CHIEF CORONER

Law Sheet No. 2

GALBRAITH PLUS[1]

1. In deciding whether to leave a conclusion to a jury, the coroner must make a judgment based on sufficiency of evidence.

2. In the criminal law the test is laid down in the well-known case of *R v Galbraith*[2]. In short the test is that a case should not be left to the jury where there is no or no sufficient evidence. Borderline cases can safely be left to the discretion of the judge.

3. But there is now authority in coroner law that suggests that the test is more than just the *Galbraith* test. It has been described as *Galbraith* plus.

4. In *R (Secretary of State for Justice) v HM Deputy Coroner for the Eastern District of West Yorkshire*[3] Haddon-Cave J ruled that the *Galbraith* test alone was not enough. More was needed[4]:

   > 'It is clear, therefore, that when coroners are deciding whether or not to leave a particular verdict to a jury, they should apply a dual test comprising both limbs or 'schools of thought' [as discussed in *Galbraith*], *i.e.* coroners should (a) ask the classic pure *Galbraith* question *"Is there evidence on which a jury properly directed could properly convict etc.?"* … <u>plus</u> (b) also ask the question *"Would it be **safe** for the jury to convict on the evidence before it?*' [emphasis added]

5. The coroner must therefore first be satisfied that there is enough evidence, in the familiar *Galbraith* sense that there is sufficient evidence upon which a jury properly directed could properly reach a particular conclusion. In addition (described in the *West Yorkshire* case as the 'the modest gloss or addition') the coroner must also be satisfied that it is **safe** to leave the conclusion to the jury: *ibid*, paras.17-25. The two questions for the coroner therefore are: Is there enough evidence to leave this conclusion to the jury? And, if so, would it be safe on the evidence for the jury to reach this conclusion? Failure to ask and answer

---

[1] I am indebted to the coroners who have commented on earlier drafts of this Law Sheet.
[2] [1981] 1 WLR 1039; (1981) 73 Cr.App.R. 124 (CA).
[3] [2012] EWHC 1634 (Admin).
[4] Para.23.

either question may render the conclusion vulnerable to challenge by way of judicial review (as in the *West Yorkshire* case).

6. It is perhaps ironic that the plus in *Galbraith* plus derives from the school of thought in past criminal cases that the judge should stop the case if, in his view, it would be unsafe for the jury to convict[5], a school of thought which was expressly rejected by the Court of Appeal in *Galbraith*. Nevertheless, as the law now stands, both limbs (sufficient evidence and safe) are required and the coroner should refer to both limbs in giving a ruling. It would be a misdirection to fail to apply the second limb of the test.

7. In the *West* Yorkshire case Haddon-Cave J reasoned that he was following the earlier decision of *R (Bennett) v HM Coroner for the Inner South London*[6], in which Waller LJ, relying in part on earlier decisions[7], had expressed himself in this way[8];

   > '… coroners should approach their decision as to what verdicts to leave on the basis that facts are for the jury, but they are entitled to consider the question **whether it is safe to leave a particular verdict on the evidence to the jury** i.e. to consider whether a verdict, if reached, would be perverse or unsafe and to refuse to leave such a verdict to the jury.' [emphasis added]

8. Haddon-Cave J justified the difference of approach between criminal and coroner courts in this way[9]:

   > 'The second limb, arguably, provides a wider and more subjective filter than the first in certain cases. In my view, this extra layer of protection makes sense in the context of a coronial inquiry where the process is inquisitorial rather than adversarial, the rights of interested parties to engage in the proceedings are necessarily curtailed and coronial verdicts are at large.'

9. The word 'safe' is not defined or explained. It should therefore be given its ordinary English meaning, the coroner exercising his or her own discretion judicially on a case by case basis. 'Safe' may have originated from the Court of Appeal's jurisdiction in criminal cases in its negative form of 'unsafe'[10] (originally 'unsafe or unsatisfactory'), but consideration of 'lurking doubt' or similar post-conviction cases will not help in this context.

10. Lord Woolf MR had adopted a similar approach, but not using the word 'safe', in the familiar case of *R v Inner South London Coroner, ex parte Douglas-Williams* [1999] 1 All ER 344, based upon the coroner's role being more inquisitorial and therefore having, at least indirectly, a greater say as to what conclusion the jury should consider than a judge at an adversarial trial. He stated at 349:

    > 'If it appears there are circumstances which, in a particular situation, mean in the judgment of the coroner, acting reasonably and fairly, it is **not in the interest of justice that a particular verdict should be left to the jury**, he need not leave that verdict. He, for example, need not leave all possible verdicts just because there is

---

[5] See *R v Mansfield* [1977] 1 WLR 1102
[6] [2007] EWCA Civ 617 (CA).
[7] *R v HM Coroner for Exeter, ex parte Palmer* Unreported 10 December 1997 (CA); *Sharman v HM Coroner for Inner North London* [2005] EWHC 857 (Admin).
[8] Para.30.
[9] Para.23.
[10] See Criminal Appeal Act 1968, section 2 (as amended in 1995).

technically evidence to support them. It is sufficient if he leaves those verdicts which realistically reflect the thrust of the evidence as a whole. To leave all possible verdicts could in some situations merely confuse and overburden the jury and if that is the coroner's conclusion he cannot be criticised if he does not leave a particular verdict.' [emphasis added]

11. Lord Woolf did, however, use the word 'safe' in an even earlier case, *R v HM Coroner for Exeter and East Devon ex parte Palmer*[11]. Having described the duty of the coroner as 'a filter to avoid injustice' he stated:

> 'In a difficult case, the Coroner is carrying out an evaluation exercise. He is looking at the evidence before him as a whole and saying to himself, without deciding matters which are the province of the jury, 'Is this a case where it would be **safe** for the jury to come to the conclusion that there had been an unlawful killing?' If he reaches the conclusion that, because the evidence is so inherently weak, vague or inconsistent with other evidence, it would not be safe for a jury to come to the verdict, then he has to withdraw the issue from the jury.' ' [emphasis added]

12. In *R (Longfield Care Homes Ltd) v HM Coroner for Blackburn*[12] Mitting J described the coroner's two-stage exercise as (1) a matter of judgment in deciding whether there is sufficient evidence, and (2) if there is, a matter of 'discretion in an appropriate case, and when **the interests of justice** require it, not to leave a verdict to the jury, even though on the *Galbraith* test there is evidence to support it'[13]. [emphasis added]

13. Finally, in *Douglas-Williams* above[14] Lord Woolf MR suggested the following procedure for jury cases which are complex. At the close of the evidence the coroner should put before the interested persons (represented or not) a draft written statement, intended to be given to the jury as part of the summing up, setting out the matters which the law requires in relation to each possible conclusion. After submissions the coroner should rule on the conclusions which are to be left or not left, where there is a dispute about them, or make reference to them if there is agreement, giving short reasons for his/her decision. Once discussed and ruled upon the coroner can then amend the draft, if necessary, ready for handing to the jury.

11 September 2013

---

[11] See Fn 6 above.
[12] [2004] EWHC 2467 (Admin).
[13] Paras.21-22.
[14] At p.355, with the agreement of Hobhouse LJ at p.355.