Is There A Level Playing Field at Inquests? From Death on the Rock to the Birmingham Pub Bombings

Professor Leslie Thomas QC

4 February 2021

"*A fair trial is one in which the rules of evidence are honoured, the accused has competent counsel, and the judge enforces the proper courtroom procedures - a trial in which every assumption can be challenged."*

Harry Browne

In the last lecture we took an in-depth look at the system of coroners in England and Wales, how it works, what the problems are, and how it could be improved.

In this lecture we're going to zoom in on an issue we touched on in the last lecture: the fairness of inquests. What does it mean to have a fair hearing? What makes a hearing fair or unfair? Should the same standards of fairness that apply to criminal or civil trials also apply to inquests? Do the bereaved family of the deceased really get a fair hearing at an inquest? And what could we do to make it fairer?

Equality of arms

One of the central concepts we will be talking about is **equality of arms.**

This is a lawyer's term for an intuitive concept that we all understand – the basic concept of procedural fairness. In short, equality of arms means that the parties to a legal proceeding should be starting on a level playing field:

a. They should each have adequate time and opportunity to prepare their case. Neither of them should be allowed to ambush the other at the last minute with a different case to the one they were expecting.
b. Each of them should have access to the evidence the other is relying on, and the opportunity to think about how they are going to challenge it.
c. At the trial, they should each have the opportunity to call witnesses, and to ask questions of the other side's witnesses.
d. They should each have the same opportunity to make arguments before the court and put forward their case.
e. In short, neither of them should be put at a procedural disadvantage compared to the other.

These are basic, obvious principles that everyone understands. But how they should be applied in practice has been debated by lawyers for centuries. For instance, does equality of arms mean that if one side is represented by lawyers, the other should also be represented by lawyers? In criminal cases, nowadays many countries guarantee the right to legal aid for people who are charged with a serious crime. But in civil cases, all over the world, it is common for one side to be represented by

a high-powered legal team and the other to be representing themselves. After all, we live in a capitalist world where legal services, like everything else, are bought and sold, and where some people have deeper pockets than others. Legal aid schemes, where they exist, are usually means-tested and don't usually cover every type of case.

A person representing themselves – a "litigant in person", as lawyers call them – may have all the same opportunities, in theory, as the other side. But they may not be able to take advantage of those opportunities because they don't know enough about the law, the procedure, or how to present their case effectively.

Another big issue for centuries has been disclosure. Does fairness mean that a party should be required to disclose evidence they hold that undermines their case or supports the other party's case? Nowadays, in England and Wales, we have complex rules on disclosure in both criminal and civil cases. In criminal cases the prosecutor is required to disclose evidence in their possession that undermines their case or assists the accused's case. Similarly, in civil cases we have a process of disclosure – which used to be called "discovery", as it still is in the US – where each party has to disclose evidence that undermines their case or assists their opponent's case. Disclosure is a really, really big issue for lawyers. You will see it in the news from time to time – for instance, when a prosecutor's failures of disclosure cause a criminal case to collapse.

Fairness in Inquests

So let's talk about inquests. First of all, a brief recap of what we were talking about in the last lecture. An inquest is the legal process by which a coroner investigates a sudden or unexplained death. An inquest is always held if the deceased died a violent or unnatural death or if the deceased died in custody or state detention. An inquest may also be held if the cause of death was unknown, unless the post-mortem investigation has established the cause of death.

Superficially, an inquest looks a lot like a trial. It takes place in court, witnesses are called and submissions are made. There is a coroner, who is a judge. Sometimes the coroner sits with a jury.

But an inquest is quite different from a trial. In a criminal or civil trial, you have parties – the prosecutor and the defendant in a criminal case, the claimant and the defendant in a civil case. The trial is a dispute between those parties. The parties decide what evidence and arguments to put forward. The court hears both parties' evidence and arguments, it decides the issues, and one party wins and the other party loses. This is what we call an adversarial process.

An inquest, in theory, is not an adversarial process. It is an inquisitorial process. It is the coroner who decides what witnesses to call and what questions they should be asked. And there are no "parties" as such. There may be a number of "interested persons" who are involved in an inquest, such as the family of the deceased and any individuals or institutions who were involved in the deceased's death. But strictly speaking, they are not parties.

Nor does an inquest have a winner or a loser. The coroner doesn't find anyone guilty or not guilty, or find anyone civilly liable to anyone else. The coroner simply returns a verdict as to how the deceased came by their death. That verdict may please some of the interested persons and displease others, but, formally speaking, nobody "wins" or "loses" an inquest.

So, one might say, does an inquest really need to be held to the same standards of fairness as a criminal or civil trial? After all, it is the coroner who is responsible for conducting the investigation. The interested persons may participate, but they aren't parties, and they don't win or lose. So how can we judge an inquest as if it were a trial?

That argument might make sense in theory. But it falls apart when it collides with reality.

When a person dies, and a powerful institution may be at fault – whether that is a police force, a hospital, a prison, a private company, or anything else – that institution is usually concerned to protect itself from reputational damage and civil liability. So, in virtually every case, the institution implicated in the death will be represented at the inquest by a high-powered legal team. In a big case, their team is likely to be led by a Queen's Counsel (senior counsel). Their team will fight tooth and nail to protect the institution from criticism. They know that if the inquest criticises them, it will be all over the papers, and they will face civil litigation and maybe even a criminal prosecution.

Similarly, individuals who may be criticised, and who may face criminal or civil liability as a result of the death, are also going to do everything they can to protect themselves. They are unlikely to have pockets as deep as the institutions they work for, but they can often rustle up some legal representation, from a body like the Medical Defence Union or the Police Federation. Again, therefore, they are often represented by experienced lawyers at the inquest.

I should emphasise that that isn't a criticism of these people and institutions for instructing good lawyers. Far from it. Any of us would do the same if we were in these circumstances. But that is my point.

The bereaved family of the deceased – the people who have suffered the unimaginable pain of losing a loved one – are often not legally represented at all. They have no automatic right to legal aid. And over the years I have known many bereaved families who felt like they were excluded, marginalised and treated poorly by the coronial process. In short, the inquest process suffers from an inequality of arms.

The History

We're now going to look at the history of the role of the bereaved family in inquests.

When I first started representing families at inquests, 30 years ago, their rights were very limited. Immediate family members of the deceased did have the power to ask questions of witnesses at the inquest, under the Coroners Rules 1984, either in person or through their lawyer. But there was no legal aid in those days for representation at inquests.

Nor were there any clear rules about disclosure. Coroners decided what to disclose to the family. I remember attending inquests where the lawyers representing the police would turn up with a large file of papers, none of which had been disclosed to me. What was particularly problematic was that the family had no right to see the witness statements in advance. So when a witness started giving evidence, the coroner and the police had seen their witness statement but we had not.

Lack of Legal Aid and the Marchioness Action Group

In the early hours of 20 August 1989 there was a collision between two vessels on the River Thames in London. The pleasure steamer Marchioness sank after being hit twice by the dredger Bowbelle at about 1:46 am. This tragedy became known as the Marchioness disaster. 51 people died including a colleague of mine from my chambers at the time.

The inquest into the deaths of 51 people on the River Thames on 20th August 1989 lasted a month between March and April 1995 and was at Hammersmith Town Hall. At the time there was no legal

aid funding for inquests. Indeed it would be many years before any formal system of legal aid would be introduced for bereaved families.

The Marchioness Action Group representing both bereaved and survivors sought a meeting with the then Lord Chancellor before the inquest. At the meeting they told him that if he did not fund legal representation for the bereaved families, each of the 51 families would participate in person at the inquest and ask questions of each witness. This would mean that the inquest would be likely to last a year or more and cost far more public money than if joint legal representation was funded by the government. This submission was entirely the idea of the Action Group and it worked.

The Government blinked. Only one working day before the inquest was due to start the Lord Chancellor announced a one off lump sum grant to lawyers to represent the bereaved. There was no requirement for time keeping and division of the lump sum was left to the lawyers.

This was a rare occasion where funding was granted, and this was very much a very rare exception.

Later when an exceptional funding scheme was introduced for inquests, the Lord Chancellor's guidance on the scheme specifically referenced the grant made for the Marchioness Disaster Inquest. This I shall return to.

The Story of Ann Power

Ann Power is one of the bravest woman that I know – brave, dogged, determined. She does not quit. Ann's husband and father of their three sons, fifty-one year old Onese Power died during a dangerous high-speed Metropolitan Police pursuit in Kentish Town, London on 17 August 1997. Onese had been disqualified from driving, but he loved his motorbikes, and on that Sunday morning he was spotted travelling at quite a crack along Camden Road, NW1 on his distinctive 'Ninja' Kawasaki. It was a powerful motorcycle with a high-volume revving noise, and hearing the growl of the engine, and surmising that Mr Power was driving over the 30pmh speed limit, two officers in a Vauxhall Cavalier, police car 'November One', decided to chase him. A high-speed pursuit then ensued through the busy streets of Camden and Holloway Road, with at least four other police vehicles joining in the chase which ended in a narrow side street where, with the convoy of police vehicles hot on his wheels, at a left-hand bend where Royal College Street, NW1, meets St Pancras Way and Farrier Street Onese hit some bollards, coming off his bike and dying instantly at the scene from fatal injuries resulting from the collision.

In 1998 the inquest took place at St Pancras Coroner's Court in north London. Mrs Power didn't have the right to legal aid. There was no legal aid for inquests then and she was unrepresented at the hearing. Everyone else in the court was armed with a great wodge of witness statements and other documents, but Ann Power was empty handed: despite a request by her she did not receive disclosure of witness statements prior to the inquest.

One of the key issues in the inquest was to investigate whether the first police vehicle 'November One' had made contact with Onese's motorbike in the closing seconds of the pursuit. Several eye-witnesses had come forward to express concern about the safety of the police operation, and the decision to continue to pursue Onese at a dangerously high speed along an extremely narrow residential street, with parked cars on either side further limiting any passing space and potentially endangering passers-by, not to mention Onese himself.

One eye-witness, who was walking home along St Pancras Way, NW5, stated that she saw a police car coming towards her, followed by four other police cars all with flashing lights and sirens. She made two statements, in which she alleged that the leading police vehicle in the chase, driven by

the police had closed in one Onese, and perhaps attempting to cut him off on the approach to the bend, had made contact with the handlebar of the Kawasaki:

> 'Shortly after they passed me I heard the sound of squealing brakes and the dull thud of a fast moving vehicle hitting a body. I looked back to see what had happened, the first police car had stopped and I saw a police officer get out and lift a man from the road. The other police vehicles were having to brake very sharply to avoid hitting the first police car. I thought they were all going so quickly there was going to be a multiple accident…'

However, this key witness was unable to attend the inquest due to ill health and her statement was afforded little weight during the hearing. And since Mrs Power had not seen her account as part of disclosure, she was not able to request an adjournment. This was unfortunate, to say the least.

Indeed, black rubber marks found on the police vehicle were possibly consistent with such contact, but Ann argued that the police inquiry into the fatal incident was patently insufficient: there were failures to test the police vehicle at the speed at which it was travelling at the time of death in order to replicate the tyre marks found at the scene; and to forensically examine the damage to the police vehicle which could have been caused by contact with the motorcycle driven by the deceased. Indeed, a road traffic accident investigator assigned to the case, had ruled out such a finding because he said he'd been able to remove the marks on the side of the police car with a bottle of Jif!

The irregularities in the inquiry didn't end there. Without the benefit of disclosure of relevant police and witness statements prior to the inquest hearing, neither Mrs Power nor the jury could have known at the time of the inquest that both the driver of 'November One', and his passenger, had made identical statements: identical save for a few words which made no contextual difference to the substance.

Furthermore, rather than writing up their accounts on the day of the incident, or as soon as was reasonably practical to do so, the officers most closely implicated in the accident made their identical statements a full five days after the date of Onese's death.

Ann Power had to cross-examine the officers blind without sight of their accounts, and therefore neither officer was interrogated about the disquieting similarities in their statements.

Now clearly the Coroner had seen, and hopefully read closely, both officers' statements, and would have picked up on and should have asked how it was that the police officers statements were so similar, how they had been compiled, and, as they were written five days after the accident, whether there was any degree of 'after-the-event' reconstruction. All of this was relevant not only to the issue of the fatal accident but also to the question of whether the police's pursuit of the deceased's motorcycle was dangerous, but rather than painstakingly examining these anomalies in police procedure, it seemed that the coroner was inclined to accept the police officers' account without too much close scrutiny.

Critically, therefore, the jury were not made aware of the issue of credibility and impropriety which could flow from such irregularities. I have no doubt that this would have been the first thing picked up upon by any skilled advocate. Meanwhile, the police officers were represented and thus shielded by senior counsel and had a number of Traffic Investigation officers giving evidence to back up their version of events.

Nevertheless, Mrs Power did her best to question the police officers involved about the speed of the police vehicle, stopping speeds and distances, etc. Remember this is a woman who has lost her husband. She is not an expert on motor vehicle car chases and stopping speeds, nor did she have

any legal training or the benefit of having seen any of the police witness statements or incident report notebooks, but she did her best.

The jury returned an open verdict.

A year later in 1999, Mrs Power came to me because she wanted to pursue an action against the police but was unable to secure funding. Her case stopped there. I thought that was the end of the Road for Mrs Power. Ann had other ideas. Ann Power did not stop there.

Nearly twenty years later, Mrs Power contacted me again. 'Do you remember me?' she asked. Of course, I remembered her. Ann said she had found some new evidence: a report had come to light, dated 21 April 1999 by Dr Searle, an expert in road accident analysis, which disagreed with the opinion of the traffic investigator that the marks on the police vehicle did not represent contact with the deceased's motorcycle. His conclusions as to the accident were that Mr Power:

> '…positioned himself near to the crown of the road with a view to smoothing out the bend… It would appear that PC Collier has attempted to overtake on the nearside. Because of the presence of the Audi car, that overtaking necessitated PC Collier going extremely close to the motorcycle.
> Because of the Police car right alongside, Mr Power was unable to lean his motorcycle in order to take the bend. When he attempted to lean his motorcycle, a contact occurred between the handlebar and the door of the Police car. Unable to lean over and negotiate the bend, Mr Power applied heavy braking, to mitigate what was by now an inevitable spill. However he ran wide, mounted the kerb and struck the bollard.'

A subsequent CPS review of the case read: 'I am uneasy about this whole incident.[...] We can all appreciate how easy it would have been for "November One" to have nudged the motorcycle on the approach to the bend. I am not surprised the family of the deceased feel unhappy with some aspects of this investigation.'

My goodness; in the twenty years that I hadn't seen or heard from her, Ann had continued steadfastly to work all alone on her case; trying to get hold of the police records, trying to get disclosure of the contemporaneous incident and specialist forensic road traffic accident reports, and it turned out there was a ton of documentation to which she never had access at the original inquest.

We met, and I agreed to help her to take an appeal to the High Court and we issued proceedings according to section 13 of the Coroners Act 1988 ("the 1988 Act") seeking an order that the original inquest be quashed, and a fresh inquest be held. We were successful at appeal and the Divisional Court judges were full of praise for Mrs Power and for her tenacity and strength in those long twenty years she spent fighting for justice.

In the judgment, the Hon. Mrs Justice Nicola Davies said,

> 'The claimant did not have the benefit of legal representation at the inquest into the death of her husband. Her request for disclosure of statements in advance of the inquest had been refused. It was clear from her questioning of PC Lamb that the case put forward on behalf of the deceased was that he was entering the left bend from College Road but was unable to lean into the bend to safely navigate it because of the presence of the police vehicle on his nearside, at some point there was contact between the two vehicles. PC Collier and Heatley deny this version of events. The evidence of the driver of the police vehicle and his passenger was critical. The fact that the two police officers had made, in effect, identical statements was a matter upon which each could and should have been questioned so as to test the credibility and veracity of each account, in particular as to speed, distance and

sequencing. One independent witness provided two statements which, on their face, could be taken as supporting the assertion of speed and contact between the two vehicles. Her statements were read, no opportunity was afforded to the unrepresented claimant to adjourn the proceedings to permit Miss McDine to attend.'

The Justices found that there were 'irregularities in the inquest proceedings and insufficiency of inquiry' and that this, along with the relevant new evidence, meant that it was in the interests of justice for a fresh inquest to be ordered, adding, 'It will be open to a new jury to return a narrative verdict which, it is to be hoped, would bring a measure of closure for the claimant, who for twenty years has fought tenaciously on behalf of her husband.'

Death on the Rock

One of the big drivers of change in the past 30 years has been the case law of the European Court of Human Rights. In 1995 the Court decided the case of McCann v United Kingdom. This was a dramatic case, also known as the "Death on the Rock" case, about the shooting of three suspected Provisional IRA men by SAS soldiers in Gibraltar. It's a judgment that's well worth reading, but for our purposes today we are particularly interested in what the Court said about investigations.

In McCann, the Court crystallised the idea that Article 2 of the European Convention on Human Rights, the right to life, isn't just about whether the state kills you. It's also about what it does after you have been killed. It said that Article 2 requires *"that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios , agents of the State."* In McCann itself, it found that that obligation had not been breached, and that the inquest that took place in Gibraltar was sufficient.

Jordan

The Court in McCann didn't go into much detail about what the investigation required. But in the 2001 case of Jordan v United Kingdom, involving a police shooting in Northern Ireland, it set out the requirements of an effective investigation in much more detail. One of the things it said is that the "next of kin" of the victim *"must be involved in the procedure to the extent necessary to safeguard [their] legitimate interests."*

In Jordan, the Court was very critical of the inquest process. It said, about the non-disclosure of witness statements:

> *"The previous inability of the applicant to have access to witness statements before the appearance of the witness must also be regarded as having placed him at a disadvantage in terms of preparation and ability to participate in questioning. This contrasts strikingly with the position of the [Royal Ulster Constabulary] who had the resources to provide for legal representation and full access to relevant documents. The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. Prior to the recent development in disclosure of documents, the Court is not persuaded that the applicant's interests as next-of-kin were fairly or adequately protected in this respect."*

This was a massive step forward, as a recognition that families were at a major disadvantage in the traditional inquest process.

As Labour Politician The Right Honourable Emily Thornberry MP stated “The Human Rights Act is not a terrorists' charter. It enables ordinary citizens to seek redress when the government breaches fundamental freedoms enshrined in the European Convention on Human Rights such as the right to a fair trial, the right to life and free expression.”

The Court in Jordan also considered the lack of legal aid for the bereaved applicant. This formed part of the background to their finding that there had been unreasonable delay in the investigation of the death. However, given that the bereaved applicant had been represented, they didn’t directly confront the question of whether and when there would be a duty under Article 2 to fund legal aid for the bereaved family.

Meanwhile, from November 2001 the Legal Services Commission did have power, by virtue of a Direction made by the Lord Chancellor under the Access to Justice Act 1999, to fund legal representation at inquests. As stated above, when these provisions were introduced reference was made to the one off grant that was made to the Marchioness inquest. This would only be done where there was a significant wider public interest or where funded representation for the family of the deceased was required to carry out an effective investigation into the death, as required by Article 2. There was, however, a further significant limitation – there was no power to waive the means test. So families who were earning slightly too much to get legal aid, but not enough to afford representation themselves, had no prospect of obtaining representation.

Khan

The next big step was a judgment of our Court of Appeal in the 2003 case of Khan. This was a very sad case where the claimant’s three-year-old daughter, Naazish, had died in hospital. The claimant and his wife had been so devastated by her death that they had suffered a breakdown and felt unable to deal with people. There was no legal aid for them to be represented at the inquest into her death, because they had slightly too much money to pass the means test. The Court of Appeal held, exceptionally, that the lack of legal aid had breached the State’s obligations under Article 2. It said:

> *“…the inquest will not be an effective one unless Naazish's family can play an effective part in it. The evidence shows… that they are in no fit state to play that part themselves. Although the function of an inquest is inquisitorial, and in the overwhelming majority of cases the coroner can conduct an effective judicial investigation himself without there being any need for the family of the deceased to be represented, every rule has its exceptions, and this, in our judgment, is an exceptional case.”*

From 1 December 2003, the new regulation 5C of the Community Legal Service (Financial) Regulations 2000 gave the Lord Chancellor power to waive the means test. So from then on, families could, exceptionally, get legal representation at an Article 2 inquest. But it remained exceptional – and the family still had to undergo intrusive means testing, even if the means test was ultimately waived.

There was a lot of criticism of this – particularly in cases where a person had died in prison or detention. INQUEST has produced a useful timeline of legal aid for inquests, which shows that over the years many reviews and reports have called for wider availability of legal aid for bereaved families. That included the Corston Report on women in prison, the Harris Review on deaths of 18 - 24 year olds in custody, and the Angiolini Review of deaths and serious incidents in custody. I have put some examples up on the slide, and you can find the full timeline on the Inquest website.

The next phase of change was the Coroners and Justice Act 2009, which we looked at in some detail in the last lecture. Section 51 of the 2009 Act would have brought representation at inquests into the ordinary scope of legal aid where the deceased had died in prison or detention, or had been a member of the armed forces on active service. However, section 51 was never brought into force and was ultimately repealed by the coalition government which came to power in 2010. And even if it had been brought into force, it would not have automatically waived the means test.

LASPO

Famously, the coalition government then brought forward the Legal Aid, Sentencing and Punishment of Offenders Act 2012, known to lawyers as LASPO. This legislation is infamous, and rightly so, for making drastic cutbacks in the scope of legal aid across a range of areas. It has fundamentally undermined access to justice, in many ways that are outside the scope of this lecture.

As regards inquests, LASPO confirmed that representation at inquests (as opposed to advice) was outside the normal scope of legal aid. It remained possible for exceptional case funding to be granted for representation at an inquest, where representation is needed to meet the procedural obligation under Article 2 or where there is a wider public interest.

Meanwhile, when it comes to disclosure, I have to acknowledge that the inquest process has improved a lot since I started working in this area, as a result of the 2009 Act and the rules made under it. Nowadays, rule 13 of the Coroners (Inquests) Rules 2013 requires the coroner to disclose certain documents to the interested persons. This has been a big step forward in terms of procedural fairness for the bereaved families. But what the state gives with one hand, it takes away with another. The 2009 Act has produced some improvements to the coronial system, as I acknowledged in the last lecture. But without legal aid, some bereaved families are still unable to get justice through the coronial process.

The Current Situation

So that brings us to where we are today. Families in England and Wales have never enjoyed an automatic, non-means-tested right to legal representation at inquests. The situation is different in Public Inquiries. At a Public Inquiry, the core participants can be funded and there is a mechanism for determining the funding.

> s.40 (2) The power to make an award under this section includes power, where the chairman considers it appropriate, to award amounts in respect of legal representation.
> (3) A person is eligible for an award under this section only if he is—
> (b) a person who, in the opinion of the chairman, has such a particular interest in the proceedings or outcome of the inquiry as to justify such an award.

The Inquiry Rules at R22 make it clear that,

> Where the chairman has determined an award for amounts to be incurred in respect of legal representation should be made, the determination of the application must set conditions, including but not limited to—
>
> (a)the nature and scope of the work to be funded;
> (b)the hourly rates which will be paid;
> (c)any upper limit or limits on the sums or number of hours which will be paid;
> (d)the frequency with which bills must be submitted to the chairman; and
> (e)the form in which bills must be submitted to the chairman.

There are government set rates for Inquiries, and these rates seem positively generous compared to the amounts paid for inquests. In this regard Inquiries steal a march on inquests. You see legal representation at inquests remains exceptional. And it remains means-tested, although there is a power to waive the means test.

This can mean major barriers for bereaved families. Some bereaved families, lacking legal representation, have to prepare the case and cross-examine witnesses themselves. A bereaved family member quoted in Inquest's February 2019 briefing on legal aid said:

> *"We had to do everything ourselves. We had no lawyer at the inquest. Those three weeks were the most terrifying thing I've ever done in my life. I had to cross examine witnesses, it was absolutely terrifying, and they had lawyers. There needs to be a level playing field; a family member should never be put through that."*

Another bereaved family member, quoted in Inquest's September 2020 submission to the Justice Select Committee, said:

> *"The lack of funding meant I had to cross-examine the pathologist myself on my dead daughter's body – something no parent should ever have to do."*

In the same submission, a different bereaved family member recalled that in their inquest, the hospital had 7 of their legal team in attendance as well as an external barrister.

We can see that many families are still in the exact same position that Ann Power faced, back in 1998. Can you imagine, when you have lost a loved one, having to prepare the case, get your head around the evidence, and cross-examine the witnesses who may be to blame for your loved one's death? Nobody should have to do that.

Even when legal aid is in place, the rates of pay for lawyers are often low. The same report referred to an inquest where counsel for each of the four police interested persons were being paid eight times more than the legal aid rates. In saying this, I'm not seeking to garner sympathy for lawyers like me. I'm simply pointing out the massive inequality of arms, where those representing powerful institutions are better-resourced than those representing bereaved families.

In fact, the rates of pay have become worse as a result of LASPO and the austerity of the 2010s. Legal aid fees have taken a big hit in both real and nominal terms.

The recent Bar Council report "Running on Empty" pointed out that legal aid rates for inquests have been squeezed. A barrister gets £900 for the brief fee and £450 per day. That might not sound too bad, until you consider that they will have had to do numerous hours of preparation for each day in court. As one barrister said, quoted in the Bar Council report:

> "*you may often get three or four lever arch bundles of paper and as a representative for the bereaved family, you are central to the process and you have an interest in all of the witnesses. You are challenging the witnesses, rather than just being here to protect their interests and you are doing the bulk of the work and the representatives of the state participants have a lower stress job, a much easier job and they get paid much better. If you might be preparing for a two-week jury inquest with 15-20 witnesses including cross-examining consultant psychiatrists and challenging witnesses to cross-examine and have three or four lever arch files of paper and £900 to cover all of your preparation and the first day of the inquest, it is hopeless*."

As my colleague of mine said in the same report:

"*if I am preparing for an inquest...I spend 2-2.5 really high stress days preparing and often on the weekend. So, if the inquest starts on Monday, I would prepare on Friday, Saturday morning and Sunday... I finished an inquest yesterday and that is exactly what I did. I worked the last three weekends straight and I did the preparation by working on Saturday and all-day Sunday and really early in the mornings and late at night during the hearing... If you have an absolutely lovely client who is perfectly reasonable but crying all the time, who is absolutely desperate for the state authorities to realise that they've screwed up and there are four barristers who are better paid than you and all against you effectively and cross-examining and getting to grips with the role of a GP, and the role of the psychological therapy service, the role of the psychiatrist and the CMHT (Community Mental Health Team) service, the role of the police and how police systems work, all in an adversarial environment, it is quite intense and in the ... moment, I do not feel like it is too much, I just get on with it but then the day after, someone asks me what it is like doing inquests for £900 and I'm like it's not very good. It's not very good*."

I'm not saying this in order to elicit sympathy for barristers. Ultimately, it's not about us. It's about our clients, the people who have lost loved ones, often in the most tragic circumstances. When powerful institutions are defended by much better-paid and better-resourced legal teams, how can it be said that there is an equality of arms for the grieving family?

Things can get even more complicated when different members of the family have different views and can't work together, yet legal aid will only pay for one legal team.

There is a further, very serious problem faced by many families. Even if they have obtained legal aid for the inquest and have obtained a waiver of the means test, what happens if they want to challenge a decision of the coroner? For example, if a coroner makes a ruling about the scope of the inquest, or about what evidence should be considered, that they disagree with? In most cases, the only way to challenge these decisions is judicial review in the High Court. And although judicial review is within the scope of legal aid, it is always means-tested and there is no power to waive the means test.

So families can end up in a situation where they believe the coroner's decision is wrong, and they have a strongly arguable case, but they are unable to challenge it because they can't afford to pay. And even if their lawyers decided to act pro bono, they could be liable for the other side's costs if they lost, which could be substantial.

Where Should We Go from Here?

Let's wrap up the lecture by talking about where we should go from here. First and foremost, I believe there should be automatic, non-means-tested legal aid for bereaved families in all cases where Article 2 is engaged, including all deaths in custody or detention. I endorse Inquest's campaign for legal aid for inquests, which you can read about on their website. I have listed some of the key reports on the PowerPoint slide.

I think there's also room to go further. There are some deaths where Article 2 is not engaged but where legal aid is still needed. Even where Article 2 is not in play, it is still vital to hold institutions to account.

Sometimes, for instance, the evidence in an inquest is so technical and complex that it is virtually impossible for the family to represent themselves. Sometimes the personal circumstances of the family mean that there is no way they would be able to do so.

The inquest is often the only chance at achieving justice for a family who have just gone through the worst experience of their life, losing a loved one. Bereaved families need, and deserve, legal representation.

So, I think that we should have a two-pronged approach. There should be automatic, non-means-tested legal aid for every Article 2 inquest. And there should be a discretion to provide legal aid even in non-Article 2 inquests, which should be non-means-tested.

Finally, we also need to create a route of appeal against coroners' decisions, as I said in the last lecture. Coroners' decisions, on issues such as the scope of the inquest or what evidence will be considered, should be appealable to the Chief Coroner. These appeals should be considered to be part of the inquest and should be funded under the same legal aid certificate as the inquest. This would mean that no one was denied the opportunity to challenge an unjust decision because of lack of funds.

Suggested Reading Materials

1. INQUEST 'Now or Never!' Legal Aid for Inquests briefing February 2019
2. INQUEST submission to the Justice Committee into the Coroner Service September 2020
3. The Bar Council 'Running on Empty' Civil Legal Aid Research Report January 2021