Should the State Be More Candid About Sudden Death?
Professor Leslie Thomas QC & Pete Weatherby QC

6 May 2021

Professor Leslie Thomas QC

In the second and third lectures in this series we talked about inquests – the judicial process in which an independent judge, called a coroner, investigates sudden and unexplained deaths.

In those lectures, we saw that whereas a criminal or civil trial is adversarial, an inquest is inquisitorial. That means that, officially speaking, there are no "parties" in an inquest and nobody wins or loses. And whereas in a trial it is the parties who decide what evidence to call and what lines to pursue, in an inquest it is the coroner – that is, the judge – who makes that decision.

Despite the inquest being nominally non-adversarial, however, inquests are often battlegrounds in which the interested persons skirmish over almost every issue. Public authorities, companies and other powerful actors who are implicated in a death will normally hire an expensive legal team, and fight tooth and nail to avoid findings that might damage their image or expose them to criminal or civil liability.

We also explored the changes in inquest law and practice over the past 30 years. We saw that the bereaved family of the deceased used to have very few rights in an inquest – no legal aid, no disclosure and very little opportunity to participate in the process. And we saw that this has improved somewhat over the past decades as a result of the European Convention on Human Rights, but that we are still far from achieving equality of arms for bereaved families. We considered some of the ways that the inquest process could be made fairer.

Today we are going to focus on the issue of disclosure.

When I first started representing bereaved families in inquests more than 30 years ago, there was virtually no disclosure. The lawyers for the institutions involved in the death, such as the police or an NHS trust, would turn up with boxes of papers, none of which we, the lawyers for the bereaved families, would be allowed to see. We didn't get to see the statements of the witnesses in advance, so we couldn't identify holes in their stories and prepare to ask about them in cross-examination. We didn't get to see the records held by the public authority, so we might well miss out on important clues as to why the deceased died and whose fault it was. The bereaved families were largely shut out of the process.

In my second lecture in this series I told the story of one of my most courageous clients, Ann Power, who at the inquest into the death of her husband in 1998 was not given access to the witness statements. Because of this, neither she nor the jury knew that the two police officers involved in her husband's death had made witness statements that were almost word-for-word identical. Nor did she have the opportunity to request an adjournment so that a key civilian witness, whose account she had not seen, could attend the inquest. Mrs Power didn't give up on fighting for justice, and thanks to her tireless efforts the Divisional Court in 2017, almost two decades later, ordered a new inquest.

Nowadays, things are a little better. There is now explicit provision for disclosure in the rules, and the bereaved family generally now does get to see the evidence that is going to be relied on at the inquest.

But that isn't the whole story, because the evidence that is going to be relied on at the inquest doesn't always tell the whole story. This lecture is going to focus on a key question: should public authorities in inquests be under a duty of candour?

When lawyers say that a party is under a "duty of candour" in a particular type of proceedings, it means that that party has an obligation to be open and honest with the court and the other parties – to lay its cards on the table, and to disclose information and documents in its possession even if they undermine its case. There are a variety of circumstances in which the law imposes a duty of candour. For instance, public authorities in judicial review proceedings are under a duty of candour. But should there be an explicit duty of candour in inquests? Should public authorities have to proactively disclose the information in their possession, including information that paints them in a bad light?

I want to introduce Pete Weatherby QC from Garden Court North Chambers. Pete is an experienced human rights lawyer who led the team representing 22 of the Hillsborough families, and who has acted in many inquests and public inquiries over the years. He has long experience in holding public authorities to account. He's going to talk about what is going wrong and what needs to change. After that, he and I are going to have a free-flowing discussion, and there will be time for questions at the end.

Pete Weatherby QC

In the trial of the police officer accused of murdering George Floyd, the Minneapolis Police Chief gave evidence for the prosecution asserting that the force used against Mr Floyd was unreasonable and that none of his officers provided first aid or medical attention. The actions of the officers were contrary to the policy of his force and contrary to its ethics. That was an example of a senior public servant acting with candour and, some might argue contrary to the narrow direct interests of his institution.

Why did he do so? It may well be that he saw the actions of Derek Chauvin as abhorrent. Or he may well have realised that the actions of Chauvin, in the full public glare, filmed by witnesses, were indefensible and it was therefore necessary to throw him under the bus to salvage anything for his police force. But whatever was actually in his mind, the right approach was to see the true interests of his organisation as concordant with the public interest. And if he did so, he was correct. In such circumstances, the public interest inevitably involves looking for what actually happened – the truth; looking for what went wrong – accountability; and looking at what should change – making things better.

Regrettably, all too often, public officers and the managers and controlling minds of private corporations who make money out of activities which cast responsibilities on them for public safety, fail to act with candour and act in their own narrow interests and those of their organisation. Sometimes direct lies are told, sometimes the facts are manipulated, sometimes omissions are made which impede the search for truth. In this country, and no doubt many others, when things go wrong and there are official investigations, there is a culture of denial and a pervasive institutional defensiveness.

Instead of a collaboration to work out what actually happened, what failures occurred, who should be held accountable and how can we change things for the better, public investigations and inquiries turn into what one advocate recently termed a carousel of blame. And by that I do not mean

bereaved families and other victims legitimately looking for accountability. What I actually mean is public authorities and private corporations instructing lawyers to spin the facts, offload responsibility to others, and work out 'litigation strategies' to limit reputational and financial damage. There is no inevitability to that. It is a choice of self-interest over public interest.

Although there is no absolute silver bullet, the key to unravelling institutional defensiveness is a duty of candour. Lack of candour causes miscarriages of justice, and subverts the nature and purpose of inquisitorial processes. Because it often arises – or perhaps more accurately, it is often noticed - in high profile cases, such as Bloody Sunday, Grenfell, and many others, it undermines public confidence in both public authorities and private corporations, and in the legal process itself. Lack of candour has become so normal that the mention of a Chief of Police in a faraway trial, telling it how it is, is remarkable.

It is neither a new phenomenon, nor one which has just become apparent. There have been countless inquiries and inquests where Chairs and judges have remarked on failures of candour and that something must be done about it. Thirty years ago, in one famous inquiry, a senior judge remarked that the reliability of the police evidence he had heard was in inverse proportion to rank. A decade ago, Sir Robert Francis, chair of the Mid-Staffs NHS inquiry, directly called for a statutory duty of candour. Similarly, in the Morecambe Bay NHS Inquiry, the Harris Inquiry, two inquiries by Dame Eilish Angiolini and in many others there have been direct calls for legal reform of this nature.

I think it is important to reflect on two matters. As a senior judge once asserted in an iconic judgment: In law, context is everything. The context of a lack of candour by those responsible for public safety and public security in particular, is that it affects people whose lives have been devastated by tragedy. The families of those who were killed on Bloody Sunday deserved better than to be subjected to decades of state cover-up. The families of those who died in the Grenfell Fire, or those who died as a result of the blood contamination scandal, or as a result of various failures in the healthcare sector, or by chronic failures in mental health settings or prisons, or those who died in sporting tragedies, all deserved better, at what is always the lowest point in their lives. That should not be forgotten, this is not a dry legal argument about duties and responsibilities, it is a real major problem affecting real ordinary people, affected by failures by state institutions and corporations, who should not then be subjected to a second indignity by a closing of ranks and what is often a casual aversion to scrutiny. So, on the one hand, lack of candour must be seen firmly in the context of its effect on victims. But there is another corollary context: lack of candour sets public authorities and officials apart from the people that they are supposed to serve. I referred to 'litigation strategies' earlier. That was a phrase used by an eminent lawyer in a recent training session for those who represent public authorities at inquests and public inquiries. That lawyer went on to assert that such processes often illuminated evidence and elicited admissions which were later used in litigation, and therefore public authorities and their lawyers need to have a litigation strategy to deal with that. So far so good, nothing actually wrong with recognising that bringing out the true facts of a disaster may have other consequences. But this is where there is a fork in the road. What was actually being trained was a 'litigation strategy' which encouraged public authority lawyers to so everything they could – of course within the professional rules – to avoid their witnesses making admissions or exposing embarrassing facts.

This is the crux of the problem. We either have a system which allows public authorities to adopt litigation strategies similar to the gangster in a criminal trial, or similar to the aggressive corporation who will use every device to avoid civil liability, or we put in place clear legal rules which require public authorities, and corporations who are responsible for public safety, to put aside that sort of self-interested strategy, and simply act in the public interest: that is, the imposition of a codified, effective, statutory duty of candour. This is not some utopian idea, it is not a proposal which requires any philosophical or jurisprudential quantum leap. In the criminal sphere, the prosecution is not permitted to adopt a win-at-any-cost approach. The duties on lawyers for the prosecution and

defence are not symmetrical. In a recent high-profile case the prosecution advocates put this very clearly: “We suffer no defeats and enjoy no victories”. That means prosecution advocates should only have the interests of justice in mind, which is the public interest in prosecuting alleged wrongdoers. They have no personal or institutional position which involves winning. On the other hand, criminal defence lawyers protect the rights of the individual, irrespective of their guilt or innocence. There is no equivalence with lawyers instructed to represent public authorities in any legal process. Public authorities have no rights or interests separate from the public interest. Like prosecuting lawyers, they should ‘suffer no defeats and enjoy no victories’.

So…back to the inquiry into Mid-Staffs NHS, which was set up to scrutinise why there were such high mortality rates in certain hospitals. The shout out of the Inquiry chair, Robert Francis QC, concerning the need for new legislation, was actually heeded, albeit to a limited extent. In 2014 the Govt brought into force new healthcare regulations which included a statutory duty of candour. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 are a model of how not to draft laws and the early research into their effect found that the provisions had made little difference. However, once bedded in, research from 2018 and 2019 has been a little more promising. The provisions are designed to change the culture of defensiveness within healthcare from a default position of covering-up mistakes to one of informing patients, managers and regulators proactively, and of course apply consequentially to inquests and inquiries. An effective duty of candour empowers conscientious officials and workers to expose systemic and individual failings before they repeat and undermines the burying of inconvenient facts which may have occurred through wrongdoing, mistake or lack of proper systems or resources.

The early lessons from the Francis reforms are that a statutory duty is necessary, but it needs to be comprehensible to all, and comprehensive in affecting all areas of life, and not just healthcare. Why would such a duty be required for doctors and nurses but not for police officers and local authorities, and in particular anyone with a responsibility for the safety of the public?

By 2017, following a series of inquests and inquiries which had highlighted this lack of candour problem, Andy Burnham, the Mayor of Manchester but then an MP, introduced the Public Authority (Accountability) Bill to parliament, which did provide comprehensible provisions – a law written in plain English, and a duty with comprehensive application and practical and effective compliance tools. Although put before parliament by Andy Burnham, it was actually sponsored by MPs from all the main parties to ensure that it was clearly non-partisan, and it had its first reading unopposed. Unfortunately, its progress was then halted by the General Election, never to be reintroduced by subsequent governments. More of that later.

In just about all other areas of legal jurisdiction in this country there are comparative provisions requiring candour. In criminal proceedings, pursuant to Section 5 of the Criminal Procedure and Investigations Act 1996, the alleged perpetrator is required by statute to file a defence statement setting out the parts of the prosecution case with which he or she disagrees and setting out his or her positive defence. In civil proceedings, pursuant to Parts 15 and 16 of the CPR, a defendant must likewise set out what is admitted, the points of disagreement, and facts averred, in the pleadings. Criminal and civil processes are of course adversarial. In public law proceedings, judicial review, Part 54 requires a defendant to file detailed grounds for contesting the claim.

But in inquests and public inquiries, there is no comparative provision. Take a moment and think that one through. In adversarial processes, in both public and private law, the parties have to set out their positions, what they allege did and did not happen, and what was wrong. Yet in inquisitorial processes, that is, ones which exist not to determine disputes between warring parties, but to determine an official narrative and to try to improve things for the future, the formal provisions do not require the participants to assist the process in the same way. Indeed, on the face of the actual

provisions, participants are entitled to sit on their hands and see what they can get away with. How on earth has that been allowed to happen and persist?

Is it simply because there are no statutory requirements of frankness and candour at inquests and public inquiries, which require proactive engagement and thereby admissions? That is sometimes argued but it does not stand scrutiny.

In other public law processes, such as judicial review, there is a well-developed common law duty of candour. In Hoareau v FCO, one of the Chagos Islands cases involving the displacement of indigenous people from their homeland by the UK, Singh LJ reviewed and set out what is required by the common law Duty of Candour in judicial review proceedings. It should be remembered that this case involved what Ousley J recorded as "the shameful treatment" of the Chagossians, and a case in which the Secretary of State admitted: "that the removal and resettlement of the Chagossians was accomplished with callous disregard of their interests". In that context, Singh LJ asserted that Public authorities not only have a duty to disclose but they have a clear duty to make sure the court is not misled by omission. The court and claimants must not be left to look for what Singh LJ expressed as "needles in the haystack", there was a need for the public authority to identify [and I Quote] "the good, the bad and the ugly". Public officials and public authorities must proactively assist the court and the process by telling it how it is. They are [and I again quote] "not engaged in ordinary litigation, trying to defend their own private interests. Rather they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law".

If the common law recognises this duty and the senior judiciary sets it out in such trenchant terms, why then has it not been recognised and applied in inquisitorial jurisdictions, at least until recently? Isn't the same 'common enterprise with the court to fulfil the public interest in upholding the rule of law' even more central to inquisitorial processes than in judicial review proceedings?

It is interesting that the common law duty of candour has been set out with such clarity in a case with an international context, because the duty of candour has a close relation in the emerging international law principle of the 'right to know', sometimes expressed as the 'right to the truth'. In a number of Strasbourg and Inter-American Court cases, there has been a recognition that often the state is in a unique position of knowledge. This is particularly true in cases of detention, security operations, and disappearances. The principle was set out with particular clarity in the extraordinary rendition case of El Masri v Macedonia, where the Grand Chamber held that candour by the authorities was essential in rebutting the appearance of collusion with wrongdoing, or tolerance of unlawful acts.

It is a fact as Lesley referred to earlier, that disclosure in the inquest process was virtually non-existent until the late 1990s. Inquisitorial proceedings were things *done* by the state, and bereaved families and others affected by disasters were at best patronised and at worst tolerated. On one side of the coroner's court sat rows of counsel for the relevant authorities, with boxes of papers, all funded by the taxpayer. On the other side of the court sat an advocate for the family, if they were lucky because there was no public funding available, with perhaps a post mortem report and precious little else.

There is no doubt that the coming into force of the HRA drove a stake through the heart of the justifications not to disclose in unnatural death cases. The investigatory obligation inherent in A2 requires the effective engagement and participation of the bereaved. But disclosure is only a start to candour, a backdrop. Without a well-developed and defined legal duty, there are several drivers to obfuscation and avoidance of responsibility. At one end of the scale there is human weakness: an inherent reluctance to accept error and failure. At the other end, there is corruption, with the concoction of false narratives and bare-faced lying. In between, there is a fear of consequences, a fear of letting the side down. Avoiding reputational damage and liability trumps truth. It leads to

instructions to lawyers to present the public authority or corporation not only in the best light, but to avoid censure, and to avoid admissions which may lead to litigation.

Drilling down into that, there is no real professional difficulty for the lawyer so long as they stay within the usual ethical boundaries, but there is a real problem for both the public authority or corporation and the process. The mission of any public authority must be grounded in acting in the public interest.T he only instructions compatible with that mission must be to come clean, disclose everything potentially relevant, and act in a genuinely transparent way to further the public interest, whether or not that exposes the institution and its officers to censure and litigation, or even prosecution. It is accepted that the position of corporations may be viewed differently as the officers have a duty to shareholders, but where the corporation is contracted to do public works, or where it adopts a responsibility for public safety, why should it be subject to different requirements of frankness, transparency and candour?

Whether the lack of candour problem results from misguided loyalty, corruption, human weakness, perceived duties to shareholders or whatever, doesn't really matter. The point is to recognise the problem rather than its cause, and the real issue is the solution.

In advancing the Public Authority (Accountability) Bill in 2017 it was argued that the existing common law duty of candour needed codifying and it needed a statutory toolkit to make it practical and effective. Without codification, without defining the ambit of the duty, those who are under scrutiny are free to make an interpretation which renders the notion of candour meaningless. What do I mean by that? Without definition, those with something to hide may choose to take a restricted view of disclosure, only address matters in witness statements that are specifically raised with them and seek to avoid scrutiny and exposure.

With proper codification but no compliance mechanisms, a fine meal may be cooked, but there is no cutlery with which to eat. So, what is required?

Critically, the Bill provided that both public authorities and private corporations which contract to undertake enterprises engaging responsibility for public safety, would be required to provide position statements to investigations setting out a narrative of their own involvement in the matters under consideration, including any failures and omissions. An intentional or reckless failure to comply with this proactive duty would render the chief officer or chief executive liable to criminal sanction. Other concurrent duties were also included in the Bill, including a duty on public officers and ex-public officers to assist inquiries and provide witness statements. It will come as a surprise to many that there is a real problem with some ex-public servants declining to assist public inquiries and inquests.

In 2016, the former Bishop of Liverpool was commissioned by then Home Secretary Theresa May to prepare a report into the experiences of bereaved families at large-scale inquests. The report highlighted candour amongst other things, and rolled out a voluntary charter to which public and private institutions would sign up, promising to be frank with inquiries in the future. Not only has the government failed to respond to the various recommendations made by the Bishop but there has been a very poor take up of the Charter more generally. For example, at the Grenfell Inquiry, there are an array of public authorities and corporations involved yet only two of them, London Mayor Sadiq Khan, and the RBKC signed-up to the charter. Not even the central govt departments or the London Fire Brigade had bothered to put their names to it. At the Manchester Arena Inquiry, I am unaware of anyone other than the Manchester Mayor who has signed-up. There has been a resounding 'no comment', a deafening silence from the government to the 2017 Bill, and it would be unrealistic to imagine that it will be reintroduced in this parliament, given the present wish to rein back judicial review generally, and row back from the HRA.

But happily, it appears that despite a lack of government take-up or institutional interest in a voluntary scheme, recognition of the existing common law duty and the clamour to make a duty of candour effective has taken hold.

Last year, a Working Party of the influential law reform charity, Justice, published a report "When Things Go Wrong" which looked at how the inquisitorial response to disasters and catastrophes should be improved. The WP included three former HC judges who have vast experience of high profile inquests and public inquiries into controversial and multiple death cases, as well as a gallery of leading barristers, solicitors and academics in this area. The report endorsed the pressing need for a statutory duty of candour.

On the ground, judges and inquiry chairs have become much more receptive to arguments for position statements based upon the duty of candour, with the use of existing powers and case management tools to compel public authorities and private corporations to set out what amount to position statements in advance of hearings.

There is a way to go and there remains the clearest need for codification and statutory powers in this area, but the legitimate complaints of the bereaved and other victims of disasters and other controversial death cases are now seen to be much more mainstream and concordant with the general interests of justice. Judges and inquiry chairs have seen the utility of compelling all participants in inquisitorial proceedings to identify and narrow the issues, to assist in applying the increasingly limited investigatory resources to areas that are actually in issue rather than ones which are not. Increasingly, judges and inquiry chairs have recognised that there is no legitimacy to public servants and authorities and indeed corporations impeding the course of inquisitorial processes by spurious claims that they do not want to pre-empt the inquiry conclusions, or worse that they have some claim to a right to silence, or at least passivity. Judges and inquiry chairs are recognising the common cause between the rights and aspirations of the bereaved families and the efficient progress of the process, through requiring candour from those who bore responsibilities which may not have been discharged.

There is therefore room for optimism. Justice requires the brightest lights being shone into the darkest corners. A duty of candour is one of those bright lights. In the same way as disclosure failures are often identified as the drivers of miscarriages of justice in the criminal arena, the failure of candour has led to huge delay in identifying systemic failures in the field and caused miscarriages of justice in ensuing inquests and inquiries.

If anyone needs to be persuaded that there is a need for an effective duty of candour, it is worth reflecting on the vehemence with which lawyers for public authorities and corporations argue against the need for position statements in inquisitorial processes. Not just vehemence but remarkable ingenuity: with advocates for public authorities arguing that position statements are somehow adversarial. The reality is really rather clear: Position statements direct inquisitorial processes, facilitate case management, prevent directing minds from hiding or obfuscating the real facts, result in earlier and shorter hearings because those investigating can see the wood for the trees. In doing so it also assists the bereaved and others affected, and it must lead to significant savings in resources. There remains the clearest need for codification and statutory compliance powers, lest the failures of the past become the calamities of the future.

<u>Issues for Discussion</u>

- We have looked at the right to know as an emerging international concept. How has that come about and why is it significant [Oneryildiz and Masri, Turkish disappearance cases: without the right to know and a candour duty put on those with responsibility the bereaved cannot know what actually happened to their loved one or get accountability, positive change

is impeded. Where continuing A2 threats persist: the citizen cannot make informed decisions without the full picture]

- Is the candour issue related to lack of funding for the bereaved and other victims? [Candour re-balances the position of different participants in an inquiry. A lack of information renders access to the court pointless and impedes participation. The continuing scandal of lack of public funding for victims prevents a level playing field, in particular for disadvantaged communities. Two distinct problems but related]
- Is there opposition to a duty of candour? [No one directly suggests that police officers or building inspectors ought to be allowed to lie to inquiries or inquests, but the problems of the past are presented as isolated. In fact, lack of candour is pervasive and a default position for many. Lawyers really do train corporate and public authority in-house personnel re "litigation-strategy", including avoiding admissions. Opposition to arguments about position statements range from assertions that those who want them are being adversarial to, there would be provision for them if parliament wanted them to be required. The vehemence with which PSs are countered is a good indicator of their utility]
- Is there anything in the argument that a duty of candour, and in particular position statements, is adversarial [No. There is a dangerous misconception that inquisitorial processes are genteel and adversarial processes involve blood and snot. A witness is just as likely to lie or hide the truth or be unreliable or mistaken at an inquest as he/she is at a criminal trial. In fact, it is arguable that adversarial processes have generally become less combative because of the requirements for defence statements and defence pleadings which narrow the issues and remove the notion of ambush. In serious criminal cases, there is less space for cross-examination generally with the predominance of CCTV, cell-siting, phone call and text data, ANPR and etc]
- If the PA(A) Bill was sponsored by MPs from all parties why is it ignored by the govt [because this govt, beyond any in living memory, is averse to scrutiny generally. Its idea of an inquiry is to determine an outcome and then commission 'friends' who have already expressed that view to undertake the inquiry: JR review, HRA review, Race review]
- Do issues of lack of candour involve or contribute to discrimination? [Potentially, v much so. Inquests and inquiries often arise from situations where persons of different backgrounds are disproportionately affected. Controversial police custody deaths disproportionately involve black men. The promised Covid-19 inquiry must deal with why persons from different Black and Asian heritages have been so disproportionately affected]
- Is there a danger of over-emphasising the lack of an effective duty of candour? [Maybe, and it should not be elevated as a panacea to everything wrong with the system. However, think of instances where a lack of candour has become apparent and ask yourself would that have occurred if the chief officer or chief executive had to sign off a position statement? Then scare yourself by asking which cases have been in where no lack of candour was apparent. Did they successfully hide inconvenient facts?]