PARK SQUARE
BARRISTERS

Balance of Probabilities: Test for Suicide confirmed by The Court of Appeal

By Kate Wilson

The landmark decision of the Divisional Court in the case of R. (on the application of Maughan) v HM Senior Coroner for Oxfordshire [2018] EWHC 1955 (Admin), has been upheld by the Court of Appeal in a judgment handed down on 10th May 2019.

The appeal raised an important question concerning the law and practice of coroners' inquests where there is an issue as to whether the deceased died by suicide. Given the significance of the case, submissions were invited from the Chief Coroner of England and Wales and from the charity INQUEST (an organisation providing assistance to bereaved families on state related deaths).

The inquest touching upon the death of James Maughan, a serving prisoner at HMP Bullington, heard that he was found hanging in his prison cell on 11th July 2016 with a ligature having been tied to the bedframe and attached to his neck. The principal issues raised at the inquest were whether the hanging was self-inflicted and deliberate; if so, whether the deceased intended to kill himself; and whether his death was caused or contributed to by failure to protect his life on the part of prison authorities. The Coroner asked the jury a series of questions for the purposes of a narrative conclusion, all of which were framed by reference to the civil standard of proof.

Practitioners and the leading texts on the practice and procedure of coronial law considered it well-established that the standard of proof for a conclusion of suicide was the criminal standard i.e. beyond reasonable doubt, rather than the civil standard i.e. on the balance of probabilities.

The Chief Coroners' Guidance recommends that wherever possible a short-form conclusion should be preferred, however a narrative conclusion can be used as an alternative or in addition to explain the conclusion and in particular to satisfy the requirement of an Article 2 "Middleton" inquest. It was noted that the Chief Coroners'

Guidance No.17 paragraph 56 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 conclusion the standard of proof is the civil standard of proof…". Further in the Coroner Bench Book suggested directions to the jury regarding the short-form conclusion of suicide applying the higher standard ("you may reach this conclusion if on the evidence you are sure that AB took his own life and intended to do so") and the lower standard to a narrative conclusion ("where, on balance, you find that he intended to take his own life but you cannot be sure about it…"). The Coroner in this case had closely modelled his approach on this guidance.

This appeal therefore threw into the spotlight the inconsistency in the above guidance, and that juries were being directed to apply different standards of proof depending on whether being directed to return a short form or narrative conclusion regarding suicide. The Court of Appeal could not discern any logic or sense in that hybrid approach. A single standard of proof must apply, the key issue on appeal was what the appropriate standard should be.

Lord Justice Davis considered the history of the application of the different standards of proof:

"As to the fact that we have different standards of proof at all, the underpinning rationale for the standard of proof in criminal cases being set at beyond reasonable doubt presumably does ultimately rest on the serious consequences: potential loss of good character and, in particular, of liberty for the defendant, coupled with concern for the risk of condemning the innocent. (Conversely, I might add, the potential grave consequences can, for example, require the application of a standard of proof even lower than the ordinary civil standard in tribunals in asylum cases.) The underpinning rationale for there being a lower standard (balance of probabilities) ordinarily applicable in civil cases rests on the fact that such cases generally concern disputes involving the private rights of parties without such potentially serious consequences, even though they still may be very serious. For reasons of consistency and certainty (and as discussed above) there can be no variable scale within the relevant standard applicable. The criminal standard is the same for a driving case in the Magistrates Court as it is for a murder case in the Crown Court.

The civil standard is the same for a claim for £5,000 in the County Court as it is for a claim for £50,000,000 in the Commercial Court." [50]

The Court of Appeal emphasised that "It is elementary, but nevertheless essential to emphasise in view of the issues arising on this appeal, that inquests are not to be regarded as litigation. They are not. They are not criminal proceedings. They are not civil proceedings. There are no "trials" and strictly no "parties" as such at all: rather, there are "interested persons". The procedural rules and procedural safeguards which may be applicable in criminal or civil proceedings do not apply. As its name connotes, an inquest is essentially, even if not entirely, inquisitorial in nature: the object being to investigate the particular death or deaths (conventionally: "who, when, where, how?"). Thus – whilst the position can perhaps sometimes in practice appear to be less than clear-cut in some particularly highly charged inquests – it is not an adversarial procedure, let alone a criminal procedure, at all. (No doubt it is mainly for that reason that the conclusions of an inquest jury are nowadays ordinarily not even described as verdicts.)"[25]
Lord Justice Davies considered that the appropriate standard of proof which should be applied throughout in cases of suicide should be the civil standard for five reasons:

1. First, the essence of an inquest is that it is primarily inquisitorial, that it is investigative. It is not concerned to make findings of guilt or liability (even though I accept that not infrequently a narrative conclusion may in practice, to an informed participant, operate to identify individuals as potentially at fault). The underpinning rationale for the need to have a criminal standard of proof in criminal proceedings simply has no obvious grip in inquest proceedings, given their nature.

2. Second, since 1961 suicide has ceased to be a crime. Suicide will of course be dreadfully upsetting to the family of the deceased; it may perhaps in some quarters also carry a stigma (although one would like to think that the predominant feeling of most observers in modern times would be acute sympathy); it may have other adverse social or financial consequences. But it is not a crime.

3. Third, whatever the prevarications in the past, the civil courts nowadays generally apply in civil proceedings the ordinary civil standard – that is, more probable than not – even where the proposed subject of proof may constitute a crime or suicide (see re B; Braganza). There is no sliding scale or heightened standard. There is no discernible reason why a different approach should apply in coroner's proceedings, at all events in relation to suicide (which is not even a crime).

4. Fourth, the importance in Article 2 cases – although in my view there actually is no reason in principle to distinguish between standards of proof in suicide cases depending on whether or not Article 2 considerations arise – of a proper investigation into the circumstances of death under s.5(2) of the 2009 Act strongly supports the application of the (lower) civil standard. The approach intended to be applicable, viewed objectively, surely would be expected to be inclined towards an expansive, rather than restrictive, approach. That also would enhance the prospects of lessons being learned for the future: one of the functions of such an inquest. I accept Ms Monaghan's point that Article 2 procedural requirements are not incapable of being met by the application of a criminal standard of proof. But context is all: and the present context of an inquest relating to suicide, and the answer to the question "how?", strongly favours the imposition of a lower standard of proof than the criminal standard.

5. Fifth, the application of the civil standard to a conclusion of suicide expressed in the narrative conclusion would cohere with the standard which is on any view applicable to other potential aspects of the narrative conclusion (for example, whether reasonable preventative measures should or could have been taken and so on).

The court rejected the earlier line of authorities referring to the criminal standard either by expressly overruling those or re-interpreting the obiter dicta comments which did not form part of the actual decision.

The decision is a significant in coronial law and it is likely to result in a conclusion of suicide being more commonly reached. This is often a distressing for the deceased's family, particularly where, as in the Maughan case, suicide is against their religious beliefs.

The Court of Appeal also provided obiter comments on the conclusion of "unlawful killing", which it seems also faces the hybrid standard of proof with the present coroners' guidance, however declined to resolve the issue as to whether the civil standard of proof applies in those cases. The Court noted the "very powerful case" for saying that the standard of proof for unlawful killing conclusions should also be the civil standard, but noted that in most cases Coroners are essentially confined to a relatively restricted class of cases of homicide. This may prove pivotal in retaining the higher standard of proof. The Court confirmed that coroners should continue to instruct juries by reference to the criminal standard of proof until this is clarified on an appeal.

Kate Wilson is part of Park Square Barristers' Inquest team, led by Lorraine Harris. She, along with many members of the team, is experienced in dealing with sensitive cases where the death appears self-inflicted. Since her appointment to the Attorney General's Regional Panel, Kate Wilson often appears on behalf of interested persons in inquests touching upon deaths in custody.

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