Reflections on *Maughan*: How to manage concurrent criminal and inquisitorial proceedings.

By Tim Green and Hazel Jackson

On 13 November 2020, the Supreme Court in *R (on the application of Maughan) (Appellant) v Her Majesty's Senior Coroner for Oxfordshire (Respondent)* [2020] UKSC 46 ("*Maughan*"), changed the standard of proof required to return a short form conclusion of suicide and unlawful killing in an Inquest from the criminal standard – beyond reasonable doubt – to the civil standard – on the balance of probabilities. This is likely to lead to an increase in conclusions of unlawful killing, with the subsequent prejudice that arises to named parties. This article looks at how practitioners might navigate concurrent criminal and inquisitorial proceedings.

The decision in *Maughan*

1. Prior to *Maughan*, the standard of proof for all short form conclusions at Inquests other than suicide and unlawful killing was the civil standard. Only in respect of these two conclusions had the higher criminal standard of proof been applied.

2. *Maughan* arose out of the death on 11 July 2016 of the appellant's brother, James Maughan ("**the Deceased**"), at HMP Bullingdon. At the Inquest, the coroner decided the jury could not safely reach a short form conclusion of suicide because the jury could not be sure beyond reasonable doubt that the Deceased had intended to kill himself. The coroner posed questions to the jury and asked the jurors to make a narrative statement of the circumstances of the Deceased's death on a balance of probabilities. The jury answered the questions by saying the Deceased had a history of mental health issues and, on the balance of probabilities, he intended to fatally hang himself and increased vigilance would not have prevented his death.

3. The appellant began judicial review proceedings against the coroner to establish that the jury's conclusion was unlawful because the coroner was wrong to have directed the jury to apply the civil standard of proof.

4. The Divisional Court dismissed the appellant's application and held the standard of proof for short form and narrative conclusions of suicide was the civil standard. The Court of Appeal upheld the Divisional Court's judgment but went onto hold that the criminal standard should continue to apply to unlawful killing.

5. The Supreme Court, by a 3-2 majority, dismissed the appeal and held that the standard of proof for *all conclusions* of suicide and unlawful killing at an Inquest is the balance of probabilities. There are has already been much helpful commentary on this decision and it is not intended to repeat all of that here. Instead to focus on the parts of the judgement relevant to mitigating the prejudice arising from a conclusion of unlawful killing. The salient points of Lady Arden's leading judgment for this article (with whom Lord Wilson agreed) are that:

    a. Inquests are a form of civil proceedings and the legal "*principle is clear, and it is that in civil proceedings the civil standard of proof should apply*" (§69, §96). The standard of proof for short form and narrative conclusions of suicide should be the same to avoid inconsistency, and an unprincipled system of fact-finding (§71).

    b. If the civil standard of proof applies to determinations of unlawful killing, then there is then consistency between determinations made at an Inquest and a common standard reflects the *"general rule*" for the standard of proof in civil proceedings (§§84-96).

6. Lady Arden's consideration of unlawful killing was relatively brief: the focus of the judgment was on the issue of suicide. The decision reached at §93 appears to be

wholly focused on achieving consistency between conclusions in the Inquest process. Lord Carnwath reached the same conclusion.

7. Lord Kerr in his dissenting judgment (with whom Lord Reed agreed) underlined that a conclusion of unlawful killing was "a solemn pronouncement" with resonance far beyond a narrative conclusion on the facts. There was nothing incongruent in putting suicide and unlawful killing in a special category of verdicts that require proof to the criminal standard (§139).

The current statutory framework and the impact of *Maughan*

8. A homicide can lead to multiple proceedings: an Inquest, a possible inquiry, a criminal investigation, and a civil claim for damages. Practitioners have to consider the legal and practical consequences if these commence simultaneously: which proceedings should take precedence; what impact will the conclusion in one form of proceedings have on another; and how to protect a client from the undoubted prejudicial effect of a conclusion of unlawful killing.

The adjournment of Inquests pending CPS prosecutions

9. The law on suspending an investigation and adjourning an Inquest is based upon the premise that investigations into a death should not be duplicated. Schedule 1 of the 2009 Act sets out when a coroner must suspend and resume investigations. There are three specific circumstances where the coroner is *obliged* to suspend the investigation and to adjourn any Inquest being held as part of that investigation, a general power to suspend and adjourn, and a discretion to suspend and adjourn.

    a. Compulsory suspension and adjournment pending contemporaneous criminal proceedings. Under paragraphs 1 and 2 of Schedule 1, the most

common circumstance in which a coroner must suspend an investigation and adjourn an Inquest is on the grounds that a person either has been, or may be charged either with a homicide offence involving the death of the deceased or an offence alleged to be a related offence. Homicide and related offences are defined in paragraph 1(6) of Schedule 1.

b. Compulsory suspension pending inquiry under the Inquiries Act 2005.

c. General power to suspend an investigation. Aside from these provisions, the coroner has a wide power under paragraph 5 of Schedule 1 to suspend an investigation if that is appropriate, where other criminal or civil proceedings arise from the same facts. For example, a prosecution by the HSE or the Independent Office for Police Conduct. Where this power is exercised, the coroner may resume the investigation at any time with sufficient reason (paragraph 10 of Schedule 1). It was this discretionary power to adjourn an Inquest which Lady Arden considered a central protection against a conclusion of unlawful killing prejudicing other proceedings.

10. When the coroner has suspended an investigation because certain criminal proceedings have been brought, he/she can only resume an investigation if there are "sufficient reasons" to do so (paragraph 8(1) of Schedule 1). An Inquest cannot be resumed until the criminal proceedings which triggered the suspension have come to an end, unless the prosecuting authority has confirmed it has no objection to this.

11. Under paragraph 8(5) of Schedule 1, the outcome of such an Inquest when resumed must also be consistent with the result of the criminal proceedings. Practitioners might assume this would be a bar to a resumed Inquest considering a conclusion of unlawful killing after a not guilty verdict in an earlier criminal trial for homicide offences. However, the Chief Coroner at paragraph 21 of the Law Sheet 6 (13

January 2021) has made it explicit that a resumed Inquest will be able to return a conclusion of unlawful killing in these circumstances because the different standard of proof applying to inquisitorial and criminal proceedings mean the rule against inconsistent verdicts is not infringed. This may cause alarm to many practitioners and IPs, for whom this will seem to be very close to double jeopardy.

12. Of course, it has always been possible to bring civil proceedings arising out of the same facts that gave rise to a criminal trial and seek a judgement for damages even where there has been a not guilty verdict. The difference is that not only does a defendant in civil proceedings have the machinery of a civil trial available to defend their reputation, the outcome of civil proceedings may be a settlement between the parties which is kept confidential. In any event, the judgement in a civil trial is not a "solemn pronouncement" akin to conclusion or verdict at an Inquest, which in the case of unlawful killing, implies fault to many.

13. Changes to the Work-related Deaths Protocol in October 2011 gave the HSE (and other enforcing authorities) greater discretion to proceed with a prosecution prior to an Inquest. Experienced practitioners will know that in many cases the HSE do wait for the outcome of an Inquest before commencing proceedings concerned to see what information comes out of the coroner's investigation, and also to see how the evidence stands up to being tested by the Inquest.

14. Guidance on the timing of criminal proceedings in work-related death cases has been produced by the Work-related Deaths Protocol National Liaison Committee ("**WRDP**") and this has been incorporated into HSE's operational instructions (OC 165/10). The OC 165/10 procedure must be followed in all cases where consideration is to be given to commencing legal proceedings before Inquest and the issues include:

    a. The liaison requirements set out in WRDP have been followed and the police and/or CPS have been engaged.

b. Primacy for the investigation has been formally passed from the police to the HSE and recorded in writing.

c. That all reasonable lines of enquiry have been completed, all available and admissible evidence gathered, and that it is unlikely that any additional evidence will come to light at an Inquest that would materially affect that decision.

d. The Police, COS, Coroner and bereaved family members have all be consulted.

15. After the decision in *Maughan*, the operation of the WRDP becomes much less clear. If the Inquest were to proceed first and might return a conclusion of unlawful killing, then this is not only prejudicial in itself for the named party, and this possible conclusion might well encourage the family and to urge the Police/CPS to hold on to the case with a view to a manslaughter prosecution following the Inquest's conclusion of unlawful killing.

16. On the other hand, if the HSE were referred the case by the Police/CPS in the usual way, and convictions followed for HSWA offences but there was no prosecution for manslaughter because the case did not meet the CPS evidentiary test, these proceedings brought by the HSE would be no protection against a damaging conclusion of unlawful killing at a resumed Inquest. Either way, interested parties face the prospect of having to meet allegations of unlawful killing in the Coroner's Court and the Crown Court arising from the same facts.

Where there is insufficient evidence to prosecute for unlawful homicide, the Inquest becomes a quasi-trial

17. By section 10 of the 2009 Act, Inquests are prohibited from reaching conclusions that impart civil or criminal liability. However, an unlawful killing conclusion

connotes a finding by a coroner or jury of an unlawful homicide. If the decision is made not to proceed with a criminal trial or the criminal trial ends in acquittal, and an Inquest is resumed, the resumed Inquests may take on the role of a quasi-criminal trial. Lady Arden herself noted the "*recent transformation of many Inquests from the traditional inquiry into a suspicious death into an investigation which is to elicit facts about what happened*" (*Maughan*, at §8). The potential effect of this is significant in light of both the majority (at §101) and the minority (at §141) in *Maughan* having referred to the case of *R v South London Coroner, Ex p Thompson* (1982) 126 SJ 635; The Times, 9 July 29182 where Lord Lane CJ said:

"… it should not be forgotten than an Inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an Inquest it should never be forgotten that there are no parties, there is no indictment, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

18. In an Inquest, it is much harder for an interested person ("IP") to protect themselves: disclosure of evidence and relevant material is in the discretion of the coroner; there is no right to call evidence by an IP; cross-examination of witnesses lies within the discretion of the coroner; the exclusionary rules of evidence to protect a defendant in a criminal case do not apply; there is no right for an IP to address a jury; appeal is effectively limited to the limited grounds of judicial review.

19. These deprivations in the process do not exist in criminal trial.

20. Lady Arden defined Inquest as civil proceeding but even in the Small Claims Courts the parties have a right to call evidence, cross-examine and the address he Judge. In short, an Inquest can record the damaging conclusion of unlawful killing without the IPs having any of the protections afforded by the common law or the right to a fair

trial under article 6 ECHR and the judgement in Maughan makes this damaging conclusion far more likely.

21. Whilst protections exist under section 10 of the 2009 Act, and the conclusion of a coroner or jury is strictly inadmissible as to the truth of its contents in later proceedings (*Hollington v F. Hawthorn & Co Ltd* [1943] KB 587; *Daniel v St Georges Healthcare NHS Trust & Anor* [2016] EWHC 23 (QB) at §40), the conclusions from an Inquest will have enormous practical significance for litigants. Especially given that an unlawful killing conclusion requires proof of either murder, manslaughter, or infanticide: the gravest criminal offences known in domestic law. As Lord Kerr recognised in *Maughan*, a verdict of suicide or unlawful killing denotes a "*solemn pronouncement and they have clear resonances beyond those of other short form conclusions*" (§115).

The Inquest as civil proceedings

22. The majority in *Maughan* proceeded on the assumption that coronial proceedings are civil proceedings (§69). Lord Kerr took a more nuanced view and noted that Inquests are "*sui generis*" proceedings, neither criminal nor civil, and followed their own procedural rules (§141). It was unwise to categorise Inquests as civil proceedings simply because they do not fit the criminal model and, given their unique nature, it was not surprising that some issues were susceptible to differing standards of proof (§141).

23. Had the majority in *Maughan* not assimilated coronial proceedings with civil proceedings, there may have been a greater focus on the particular issues that arise in relation to suicide and unlawful killing, and thus whether it was appropriate to lower the standard of proof in favour of achieving consistency between conclusions in the Inquest process.

The presumption that civil proceedings proceed before a criminal trial is concluded

24. It is often suggested that a potential injustice may arise if regulatory or other civil proceedings are conducted at the same time as a related criminal trial, because of the risk that evidence which may not be admitted in criminal proceedings may enter the public domain during the course of the other concurrent proceedings. In the conduct of Inquests the coroner has a discretion to adjourn proceedings and it was that discretion Lady Arden relied upon as a protection against prejudice in a subsequent criminal trial but she did not take account of authority that the is a strong presumption that civil proceedings (e.g. the Inquest) should proceed before any criminal trial.

25. Nevertheless, in *Mote v Secretary of State for Work and Pensions* [2007] EWCA Civ 1324 ("***Mote***"), the Court of Appeal held that civil proceedings can often proceed concurrently without risk to the defendant's rights in a related criminal trial, and there is a "real discretion" as to whether or not to adjourn the civil proceedings.

26. *Mote* concerned an appeal brought by Mr Mote against the refusal by the Social Security Commissioners, to postpone a hearing concerning overpayments of income support and housing benefit until the conclusion of Mr Mote's criminal trial in which he was charged with offences of dishonesty in relation to his benefit claims. The appeal was dismissed. The relevant consideration was whether the continuation of civil proceedings would give rise to a "*real risk of prejudice to the defendant in the criminal proceedings*" (§31). The Court of Appeal found further at §31 that:

    a. A risk of prejudice could be expected to weigh heavily in favour of an adjournment of the civil proceedings but would not necessarily be decisive.

b. Whilst the court must not act in breach of a defendant's human rights, it was difficult to see how the continuation of the civil proceedings could give rise to a breach of those rights.

c. In deciding whether or not to adjourn, the civil court could take into account the existence of the powers of the judge in the criminal proceedings to stay those proceedings or limit the evidence to ensure a fair trial.

d. Further, the Court of Appeal did not accept that the fact the prosecution effectively had an opportunity to "rehearse its case" via the appeal would give rise to substantial prejudice to the defendant in relation to the subsequent criminal trial (§36). Otherwise, this would be a ground of objection to a retrial in criminal proceedings where the jury have been unable to agree in the first trial or where a conviction in the first trial has been quashed on appeal.

e. *Mote* also clarifies that neither the privilege against self-incrimination nor the risk of 'double jeopardy' are grounds for delaying civil proceedings, as both are only relevant to criminal proceedings.

27. The decision in *Mote* clearly establishes a high threshold to satisfy in order to delay civil proceedings where they are simultaneous to a criminal trial. In the context of Inquests, *Mote* is authority that there is a presumption that Inquest should proceed first unless the IP can discharge the burden of showing a "*real risk of prejudice*." This will almost certainly mean Inquests proceed and end in conclusion of unlawful killing before criminal proceedings have concluded. Given that a finding of unlawful killing at Inquest is no bar to a prosecution for homicide, *Mote* is authority for the proposition that the Inquest should go first, despite what was said in *Maughan* about the coroner's discretion to adjourn the Inquest to avoid prejudicing criminal proceedings.

Conclusions

28. There is no clear answer as to the correct management of concurrent criminal and inquisitorial proceedings. There are competing interests in balancing a swift inquiry into the circumstances surrounding a person's death for the family's sake, against the need to protect the right to a fair criminal trial.

29. The effect of *Maughan* is likely to mean that there will be an increased number of unlawful killing conclusions. Where these conclusions follow, for example a fatal accident at work, the conclusion may be considered highly prejudicial to a defendant facing a criminal trial for any offence. This risk is exacerbated by the decision in *Mote* create a presumption that the Inquest will proceed.

30. The majority in *Maughan* relied on the provisions to adjourn Inquests in Schedule 1 of the 2009 Act to protect defendants from prejudice in concurrent criminal proceedings. However, this does not deal with the fact that a conclusion of unlawful killing is highly prejudicial in its own right. Nor does it deal with circumstances where the CPS decide not to prosecute for homicide, and the Inquest then assumes the role of a quasi-criminal trial with the family of the bereaved in the role of prosecutor. In these circumstances the IPs have none of the protections afforded a defendant in criminal or civil proceedings to ensure the trial is fair.

31. One consequence of Maughan may even be that IPs who are also suspects actively encourage a prosecution because at least the criminal trial affords them fuller disclosure of relevant material and an opportunity to fully test the evidence before it is heard in an Inquest.

32. Finally, experienced practitioners may consider the ability of the general public to understand the separation between, and nuances of, criminal and inquisitorial proceedings, is uncertain. A conclusion of unlawful killing is indeed "*a solemn*

pronouncement". Until very recently this was referred to as an inquest "verdict" and not a conclusion. The public are likely to see a conclusion on unlawful killing as hardly distinct from a verdict of manslaughter.

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