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More Likely Than Not: The Civil Standard of Proof Applies to All Short-Form and Narrative Conclusions at Inquests

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By a majority of three to two, the Supreme Court has held that the standard of proof for findings of suicide and unlawful killing at an inquest is the balance of probabilities: *R (Maughan) v Her Majesty's Senior Coroner for Oxfordshire* [2020] UKSC 46.

This is contrary to the general understanding prior to this case that the criminal standard (beyond reasonable doubt) applied to such findings. The result is that that the standard of proof for all short-form, as well as narrative, conclusions at an inquest is the civil standard.

It is suggested that this represents a positive development. This decision increases coherence in the coronial context (in that inquests will now involve the application of a single, consistent standard of proof) and, more widely, in civil litigation (in that the same, unerring standard of proof now applies in almost all contexts).

The judgment in *Maughan* can be read here. The background to the Supreme Court's decision is examined in more detail below.

The Facts

James Maughan was a prisoner at HMP Bullingdon. On 11 July 2016, he was found hanging in his cell and was pronounced dead shortly afterwards.

At the inquest into his death, the Senior Coroner for Oxfordshire decided that the jury could not safely reach a short-form conclusion of suicide because they could not be satisfied to the criminal standard (that is, sure beyond reasonable doubt) that Mr Maughan had intended to kill himself. Instead, the Senior Coroner put questions to the jury and asked them to reach a narrative conclusion as to the circumstances of Mr Maughan's death on a balance of probabilities.

The jury answered the questions put to them by saying *inter alia* that, on the balance of probabilities, Mr Maughan had intended fatally to hang himself. The jury accordingly returned a narrative conclusion, finding that it was more likely than not that Mr Maughan had committed suicide. There was no short-form conclusion of suicide.

Proceedings in the Divisional Court

Mr Maughan's brother commenced judicial review proceedings challenging the jury's determination and arguing that the Senior Coroner had erred in law in instructing the jury to apply the civil standard of proof when considering whether Mr Maughan had killed himself.

The Divisional Court (Leggatt LJ and Nicol J) dismissed the application for judicial review, holding that the standard of proof to be applied in cases of suicide, both for short-form and narrative conclusions, was the civil standard. In so deciding, at least with regard to short-form conclusions, it departed from a long line of authority, from guidance issued by the Chief Coroner and from statements made in the leading textbooks on the law relating to coroners. The Divisional Court accordingly granted leave to appeal to the Court of Appeal.

Appeal to the Court of Appeal

The Court of Appeal (Davis LJ, with whom Underhill and Nicola Davies LJJ agreed) dismissed the appeal, holding *inter alia* that "*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*" (i.e. to both short-form and narrative conclusions) and that the application of the civil standard to a conclusion of suicide "*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)*": see [73]-[74].

The Court of Appeal observed that there was much to be said for applying the civil standard to cases of unlawful killing (and, indeed, for all purposes), but considered itself precluded from this course by binding authority: see [90]-[96].

When handing down judgment, the Court of Appeal took the unusual step of granting permission to appeal to the Supreme Court.

The Supreme Court's Decision

As above, the Supreme Court dismissed the appeal by a majority of three to two. The lead judgment was given by Lady Arden (with whom Lord Wilson agreed). Lord Carnwath gave a brief concurring judgment. Lord Kerr (with whom Lord Reed agreed) prepared a dissenting judgment.

The Supreme Court gave considerable attention to the prescribed Record of Inquest form under the Coroners (Inquests) Rules 2013 (see here at page 16), and in particular Note (iii) thereto, which reads:

> "*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.*"

The Divisional Court (see [47]) and Court of Appeal (see [76]) considered the effect of Note (iii) only briefly. In the Supreme Court, which had the benefit of consultation documents in relation to the 2013 Rules, Lady Arden defined the questions for the court as follows:

1. whether Note (iii) simply declares the common law position in a convenient form or whether it goes further and codifies the common law rules and makes them mandatory so as to remove them from the reach of the courts when considering the true state of the common law (see [17]); and

2. if the former, whether the approach in Note (iii) correctly reflects the common law, either historically or currently (see [2]).

As to the first question, Lady Arden held that Note (iii) expressed the common law position as it was perceived to be (see [41]) but that it did not have the effect of codifying the common law and taking away the power of the courts to develop, elucidate or correct it (see [42]-[55]). In so holding, Lady Arden took account of the consultation material and relied upon several canons of statutory interpretation, including that matters of principle should not be included in a schedule (see [44]). *Hunt v RM Douglas (Roofing) Ltd* [1990] 1 AC 398 was distinguished on the basis that, unlike in that case, there had been no debate in the case law as to the correctness of the common law rule reflected in Note (iii) prior to its enactment: see [43].

In his concurring judgment, Lord Carnwath reached the same conclusion without reference to the preparatory materials cited by Lady Arden, though they were noted to provide "*useful confirmation*": see [107].

As to the second question, Lady Arden considered that there were four reasons why the civil standard of proof should apply to short-form conclusions of suicide as well as narrative conclusions: see [68]-[82]. In summary, these were as follows:

1. As a matter of legal principle, the civil standard of proof should apply in civil proceedings (including inquest proceedings) and there in no cogent reason for departing from that principle.

2. The criminal standard may lead to suicides being under-recorded and lessons not being learned.

3. The changing role of inquests and changing societal attitudes and expectations confirm the need to review the standard of proof.

4. Leading Commonwealth jurisdictions (for example Canada, New Zealand and Australia) have taken the same course.

Finally, Lady Arden considered that short-form conclusions of suicide and unlawful killing cannot satisfactorily be distinguished with respect to the standard of proof. Accordingly, the civil standard should also apply to conclusions of unlawful killing: see [84]-[96].

Lord Carnwath agreed with both of these conclusions: see [103] and [108].

The Dissenting Judgment

In a short dissenting judgment, Lord Kerr considered that "*Note (iii) of Form 2 admits of no interpretation other than that the prescribed short form conclusion in inquests involving questions of "unlawful killing" or "suicide" can only be reached by applying the criminal standard of proof*": see [127]. His Lordship also opined that there is "*no incongruousness*" between a narrative conclusion of suicide on the balance of probabilities and a short-form conclusion requiring proof beyond reasonable doubt: see [116] and [143].

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