

## Reflections on *Maughan*: disclosure in inquests

By Tim Green & Elizabeth Tremayne

Inquests are not adversarial proceedings. However, the Supreme Court decision in *Maughan*<sup>1</sup> (lowering the standard of proof for an inquest conclusion of ‘unlawful killing’ to the balance of probabilities) has left practitioners concerned about the ability of the coronial process to protect Interested Persons (“IPs”) from the serious reputational damage such a conclusion will inevitably cause. This article looks at one critical part of the process, namely disclosure.

### Disclosure to the coroner

- I. The starting point for disclosure is that that if material is ‘*relevant for the purposes of... (the coroner’s) inquiry*’<sup>2</sup> (including consideration of scope, Article 2 ECHR, reports to prevent future deaths, the selection of appropriate witness and documentary evidence, the pursuit of relevant lines of inquiry and the framing of questions for witnesses) then the coroner is entitled to see it<sup>3</sup>. That entitlement is subject to only limited exceptions. In assessing the scope of disclosure, the coroner has a duty to ensure that the ‘*relevant facts [related to an Inquest] are fully, fairly and fearlessly investigated*’<sup>4</sup>.

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<sup>1</sup> *R (on the application of Maughan) v HM Senior Coroner for Oxfordshire* [2020] UKSC 46

<sup>2</sup> *Worcestershire County Council & Anor v HM Coroner for the County of Worcestershire* (2013) EWHC 1711 (QB) at §98

<sup>3</sup> The scope of an inquest is essentially a matter for the coroner (*Regina v HM Coroner for North Humberside and Scunthorpe ex-parte Jamieson* [1995] QB 1). Further, where an Article 2 ECHR type inquest is required, or where the coroner’s Rule 43 powers (under the *Coroners (Inquests) Rules 2013*) may require a fuller investigation into the circumstances in which the death occurred, wide ranging disclosure may be (legitimately) required

<sup>4</sup> Per Bingham LJ in *R v. HM Coroner for Humberside ex parte Jamieson* supra at p24

2. It is important to remember that the *Coroners and Justice Act 2009* (**'CJA'**) does not impose a statutory duty of candour in respect of inquests. Nevertheless, coroners will expect public bodies in particular to engage co-operatively in the process of disclosure to assist the investigation to the fullest extent possible. The Ministry of Justice recently published a protocol which sets out the principles it expects to guide the behaviour of Government Legal Department lawyers and those they instruct in coronial proceedings: it is said they should adopt a principle of: *'openness and honesty, including supporting the disclosure of all relevant and disclosable information to the coroner'*<sup>5</sup> This, they suggest, should be a 'model of behaviour' for all IPs.
3. Corporate and individual IPs are not under a legal duty to disclose material which is or may be relevant to the inquest, unless asked to do so by the coroner. Whilst responsible IPs will usually be mindful of the investigative purpose of the inquiry and accordingly act under a moral duty to disclose relevant material in any event, there is no legal obligation to do so unless expressly requested by the coroner.
4. This contrasts with the disclosure obligations in civil or criminal proceedings. For example, if the CPS were to prosecute a defendant for corporate manslaughter (equivalent to a conclusion of unlawful killing), it would carry a well-defined burden to disclose that which may assist the defence or undermine the prosecution pursuant to the *Criminal Procedure and Investigations Act 1996* (**"CPIA"**), *CPIA Code*, *AG's Guidelines on Disclosure* and an extensive body of case law. The absence of like duties on IPs creates the risk that an IP will inadvertently, or in some cases intentionally, fail to disclose material that may be helpful to what would effectively be another IP's "defence" to a conclusion of unlawful killing.

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<sup>5</sup> *A Guide to Coroner Services for Bereaved People* January 2020

5. One justification for the very different disclosure regimes between inquests and civil/criminal proceedings, is that an inquest is not adversarial. Whether or not this distinction remains valid after *Maughan* remains to be seen.

### Disclosure management

6. In the usual course of investigations and at Pre-Inquest Review hearings (“**PIRs**”) the process of disclosure is managed informally through discussions between coroner and counsel/representatives of IPs in a collaborative effort to identify, locate and disclose relevant material. However, Sch. 5 CJA also allows the coroner to issue a notice requiring a person to:
- a. Give evidence at an inquest.
  - b. Produce relevant documents in their custody or control (which includes information stored in electronic form).
  - c. Produce for inspection, examination or testing any other relevant thing in their custody or control.
7. It is perhaps less well known that Sch. 5 CJA also provides for entry, search and seizure powers. In practice, coroners rarely need to exercise their Sch. 5 powers but, if the court does issue a notice, and the respondent objects, they are entitled to argue that either (a) they are unable to comply or that (b) it is ‘*not reasonable in all the circumstances to require [them] to comply...*’ (Sch. 5 CJA 1(4)). What is unreasonable will inevitably vary from case to case, such arguments being determined by the coroner taking into account, in particular, the public interest. In considering whether it is appropriate to object, it should be borne in mind that a person may not be required to give evidence/produce a document if:
- a. he/she could not be required to do so in civil proceedings in a court in England and Wales; or
  - b. the requirement would be incompatible with a retained EU obligation (Sch. 5 2(1)).
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8. Many of the same factors relevant to whether or not it is proper to withhold documents in civil proceedings will therefore be equally relevant in coronial investigations – for example, on grounds of privilege.
9. Consequently, a balancing act is to be struck between meeting one’s obligations to assist the coroner to the greatest degree, and, where appropriate, challenging a coronial decision if it requires disclosure of material which is either irrelevant or not properly disclosable. As a consequence of *Maughan* there may be an increasing number of early-stage disputes over what is properly disclosable where there is a risk of an unlawful killing conclusion.

#### **Disclosure to other IPs**

10. IPs may be content to disclose confidential or sensitive information to coroners but may also express concerns about the onward dissemination of those documents. The distinction between disclosure to the coroner and to other IPs has always been marked. The decision in *Worcestershire County Council and Worcestershire Safeguarding Children Board v HM Coroner for the County of Worcestershire*<sup>6</sup> refers to disclosure as a two-stage process (a) to the coroner alone; and then (b) for the coroner to decide whether there can and should be onward disclosure to IPs. In practice these stages are often elided, but it is useful to address the distinction where necessary.
11. If an IP who holds relevant material wishes to object to onward disclosure to IPs or others the usual approach will be for the material to be supplied to the court with a notice of objection. Common arguments raised in support of a such a request include public interest immunity and risks associated with national security, but commercial sensitivity and the right to privacy could also be relevant grounds for redactions before circulation.

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<sup>6</sup> [2013] EWHC 1711 (QB)

12. Conversely, where an IP considers a document should be disclosed to it and has not been, under the *Coroners (Inquests) Rules 2013* (**‘the Rules’**) any IP make may a request for a document held by the coroner relevant to the inquest (r13). Rule 14(b) entitles the coroner to redact a document and under Rule 15 the coroner may refuse to provide a document where:
- a. There is a statutory or legal prohibition on disclosure.
  - b. The consent of any author or copyright owner cannot reasonably be obtained.
  - c. The request is unreasonable.
  - d. The document relates to contemplated or commenced criminal proceedings; or
  - e. The coroner considers the document irrelevant to the investigation.
13. If an IP objects to the circulation of material between other IPs, coroners often welcome clear submissions on which of the considerations under Sch. 5 and/or Rule 15 CJA apply (and in particular, if relevant, which statutory or legal prohibitions are engaged) as well as practical suggestions on how best a compromise may be reached. For example, if documents contain sensitive personal data or commercially valuable information, it may be that a process of redaction could ameliorate the concerns of the organisation, its staff or clients. Similarly, it may be that alternative documents also contain the relevant information without the extraneous sensitive or privileged material. In medical cases, for example, a summary of care or an overview of the deceased’s deteriorating physical condition given by a manager or consultant can often provide adequate detail in a more accessible form than disclosing lengthy daily or hourly care or hospital records.

14. Similarly, in technical cases, a summary explanation of the mechanism, technology or scientific findings can often be of more value and less likely to include confidential material than raw data or internal reports.
15. As foreshadowed above, if inquisitorial proceedings become more adversarial because of the risk of an unlawful killing conclusion, we expect requests for additional disclosure and consequent objections and proposed redactions to become much more common. PIRs could foreseeably become battle grounds for arguments over disclosure, both between coroner and IPs and between the IPs themselves.

#### **Disclosure to the media and others**

16. As to the power of the coroner to disseminate material which has been disclosed more widely – for example to the media – the courts are to be guided by the principle of ‘*open justice*’ best explained by the Court of Appeal in *Guardian News and Media Ltd*<sup>7</sup> (which applies to all courts). In the context of the Coroners’ Court and disclosure – the principle is applied to establish a presumption that where a member of the press makes a *bona fide* request for access to a document referred to in open court such will be granted (though there is no like obligation to disclose documents *not* referred to in open court). The coroner retains a discretion under Regulation 27(2) of the *Coroners (Investigations) Regulations 2013* to provide a document or recording ‘*to any person who in the opinion of the coroner is a proper person to have possession of it*’. The coroner should take into account, *inter alia*:
  - a. The person requesting the document.
  - b. The reason for the request.
  - c. The public interest.

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<sup>7</sup> [2012] EWCA Civ 420

- d. Issues of national security, public interest immunity or privilege.
- e. The avoidance of prejudice to current or future criminal proceedings.
- f. The protection of personal information.
- g. The sensitivities of particular passages of evidence.
- h. The need for editing or redaction and
- i. Any other relevant factors<sup>8</sup>.

### Disclosure of the conclusions of previous investigations

17. Where IPs already have materials which provide the findings and conclusions of prior investigations – for example by independent experts or other suitably qualified governmental bodies – coroners have been judicially discouraged from investigating the cause of the accident or incident *de novo*. In *R (on the application of Secretary of State for Transport v HM Senior Coroner for Norfolk & British Airline Pilots Association (intervener))*<sup>9</sup> (an inquest into the deaths of four men in a helicopter accident), a report had been produced by the Air Accidents Investigation Branch (“**AAIB**”) before the inquests were heard. In the weeks running up to the inquests, the coroner issued a number of notices requiring the AAIB and its Chief Inspector to disclose the cockpit voice and flight data recorder and/or a transcript of the recording. Disclosure was not made, and the coroner twice fined the Chief Inspector for non-compliance with the notices.
18. On appeal, a court comprising the former Lord Chief Justice and Singh J found that the legal effect of EU legislation governing the relevant aspects of civil aviation meant that the coroner had no power to make the disclosure orders (effectively affirming that the disclosure powers in Sch. 5 CJA do not ‘trump’ EU legislation). However, a further, broader, point about duplication of effort and

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<sup>8</sup> See *Chief Coroner’s Guidance Note No. 25*

<sup>9</sup> [2016] EWHC 2279 (Admin)

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cost was also made: *‘it is important to emphasise that there is no public interest in having unnecessary duplication of investigations or inquiries. The AAIB fulfils an important function in that it is an independent body investigating matters which are within its expertise. I can see no good reason why Parliament should have intended to enact a legislative scheme which would have the effect of requiring or permitting the Coroner to go over the same ground again when she is not an expert in the field.’*<sup>10</sup>.

19. Lord Thomas CJ emphasised Singh J’s point, finding that the ‘better approach’ is that the body with the greatest expertise determines the cause of the accident or incident. In the absence of *‘credible evidence that the investigation...is incomplete, flawed or deficient’*<sup>11</sup> the coroner should not re-open and commence that investigation afresh but accept the conclusions of the report into evidence.

### Appeal

20. Unlike a decision made by a Judge in a civil or criminal trial, it is worth remembering that the grounds on which to challenge a coronial decision on the scope of disclosure are very limited. The higher courts will only interfere in exceptional circumstances<sup>12</sup> because of the wide discretion afforded to a coroner to control his or her own proceedings. Given the role of the coroner is in theory investigative, questions of strict relevance and materiality are unlikely to be as decisive as they would be in the context of civil litigation<sup>13</sup>. In a comparable criminal context, a failure of the prosecution to make relevant disclosure in a manslaughter trial would be an obvious ground of appeal against conviction. However, were an IP to be prejudiced by the same failure arising at inquest, a challenge to an unlawful killing conclusion would be much harder to sustain because of the coroner’s very wide discretion governing disclosure and the

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<sup>10</sup> Singh J at §49

<sup>11</sup> At §55

<sup>12</sup> *Regina v Inner West London Coroner ex-parte Dallaglio & Another* [1994] 4 All ER 139

<sup>13</sup> *Inner West London Assistant Deputy Coroner v Channel Four Television Corporation* [2008] 1 WLR 945



limited grounds upon which a challenge to the exercise of that discretion can be made (*Wednesbury* unreasonableness, for example).

### **Key points and concluding remarks**

- (a) The greater prospect of a finding of unlawful killing is likely to lead to much greater scrutiny of the coroner's powers to order disclosure, and of disclosure between IPs, who may find themselves, in practice, as adversaries despite the inquisitorial nature of the proceedings.
- (b) In the conventional course of events, disclosure in inquests is usually managed informally through discussions between coroner and counsel or representatives of IPs in a collaborative effort to identify, locate and disclose relevant material. This could now come under strain.
- (c) Where formal powers are required, they are to be found under the CJA and notice can be given requiring a person to produce relevant documents or other objects/materials for inspection, examination or testing.
- (d) IPs are entitled to object to such request if they consider they are unable to comply or that it is '*not reasonable in all the circumstances to require [them] to comply*'.
- (e) IPs may not be required to give evidence/produce a document if they could not be required to do so in civil proceedings or the requirement would be incompatible with a retained EU obligation. Legitimate questions of legal privilege may arise in this context.
- (f) Where an IP is obliged to disclose material to a coroner, it does not necessarily follow that that material should be disseminated amongst other IPs. It should be remembered that disclosure is a two-stage process.
- (g) IPs may apply for disclosure of information provided by other IPs, and the coroner must accede to that request unless one of the exceptions applies.

Clear submissions on these issues and any proposed compromise will assist the court.

- (h) As to wider dissemination of disclosure to the media – the courts must be guided by the principle of ‘*open justice*’. There will be a presumption that where a member of the press makes a *bona fide* request for access to a document referred to in open court such will be granted.
- (i) Where IPs already have material which provides the findings and conclusions of prior investigations coroners are judicially discouraged from investigating the cause of the accident or incident *de novo*.
- (j) Where IPs wish to appeal a decision on disclosure, they should proceed with caution given, in particular, the higher courts will only interfere with such decision in exceptional circumstances.
- (k) *Law Sheet No. 6*<sup>14</sup> by the new Chief Coroner reminds practitioners that there were only 166 conclusions of unlawful killing in 2019 out of 31,254 inquest conclusions. The full consequences of *Maughan* will only manifest themselves in time but given the Chief Coroner is clear at §21 that an acquittal of homicide in the Crown Court is no bar to a finding of unlawful killing at a subsequent/resumed inquest, it seems foreseeable that inquests are likely to become increasingly adversarial as IPs seek to protect themselves, including in their approach to disclosure at an early stage. Whether the processes and procedures of the coroner’s court are fit for this shift in approach is highly debatable.

**18.01.21**

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