



CHIEF CORONER

## Law Sheet No.5

### THE DISCRETION OF THE CORONER

#### Introduction

1. The purpose of this Law Sheet is to set out for coroners the main headlines from the authorities on the exercise of the coroner's discretion. It is not intended to cover all aspects of the coroner's discretion, but to consider generally the ambit, limits and possible challenge to its exercise.
2. The discretion of the coroner derives in some instances from statute (for example in relation to juries, see paragraph 20 below). But otherwise it emanates from the inquisitorial nature of the coroner's inquiry. The ambit of the coroner's investigation and inquest is determined not by parties or interested persons but by the coroner.<sup>1</sup>

#### A wide discretion

3. The coroner has a wide discretion in setting the scope of an investigation (*Smith*):

'Everyone agrees that coroners have a considerable discretion as to the scope of their inquiry, although the verdict that they may deliver differs according to the type of inquest being held [*Jamieson or Middleton*].'<sup>2</sup>

4. The 'scope and breadth of the coroner's enquiry is a matter for the ... coroner': *My Care*.<sup>3</sup>
5. In the well-known passage in *Jamieson* Sir Thomas Bingham MR explained the duty and responsibility of the coroner:

'It is the duty of the coroner as the public official responsible for the conduct of inquests, whether he is sitting with a jury or without, to ensure that the relevant facts are fully, fairly and fearlessly investigated ... He must ensure that the relevant facts are exposed to public scrutiny, particularly if there is evidence of foul play, abuse or inhumanity. He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry. He

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<sup>1</sup> See *R v South London Coroner, ex parte Thompson* (1982) 126 SJ 625. For a similar inquisitorial process, see the Court of Protection: *Re X and others (Deprivation of Liberty) (Number 2)* [2014] EWCOP 37, at [10].

<sup>2</sup> *R v Secretary of State for Defence, ex parte Smith* [2010] UKSC 29, per Lord Mance at [208].

<sup>3</sup> *My Care (UK) Ltd v HM Coroner for Coventry* [2009] EWHC 3630 (Admin), at [4].

must rule on the procedure to be followed. His decisions, like those of any other judicial officer, must be respected unless and until they are varied or overruled.’<sup>4</sup> [emphasis added]

6. ‘We are unwilling, for our part, to fetter the discretion of a coroner by being at all prescriptive about the procedures he should adopt in order to achieve a full, fair and thorough hearing’: *Hay*.<sup>5</sup> Brooke LJ, giving the judgment of the court, added:

‘Subject to the need to obey the requirements of the Act and the Rules, it is for each coroner to decide how best he should perform his onerous duties in a way that is as fair as possible to everyone concerned ...’.

7. In *Dallaglio* Simon Brown LJ acknowledged the broad remit of the coroner in setting the scope of an investigation:

‘... the [coroner’s] inquiry is almost bound to stretch wider than strictly required for the purposes of a verdict [conclusion]’. How much wider is pre-eminently a matter for the coroner whose rulings upon the question will only exceptionally be susceptible to judicial review’.<sup>6</sup>

8. In *Middleton* (an Article 2 inquest) Lord Bingham explained that ‘it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury’s conclusion on the central issue or issues’.<sup>7</sup>

### Calling witnesses

9. The coroner’s discretion on the calling of witnesses was formerly prescribed by statute. Section 11(2), Coroners Act 1988, provided that the coroner must call ‘all persons who tender evidence as to the facts of death ... whom he considers it expedient to examine’. This provision was, however, repealed by the 2009 Act and not replaced.
10. The position at law is therefore defined now by the case law. In summary the coroner has a broad discretion which witnesses to call in order to satisfy the investigation (and inquest) requirements of the Coroners and Justice Act 2009.
11. It is for the coroner to decide how to adduce the necessary evidence as to death: *McKerr v Armagh Coroner*.<sup>8</sup> The coroner is not required to call every witness who might have relevant evidence, but sufficient witnesses to undertake a proper inquiry: *Ahmed*<sup>9</sup>; *Mack*<sup>10</sup>.
12. ‘This court [the High Court] cannot dictate what witnesses the coroner calls or what cross-examination he permits ...’: *Lin*.<sup>11</sup>
13. It is for the coroner to decide what is relevant (*Fields*):<sup>12</sup>

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<sup>4</sup> *R v HM Coroner for North Humberside and Scunthorpe ex parte Jamieson* [1995] 1 QB 1, 26.

<sup>5</sup> *R v Coroner for Lincolnshire, ex parte Hay* (1999) 163 JP 666, at [46].

<sup>6</sup> *R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139, 155. See paragraph 32, below.

<sup>7</sup> *R v HM Coroner for Western District of Somerset, ex parte Middleton* [2004] 2 AC 182, [36].

<sup>8</sup> *McKerr v Armagh Coroner* [1990] 1 WLR 649, 656-657.

<sup>9</sup> *R (Ahmed) v South and East Cumbria Coroner* [2009] EWHC 1653 (Admin), [35].

<sup>10</sup> *Mack v HM Coroner for Birmingham* [2011] EWCA Civ 712 (CA), per Toulson LJ at [8].

<sup>11</sup> *R (Lin) v Secretary of State for Transport* [2006] EWHC 2575 (Admin), per Moses LJ at [56].

<sup>12</sup> *R v Southwark Coroner, ex parte Fields*, (1998) 162 JP 411, per Simon Brown LJ.

‘The decision whether or not this evidence was relevant was for the coroner. Subject only to *Wednesbury*, the question was essentially one of fact and degree for him. Unless no reasonable coroner could have reached the view [which he did] ... his decision cannot be impugned.’

14. Referring to both the old statutory provision and the case law, the Court of Appeal in *Mack*<sup>13</sup> reaffirmed the breadth of the discretion:

‘The coroner has a wide discretion – or perhaps more appropriately a wide area of judgment – whom it is expedient to call. The Court will only intervene if satisfied that the decision made was one which was not properly open to him on *Wednesbury* principles.’ [For *Wednesbury* principles, see paragraph 30 below.]

15. This wide discretion includes the calling of expert witnesses (*Takoushis*<sup>14</sup>). This includes psychiatrists (see, for example, *Warren*<sup>15</sup>).
16. There is no principle that independent expert evidence is always required in order to render an inquest an effective investigation for the purposes of Article 2: *Goodson*.<sup>16</sup> In rejecting the claimant’s ‘bold contention’ in *Chambers* that ‘independent’ psychiatric evidence should be called in every case of suicide in prison where there may be a mental health issue, the Divisional Court held:

‘Each case must be determined on its own facts. To suggest otherwise would be to fetter the discretion of the coroner. It is long-established law and practice that the coroner has a wide discretion which witnesses to call.’<sup>17</sup>

17. In *Takoushis* Sir Anthony Clarke MR stated that if an interested person wished the coroner to call expert evidence that person may put the substance of the evidence before the coroner ‘so that the coroner may be able to decide whether or not it is appropriate’.<sup>18</sup> Sometimes it may be wise to call such a witness, in the exercise of the coroner’s discretion, even though strictly unnecessary, if only to allay rumours and suspicion<sup>19</sup>: *LePage*.<sup>20</sup> ‘This is a field in which appearances are generally thought to matter’: *Dallaglio*.<sup>21</sup>

### Discretion to adjourn

18. A coroner may adjourn an inquest if the coroner is of the view that it is reasonable to do so: Rule 25(1), Coroners (Inquests) Rules 2013.

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<sup>13</sup> *Mack v HM Coroner for Birmingham* [2011] EWCA Civ 712 (CA), per Toulson LJ at [9].

<sup>14</sup> *R (Takoushis) v Inner North London Coroner* [2006] 1 WLR 461, at [61]. See, for example, *Francis v Southwark Coroner’s Office* [2013] EWCA Civ 313.

<sup>15</sup> *R (Warren) v HM Assistant Coroner for Northamptonshire* [2008] EWHC 966 (Admin).

<sup>16</sup> *R (Goodson) v Bedfordshire and Luton Coroner* [2006] 1 WLR 432, 458.

<sup>17</sup> *Chambers v HM Coroner for Preston and West Lancashire* [2015] EWHC 31 (Admin), [31].

<sup>18</sup> Note 14, at [61].

<sup>19</sup> See the Brodrick Report, *Death Certification and Coroners* (1971), paragraph 14.19(ii), cited in *R v Manchester Coroner, ex parte Tal* [1985] 1 QB 67, 83.

<sup>20</sup> *R (LePage) v HM Assistant Coroner for Inner South London* [2012] EWHC 1485(Admin), [61]-[63].

<sup>21</sup> *Dallaglio*, note 6, per Simon Brown LJ at 155-156, citing Bingham LJ in *R v Chief Constable of the Thames Valley Police, ex parte Cotton* [1990] IRLR 344, 352.

19. The High Court will not interfere lightly with the coroner's discretion to adjourn (or not adjourn) proceedings unless it is clear that the coroner has erred or misdirected himself in law or his decision is unreasonable: *Doyle*.<sup>22</sup>

### **Inquest with jury**

20. In addition to the mandatory powers of a coroner to hold an inquest with a jury,<sup>23</sup> a coroner has a discretion to hold an inquest with a jury if the coroner 'thinks that there is sufficient reason for doing so': section 7(3), 2009 Act.

### **Leaving conclusions to a jury**

21. The coroner has a wide discretion in deciding which conclusions to leave to a jury: *Douglas-Williams*.<sup>24</sup>
22. Deciding whether to leave an issue to a jury is 'very much a matter for the judgment of the ... coroner who has seen and heard the evidence tested ... An appellate court will rarely intervene.': *Sreedharan*.<sup>25</sup>
23. The coroner has a power (and therefore a discretion) but not a duty to leave to the jury (in an Article 2 inquest) circumstances which were possible but not probable causes of death: *Lewis*.<sup>26</sup>
24. The exercise of discretion should be distinguished from the exercise of judgment. For example, in deciding whether to leave a particular conclusion to the jury, the coroner must adopt the *Galbraith* plus two-stage approach, one involving judgment, the other discretion.<sup>27</sup> First the coroner has to decide whether there is sufficient evidence; that is a matter of judgment. Secondly, if there is sufficient evidence, the coroner must decide whether it is safe to leave the conclusion to the jury; that is a matter of discretion.

### **Discretion to be exercised reasonably and fairly**

25. The coroner's discretion, whether to call evidence or leave conclusions, must be exercised 'reasonably and fairly': *Douglas-Williams*.<sup>28</sup> See also *Hay*, at paragraph 6, above.
26. The coroner's discretion is wide but not unlimited. There must be a good reason to exercise a discretion in a particular way, both in fact and in law. As Lord Greene MR said in the *Wednesbury* case<sup>29</sup>:

'... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant.'

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<sup>22</sup> *Re Doyle's Application*, unreported, 18 April 2005 (cited in *Jervis* 13<sup>th</sup> Edn. at 11-36, note 105).

<sup>23</sup> Section 7(2), Coroners and Justice Act 2009.

<sup>24</sup> *R v Inner South London Coroner, ex parte Douglas-Williams* [1999] 1 All ER 344 (CA).

<sup>25</sup> *R (Sreedharan) v HM Coroner for Greater Manchester* [2013] EWCA Civ 181 (CA), [72].

<sup>26</sup> *R (Lewis) v Mid and North Shropshire Coroner* [2010] 1 WLR 1836.

<sup>27</sup> See Chief Coroner's Law Sheet No.2; *R (Secretary of State for Justice) v HM Deputy Coroner for the Eastern District of West Yorkshire* [2012] EWHC 1634 (Admin); *R (Longfield Care Homes Ltd) v HM Coroner for Blackburn* [2004] EWHC 2467 (Admin).

<sup>28</sup> Note 22, per Lord Woolf MR at 349.

<sup>29</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229.

27. As Lord Bingham wrote in *The Rule of Law*,<sup>30</sup> ‘The job of the judges is to apply the law, not to indulge their personal preferences. There are areas in which they are required to exercise a discretion, but such discretions are much more closely constrained than is always acknowledged.’
28. The duty to act reasonably in the *Wednesbury* sense in an Article 2 inquest was expressed in *Goodson*<sup>31</sup> as the lawful judgment on the part of the coroner that ‘fuller investigation was not required in the circumstances’.
29. In exercising discretion, particularly on a contentious issue such as whether the conclusion of unlawful killing should be left to a jury, the coroner must give reasons for the decision: *Cooper*.<sup>32</sup>

### Challenge to exercise of discretion

30. Where the coroner exercises a discretion, the High Court will not act as a court of appeal. On an application for judicial review it will interfere only on *Wednesbury*<sup>33</sup> grounds, namely where the coroner has erred in law, has taken into account an irrelevant consideration or failed to take into account a relevant consideration, or has acted in a way in which no reasonable coroner would have acted: *Palmer*.<sup>34</sup>
31. The grant of judicial review is itself discretionary: see *Douglas-Williams*.<sup>35</sup>
32. The exercise of the coroner’s discretion on the width of the investigation ‘will only exceptionally be susceptible to judicial review’: *Dallaglio*.<sup>36</sup> This approach ‘indicates a narrow scope of review’, but a coroner’s decision may, ‘despite the width of the coroner’s powers’, be successfully challenged ‘if it is founded on an erroneous understanding of the law or ... it is *Wednesbury* unreasonable’: *Butler*.<sup>37</sup>
33. In considering what means are best in an Article 2 case for eliciting the jury’s conclusions on the central issue or issues (in an Article 2 case), ‘the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown’: *Middleton*.<sup>38</sup>
34. See also paragraphs 13 (relevance), 14 (calling witnesses) and 19 (whether to adjourn), above.

### Limited challenge before inquest completed

35. A challenge to the exercise of a coroner’s discretion, such as a decision to leave a particular conclusion to a jury, should not in the ordinary case be entertained by the High Court before the inquest is completed: *Cooper*. The Court concluded:

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<sup>30</sup> Allen Lane, 2010.

<sup>31</sup> *R (Goodson) v Bedfordshire and Luton Coroner* [2006] 1 WLR 432, 459, Richards J.

<sup>32</sup> *R (Cooper) v HM Coroner for North East Kent* [2014] EWHC 586 (Admin),.

<sup>33</sup> Note 29.

<sup>34</sup> *R v Coroner for Exeter and East Devon, ex parte Palmer*, [2000] Inquest LR 78 (CA), p9. See also *R (Butler) v HM Coroner for the Black Country District* [2010] EWHC 43 (Admin) at [62].

<sup>35</sup> Note 24, at p347.

<sup>36</sup> See note 6, at p155.

<sup>37</sup> *R (Butler) v HM Coroner for the Black Country District* [2010] EWHC 43 (Admin), [62], citing *Dallaglio* and *Takoushis*, above.

<sup>38</sup> Note 7, at [36]. See also *R v Inner London Coroner, ex parte Linnane* [1989] 1 WLR 395, 398 (under section 8(3), Coroners Act 1988).

'Accordingly, in my judgment, challenges of this kind should not in the ordinary case be entertained by the High Court. No judge sitting in this court, having, as this court does, jurisdiction to entertain a challenge, can ever confidently say that there should never be one. But I find it difficult to envisage circumstances in which this court should ever entertain such a challenge.'<sup>39</sup>

**HH JUDGE PETER THORNTON QC  
CHIEF CORONER**

**16 February 2015**

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<sup>39</sup> *Cooper*, note 32, *per* Mitting J at [17].