

Screening Inquest Witnesses: An appropriate protection or a disproportionate intrusion into open justice?

written by Bridget Dolan QC | 12 November 2019

Dyer v Assistant Coroner for West Yorkshire [2019] EWHC 2897 (Admin)

If the tribunal, the lawyers and the jury who will be making the decision can watch a witness as they give live evidence one might ask why should it matter if the rest of the public and press might not see the witness' face?

However it matters a great deal if one is to have any respect for the constitutional principle of open justice which, as one of the core safeguards in our judicial system, should be fundamental to all courts and tribunals exercising the judicial power of the state.

In Coroners courts, as in the rest of the British justice system, the notion that justice should not just be done, but also be seen to be done is far more than an often repeated trope; it is something that rightly weighs heavy when the loss of a life is at the centre of the inquiry, and particularly so when agents of state are implicated in the tragic death of a black man in custody. It is, therefore, unsurprising that in the recent case of *Dyer* heavy justification was required for preventing the deceased's parents, partner and son from watching the faces of the police witnesses whilst they gave their inquest evidence.

Although balancing potential risks to police officers from those who may wish them harm could justify their giving evidence behind screens and so not open to public scrutiny, it was a step too far, held Mrs Justice Jefford, to also prevent the close family of the deceased from seeing the relevant officers' faces.

Brief background

Andrew Hall had been found collapsed at home, he was taken to hospital where, he became agitated and was alleged to have slapped a nurse. Police were called who arrested Mr Hall and took him to a police station. Whilst he was being moved to a cell there was a struggle, Mr Hall was restrained and apparently struck by one or more police officers. He was soon returned to hospital where his condition deteriorated and, two hours later, he died.

The inquest anonymity application

Sixteen police officers were due to give evidence at the ensuing inquest. Applications were made to preserve the anonymity of those officers, including by pixelating their faces and redacting any mention of their names from the CCTV footage that was to be shown in open court.

The deceased's partner, his parents, three of his siblings and his adult son ('the family') did not oppose those applications. The family, along with the other interested persons and their legal representatives, already knew two of these witnesses' identities and they and the jury would have access to copies of the un-redacted CCTV footage.

However, although the anonymity ruling was unchallenged, the family did oppose a further

application that the police witnesses should give their oral evidence from behind a screen. If granted the effect would be that the family and members of the press and public would not see the police witnesses' faces – although the coroner, the jury and all legal representatives would be able to see each witness on the stand.

It was argued that the screen was required to ensure that the anonymity of the police officers was preserved in circumstances where several police witnesses had "*a genuine fear and concern*" that another of the deceased's brothers, Q, might act against them or their families if he knew who they were. Q, who was not a party to the application, had a criminal record and a history of making threats. There was "*ample evidence*" before the assistant coroner from a police inspector and in the statements of the officers themselves regarding the perceived risk that Q posed.

When the assistant coroner granted the police officers' application under r18 Coroners (Inquest) Rules 2013 Mr Hall's family sought judicial review of that decision. They argued that using the screen to block their view was a disproportionate and unlawful intrusion into open justice.

The decision

Jefford J reflected upon the correct approach to such applications:

- The important principle of open justice must be taken into account
- Any incursion into that principle is to be approached with care;
- Any derogation from openness should be no more than is necessary;
- Screening may be used to protect vulnerable witnesses;
- The determination requires a balancing exercise between the benefits and detriments of screens;
- Where the quality of evidence will be improved if given without fear this will be a material factor;
- But so too is the risk of undermining public confidence in the procedure.

The assistant coroner had made his decision having found the threat credible and officers' fears genuine. He had considered that witnesses would give better evidence if not in fear and also that using a screen would not impede the questioning by the family's barrister. However, it appeared to the judge that when conducting his balancing exercise the assistant coroner had not taken sufficiently into account the fundamental importance of open justice and maintaining public confidence in the procedure.

"The family members banned from seeing the officers' faces posed no threat themselves."

Significantly, the family members banned from seeing the officers' faces posed no threat themselves. They knew the identity of two police officers already and had not disclosed those identities to Q. Undertakings could be given by the family and there was no good basis to suggest they would breach those undertakings or the anonymity order in the future: the judge said that any suggestion that Q might force them to do so was pure speculation.

To the extent that the screens would prevent family members from seeing the officers this was unnecessary: the decision was irrational, disproportionate and unfair as it failed to take account of the objectively low level of risk of breaching anonymity that these particular family members presented and so was a greater incursion into open justice than was necessary.

But is watching a witness' demeanour actually important?

Whilst the benefit to bereaved families of seeing key witnesses giving evidence at inquests, including seeing those involved in a death explaining their actions and so enabling more trust in the investigation, should not be underestimated, it is of interest that INQUEST put a statement before the High Court that also emphasised the importance of bereaved families "having the opportunity to see and understand the body language of a witness".

Although not part of the ratio, Jefford J's judgment similarly perpetuates the often held view that "*being able to see a witness give evidence is an important factor in assessing a witnesses' demeanour and, if it is in issue, credibility*"[1]. Yet, as the Court of Appeal have recently emphasised[2], it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. Indeed to attach any significant weight to the impression of a witness' demeanour in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices[3][4].

Coroners and inquest advocates would do well to recognise that the consistent findings of psychological research is that ordinary people are not able to effectively use nonverbal indicia to determine whether another person is lying. Assessing demeanour is not an effective way to decide whether to believe a witness when, save for a few very transparent liars, 'honest demeanour' is uncorrelated with honesty for most people[5]. The legal premise concerning the importance of demeanour is erroneous. Indeed there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments[6].

As Lord Justice Leggatt reminds us all in SS, the accurate detection of deception relies upon liars being more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth [7]. One of the main potential benefits of examining a witness is that skilful questioning can expose inconsistencies in false stories. It is through skilled and probing questioning, rather than assessing demeanour, that coroners (and inquest advocates) will be more likely to reveal the truth of how a person came to die.

Footnotes

[1] At §18

[2] In *SS (Sri Lanka) v SoS Home Dept* [2018] EWCA Civ 1391

[3] *Duped: Truth default theory and the social science of lying and deception*. Levine, T.R. (2019) Univ. Alabama Press

[4] See the longer article on the SS case by Gordon Exall in his civil litigation brief [here](#)

[5] Levine, T. R. (2010). A few transparent liars: Explaining 54% accuracy in deception detection experiments. In C. Salmon (Ed.) *Communication Yearbook* 34 (pp. 40-61). Sage.

[6] OG Wellborn, "*Demeanor*" (1991) 76 Cornell LR 1075 as cited in SS at §40

[7] Minzner, "*Detecting Lies Using Demeanor, Bias and Context*" (2008) 29 Cardozo LR 2557

Nageena Khalique QC of Serjeants' Inn Chambers is instructed to act for Calderdale and Huddersfield NHS Foundation Trust who are an interested person in Mr Hall's inquest