nowhere near enough for a crime as serious as manslaughter to be committed."

Jonathan Dixey

Unlawful Killing III: Corporate manslaughter

In 2007 the Corporate Manslaughter and Corporate Homicide Act 2007 ('the 2007 Act') created the new offences of corporate manslaughter (in England, Wales and Northern Ireland) and corporate homicide (in Scotland). In the years since there have been relatively few prosecutions as proving the offence is difficult. Whilst it is possible that convictions for corporate manslaughter will continue to be rare, the lower standard of proof means a finding of unlawful killing by reason of corporate manslaughter may become an increasingly common phenomenon in inquests.

By s.1(1) of the 2007 Act, an organisation to which that section applies is guilty of an offence (corporate manslaughter or homicide depending on the jurisdiction) if:

"the way in which its activities are managed or organised –

a. causes a person's death, and

b. amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."

Who may be liable?

The offence of corporate manslaughter can only be committed by an organisation to which s.1(1) of the 2007 Act applies: these include corporations (i.e. companies etc), most government departments and police forces (s.1(2)). Prior to the Act coming into force, Crown servants and agents could not be prosecuted for the common law offence of gross negligence manslaughter by a corporation.

What is a 'relevant duty of care'?

An offence may only be committed if the organisation owed to the deceased a 'relevant duty of care'. Section 2(1) of the 2007 Act explains that a 'relevant duty of care' means one of the following duties owed by the organisation under the law of negligence (including under the Occupiers' Liability Act 1957, the Defective Premises Act 1972 and the Occupiers' Liability Act 1984):

a. a duty owed to its employees or to other persons working for the organisation or performing services for it;

b. a duty owed as occupier of premises;

c. a duty owed in connection with–

(i) the supply by the organisation of goods or services (whether for consideration or not),

(ii) the carrying on by the organisation of any construction or maintenance operations,

(iii) the carrying on by the organisation of any other activity on a commercial basis, or

(iv) the use or keeping by the organisation of any plant, vehicle or other thing;

d. a duty owed to a person who, by reason of being a person within s.2(2), is someone for whose safety the organisation is responsible.

A person is within the ambit of s.2(2) if (amongst others):

- he is detained at a custodial institution or in a custody area at a court, a police station or customs premises;
- he is detained at a removal centre;
- he is being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements;
- he is living in secure accommodation in which he has been placed; or
- he is a detained patient (i.e. pursuant to Parts 2 or 3 or s.137 of the Mental Health Act 1983).

In short, the range of situations in which a relevant duty of care may be owed is very broad. However, as discussed in Alison's article, there will be difficult cases in which it may be unclear whether a duty of care existed. In those cases, the three-stage test set out in Caparo Industries *PLC v Dickman* [1990] 2 AC 60 will need to be considered. Following the Supreme Court's decision in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736, this is likely to be particularly important when considering the acts or omissions of police officers who can no longer rely on the so-called '*Hill* immunity'.

Whether a particular organisation owes a duty of care to a particular individual is a question of law (s.2(5)). Under the 2007 Act, it is for the judge to make any findings of fact necessary to decide that question.

The possible breadth of the offence is reduced by various exclusions:

- Any duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests) is not a "relevant duty of care" (s.3(1)).
- Any duty of care owed in respect of things done in the exercise of an exclusively public function (i.e. a function that falls within the prerogative of the Crown or is, by its nature, exercisable only with

Jonathan Dixey

Unlawful Killing III: Corporate manslaughter (continued)

authority conferred by the exercise of that prerogative, or by or under a statutory provision) is not a "relevant duty of care" unless it falls within (a), (b) or (d) above (s.3(2)).

- Certain military activities are excluded (s.4).
- Certain policing and law enforcement activities are excluded (s.5). These exclusions include duties of care owed in respect of operations for dealing with terrorism, civil unrest or serious disorder where officers or employees of the public authority in question "come under attack, or face the threat of attack or violent resistance, in the course of the operations".
- Fire and rescue, NHS and others are excluded when dealing with certain emergencies (s.6).
- Certain local authority or other public authority duties of care are excluded where those authorities are exercising child protection and probation functions (s.7).

What is 'a gross breach'?

An organisation is guilty of the offence only if "the way in which its activities are managed or organised by its senior management is a substantial element in the breach" (s.1(3)). For these purposes, 'senior management' means "the persons who play significant roles in (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities".

Prior to the 2007 Act, before a company could be convicted of manslaughter, a 'directing mind' of the organisation (that is, a senior individual who could be said to embody the company in his actions and decisions) also had to be guilty of the offence. This was known as the identification principle. In practice, this meant proving the offence was extremely difficult. For example, a prosecution arising from the 1987 sinking of the *Herald of Free Enterprise* collapsed as the prosecution had failed to prove that a reasonable person occupying the position of any of the five senior defendants would have perceived the risk as obvious or serious. The absence of a director in charge of health and safety and the lack of clear safety policies made it more difficult to convict the company. Of course, an earlier inquest had reached a conclusion of unlawful killing on the basis of gross negligence manslaughter.

During the passage of the Bill through Parliament, the Minister explained (HC Deb (4 December 2006). vol.454, col.116):

> *"At the heart of the new offences lies a highly significant shift in the way liability for manslaughter will be attached to an organisation. At present, that is bound up with the guilt of particular senior individuals. In the future, it will be about how the activities of the company were managed or organised, and whether that paid scant regard to the health and safety of employees or others. The test must also reflect the very serious nature of the offence. There will be a finding of manslaughter and it must be clear that the organisation as a whole is responsible for the offence, so the test must be one of systemic failure… There remains a need to show a substantial failing at a senior level…The question is whether the organisation as a whole failed, and a key factor in that must be the conduct or omissions of its senior management. It also means that senior management must take their responsibilities seriously or risk the possibility of prosecution."*

A breach of a duty of care is a "gross" breach if the conduct in question "falls far below what can reasonably be expected of the organisation in the circumstances" (s.1(4)). Where it is established that an organisation owed a relevant duty, in the Crown Court the question of whether there was a 'gross breach' of that duty is a matter for the jury to determine (s.8(1)).

"Prior to the 2007 Act, before a company could be convicted of manslaughter, a 'directing mind' of the organisation (that is, a senior individual who could be said to embody the company in his actions and decisions) also had to be guilty of the offence. "

Jonathan Dixey

Unlawful Killing III: Corporate manslaughter (continued)

In determining that question, the jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so (i) how serious that failure was; and (ii) how much of a risk of death it posed (s.8(2)).

> The jury may also consider "the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure…or to have produced tolerance of it" and have regard to any health and safety guidance that relates to the alleged breach (s.8(3)).

Conclusions

The statistics suggest that it remains very difficult for prosecutions for corporate manslaughter to be brought. In 2008-2018 only 27 charges had been made organisations for corporate manslaughter. Despite this relatively modest figure, the lower standard of proof in inquests may mean it becomes increasingly common for coroners and juries to consider a conclusion of unlawful killing by way of corporate manslaughter. If this right, it is likely to mean changes in the way in which both coroners and interested persons will need to approach such inquests.

Firstly, such inquests are likely to require a broader scope and more extensive evidence than might otherwise be the case. Specifically, evidence will be required not just from those who may have been directly involved in the death but also from the senior managers whose acts or omissions will be scrutinised. The organisation's compliance with health and safety legislation will be considered, as may the "attitudes, policies, systems or accepted practices" within the organisation. The bereaved will rightly press for disclosure of this evidence. Organisations themselves will need to be proactive in collating evidence demonstrating how they complied with health and safety legislation.

Typically coroners avoid engaging with the question of whether a particular person or organisation was negligent (*cf* whether a death was caused or contributed to by 'neglect'). Section 10(2)(b) of the Coroners and Justice Act 2009 expressly prohibits a coroner or jury from framing their determinations in such a way as to appear to determine any question of civil liability. However, there is now likely to be greater emphasis on the question of whether a duty of care was owed.

Might the emphasis in s.8 of the 2007 Act on the role of the jury in determining the question of whether a breach is 'gross' result in greater pressure on coroners to exercise their discretion to conduct inquests where there is the possibility of a conclusion of unlawful killing by reason of corporate manslaughter?

What is clear, is that the sea-change effected by *Maughan* will be felt for many years to come.

"…such inquests are likely to require a broader scope and more extensive evidence than might otherwise be the case. Specifically, evidence will be required not just from those who may have been directly involved in the death but also from the senior managers whose acts or omissions will be scrutinised. The organisation's compliance with health and safety legislation will be considered, as may the "attitudes, policies, systems or accepted practices" within the organisation."

Jonathan Landau

Maughan for the Healthcare sector

Maughan raises particular risks for the healthcare sector. Whilst other sectors may have the option of battening down the hatches in the event of an accident, healthcare providers[1] and professionals[2] owe duties of candour that largely preclude that option. In addition, all healthcare providers are required to investigate "safety and safeguarding incidents, and events when things go wrong" under the Care Quality Commission's Key Lines of Enquiry – the prompts the CQC uses to assess providers' performance. In the NHS, this duty is discharged under the Serious Incident Framework that commends Root Cause Analysis reports (RCA) that identify problems, contributing factors and root causes. Coroners will usually require sight of RCAs before holding inquests, particularly if other Interested Persons have raised concerns. The better the investigation, the more the RCA will set out the failings[3].

Unlawful killing conclusions are available for manslaughter offences which include, among others, gross negligence manslaughter and corporate manslaughter (see Fiona, Emma, Alison and Jonathan's articles). Both offences include an element of 'gross' breaches of duties. Inquest practitioners will be familiar with the term 'gross' from the test for neglect, which in the medical context is a gross failure to provide basic medical attention to someone who cannot provide it for themselves that more than minimally, negligibly, or trivially contributes to the death. Accordingly, it may well be the case that bereaved families, particularly when represented, may now advocate for unlawful killing conclusions when previously they would have argued for neglect.

Granted, the test for 'gross' is not the same for neglect and manslaughter. For neglect, the word connotes "a sufficient level of fault" to justify a finding of neglect (*R v HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1995] QB 1). For gross negligence manslaughter, the test is whether "having regard to the risk of death involved, was the conduct so bad in all the circumstances as to amount to a criminal act or omission?" (*R v Adomako* [1995] 1 AC 171). For corporate manslaughter, there is yet another test: whether "the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances" (Corporate Manslaughter and Corporate Homicide Act 2007, s.1(4)(b)).

Nevertheless, despite the differing tests, there will undoubtedly be more submissions advocating unlawful killing conclusions following *Maughan*. That is perhaps exacerbated by the fact that 'neglect' is limited to omissions, whereas manslaughter can also be formulated upon acts. As a consequence, we expect the first batch of judicial reviews in this area to be coroners' decisions as to whether or not to leave the conclusion to juries.

Another aspect of corporate manslaughter is that the way in which the organisation's activities are managed or organised by its senior management is a substantial element in the breach. Providers that are rated as anything less than 'Good' for the key question of 'well-led' by the CQC are therefore particularly vulnerable.

A further consequence of *Maughan* is that as both clinicians and providers are now independently more vulnerable to unlawful killing conclusions, there may be conflicts between different participants in the inquest and, consequently, the need for separate representation in more cases.

Managing the risks

For providers, the key strategy is to ensure strong leadership and governance, with quality assurance at the heart of the organisation. Particularly for larger providers, adverse incidents, including avoidable deaths, are inevitable. However, providers should be able to adduce a weighty body of evidence to show that any breach was not attributable to the way in which senior management manages the organisation's activities. Healthcare regulatory solicitors are uniquely well-placed to advise their clients about these matters because they have a deep understanding of both their client's organisation and the relevant regulatory requirements. Services that can help mitigate the risk of unlawful killing conclusions include auditing providers' compliance with well-led and safety domains of CQC's regulatory framework.

As regards healthcare professionals, the clinician will wish to show that even if there was an error, it was not 'so bad' as to amount to a criminal offence. They will be better able to do that if they can point to full, contemporaneous notes that rationalise their decision-making. Internal or external training on record-keeping will assist in this regard.

Solicitors can also assist their clients by developing an inquest risk assessment to determine whether external representation is required.
Factors may include:

- Does the family have concerns?
- Is the family represented and by whom?

Jonathan Landau

Maughan for the Healthcare sector (continued)

- Is the case to be heard with a jury?
- Is it an art.2 inquest?
- Was the RCA critical and if so, how serious were the failings?
- Are any failings repeats of errors in previous cases?
- Is there conflict, or potential conflict, between staff and the provider, or between different members of staff?
- Is there conflict, or potential conflict, with other interested persons?
- Are the police, regulators or safeguarding involved?
- Is there an indication of a claim, or a risk of a high-value claim?
- Is there media interest?

As to conflicts, these should be identified early. Coroners may be reluctant to adjourn inquests late in the day, and there is a risk that solicitors or counsel may be required to withdraw if they have been in receipt of confidential information from a party that they are no longer able to represent.

When it comes to the inquest, those representing providers will advocate for a scope that answers the four questions without enquiring into wider issues such as management. If that it is out of scope from the outset, there is unlikely to be sufficient evidence to safely return a conclusion of unlawful killing based on corporate manslaughter.

Maughan is a new risk. As with all risks, it calls for appropriate assessment and mitigating measures - steps with which healthcare providers are well-versed.

"When it comes to the inquest, those representing providers will advocate for a scope that answers the four questions without enquiring into wider issues such as management. If that it is out of scope from the outset, there is unlikely to be sufficient evidence to safely return a conclusion of unlawful killing based on corporate manslaughter."

[1]The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, regulation 20.

[2]See the 'Guidance on the professional duty of candour' published jointly by the NMC and the GMC (including relevant rules curated in appendix 1).

[3]In contrast, the new **Patient Incident Response Framework** (March 2020) due to be rolled out next year provides that the purpose of investigations is

> "**not:**
> to determine the cause of death (where applicable); that is for coroners
> to hold any individual or organisation to account; this includes judgements on avoidability, preventability, liability, predictability, etc."

However, the increased focus on a systems approach may raise leadership failures which increases the risk of submissions based on Corporate Manslaughter.

Amy Clarke

Galbraith Plus: where now?

One of a coroner's many essential functions is to ensure that at any inquest, especially those heard with juries, there is a lawful basis for the conclusion that is ultimately recorded on the record of inquest. The mechanism for ensuring that only lawful conclusions are returned by juries is the application of the *Galbraith* Plus test.

The test derives from the criminal jurisdiction, in the case of *R v Galbraith* [1981] 1 WLR 1039. In that case, which concerned the test to be applied in the criminal courts when considering a submission of no case to answer, the Court of Appeal concluded:

> *"How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*

In inquests, the 'pure' Galbraith approach is modified. In *R (Secretary of State for Justice) v HM Deputy Coroner for the Eastern District of West Yorkshire* [2012] EWHC 1634 (Admin). Haddon-Cave J explained that an additional level of scrutiny was required (at §23):

> *"…when coroners are deciding whether or not to leave a particular verdict to a jury, they should apply a dual test comprising both limbs or 'schools of thought', i.e. coroners should (a) ask the classic pure Galbraith question "Is there evidence on which a jury properly directed could properly convict etc.?" … plus (b) also ask the question "Would it be safe for the jury to convict on the evidence before it?"."*

The coroner must therefore first be satisfied not only that there is enough evidence to leave a particular conclusion to the jury, but also if there is, that it is safe to do so. It will only be safe to do so if there is a sound, not speculative, evidential basis to do so.

The reason for the "modest gloss" was explained by Haddon-Cave J thus (at §23):

> *"The second limb, arguably, provides a wider and more subjective filter than the first in certain cases. In my view, this extra layer of protection makes sense in the context of a coronial inquiry where the process is inquisitorial rather than adversarial, the rights of interested parties to engage in the proceedings are necessarily curtailed and coronial verdicts are at large."*

'Safe', the former Chief Coroner explains in his Law Sheet No.2, should be given its ordinary English meaning, the coroner exercising his or her own discretion judicially on a case by case basis.

Practitioners will now have to grapple with the impact of *Maughan* on how the application of this test is argued at forthcoming inquests where suicide or unlawful killing are potential conclusions. It is the decision to lower the standard of proof for unlawful killing that has understandably piqued the interest of inquest practitioners, particularly those who represent Trusts, police forces and other public bodies.

The lowering of the standard of proof may, at first blush, appear to open the door widely to the possibility of unlawful killing conclusions becoming more frequently recorded. However, the core principle of the *Galbraith* Plus test not only remains unaltered, it is arguably even more important than ever.

Whilst the judgment in *Maughan* lowers the evidential threshold, it does not usurp the need to ensure that the evidential threshold is properly met. It is likely that representatives will argue more often that an unlawful killing conclusion should be left to jury, but the second limb of the *Galbraith* Plus test offers an important restraint on when such conclusions should be left. Coroners may need to be reminded of why the "extra layer of protection" remains important – and is perhaps even more important than before – where notwithstanding the lower standard of proof, the same procedural limitations apply.

Cicely Hayward

The risk of prosecution and misconduct proceedings

When summarising the submissions made on behalf of INQUEST as to the reasons why the civil standard of proof should be maintained in all non-criminal cases, Lady Arden stated "the person implicated in an unlawful killing is at no greater risk of prosecution than he would be if findings of fact had been made against him in civil proceedings".

In the context of prosecutions for homicide offences, that analogy provides little reassurance to those who may now find themselves implicated by an unlawful killing conclusion. That is because it is actually fairly unusual for a civil judge to be called on to make findings of fact in cases alleging unlawful use of force, or gross negligence, causative of death. In almost all cases where there is potential culpability for a death the inquest precedes the resolution of the civil proceedings. And whilst the conclusions of the inquest are not admissible in civil proceedings, in practice they usually determine whether the proceedings are settled, contested to trial or indeed withdrawn. So whilst it may be right that a person should be at no greater risk of prosecution for homicide offences from an inquest conc-lusion than from a civil judgment, that doesn't mean very much.

As a starting point, there is no question that reducing the standard of proof to the balance of probabilities for a conclusion of unlawful killing will increase the number of inquests in which that conclusion is reached (particularly in cases which might in the past have included neglect as a rider to the conclusion).

> In those cases, will the people or organisations implicated by the unlawful killing conclusion be more likely to face criminal proceedings than they would have been? Whilst the logical answer should be "no", as the facts and evidence should either justify the bringing of charges or not, there are a number of considerations which may well mean that in practice the answer is "yes", or at least "yes for now".

In its Legal Guidance on coroners and inquests (last updated in December 2019), the CPS reminds prosecutors to bear in mind the judgment in *R v DPP ex parte Manning* [2001] QB 330 which states that "where an inquest following a proper direction to the jury culminates in a verdict of unlawful killing ... the ordinary expectation would naturally be that a prosecution would follow", and notes that the judgment in *Manning* directs that where no prosecution follows "solid grounds" should exist to explain why that decision has been taken.

The CPS' Legal Guidance reflects the 2016 Agreement between the Crown Prosecution Service, the National Police Chiefs' Council, the Chief Coroner and the Coroners' Society of England and Wales, which establishes a common understanding of the roles and responsibilities of the CPS, police, and coroners where an investigation gives rise to a suspicion that a serious criminal offence may have caused a death. Paragraph 6.1 of that Agreement provides that in the event that an inquest concludes with an unlawful killing conclusion:

> *"The CPS will, upon receiving notification of an unlawful killing conclusion, consider whether there is any new evidence or information within the coroner's proceedings which has the capability to change any previous CPS decision not to bring criminal charges against an individual(s) or organisation."*

In *Manning* the Divisional Court did not expressly address whether the fact that the inquest jury's verdict of "unlawful killing" was reached beyond reasonable doubt was a relevant factor in the expectation that a prosecution would follow such a verdict (although some aspects of Lord Bingham's decision are best explained by this factor being in his mind – in particular his suggestion that it might be considered inexplicable not to prosecute someone implicated by an unlawful killing verdict). The court considered that the requirements on the state derived from art.2 to conduct an effective investigation capable of leading to the identification and punishment of those responsible for unlawful violence required that if a prosecution was not to follow a conclusion of unlawful killing a plausible explanation would need to be given for that decision. Whilst it remains to be seen whether the ordinary position that a prosecution will follow an unlawful killing conclusion will withstand *Maughan* (and some of the difficulties these prosecutions will face are addressed below), it seems likely that the CPS will still be expected to consider the position in every case where an unlawful killing conclusion is returned and give reasons for not prosecuting where that is the decision.

In deciding whether to bring charges prosecutors are required firstly to consider whether they are satisfied that there is sufficient evidence to provide a realistic prospect of conviction. The Code for Crown Prosecutors explains that a realistic prospect of conviction means that "an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged". That is a different test to the one which coroners and juries will have applied in inquests – namely whether the

Cicely Hayward

The risk of prosecution and misconduct proceedings (continued)

elements of the offence are made out on a balance of probabilities – as it requires the prosecutor to be satisfied that it is more likely than not that the jury will find the elements of the offence proven beyond reasonable doubt. But it is not so very different. In cases where the relevant evidence relied on by the inquest jury would be admissible in the criminal proceedings a prosecutor's decision not to bring charges may be susceptible to challenge.

Prosecutors are then required to determine whether it is in the public interest to prosecute. By definition, in unlawful killing cases the offences in question will always be serious. Whilst a whole range of factors will go into an assessment of whether a prosecution is in the public interest, it is likely that one such factor will be the public confidence in a criminal justice system that does not pursue criminal convictions of those involved in a case where an inquest jury has recorded a conclusion of unlawful killing.

So, in these early days at least, it seems probable that the effect of the increased number of inquests which result in an unlawful killing conclusion will be at least a significant increase in the number of cases which require a charging decision by the CPS, and potentially also an increase in prosecutions for homicide offences. However, it is also probable that those will be difficult prosecutions.

> There are significant differences in the safeguards that exist for criminal proceedings as compared with inquests: in an inquest hearsay evidence is admissible, evidence that is potentially prejudicial (such as disciplinary records) is often adduced and there is no statutory threshold as to whether it would be unfair for it to be heard, limits are rarely placed on what...

> ...material a witness can see before going into the witness box and witnesses can usually hear each other's evidence before giving their own evidence. All of this may mean significantly less evidence is available to the criminal proceedings than was available in the coronial proceedings.

And experience has taught us that, even in cases where the inquest jury has reached an unlawful killing conclusion applying the criminal standard of proof, criminal juries very often do not follow suit on the same evidence.

Going forward, the CPS will no doubt provide more extensive guidance than it currently does to assist prosecutors in approaching the assessment of whether charges should be brought following inquests which return an unlawful killing conclusion, and also in formulating reasons for a decision not to prosecute. It may be that the reduced standard of proof for an unlawful killing conclusion results in an increase in referrals under r.25(4) of the Coroners (Inquests) Rules 2013, which requires Coroners to adjourn an inquest and notify the DPP if, during the course of an inquest, it appears to the Coroner that the death of the deceased is likely to have been due to a homicide offence and a person may be charged in relation to that offence. In practice this is most likely to arise in cases where the inquest obtains new expert medical evidence, perhaps suggestive of gross failures, or changing the causation picture in a use of force case. Interested persons will probably look to obtain their own expert evidence sooner and more routinely than they presently do, to ensure (amongst other things) any consideration by the CPS has regard to a range of opinion.

Whilst most of this article has been devoted to criminal proceedings, the change in the standard of proof is bound to result in an increase in misconduct proceedings. Consider a case where the deceased died following police restraint. The matter was referred to the IOPC from the outset as a mandatory referral, the IOPC investigated and it assessed there was no case to answer for any misconduct causative of death. The inquest jury then returned an unlawful killing conclusion. The IOPC would then in almost all cases have to re-open the investigation into the officers implicated by the conclusion and determine which officers had a case to answer for misconduct or, more probably, gross misconduct. Whilst arguably a similar process should have occurred in the past where narrative conclusions recorded findings of excessive force for example, the effect of an unlawful killing conclusion is bound to result in increased and routine pressure for misconduct proceedings to be instigated or reopened, with all the uncertainty that brings for those involved.

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How could the decision in *Maughan* influence preparation for an inquest?

In *Maughan*, Lord Carnwarth said of the Coroners and Justice Act 2009 that, "... [it] should in my view be approached as a new statute intended to restate the law in modern form..." (§99). The 2009 Act cemented developments in practice which had seen, and continue to see, inquests evolving into more open but complex processes. That a coroner or inquest jury now no longer needs to be sure that the deceased was killed unlawfully is undoubtedly a significant development in inquest law. It reiterates the need to give early consideration not only to the risk of an unlawful killing conclusion, but also that a coroner may be more willing to investigate the question. That influences the approach sensible organisations should take to an inquest. A number of issues need to be borne in mind.

Can the inquest even proceed?

A conclusion of unlawful killing is restricted to the homicide offences of murder, manslaughter (including gross negligence and corporate manslaughter) and infanticide (*R (Wilkinson) v HM Coroner for Greater Manchester South District* [2012] EWHC 2755 (Admin)). The Coroners (Inquests) Rules 2013 mandate that a coroner must adjourn an inquest and notify the DPP (in effect the CPS) if, during the course of the inquest, it appears to the coroner that the death under investigation is likely to have been due to a homicide offence and that someone may be charged in relation to the offence. The obligation can arise at an early stage of an investigation and until the outcome of any referral is determined the inquest will remain suspended (see Cicely's article).

Even where an inquest proceeds because a coroner decides not to make a referral to the DPP, or the CPS has decided not to charge someone, or the circumstances mean that there is no prospect of a trial (the death of the killer being a ready example), *Maughan* makes it possible that unlawful killing could be found. It is likely that we will see more inquests where that conclusion is recorded, particularly in relation to deaths in settings such as the workplace, hospitals and children's homes.

Early engagement is key

There is now an even more vital need to engage early with a coroner's investigation. That better assists a coroner in identifying the key issues and the evidence necessary to determine those issues.

As a first step, individuals and / or organisations will need to assess the risk that an inquest may find there has been an unlawful killing. That assessment will be informed by the outcome of any internal investigation and / or police investigation. It is pertinent to note that a coroner is likely to seek disclosure of any documents generated during the course of any such investigation, if these have not already been provided.

Assessment of the risk allows interested persons to be proactive about making representations on scope. A party who decides to seek interested person status after scope has been determined may find it difficult to persuade a coroner to revisit the question to any great extent. Often a coroner will frame scope in wide terms. Cogent submissions on the sufficiency of the available evidence when set in the context of the legal elements of a homicide offence and the statutory purpose of an inquest will better assist a coroner in adopting a more focussed framework for the investigation. It may be important, for example, to encourage a coroner to set out their thinking as to why corporate manslaughter is relevant given the exceptions in the Corporate Manslaughter and Homicide Act 2007 as to what is meant by a "relevant duty of care" (see Jonathan's article).

Similarly, where a jury is not mandated by the 2009 Act, the question arises as to whether there is sufficient reason to summon a jury. Coroners will need submissions on whether the issues would be better resolved in the absence of a jury. The circumstances of a case may benefit from a coroner, sitting alone, making detailed factual findings which are open to public scrutiny. By contrast, a jury is limited to those details it can record on the record of inquest.

Away from the pre-inquest review, it will be important to reach an early view as to whether any employee of an organisation needs to be separately represented. That an inquest conclusion cannot name individuals will be a small comfort to someone who will not be giving evidence anonymously and who is well aware that they can be easily identified. Their interests may be in obvious conflict with those of other employees or their employer. An organisation's commitment to assisting a coroner to conduct a full, fair and fearless investigation may not sit easily with the legitimate protection of an employee who may need advice on the privilege against self-incrimination.

Careful consideration will also need to be given as to whether further evidence should be submitted to the coroner. Resource limitations can often mean that coroners rely on statements obtained by the

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How could the decision in *Maughan* influence preparation for an inquest? (continued)

police or an investigating authority. These are not always prepared specifically for an inquest. Well prepared statements addressing the issues to be explored at an inquest ensures that a coroner has all available evidence. It will be equally important to ensure the coroner has identified all relevant witnesses.

Is expert evidence required?

Where appropriate, coroners will obtain expert evidence having invited submissions as to the questions any report should address. Given the consequences of an unlawful killing conclusion, it may be preferable for an interested person to obtain its own expert evidence. Indeed, the need may inevitably arise if another party has already disclosed an expert opinion which cannot be accepted. Addressing sooner rather than later whether an expert is required ensures that the best qualified expert is instructed (this is particularly important if the required specialism is discreet) and is asked the right questions. Where there is a jury, it may be particularly important to have an independent explanation of the applicable standards said to have been breached and the causative impact of any alleged act or omission.

Of course, should a coroner decide to adduce the evidence of an expert instructed by a particular interested person then that expert becomes the coroner's witness. The expectation therefore is that, if a party indicates that it will obtain its own expert evidence, then that evidence will be disclosed. In Re Ketcher and Mitchell [2020] NICA 31, the Northern Irish Court of Appeal held that a coroner could order the bereaved family to disclose an expert report as inquests were essentially inquisitorial proceedings and litigation privilege did not apply. While this decision is not binding on coroners in this jurisdiction, it heralds a new line of argument on disclosure obligations.

Will inquests become more adversarial?

The modern inquest gives proper deference to the family of the deceased while disclosure will often be substantial and made on a voluntary basis. Alongside such welcome developments, critics point to the adversarial atmosphere that pervades many inquests and their use as a forum to venture into examinations of policy far removed from the statutory questions of who, when, where and how.

To a degree, inquests have always been adversarial. That may be because the issues are controversial; it may be because family representation at an inquest is dependent on the outcome of a successful civil claim; or it may be because entities take an overly defensive approach to the risk of criticism. Where a coroner is prepared to investigate whether a death was more likely that not due to unlawful killing, then the inquest is set to become more adversarial. Separate representation for individuals will mean more interested persons. Inquests may take longer. Aside from the increased complexity and cost, there will be legal argument on scope, disclosure, the use of evidence and the privilege against self-incrimination. Parties will be alert to the possibility that the police can reopen an investigation after an inquest has ended.

The impact on linked proceedings

The view that resolution of any civil proceedings should always await the conclusion of an inquest is overdue for re-evaluation. Given the extent of advance disclosure in an inquest, it is possible for the representatives of a family to formulate a civil claim ahead of the substantive inquest. Early settlement reduces the delay in a family being compensated and limits the exposure of organisations (many publicly funded) to a claim for inquest costs, which can often be substantial. Whether such a flexible approach can be adopted or the extent to which civil proceedings can be resisted may depend on the willingness of individuals at risk of serious criticism to assist in those proceedings or the view that a more cautious approach, avoiding any hint of admitting liability, should prevail.

The reputational aspect

That a conclusion of unlawful killing may now be more likely will cause obvious concern to individuals and organisations facing such a finding. It risks reducing confidence in bodies exercising a public function or offering a service to the general public. Public opinion may not appreciate that the criminal standard of proof no longer applies. The reputational impact could be particularly severe where an unlawful killing conclusion is combined with a narrative conclusion identifying systemic failings (indeed systemic failings may be connected to a death by suicide). The preparation for an inquest should always involve addressing what steps have been, or will be taken, to address potential systemic issues such as training or information sharing. Such issues inform a coroner's PFD function. Identifying a suitable senior witness able to explain the current position is critical to addressing any residual concerns a coroner may have.

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