Proving things at inquests – the balance of probabilities now the only test

"*The standard of proof for all short form conclusions at an inquest is the balance of probabilities*" – Lady Arden JSC at [97]

The Supreme Court's decision in *Maughan*, awaited since February, has, by a 3-2 majority, reaffirmed the lower Courts' decision that the civil standard of proof now applies to suicide conclusions and extended that standard to unlawful killing conclusions. Before *Maughan*, Coroners and juries could and did conclude, on the balance of probabilities in a narrative conclusion, that the necessary elements of suicide – that the Deceased took his own life did so intending to kill himself or another – were present, but were unable to go on to reach a short form conclusion of suicide unless they were sure to the criminal standard. The same applied to unlawful killing conclusions. Following *Maughan,* there is now only one standard of proof.

Much of the detail of the Supreme Court's judgment involves analysis of the principles of statutory interpretation. However, it is clear that the majority accepted that what they were engaged in was an exercise of changing the common law in an important respect. They decided that now is the time for that change to be made, for a number of reasons which Lady Arden set out in the course of her leading judgment. In civil proceedings, the civil standard of proof should apply [67] (though whether or not inquests really are "civil proceedings" remains a matter for debate); insisting on the criminal standard may lead to suicides being under-recorded and lessons thereby not being learnt [73]; public attitudes to suicide have moved away from the stigma previously associated with it [70], [77]; Canada, Australia and New Zealand have also taken this approach [82]. Lady Arden went on to hold that, there being no good reason of legal principle why short form conclusions of unlawful killing should remain subject to a different standard of proof, the civil standard of proof should apply across the board.

Lord Carnwath reiterated at [99] that there is no sliding scale of probability to be applied, commensurate with the subject matter or the seriousness of the decision. As per Lady Arden at [62] "*suicide is not to be presumed and must be affirmatively proved by some evidence… It is not sufficient to say that, if all other causes of death are ruled out, it must have been a suicide*".

Lords Kerr and Reed would have held that a footnote to Form 2, the prescribed form for recording those matters which must be recorded at the conclusion of an inquest, had the force of law as a result of the Coroners and Justice Act 2009, so that any change to it would be a matter for statute or regulations, not the Courts. That footnote said in terms that the standard of proof required for short form conclusions of unlawful killing and suicide was the criminal standard. The majority disagreed that the footnote had the force of law in and of itself, as opposed to simply summarising the state of the common law at that time. Lord Kerr went on to comment that there are good reasons to place suicide and unlawful killing conclusions in a special category requiring proof over and above the normal civil standard.

It is somewhat surprising to find the Supreme Court so closely divided on such an important issue. Following *Maughan*, the standard of proof required in inquests is now settled law. That said, especially given the division of opinion on the bench, it may not quite be the last word on the matter. It is possible to envisage, for instance, a challenge to an unlawful killing conclusion brought by someone who considers themselves to have been unfairly stigmatised by a Coroner's decision even if (because of the prohibition on making findings indicative of criminal responsibility on the part of any named individual) they are not directly named as the perpetrator. The prospect of a differently constituted Court hearing some future appeal on this issue and exercising its right to depart from a previous Supreme Court decision when it appears right to do so (following the House of Lords Practice Statement on Judicial Precedent) does not seem beyond the realm of possibility.

The change in the standard of proof will inevitably make it easier for Coroners to reach short form conclusions of suicide and unlawful killing. This move has been welcomed by INQUEST, a leading charity which works with bereaved families, which says it "*should mark a step forward for state and corporate accountability*". The Maughan family, who had resisted this outcome partly because of their Catholic faith and their belief that suicide still does carry a stigma, stated their disappointment but noted that the reduction in the standard of proof for unlawful killing will make it easier for bereaved families to hold state institutions to account.

There have already been calls from some specialists solicitors for the Chief Coroner to issue some guidance as to how the new lower standard of proof should be applied. Plainly, it would be unsatisfactory if conclusions such as suicide or unlawful killing were to become 'tick box' exercises. Such conclusions should be accompanied by narrative conclusions setting out the background to how the death in question came about and identifying any failings which there may have been, for instance in mental health care, so that lessons can be learned.

As has already been noted by the Supreme Court, the reduction in the burden of proof for unlawful killing conclusions may well mean an increase in unlawful killing conclusions but without this being matched by any increase in prosecutions. This is, of course, a natural result from the continued requirement for the criminal standard of proof to be applied when considering such prosecutions. The expectations of bereaved families around that issue may need careful management.

Ross Beaton
17.11.2020