Neutral Citation Number: [2019] EWCA Civ 809

Case No: C1/2018/1962

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ADMINISTRATIVE COURT
LORD JUSTICE LEGGATT AND MR JUSTICE NICOL
CO/367/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2019

Before :

LORD JUSTICE UNDERHILL, VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE DAVIS
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

The Queen (on the Application of Maughan)	**Appellant**
- and -	
Her Majesty's Senior Coroner for Oxfordshire	**Respondent**
-and-	
The Chief Coroner of England and Wales	**Intervener**

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- -

Karon Monaghan QC and Jude Bunting (instructed by **Matthew Gold and Co. Ltd**) for the **Appellant**
Alison Hewitt (instructed by **Oxfordshire County Council Legal Services**) for the **Respondent**
Jonathan Hough QC (instructed by the **Chief Coroner**) for the **Chief Coroner** (as Intervener)
Adam Straw (instructed by Hickman & Rose) submitted written submissions on behalf of **INQUEST** (as Intervener)

Hearing date : 9th April 2019

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Approved Judgment

Lord Justice Davis :

Introduction

1. This appeal involves questions of importance concerning the law and practice of coroners' inquests where an issue is raised as to whether the deceased died by suicide. The questions can be formulated as follows:

   (1) Is the standard of proof to be applied the criminal standard (satisfied so as to be sure) or the civil standard (satisfied that it is more probable than not) in deciding whether the deceased deliberately took his own life intending to kill himself?

   (2) Does the answer depend on whether the determination is expressed by way of short-form conclusion or by way of narrative conclusion?

   Those are the questions falling for decision in this case; but to an extent they have also required some consideration of the position with regard to unlawful killing.

2. By its judgment handed down on 26 July 2018 the Divisional Court (Leggatt LJ and Nicol J) decided that the standard of proof to be applied throughout in cases of suicide, both for short-form and narrative form conclusions, is the civil standard. In so deciding, at least with regard to short-form conclusions, it departed from a long line of Divisional Court and High Court authority, from practice guidance issued by the Chief Coroner and from statements made in the leading textbooks on the law relating to coroners. The Divisional Court itself granted leave to appeal to this court.

3. The appellant, who is the brother of the deceased in this case, challenges the correctness of that decision. His case is that the criminal standard should have been and should be applied throughout, both for the purposes of a short-form conclusion and for the purposes of a narrative conclusion, in deciding whether the deceased deliberately killed himself intending to take his own life.

4. The respondent Senior Coroner for Oxfordshire, whilst maintaining a neutral position, has suggested arguments in favour of the civil standard applying throughout in cases of suicide (following the view of the Divisional Court) or alternatively (and as reflected in a Respondent's Notice) in favour of the civil standard applying with regard to a narrative conclusion.

5. With leave previously granted by this court, the Chief Coroner of England and Wales has intervened. His position too has been neutral; but he has very helpfully through counsel advanced detailed arguments representing the pros and cons of the respective positions. In addition, he has helpfully advanced arguments addressing the position of unlawful killing. The charity INQUEST has also previously been given leave to intervene on this appeal: in its case, by written submissions only. It has advanced arguments strongly advocating a position (if otherwise unconstrained by authority) that in principle the standard of proof at an inquest should be the same for unlawful killing and suicide: and that there is no proper justification for a higher standard of proof for issues of unlawful killing raised at inquests.

6. Before us, the appellant was represented by Ms Karon Monaghan QC leading Mr Jude Bunting. The Senior Coroner for Oxfordshire was represented by Ms Alison Hewitt.

The Chief Coroner of England and Wales was represented by Mr Jonathan Hough QC (whose arguments Ms Hewitt adopted, with some supplementation). The case was very well argued.

Background

7. At around 5.20 in the morning of 11 July 2016 James Maughan was found hanging in his prison cell at HMP Bullingdon. A ligature had been tied to the bedframe and attached to his neck. He was pronounced dead shortly thereafter. There was evidence that in the past he had had mental health and other problems and that there had been previous attempts at suicide and self-harm.

8. In such circumstances, an inquest was required to be held and was held. The inquest took place between 9 and 12 October 2017 before the Senior Coroner for Oxfordshire and a jury. The appellant was not legally represented: but the deceased's wife, Kelly Shakespeare, was (as were various other persons) and members of the family were permitted to participate and to ask questions.

9. The principal issues raised at the inquest were whether the hanging was self-inflicted and deliberate; whether, if it was, 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 the prison authorities.

10. At the conclusion of the evidence the Coroner received submissions from the various interested persons. Having done so, he accepted that the evidence was insufficient to enable a jury, properly instructed, to conclude to the criminal standard that the deceased had intended to take his own life. He applied a modified version ("Galbraith plus") of the principles of *R v Galbraith* (1981) 73 Cr. App. R 124 in this regard. He ruled that a short-form conclusion of "suicide" should not be left to the jury. But, having so ruled, he further decided that it would not be appropriate simply to elicit an open conclusion from the jury. He considered that it was requisite that, so far as possible, the jury's conclusion on the circumstances in which the deceased had died should be elicited by way of narrative conclusion from them. In so deciding, he followed the guidance contained in Guidance No. 17 issued (in 2016) by the then Chief Coroner and in the Coroner Bench Book (2015 version). I will come on to those in due course.

11. After discussion with the legal representatives, the Coroner posed the following questions for the jury:

> "1. When, where and how was James Maughan found on 11 July 2016 and at what time and where was his death formally pronounced? (Approximate times will suffice if this is all that can be determined on the evidence).
>
> 2. What is the medical cause of death?
>
> 3. Did James Maughan deliberately place a ligature around his neck and suspend himself from the bedframe?
>
> 4. Are you able to determine if it is more likely than not that he intended the outcome to be fatal, or, for example, if it is likely

> that he intended to be found and rescued? If you are unable to determine his intention, please say so.
>
> [Additionally, the Coroner directed the jury to add to question 4, and to consider, whether the Deceased was unable to form a specific intent to take his own life through mental illness.]
>
> 5. Were there any errors or omissions on the 10-11 July 2016 in the provision of care on the part of HMP Bullingdon/prison staff which caused or contributed to James Maughan's death? If so, please state what they are and how they contributed to his death."

In accompanying written instructions, the Coroner again made clear that, in reaching their conclusions on the questions posed, the jury were to apply a standard of proof by reference to the balance of probabilities.

12. It will thus be seen that for the purposes of the narrative conclusion those questions and those instructions throughout were framed by reference to the civil standard of proof.

13. The jury's eventual answers to those questions were set out in the Record of Inquest.

14. Typed item 3 on the standard form of Record of Inquest stated:

> "How, when and where and, for investigations where section 5(2) of the Coroners and Justice Act 2009 applies, in what circumstances the deceased came by his or her death".

The answer (completed in manuscript) of the jury among other things stated:

> "We believe that James deliberately tied a ligature made of sheets around his neck and suspended himself from the bedframe".

15. Typed item 4 on the form stated "Conclusion of the jury as to death". In answer to that the jury among other things recorded in manuscript their conclusion, expressed to be a narrative conclusion, that the deceased had a "history of mental health challenges" and had been "visibly agitated" on the night of 10 July 2016. They went on to say this:

> "We find that on the balance of probabilities it is more likely than not that James intended to fatally hang himself that night".

The jury further went on in their narrative conclusion to consider the conduct of the prison staff. The jury concluded that prison officers had, given what they knew and witnessed, acted reasonably in not opening certain suicide and self-harm prevention measures (known as ACCT) and had generally carried out their duties in an adequate manner with regard to the deceased's well being that night. The jury nevertheless indicated that they accepted that perhaps more might have been done but went on:

> "…however, neither formally opening an ACCT nor increased vigilance generally would have likely prevented James' death, given what we believe was James' intent to end his life."

The jury further concluded that any lack of training or experience on the part of particular staff on the relevant wing at HMP Bullingdon was not a significant factor in causing or contributing to the death.

16. It thus is clear that, faithful to the questions asked of them and instructions given to them, the jury had, for the purposes of their narrative conclusion, considered whether the deceased had intended fatally to hang himself by reference to the balance of probabilities.

17. A conclusion that the deceased had committed suicide was, understandably, very distressing for the deceased's family. (In fact, evidence was also permitted to be adduced in the Divisional Court to the effect that the Maughan family held strong Catholic beliefs. A statement of Deacon David Palmer dated 14 June 2018 indicated that the teaching of the Catholic Church is that suicide is contrary to love for the living God and is considered a grave sin.) His brother, by judicial review proceedings filed on 11 January 2018, challenges the determination, contained in the narrative conclusion of the jury, that the deceased had intended to kill himself. The complaint in essence is that the jury were incorrectly instructed by the Coroner: they should only have been permitted to reach such a conclusion by applying the criminal standard of proof.

Coroners' Investigations

(a) The legislative scheme

18. The purpose of a coroner's investigation is set out in statute, in the form of the Coroners and Justice Act 2009 ("the 2009 Act").

19. By s.1(1) of the 2009 Act a senior coroner must conduct an investigation into a person's death in certain specified circumstances. One of those circumstances is where the deceased died whilst in custody or otherwise in state detention. This, of course, was such a case. It was also a case whereby, by virtue of s.7, a jury was required at the inquest.

20. Section 5 of the 2009 Act provides as follows with regard to the matters to be ascertained:

> "5. (1) The purpose of an investigation under this Part into a person's death is to ascertain –
>
> (a) who the deceased was;
>
> (b) how, when and where the deceased came by his or her death;
>
> (c) the particulars (if any) required by the 1953 Act to be registered concerning the death.

> (2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 (c.42)), the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.
>
> (3) Neither the senior coroner conducting an investigation under this Part into a person's death nor the jury (if there is one) may express any opinion on any matter other than –
>
> (a) the questions mentioned in subsection (1)(a) and (b) (read with subsection (2) where applicable);
>
> (b) the particulars mentioned in subsection (1)(c).
>
> This is subject to paragraph 7 of Schedule 5."

21. So far as determinations and findings to be made are concerned, those are the subject of s.10. That provides as follows:

> "10. (1) After hearing the evidence at an inquest into a death, the senior coroner (if there is no jury) or the jury (if there is one) must –
>
> (a) make a determination as to the questions mentioned in section 5(1)(a) and (b) (read with section 5(2) where applicable), and
>
> (b) if particulars are required by the 1953 Act to be registered concerning the death, make a finding as to those particulars.
>
> (2) A determination under subsection (1)(a) may not be framed in such a way as to appear to determine any question of –
>
> (a) criminal liability on the part of a named person, or
>
> (b) civil liability
>
> (3) In subsection (2) "criminal liability" includes liability in respect of a service offence."

22. In addition, s.45 confers a power to make rules ("Coroners rules") for "regulating the practice and procedure at or in connection with inquests". Such rules have been made, with effect from 25 July 2013: Coroners (Inquests) Rules 2013, SI No.1616. By Rule 34, headed "Record of the Inquest", it is provided as follows:

> "A coroner or in the case of an inquest heard with a jury, the jury, must make a determination and any findings required under section 10 using Form 2."

23. Form 2, as appended, sets out under five itemised and numbered points the matters to be addressed in the record of the Inquest. It is prefaced by the words: "The following is

the record of the inquest (including the statutory determination and, where required, findings) –". Item 4 in that prescribed form as appended is worded: "Conclusion of the coroner/jury as to the death: (see notes (i) and (ii))." Note (i) says that "one of the following short-form conclusions may be adopted." These conclusions are nine in number: they include, among others, "lawful/unlawful killing" and "suicide". Note (ii) then says:

> "As an alternative or in addition to one of the short-form conclusions listed under NOTE (i), the coroner or where applicable the jury, may make a brief narrative conclusion."

Note (iii) – and I observe that note (iii) does not appear expressly to be referred to in the body of the prescribed form of the Record of Inquest itself – says:

> "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 statement the standard of proof is the civil standard of proof."

24. It at all events is absolutely clear, from the wording of s.5(2), that in an appropriate case where Convention points arise the inquiry must extend to "the circumstances" in which a deceased had died. The removal of the previous limitations, in particular with regard to deaths in custody and deaths involving state agencies where Article 2 considerations arose, as identified and decided in cases such as *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 and (in particular for present purposes) *R (Middleton) v HM Coroner for West Somerset* [2004] UKHL 10, [2004] 2 AC 182, has thus been given a statutory imprimatur.

(b) The conduct of inquests

25. 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.)

26. Thus in *R v South London Coroner, ex parte Thompson* (1982) 126 SJ 625, Lord Lane LCJ had said this at p. 2 of the official transcript of his judgment:

> "It should not be forgotten that 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 prosecution,

> there is no defence, 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.... the function of an inquest is to seek out and record as many of the facts concerning the death as the public interest requires."

27. In this regard, coroners not only have the assistance of the Coroners rules but also have the assistance both of guidance provided from time to time by the Chief Coroner and of the Coroner Bench Book.

28. Guidance No. 17 deals specifically with the use of short-form and narrative conclusions. At paragraph 19 of that Guidance it is observed that the two types of conclusion are alternatives but that: "it is permissible to combine the two types of conclusion". At paragraph 26 of the Guidance this is said:

> "Wherever possible coroners should conclude with a short-form conclusion. This has the advantage of being simple, accessible for bereaved families and public alike, and also clear for statistical purposes."

At paragraph 32 this is said:

> "Note (ii) also states that a narrative conclusion may be used 'in addition' to a short-form conclusion. This means that a narrative may be used as a brief expansion of the stated short-form conclusion in Box 4, although in most cases this will not be necessary because of the words already used in answering 'how' in Box 3."

Detailed guidance is later given with regard to inquests involving Article 2 considerations. Among other things, this is said at paragraph 47:

> "A short-form conclusion may be sufficient to enable to jury to express their conclusion on the central issues canvassed at inquest. Frequently a narrative conclusion will be required in order to satisfy the procedural requirement of Article 2, including, for example, a conclusion on the events leading up to the death or on relevant procedures connected with the death: see *Middleton."*

29. The Guidance also deals with "standards (sic) of proof" at paragraph 56. That states as follows:

> "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. See Note (iii), Form 2, Schedule to the 2013 Rules."

Paragraphs 60 to 63 then deal more specifically with conclusions of suicide. One specific form of suggested conclusion there set out (as justifying an open conclusion) involves expressly stating that it is more likely than not that the deceased intended to take his own life but that the decision maker could not be satisfied so that he was sure that the deceased intended to do so.

30. Turning to the Coroner Bench Book, that follows a similar line. By way of specimen example of a form of words that might be used in summing-up to a jury at an inquest involving a prison death where the deceased has died by hanging, the suggested direction with regard to suicide, at paragraph 21, is that:

> "You may reach this conclusion if on the evidence you are sure that AB took his own life and intended to do so."

The suggested directions with regard to a narrative conclusion extend, by paragraph 28, to cases "where, on balance, you find he intended to take his own life but you cannot be sure about it." The suggested directions then following (at paragraphs 29 and 30) include express reference to the balance of probabilities.

31. It is plain that in the present case the Coroner had, very understandably, closely modelled his approach on the Guidance and on the Coroner Bench Book.

32. It appears from the Guidance (and the cases there referred to in the footnotes) that the guidance that, for short-form conclusions, the standard of proof in suicide cases was the criminal standard was based on the legal authorities, as they then stood and as they were then understood. We inquired, however, as to the basis for the guidance to the effect that it was the civil standard of proof which was to be applied for the purposes of narrative conclusions. We were told that that did not derive directly from any decision of the courts but had been thought appropriate in the light of the perceived need to ensure compliance in a proper way with *Middleton* (cited above) and now with s.5(2) of the 2009 Act.

The legal authorities

33. We were presented with a great number of legal authorities. But I think that I need refer only to a selection.

34. It is plain enough, at least since the decision of the Court of Appeal in *Southall v Cheshire County News Co. Limited* (1912) 5 BWCC 251, that it has been established as a general proposition that suicide should never be presumed. Suicide must be affirmatively proved. That was over the years endorsed, with varying degrees of emphasis, in a number of subsequent authorities relating to inquests. But none of such authorities specifically held that the applicable standard of proof in suicide cases was the criminal standard: even if some came quite close to doing so.

35. However, in *R v HM Coroner for Dyfed, ex parte Evans* (unrep. 24 May 1984), a case where suicide was in issue, a Divisional Court (Watkins LJ and Forbes J) in terms accepted counsel's argument that it was not permissible for a jury at an inquest to bring in a finding of suicide on the balance of probabilities. Although not spelled out quite so specifically, that also seems subsequently to have been the approach of a Divisional Court (Parker LJ and Pill J) in *R v Essex Coroner, ex parte Hopper* (unrep. 13 May

1988). In the meantime, however, that unquestionably had been the approach of a further Divisional Court over which Watkins LJ presided (Watkins LJ and Roch J) in the case, decided on 19 December 1986, of *R v West London Coroner, ex parte Gray* [1988] 1 QB 466.

36. *Ex parte Gray* was a case where unlawful killing was in issue. Watkins LJ recorded that "we heard much argument" about the standard of proof. He noted a lack of direct authority on the point (it seems, incidentally, that he had not been reminded of his own earlier decision, unreported, in *ex parte Evans*). He stated of suicide at p.477D:

> "Suicide was then a crime. It no longer is. But it is still a drastic action which often leaves in its wake social, economic and other consequences."

After referring to certain statements of Lord Widgery LCJ in the case of *R v City of London Coroner, ex parte Barber* [1975] 1 WLR 310 (itself a case involving a verdict of suicide), Watkins LJ said this at p.477G:

> "…I cannot believe, however, that he [Lord Widgery] was regarding proof of suicide as other than beyond a reasonable doubt. I so hold that that was and remains the standard. It is unthinkable, in my estimation, that anything less will do. So it is in respect of a criminal offence. I regard as equally unthinkable, if not more so, that a jury should find the commission, although not identifying the offender, of a criminal offence without being satisfied beyond a reasonable doubt.
>
> As for the other verdicts open to a jury, the balance of probabilities test is surely appropriate save in respect, of course, of the open verdict. This standard should be left to the jury without any of the refined qualifications placed upon it by some judges who have spoken to some such effect as, the more serious the allegation the higher the degree of probability required. These refinements would only serve to confuse juries and, in the context of a jury's role are, I say with great respect to those who have given expression to them, I think, meaningless. Such matter as that led the coroner astray in this case, by providing the jury with no plain standard of proof to be guided by. He cannot be blamed for that, but it is another factor which must cause this verdict to be quashed."

37. The leading text books on the law and practice relating to inquests (including Jervis on the Office and Duties of Coroners) have all since then taken it that for a conclusion of suicide the criminal standard of proof applies. At the same time, none have really queried the suggestion in the Guidance issued by the Chief Coroner and in the Coroner Bench Book, or the statement in note (iii) to the prescribed Form 2 appended to the Coroners rules, to the effect that for the purposes of a narrative conclusion the civil standard, based on the balance of probabilities, can apply.

38. Our attention was, however, also drawn to a decision which was not mentioned by the Divisional Court. This decision, unlike the others of potential relevance, is a decision

of the Court of Appeal. It is the case of *R v Wolverhampton Coroner, ex parte McCurbin* [1990] 1 WLR 719.

39. In *McCurbin*, there had been a death in the course of a police arrest. The coroner was required to give directions on verdicts of unlawful killing and misadventure (it may be observed that suicide was not in issue). The jury reached a conclusion of misadventure. One of the issues raised on appeal was that of the standard of proof. It was argued that the standard of proof applicable to unlawful killing was not, as the coroner had directed, the criminal standard but was the civil standard: viz. the balance of probabilities. It was among other things argued that *ex parte Gray* was wrongly decided.

40. In his judgment Woolf LJ (with whom Stocker LJ and Lord Donaldson MR agreed) referred to and discussed the civil cases of *Hornal v Neuberger Products Limited* [1957] 1 QB 247 – a case which had itself been cited, although not expressly referred to in the judgment, in *ex parte Gray* – and *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74 (in particular the observations of Lord Scarman at p. 112). Having cited at length from *ex parte Gray*, Woolf LJ went on as follows at p.727F:

> "As appears from the passage from the speech of Lord Scarman *in Reg v Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74, 112-114, which I have cited, in different proceedings there are different considerations which lead to what is the appropriate test which it is useful to apply, having regard to the role of the decision-making body who has the task of coming to the conclusion on the facts. As I have sought to indicate, whether in a case of a serious nature such as unlawful killing you adopt the standard of proof which is technically a civil standard but you elevate it because of the gravity of the issue, or whether you use the criminal standard of proof, the result will almost inevitably be the same.
>
> I can see that there may be force in Mr. Macdonald's submission that perhaps in the case of a coroner's inquest, theoretically speaking, the appropriate standard might be said to be a very high standard indeed on the basis of the civil standard of proof. However, whether that be right or not, what I am absolutely satisfied about is that the practical guidance which is given by Watkins in *Reg v West London Coroner, Ex parte Gray* [1988] Q.B. 467 is correct, bearing in mind that it is given in relation to the coroner's role in respect of his duty to direct a coroner's jury as to how that jury is to perform its task.
>
> I am quite satisfied that, in a case where it is open to a jury, as a result of a coroner's inquest, to come to a verdict of unlawful killing, the appropriate direction which the coroner should give to the jury is the simple one that they should be satisfied beyond all reasonable doubt or, as sometimes said, satisfied so that they are sure. That provides clear guidance to the coroner's jury which they will be able to follow, and it is not necessary for them to be involved with sliding scales which are more appropriate for a judge than a jury.

> It is true that, in many cases where it is open to a coroner's jury to find a verdict of unlawful killing, they may also have to consider the question of death by misadventure. However, in my view, this does not and should not give rise to problems. The coroner should indicate to the jury that they should approach, initially, the question as to whether or not they are satisfied so that they are sure that this is unlawful killing. If they come to the conclusion that it is unlawful killing, there is no need for them to go on to consider death by a misadventure. But, if they come to the conclusion that it is not unlawful killing, they are not satisfied so that they are sure that that verdict is appropriate, then they will consider the question of misadventure and, in so doing, they do not need to bear in mind the heavy standard of proof which is required for unlawful killing. They can approach the matter on the basis of the balance of probabilities. The situation is that, just as it is important that a jury should not bring in a verdict of suicide unless they are sure, likewise they should not bring in a verdict of unlawful killing unless they are sure."

41. It is the position of Ms Monaghan that in the present case we are bound to follow, or at any rate should follow, that decision.

42. Finally, we were referred to a number of subsequent decisions relating to inquests where it had in effect been assumed, without argument on the point, that at inquests the criminal standard of proof applies in cases of suicide. I do not think that I need refer to those decisions further. The point was, however, substantively discussed by Lang J in the case of *R (Lagos) v HM Coroner for the City of London* [2013] EWHC 423 (Admin). In that case the husband of the deceased – perhaps unusually – was positively arguing for a conclusion of suicide. Lang J considered a number of the authorities. She found – indeed was bound to find, on the precedent of the Divisional Court cases cited to her – that it was the criminal standard of proof which applied to a conclusion of suicide.

43. I should perhaps also mention that we were referred to the position in a number of other jurisdictions. It suffices to say that there is no clear pattern. Some adopt the criminal standard; others a civil standard. They do not really advance the argument as to what the position is under the law of England and Wales.

A sliding scale?

44. Another potential problem arises, however.

45. As can be seen from the discussion in the judgments in *ex parte Gray* and in *McCurbin*, some consideration was given to whether there could be, as it were, a heightened standard of civil proof: although in the event both decisions unequivocally plumped for directing the inquest jury to the criminal standard: at all events, in cases of unlawful killing.

46. Whatever general difficulties that issue in the past may have generated (arising in particular from some observations in *Hornal*) those have now been laid to rest in civil proceedings. The civil standard of proof, where that applies, is that of the balance of probabilities, without refinement.

47. This was established by the decision of the House of Lords in the case of *re H (Minors)* [1996] AC 563, as confirmed and supplemented by the decision of the House of Lords in *re B (Children)* [2008] UKHL 35, [2009] 1 AC 11. It is in fact noticeable that both those cases were care proceedings involving children and so did not just represent a private lis between parties but also involved an important public interest element. It was there decided that the ordinary civil standard of proof applied and that: "there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not" (at p.20 H per Lord Hoffmann).

48. This, I observe, is not to say that in all non-criminal contexts the criminal standard of proof can never be appropriate. On the contrary, in some special contexts it can be (as certain authorities indeed indicate). All ultimately will depend on the context and underpinning purpose, statutory or otherwise. Thus, by way of example, in civil contempt proceedings the criminal standard is conventionally and appropriately applied. As stated by Lord Brown in *re D* [2008] UKHL 33, [2008] 1 WLR 1499 at p. 1515A, after he had discussed various instances where the criminal standard of proof was applied:

> "Certainly, once it became established as it finally was in re H [1996] AC 563, that there is no such thing as an intermediate standard of proof, logic surely demanded that one standard or the other be applied and common sense dictates the rest."

Thus it remains the general position that there now are no intermediate positions for the civil standard of proof where the civil standard of proof falls to be applied.

49. In *Braganza v BP Shipping Limited* [2015] UKSC 17, [2015] 1 WLR 1661, Lady Hale, after referring to the decision in *ex parte Gray* and to the comments of Longmore LJ in the Court of Appeal in the instant case that *ex parte Gray* might itself "be said to be a little outdated", stated firmly (at p.1673G-H) that:

> "…there is not a sliding scale of probability to be applied, commensurate with the seriousness of the subject matter or the consequences of the decision. The only question is whether something is more likely than not to have happened."

That case, I note, involved private law proceedings and a determination by an employer, for the purposes of the assessment of death in service benefit, as to whether a deceased chief engineer had committed suicide during a voyage by sea.

50. 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.

51. As I have stated, an inquest is not a criminal proceeding. Nor is it a civil proceeding. But, that said, the clear conclusion at least has to be that, surely, no "intermediate" standard of proof can apply with regard to inquests. Accordingly, either it is the civil standard both for short-form and for narrative conclusions; or it is the criminal standard both for short-form and for narrative conclusions; or - as the Coroner here proceeded - it is the criminal standard for short-form conclusions and the civil standard for narrative conclusions. (No one could sensibly argue, or did argue before us, for a civil standard for the short-form conclusion and a criminal standard for the narrative conclusion.)

The proceedings in the Divisional Court

52. Prior to the hearing in the Divisional Court, both parties – the appellant and the Coroner – had proceeded on the assumption that a short-form conclusion of suicide could only be reached on the application of the criminal standard of proof. That was so because that was the settled practice and understanding: based on the weight of authorities going back over some 35 years and reflected also in the leading text books, in the Chief Coroner's Guidance and in the Coroner Bench Book. Mr Bunting thus had come prepared to argue that the criminal standard applied also to the narrative conclusion: Ms Hewitt had come prepared to argue in favour of the position set out in the Guidance and the Coroner Bench Book and as adopted here by the Coroner.

53. But at the hearing the Divisional Court challenged that approach. It queried the mutual assumption of counsel that a short-form conclusion of suicide could only be returned by application of the criminal standard of proof rather than by application of the civil standard of proof. It appears that Mr Bunting and Ms Hewitt then had to adapt their arguments in pretty short order to meet this new point and had limited opportunity for further research.

54. The judgment of the court (as delivered by Leggatt LJ) was a reserved judgment. It is characteristically thorough, thoughtful and erudite: [2018] EWHC 1955 (Admin).

55. The judgment set out the background very fully. It dealt with the legislative scheme and rules and the Guidance and Coroner Bench Book. The court then indicated its initial view that it could be important, in determining the circumstances of death, to determine whether a deceased intended to take his own life: and if such a finding was important, the coroner or jury surely, it was indicated, must be entitled to record it in a narrative conclusion. The court went on to say in paragraph 24:

> "We see force in the point made by Ms Hewitt that, in order to determine the causative relevance of any acts or omissions on the part of state agents, it may be necessary for a coroner or jury to make a finding on the balance of probabilities as to whether the deceased intended to take his own life. If such a finding is made and is important, the coroner or jury must be entitled to record it in a narrative conclusion. Yet it appears illogical to

> conclude (on the balance of probabilities) that the deceased intended to end his life in the context of deciding whether his death could have been prevented whilst at the same time concluding that he did not intend to end his life (because the coroner or jury is not sure of that fact) for the purpose of deciding whether he committed suicide."

56. The court then went on to say this at paragraph 25:

> "Nevertheless, if the premise of the claimant's argument is correct, the conclusion is in our view irrefutable. A narrative conclusion to the effect that on the balance of probabilities the deceased did a deliberate act which caused his own death intending the outcome to be fatal clearly amounts to a conclusion that the deceased committed suicide whether or not the word "suicide" is used. It is sophistry to say that such a conclusion is not one of suicide because the required standard of proof has not been met. The standard of proof even if referred to in the record of inquest, as it was in this case, is not itself part of the substantive conclusion adopted by the coroner or jury. It is simply a statement of the evidential test which must be met in order to reach a particular conclusion. If the standard of proof required to determine that the deceased committed suicide is the criminal standard and the necessary facts have been proved only on the balance of probabilities, this does not mean that a conclusion which records those facts is not one of suicide. It means that the coroner or jury cannot lawfully reach that conclusion."

57. The court then reviewed the 2009 Act and the Coroners rules. It could find nothing in them to support a conclusion that the criminal standard of proof applied at either stage. After referring to the differences between coroner's proceedings and criminal proceedings and the differences between coroner's proceedings and civil proceedings, the Divisional Court then said this at paragraph 40:

> "These differences, in our view, make it, if anything, less rather than more appropriate to apply in coroner's proceedings a standard of proof higher than the civil standard. In circumstances where the function of an inquest is to determine the relevant facts concerning the death as accurately and completely as possible without determining even any question of civil liability, we can see no justification in principle for weighting the fact-finding exercise against any particular conclusion and requiring proof to any higher standard than the balance of probabilities. That is so even if the facts found disclose the commission of a criminal offence. Given that in civil proceedings the standard of proof of criminal conduct remains the ordinary civil standard, we can see no principled reason for adopting a different approach in coroner's proceedings. The position is a fortiori where the

> conclusion under consideration is one of suicide as, although it was once a crime, suicide has not been a crime for over 50 years since that rule of law was abrogated by section 1 of the Suicide Act 1961."

58. The court then turned to the authorities. Having assessed a number of them in detail (indeed, more detail than I have myself thought necessary) it found no case prior to that of *ex parte Gray* – it seems that *ex parte Evans* had not been noted by the Divisional Court – to support the proposition that a conclusion of suicide at an inquest may only be reached if the necessary elements were proved to the criminal standard. As to *ex parte Gray*, the court felt able to conclude that the relevant remarks were dicta. But even if the statements of Watkins LJ as to proof of suicide were part of the ratio, those statements were, the court concluded, wrong. They were wrong because first, they involved a misunderstanding of Lord Widgery's statements in *ex parte Barber*; and second, because they did not engage with the proposition (as discussed in *Hornal)* that the standard of proof in civil proceedings as to whether a criminal offence has been committed is the civil, and not the criminal, standard and thus that there was no reason why a different approach should apply in coroner's proceedings.

59. The court went on to hold that subsequent decisions such as *Lagos* did not advance, and were no more correct than, *ex parte Gray*. As we have said, however, the Divisional Court had not been referred to - doubtless just because counsel had had relatively little time to research matters – and did not itself refer to the Court of Appeal authority of *McCurbin*.

60. The court stated (at paragraph 73):

> "…although we recognise that a finding of suicide is a serious matter which can cause serious consequences, this is not a consideration which can in principle or consistently with the approach of the law in civil proceedings affect the legal standard of proof".

Its overall conclusion was expressed in these terms in paragraph 75:

> "In summary, we are unable to accept the claimant's contention that a conclusion of suicide at an inquest requires proof to the criminal standard. We are satisfied that the authorities relied on to support that contention either on analysis do not support it or do not correctly state the law. We consider the true position to be that the standard of proof required for a conclusion of suicide, whether recorded in short-form or as a narrative statement, is the balance of probabilities, bearing in mind that such a conclusion should only be reached if there is sufficient evidence to justify it."

Submissions

61. It was the submission of Ms Monaghan that this conclusion is not sustainable.

62. Her essential arguments can be summarised as follows:

(1) The Divisional Court was correct to find that, in cases of suicide, there was illogicality in applying the criminal standard to the short-form conclusion but the civil standard to the narrative conclusion. That would also be productive of confusion and inconsistency, both for juries and for members of the public having an interest in the outcome. Thus the standard should indeed be the same both for short-form and for narrative conclusions. But where the Divisional Court went wrong, she said, was to say that the applicable standard throughout was the civil standard: rather, it was the criminal standard throughout.

(2) That the criminal standard is the applicable standard was established by the notes to Form 2, which form had been prescribed by the Coroners rules.

(3) In any event, that the applicable standard is the criminal standard is established by authority, particularly in the form of the Divisional Court decisions in *ex parte Evans* and *ex parte Gray* and the Court of Appeal decision in *McCurbin*. Even if the former cases are not binding on this court the latter case is. In any event, the statements made in those cases, even if not strictly binding with regard to suicide, were correct and should be followed.

(4) Such an approach did not involve an undue restriction on the need (in an Article 2 case) for an investigation into the circumstances of the death in accordance with *Middleton* and s.5(2) of the 2009 Act. The actual intent of a deceased may not necessarily be material for such an investigation or for the consideration of (for example) the reasonableness of the conduct of state agents in failing to prevent death. In any event, there is no principle that the procedural requirements of Article 2 cannot be met by the application of the criminal standard of proof.

63. Mr Hough, as I have said, took a position of neutrality. However, he helpfully advanced submissions on the various scenarios arising. In doing so, he acknowledged the general importance of this case.

64. He pointed out at the outset – validly, in my view - that there is no particular magic in differentiating between a short-form conclusion and a narrative conclusion: in the sense that both are directed at the actual overall conclusion, in particular the question of *how* a deceased came to die as he did. In that regard, he drew attention to the requirements of *Middleton*, as now reflected in s.5(2) of the 2009 Act; and submitted that it would seem very desirable not to impose any undue restriction in terms of burden of proof on such an investigation into the circumstances of death; which circumstances may well include, among other things, the issue of intent.

65. In support of the Divisional Court's approach he observed:

(1) It avoids the seeming illogicality of different standards of proof applying to short-form conclusions and narrative conclusions.

(2) It also avoids the potential result that separate findings within a single narrative conclusion may be reached by internally applying differing standards of proof:

for example, concerning issues of intent and causation and the reasonableness of the preventative steps (if any) of the relevant state agents.

(3) It assimilates the standard of proof for suicide conclusions in inquests with that applicable to equivalent conclusions in civil proceedings (see, for example, *Braganza)*.

(4) The imposition of a criminal standard runs against the grain of an inquest, which is concerned to find facts, not to establish culpability or liability on the part of anyone. Further, to set such a standard might distort statistics of death and thus undermine prevention for the future of (for example) deaths in prison: an important potential function of such an inquest. Further, the "stigma" argument should not be overstated, particularly in modern times. In any event, stigma and other adverse consequences, including social and financial ruin, can equally arise from findings (for example, of fraud or violence) in a civil case.

(5) The authorities do not bind this court or compel a conclusion that the criminal standard applies in suicide cases. Nor is there any difficulty in instructing juries on the application of the civil standard.

66. In support of the appellant's approach Mr Hough readily acknowledged the points made by Ms Monaghan and the range of authorities supporting her arguments.

67. As to the approach adopted by the Coroner in the present case, Mr Hough pointed out that that followed the notes to the prescribed form, the Guidance and the Coroner Bench Book. Such an approach also at least meant that the same standard of proof applied to the entirety of the narrative conclusion. Further, the conclusions expressed in narrative form can also be appropriately qualified. A short-form conclusion of suicide, on the other hand, is a "head line" conclusion which by its nature carries no qualification or explanation: this may, therefore, justify application of the criminal standard at least to a short-form conclusion.

68. For her part, Ms Hewitt, whilst likewise adopting a neutral position, also pointed out that the Coroner here had followed the Guidance and the Coroner Bench Book. She emphasised that such approach sought to reconcile the position on the perceived requirement for a criminal standard of proof (as thus far understood, before this decision of the Divisional Court, to apply) on the one hand and the perceived requirements of *Middleton* and s.5(2) of the 2009 Act on the other hand. In this latter respect, she further emphasised that establishing the intent of a deceased may well be a key aspect into the investigation of the circumstances of the death: and she submitted that it might well be thought that in such a scenario a requirement of the criminal standard of proof for a narrative conclusion could be a very undesirable restriction on the practical utility of such an investigation as recorded in a narrative conclusion.

Disposal

69. In my opinion, the Divisional Court adopted a bold approach in departing from what had been regarded as settled law and practice, at least at Divisional Court level, for over 35 years. Moreover it did so without having regard to the Court of Appeal decision in *McCurbin*, of which it was not made aware. Nevertheless, I consider that it was right in the ultimate conclusion which it reached.

70. I will relatively briefly say, in my own words, why I reach that conclusion.

71. The prescribed form appended to the Coroners rules in terms acknowledges that (as has long been the practice) there may be one or other or both of a short-form conclusion and a narrative conclusion. The central point is then, in my view, that there seems a very real inconsistency in adopting a criminal standard of proof for a short-form conclusion but a civil standard of proof in a narrative conclusion. Where is the logic and sense in that hybrid approach? I cannot discern any. Moreover, not only would it create difficulties for juries in having differing standards of proof relating to various findings within its conclusions, depending on their nature, but also it could tend to create difficulties or confusion in terms of public perception of the outcome.

72. In saying that, I have every sympathy for the approach taken by the Coroner's Guidance and the Coroner Bench Book, and reflected also in the notes to the prescribed form: and which the Coroner in the present case understandably followed. But that approach is predicated on it having been understood that it was a legal requirement that the criminal standard applies. That understanding immediately led to an appreciation that that could have a restrictive impact, at least in Article 2 cases, with regard to the requirements of *Middleton* and of s.5(2) of the 2009 Act. It is this which, it seems, has then led to the awkward hybrid approach adopted in the notes to the prescribed form, the Guidance and the Coroner Bench Book.

73. Thus there is everything to be said for one and the same standard of proof applicable at each stage to cases of suicide at an inquest. The question then is: should that be the criminal standard (the appellant's approach) or the civil standard (the Divisional Court's approach)?

74. In the absence of authority, I would be of the clear view, in agreement with the Divisional Court, that the appropriate standard of proof to be applied throughout in cases of suicide should be the civil standard. I say that for a number of 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).

75. Ms Monaghan nevertheless briefly submitted that the point has been determined by the Coroners rules: in that Rule 34 requires that the determination and findings required must be made using Form 2. Going, then, to Form 2, that, by note (iii), requires the criminal standard: and that, she says, has the status of a rule governing the position.

76. That is a very two-edged argument, given that the self-same note provides for the application of the civil standard to narrative conclusions. But in any event I am in no doubt, in agreement with the Divisional Court, that the entire argument is wrong. If it was desired by the Coroners rules to make provision for the standard of proof (and it was common ground before us that s.45 of the 2009 Act would have so permitted) then the obvious place to do so would have been in the body of the Coroners rules themselves. The notes appended to the prescribed form cannot, in my view, be given the substantive status of rules. They simply set out, for the convenience of coroners, an understanding of the law.

77. I might observe, in any event, that item number 4 in prescribed Form 2 ("Conclusion of the coroner/jury as to the death") as appended to the Coroners rules refers only to notes (i) and (ii): it does not in terms refer to note (iii). Moreover, we gathered that such notes to the form in any event are not ordinarily supplied to a jury. Certainly they were not in the present case: indeed item number 4 on the Record of Inquest here used as to the conclusion had also deleted reference to "see notes (i) and (ii)".

78. That then leaves the question of whether authority compels a different result. Obviously this court does not have any constraint of binding precedent in the form of Divisional Court or Administrative Court decisions (although naturally we accord them persuasive respect). In such circumstances, it is pointless engaging in lengthy debate as to whether the statements there made were ratio or obiter in the way that the Divisional Court felt constrained to do.

79. The decisions in *ex parte Evans* and *ex parte Gray* are clear that the criminal standard applies at an inquest in case of suicide. That is an express part of the decision in *ex parte Evans*; and whilst *ex parte Gray* was a case of unlawful killing, the reasoning is so structured that a conclusion that the criminal standard applies to suicide is, as I read it, a necessary part of the reasoning leading to the conclusion with regard to unlawful killing.

80. But is that reasoning correct and is that conclusion justified with regard to suicide? I do not think so.

81. I would not say that in *ex parte Gray* Watkins LJ ultimately had engaged in an impermissible adoption of a "sliding scale" of the civil standard of proof. To the contrary, he had unequivocally selected the criminal standard of proof: thus in principle adhering to an approach subsequently approved by Lord Brown in *re D*. But given that an inquest is not a criminal proceeding nowhere is it really explained *why* the criminal standard was thought appropriate. Watkins LJ necessarily had to acknowledge that suicide was no longer a crime. But he then provided no real rationale for a conclusion that the criminal standard applied apart from saying that suicide "is still a drastic action which often leaves in its wake serious social, economic and other consequences". But that can be said of many other acts which attract the civil standard of proof: and consideration of such consequences surely cannot of itself determine the applicable standard of proof.

82. Moreover, the line of authorities cited in *ex parte Gray* had only been to the effect that there could be no presumption of suicide and that affirmative proof was needed. To the extent that Watkins LJ had, in going further, placed reliance on the observations of Lord Widgery in *ex parte Barber* those, on analysis and as pointed out by the Divisional Court, lend no real support for his conclusion. Moreover, whilst an instruction to the jury at an inquest on the criminal standard is doubtless easy to apply it can hardly be said that an instruction on the civil standard (eschewing, of course, all questions of a "heightened standard") is any more difficult to apply.

83. The previous conclusion of Watkins LJ to like effect in *ex parte Evans* (which conclusion was announced without any real supporting reasons at all) can have no greater or better authoritative effect than his conclusion in *ex parte Gray*.

84. That leads me to the decision in *McCurbin*. That decision, being a decision of the Court of Appeal, does bind this court. But it only binds this court for what it actually decides. And in my judgment *McCurbin* does not decide that, in cases of suicide, the applicable standard of proof at an inquest is the criminal standard.

85. *McCurbin*, like *ex parte Gray*, was a case on unlawful killing: not on suicide. Further, unlike *ex parte Gray*, *McCurbin* does not, as I read it, reason from a conclusion on suicide as a necessary part of the reasoning towards a conclusion on unlawful killing.

86. The judgment of Woolf LJ is, with respect, in some places rather equivocal as to whether or not it is the civil standard, albeit to "a very high standard indeed", which is being applied. But be that as it may the ratio of the decision in this respect, in my view, is found in the passage set out at p. 728 A – B: that is, that for a conclusion (or verdict) of unlawful killing the correct direction is by reference to the criminal standard. It is true that subsequently at p. 728 D, Woolf LJ said: "The situation is that, just as it is

important that a jury should not bring in a verdict of suicide unless they are sure, likewise they should not bring in a verdict of unlawful killing unless they are sure". But, set in context, the reference here to suicide is, in my view, clearly obiter. It does not form part of the actual decision, which had already been expressed by Woolf LJ: nor is it a necessary part of the reasoning for that decision, which was confined to unlawful killing.

87. To the extent that certain other cases have subsequently proceeded on the footing that, in inquest cases, the criminal standard applies to cases of suicide, that was on an assumed or agreed basis, without argument. The point was, it is true, specifically addressed by Lang J at first instance in *Lagos*. But as that decision was (necessarily) predicated on the decision in *ex parte Gray* it takes matters no further.

88. The upshot is, in my judgment, that the decision in *ex parte Evans* is to be over-ruled. The reasoning in *ex parte Gray* (in so far as it relates to suicide) and the dictum of Woolf LJ in *McCurbin* with regard to suicide are not to be followed. The standard of proof to be applied at an inquest where an issue of suicide arises is in all respects, and whether for the purposes of a short-form conclusion or for the purposes of a narrative conclusion, the civil standard of proof: that is to say, by reference to the balance of probabilities.

89. It may well be that the Chief Coroner will accordingly wish to reconsider, as a matter of expedition, the current Guidance and Coroner Bench Book in these respects; and so, likewise, may those having responsibility for the drafting of the notes to Form 2 as currently appended to the Coroners rules.

Unlawful Killing

90. Although this case has been directly concerned only with a case of suicide, I think that it would be wrong, in the circumstances, not to comment (even if necessarily on an obiter basis) on the standard of proof applicable to cases at inquests where the issue of unlawful killing arises. In fact, Mr Hough told us that the Chief Coroner would welcome clarification from this court, in view of the Divisional Court's apparent indication – albeit in ignorance of the decision in *McCurbin* - in paragraph 40 of its judgment that in such cases the civil standard applies.

91. As will have appeared from some of the observations made above, there is a very powerful case for saying that the civil standard of proof should apply to all inquests in all respects: and in particular, for these purposes, that it should apply to cases of unlawful killing. Such an approach would reflect the essentially inquisitorial nature of an inquest; would reflect the importance of the need to investigate the circumstances of death where s.5(2) applies; would promote consistency of approach both with regard to the findings reached within each potential conclusion and with regard to all other conclusions available to an inquest; and would accord with the general approach to proof of criminality adopted in civil cases. That position is also cogently advanced in articles of Paul Matthews (now Judge Paul Matthews), an editor of Jervis, entitled "The coroner and the quantum of proof": (1993) CJQ 297, (1994) CJQ 309. It is further cogently advanced in the written submissions prepared by Mr Adam Straw of counsel and submitted on this appeal on behalf of the charity INQUEST, as intervener.

92. But, attractive and cogent though those submissions are, I do not think that it would be justifiable to accede to them. Indeed, I think that Mr Hough in turn made some powerful points against such an outcome for unlawful killing cases.

93. There are these considerations:

(1) The first point is the fundamental point that, whilst inquests are not criminal proceedings, unlawful killing (in contrast with suicide and with all other conclusions open to an inquest, as enumerated in the notes to Form 2) connotes a crime. Thus unlawful killing can properly be considered to have its own special status, as it were, as a conclusion at an inquest.

(2) Second, and linked to the first point, conclusions of unlawful killing appear to be confined to a relatively restricted class of cases: in effect, homicide (murder, manslaughter, infanticide). Thus it has been decided in the Divisional Court that cases of causing death by dangerous or careless driving cannot justify a conclusion of unlawful killing at an inquest*: see R (Wilkinson) v HM Coroner for the Great Manchester South District* [2012] EWHC 2755 (Admin).

(3) Third, while s.10(2) of the 2009 Act precludes a determination having the appearance of determining any question of criminal liability on the part of a named person, a conclusion of unlawful killing has a strong "head line" connotation; and quite often – as a number of decisions have pointed out – the identity of the particular alleged perpetrator(s) will in reality have become manifest from the hearing itself. It could be thought fairer to such person(s) that the criminal standard applies. Moreover, whilst the procedural connection between a finding of unlawful killing by a named person at an inquest and a consequential indictment for homicide was abolished by the Criminal Law Act 1977, it remains the case that, under current procedures, a conclusion of unlawful killing at an inquest will ordinarily cause a reconsideration by the Crown Prosecution Service of whether charges should be brought.

(4) Fourth, since the wording of s.10(2) connotes that questions of criminal liability may be determined (even if persons are not to be named) that is consistent with a criminal standard of proof being contemplated as available.

(5) Fifth, that unlawful killing can be regarded as standing apart from all other conclusions available also is perhaps reflected in footnote 44 to paragraph 56 in Guidance No. 17. That refers to there being "ongoing [2016] discussion as to whether suicide should be proved to the criminal or civil standard. The Ministry of Justice are considering the alternatives." We were told that, so far as is known, there is in fact currently (in 2019) no ongoing consideration of such alternatives. The point, however, is that the then ongoing discussion, in 2016, was confined to suicide. It apparently did not extend to unlawful killing.

(6) Finally, and not least, there is the question of authority. The courts have consistently taken it that, in unlawful killing cases, the applicable standard of proof is the criminal standard. For example, in *R (Duggan) v North London Assistant Deputy Coroner* [2017] EWCA Civ 142, [2017] 1 WLR 2199, the decision proceeded on the footing that the requirements (in the context of the issues of unlawful killing and lawful killing there raised) were appropriately

> consistent with the requirements of the criminal law: and thus that the jury was to be directed on the issue of self-defence by reference to the requirements of the criminal law as to that defence, not by reference to the requirements of the civil law as to that defence. In any event, I consider that the matter is concluded at this level by the decision of the Court of Appeal in *McCurbin* (cited above). The decision in that case with regard to unlawful killing is ratio. Nor can the decision be said to be necessarily incompatible with the subsequent decision of the House of Lords in *re B:* for the decision in *McCurbin* does not, ultimately, depend on an (incorrect) adoption of a heightened civil standard but instead unequivocally finds that the criminal standard is to be applied: a course which (as the comments of Lord Brown in *re D* also show) remains available in what is considered to be an appropriate situation. Further, whilst *McCurbin* did not address Article 2 considerations in the way that the House of Lords did subsequently in *Middleton* that factor also does not invalidate the decision on this point either. Indeed, as Ms Monaghan had, as I have said, pointed out, the procedural requirements of Article 2 are not incapable of being satisfied, in an appropriate case, by a criminal procedure or by the adoption of the criminal standard of proof.

94. In indicating these considerations, I should not be taken as necessarily agreeing myself that this *ought* to be the outcome. I can see a very powerful case for saying that the standard of proof applicable to unlawful killing cases in inquests should also be the civil standard (as for all other available conclusions), both as a matter of principle and as a matter of practicality. But that, as I see it and in particular in the light of the decision in *McCurbin*, is not the current state of the law: a state of the law which, in fairness, cannot be said to be altogether devoid of supporting arguments.

95. Accordingly, my opinion is that coroners should, in cases where unlawful killing arises as an issue, continue to instruct juries by reference to the criminal standard of proof in the way that they currently do.

96. All that said, it seems to me to be unfortunate that so important a matter as the standard of proof applicable in inquests (extending not only to unlawful killing but also to suicide) has thus far been left to, in effect, a piece-meal decision making process by the courts and by practice guidance. Given the availability of the relevant rule-making power in s.45 of the 2009 Act, it surely would be greatly preferable, and would put matters beyond all debate, if the desired position was now explicitly articulated within the Coroners rules themselves.

Conclusion

97. In the result, I conclude that, in cases of suicide, the standard of proof to be applied throughout at inquests, and including both short-form conclusions and narrative conclusions, is the civil standard of proof. Since, in the present case, that is how the Coroner instructed the jury as to the narrative conclusion which they might reach, the present challenge by the appellant cannot be accepted.

98. Ms Monaghan did also briefly submit in her written argument that even if that were this court's conclusion nevertheless the appeal should still be allowed, on the basis that the jury received no sufficient guidance on the presumption against suicide. But no such guidance was called for; indeed it might have been confusing for the Coroner to have

made any reference to starting presumptions. What mattered was that the jury in the present case were clearly told that they could not make a determination of suicide unless they were satisfied that it was more likely than not, on the balance of probabilities, that the deceased deliberately killed himself intending to take his own life. That was the correct instruction.

99. I would therefore, for my part, dismiss this appeal.

Lady Justice Nicola Davies:

100. I agree.

Lord Justice Underhill:

101. I agree with Davis LJ's conclusion as regards the standard of proof to be applied in reaching both short-form and narrative verdicts in suicide cases and with his clear and comprehensive reasoning. I also agree with his observations, albeit necessarily obiter, on the standard of proof in cases of unlawful killing. Like him, I think it is a pity that the law in this area has been left to develop piecemeal in the way that it has, and I too would see value in it being authoritatively stated in the Coroners rules (quite apart from tidying up the position about the notes to form 2, as he recommends at para. 89).