Probably unlawful killing: a new inquest conclusion

written by Bridget Dolan QC | 13 November 2020

***R (Maughan) v Senior Coroner for Oxfordshire* [2020] UKSC 46**

There is perhaps no better example of the judicial development of our common law than *Maughan*. A case which began with a family member appealing against what they believed was the incorrect application of the civil standard of proof to a suicide conclusion has ended with the Supreme Court determining that not only was the standard of proof correctly applied in circumstances where suicide is a civil finding, *but* that the same logic also applies to an inquest conclusion of unlawful killing.

> ***"There is to be only one standard of proof in inquests and that is proof that the fact in issue more probably occurred than not."***

This will no doubt surprise many readers, and perhaps rightly so, as the decision in *Maughan* is from a divided court: a 3:2 majority concluded that the standard of proof for **all** conclusions at an inquest – including 'suicide' and 'unlawful killing' – should be the civil standard.

Although as one of the dissenting voices, Lord Kerr, has quite rightly emphasised in another setting:[1] the importance of dissent, even when in the final court of appeal, is that it contributes to the transparency of the debate, and far from detracting from the authority of the majority opinion, that opinion, in confronting and disposing of an opposite view, if it has been done convincingly, will be all the more commanding of acceptance as a result.

Giving the lead judgment Lady Arden starts at the bottom, by explaining why a mere footnote on the Record of Inquest (ROI) form cannot codify the law.

Note (iii) on Form 2 – the ROI – states:

> *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.*

Applying principles of statutory interpretation Note (iii) simply states the common law rule as it was at the time the form was created. It does not have the effect of codifying the law and taking away the power of the courts to develop the common law ([56]).[2]

More pertinent to the daily practice of inquest lawyers, Lady Arden went on to explain why she agreed with the Court of Appeal that the civil standard should apply to 'suicide' and why it should also apply to 'unlawful killing'.

Why should the civil standard apply to 'suicide'?

Lady Arden set out four principal reasons why the civil standard should apply to short form 'suicide' conclusions (helpfully set out under sub-headings – if only all judgments were so easy to navigate):

1. In principle, in civil proceedings the civil standard of proof should apply ([69] to [72]);
2. The criminal standard may lead to suicides being under-recorded and to lessons not being learnt ([73] to [74]);
3. The civil standard better aligns with the changing role of inquests and changing societal attitudes ([75] to [81]);
4. Leading Commonwealth jurisdictions have applied the civil standard (Canada, New Zealand and Australia; [82] to [83]).

Civil standard in civil proceedings

Lady Arden appears to assume that inquests are civil proceedings and notes that civil proceedings where the civil standard does not apply are rare and generally involve risk of liberty and loss of property (for example contempt and forfeiture) ([69]).

Notably however, the Supreme Court don't agree on even the basic nature of inquests: Lord Kerr, in his dissenting judgment, says they are neither civil nor criminal but *sui generis* with rules of procedure of their own ([141] and [142]). Many will agree with Lord Kerr, that inquests do not easily sit alongside civil proceedings generally: they are inquisitorial rather than adversarial, therefore there are no parties or pleadings; their structure is altogether different, the questions asked and the conclusions are all matters at the discretion of the Coroner who has a much greater freedom than a civil judge. As Lord Kerr identified, they have their own procedural rules – the CPR does not apply. Participants have no 'case' and there are no costs to award or recover (at least not within the inquest). There is no appeal structure – challenges are by judicial review.

Be that as it may, Lady Arden was concerned about inconsistency between the evidential basis of different findings relevant to suicide in a single inquest. This, Lady Arden considered, would entail a system of fact-finding that is "*internally inconsistent and unprincipled and does not meet the standards of a modern, principled legal system*" ([71]).

Criminal standard may lead to suicides being under-recorded and to lessons not being learnt

Society needs to understand the causes and to try and prevent suicides. Statistics are the means by which this can be done. The criminal burden makes an open verdict more likely. Lady Arden commented that this is especially worrying in the case of state-related deaths. She may have been thinking of the number of deaths in prisons, of which *Maughan* is an example. Accurate suicide statistics may reveal a need for social and medical care in areas not previously regarded as significant ([74]).

This blogger wonders if this puts the cart before the horse somewhat. It may be a benefit of a law that its outcomes can be clearly classified and counted for epidemiological purposes but should the course of the law be changed to achieve that outcome?

Changing role of inquests and changing societal attitudes

Lady Arden considered that the civil standard better reflects society's attitude to suicide. Suicide is no longer a crime and there has been an unmistakable change in society's understanding and attitude of suicide. Although there are some who consider suicide a mortal sin, this view cannot be described as the generally prevailing social attitude ([75] to [80]).

Lord Kerr was less convinced that a conclusion of suicide had lost so much of its potency ([138]). Family members may suffer "additional blows" through the finding of an inquiry that a loved one has killed him/herself ([137]). It may have financial implications with the loss of employee or insurance benefits – a point Lady Arden mentions only fleetingly ([80]). For Lord Kerr there was therefore still justification for treating suicide differently from the other conclusions.

Lady Arden's final and perhaps most powerful justification was that the role of inquests within our society has changed. Inquests today are concerned not with issues of criminal justice but with the investigation of deaths ([81]).

Why the civil standard should apply to 'unlawful killing'

In *Maughan*, the standard of proof applying to 'unlawful killing' was first raised in the Court of Appeal. The Court of Appeal was bound by authority to hold that the criminal standard applied (*McCurbin* [1990] 1 WLR 719) – see our earlier blog here.

Lady Arden considered that the short form conclusions of 'unlawful killing' and 'suicide' could not be satisfactorily distinguished with regards the standard of proof ([93]). She concluded that the civil standard should apply to both. It is more consistent with principle, removed inherent inconsistency in inquest determinations and reflects the general rule for the standard of proof in civil proceedings ([96]).

> ***"[93]…[I]t is as at least as likely that public confidence in the legal system will be diminished if the evidence at the inquest cannot lead to clear findings on a balance of probabilities. It would appear to the public as if the system has conspired to prevent the truth from being available to them"***

She was not persuaded by the argument that public confidence in the legal system would be diminished if a conclusion of unlawful killing is reached at inquest on the civil standard, but resultant criminal prosecution fails. That can happen even if the criminal standard is maintained. In her view, it is at least likely that public confidence would be diminished if, at the conclusion of the inquest, clear findings cannot be made on the balance of probabilities. It would appear to the public as if the system had conspired to keep the truth from them. The public are likely to understand the difference between an inquest and a criminal trial, where the accused has well-established rights to participate actively ([93]).

Of course the statute already deals with adjourning an inquest so criminal proceedings can be brought[3]. Although on occasions charges are not envisaged before or during the inquest, but it is the findings made at the inquest that trigger prosecuting authorities to think again.

Prejudice to the alleged perpetrator dd not concern Lady Arden – after all the alleged perpetrator is already equally liable to suffer prejudice from the factual findings contained in a narrative conclusion (which are to be found on the balance of probabilities). The alleged perpetrator will be in the same position in an inquest as he already is if civil proceedings are brought against him ([95]).

The Dissent

Lord Kerr has form for providing a dissenting judgment: this time one with which Lord Reed agrees. For Lord Kerr the alternative interpretation of Note (iii) is that it elevates the common law rule: once the Coroners (Inquests) Rules 2013 were enacted, the common law rule that proof to the criminal standard was required for a conclusion of 'suicide' or 'unlawful killing' was given statutory force ([126]).

The implications

This decision is going to have significant and wide ranging ramifications at inquests in which the use of force is potentially in issue. This perhaps makes it more surprising to find such a significant change in the law when the issue did not arise in the case appealed (unlawful killing was never a potential conclusion in *Maughan*).

Applying the civil rather than the criminal standard to questions such as the degree of 'reasonable' (or not) force used where public bodies are involved in restraint (such as in police, immigration and mental health settings) will mean even higher stakes in play at such inquests. The bodies potentially implicated will no doubt wish to protect their reputation by instructing lawyers even more often. Unless unlawful killing being in play is deemed relevant to 'exceptional legal aid' provision for families the current inequalities of arms will be even more pronounced (at least in those cases where Art 2 ECHR is not also engaged).

That is not so say that an increase in the number of unlawful killing conclusions is in itself a bad thing – it may place pressure on the agencies involved to change their practices and ensure that fewer lives are lost.

Footnotes

[1] "Dissenting judgments: self-indulgence or self-sacrifice? The Birkenhead Lecture, 8 October 2012

[2] The Chief Coroner has indicated to Coroners that he will make the necessary changes to Guidance on short-form and narrative conclusions. Clearly old copies of Form 2 need to be discarded (although it is already rare for any court to use the form with its footnote in any event).

[3] Coroners and Justice Act 2009, Schedule 1