Witness Anonymity: 'I want to look into the eyes of my son's killer and know his name.'
Professor Leslie Thomas QC

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The dead cannot cry out for justice.
It is a duty of the living to do so for them.
Lois McMaster Bujold, writer

I'm going to introduce you to our fictional mother let's call her Sally Rose for the sake of argument.

Now Sally She is a hard-working mother of 3 teenage boys, that she has been bringing up on her own since the day the children's father died.

Life is tough and she has had to make ends meet. But like most working single mothers, she does her best and is holding down two part time jobs.

She feels a little guilty that she cannot spend more time in her boys' lives. But those are the cards she has been dealt. Two of her sons are doing well in school, however, her third son (the youngest), I'm going to call him Jacob, is not.

Jacob isn't doing well at school.

He is mixing in the wrong company and constantly getting into trouble with the police for petty things and low-end crime. Sally is at her wits' end.

One day, Sally's worst fears come true.

She is at work when she receives a visit at work from a Police Family Liaison Officer, telling her that her boy is dead. Shot dead by police officers during a firearms operation to prevent a robbery taking place.

So, an investigation is opened into her son's death.

And as in the previous lectures in which we have explored and looked at some of that process there will be an inquest.

However, this one will be different suddenly and without any real warning, she is told by her lawyers, that all the police officers who are witnesses or directly involved in Jacob's shooting want to hide their identities and be given ciphers (code names).

They also want to give their evidence behind screens. This will mean that Sally, the media, the public and, if the police have their way, her lawyers, will be prevented from seeing the officers.

In this the sixth and final lecture in this present series I want to explore the contentious issue of anonymity, screening and other protective measures in the context of inquests and public inquiries.

By the end of this lecture, we will have examined the competing interests and why they cause such concern for human rights and civil liberties advocates. We will address a number of issues.

First, what role does the principle of open justice play in English courts? Why is it important?

Second, why do state agents, including police officers who are used to dealing with dangerous situations, want to be protected behind screens? If they have done nothing wrong, why hide?

Third, what are protective measures and why the fuss? Does it matter whether we know the officer's name or not? What are the benefits for families, the media and the wider public of seeing witnesses giving their evidence?

Fourth, how should coroners decide whether to order protective measures? What factors should they take into account? And are they getting it right?

Let's start by explaining what we mean.

When I say 'anonymity' I use it to mean that the name and other identifying details of the individual witness are withheld, a pseudonym is used, Officer A or X, and no questions may be asked that might lead to the identification of that witness.

In some cases, additional measures may be used to protect the witness. A common one is to screen the witness from the public and the press, or sometimes even from the family of the deceased, while they are giving evidence.

Other methods that may be used include redaction of documents and distorting the witness' voice.

Let's come back to Sally Rose's response when I explain the above to her: -

She tells me:

"I want you to know I gave Jacob life, I experienced the pain of child birth bringing him into this world. I reared him, for better or worse. Now a police officer, who I do not know ended my son's life. If, Jacob was up to no good or not when his life ended this inquest will examine that. No doubt the police will have to account for their actions, and if they were justified in taking my son's life that will be revealed in court, but do not tell me I cannot look into the eyes of the man who took my son's life when he explains why he did it."

<u>Open Justice</u>

It is a longstanding, fundamental principle of the English common law that, by default, court proceedings are held in public.

The identities of the parties and witnesses are public, the evidence is heard in public, the judgment is public, and the press are free to report on it.

This principle of open justice has been explicitly recognised since the 1913 case of Scott v Scott, that is still regularly referred to as the leading case on the subject. It has been reaffirmed in numerous House of Lords and Supreme Court cases since.

However, it has long been recognised, and was recognised in Scott v Scott, that there are some exceptions to this principle. The most well-known exception is for proceedings concerning the welfare of children. In those days that primarily applied to wardship proceedings.

Nowadays it applies to family court proceedings concerning children, including proceedings under the Children Act 1989. Most family court judgments concerning children are anonymised, and the press are prohibited from identifying the child. Another exception, since 1933, is that the identities of children who are charged with crimes are protected by law. We can all recognise that where the protection and welfare of children is involved, there can be good reasons to depart from the principle of open justice.

But in addition to these general exceptions, it is also possible for courts to depart from open justice in an individual case. That is what we are going to be talking about today.

In Scott, the Lord Chancellor, Viscount Haldane, emphasised that judges considering whether to depart from open justice must treat the question *"as one of principle, and as turning, not on convenience, but on necessity".*

This principle applies just as strongly to coroners' inquests as to any other proceedings. It is an issue of principle, and it has to be necessary, not merely desirable or convenient, to depart from the principle of open justice.

Nowadays, the common law principle of open justice co-exists with human rights law.

Several articles of the European Convention on Human Rights are relevant to decisions about open justice.

First of all, there is Articles 2 and 3 of the Convention, the right to life and the right to be free from torture and inhuman or degrading treatment or punishment. These can be relevant to a decision about open justice in an inquest in two ways.

On the one hand, if there is a real and immediate risk that a witness will be killed or seriously ill-treated as a result of giving evidence without anonymity, a duty will arise under Articles 2 and 3 to give them anonymity. That issue was considered by the House of Lords in the 2007 case of Re Officer L, where serving and former Northern Irish police officers claimed that there would be a risk of violence to them if their identities became known through giving evidence at a public inquiry into a sectarian killing.

Such claims do, of course, require scrutiny. In Officer L itself the House of Lords, reversing the Court of Appeal, upheld the tribunal's decision that, on the facts, the risk of harm to the officers would not be materially increased if they gave evidence without anonymity.

Articles 2 and 3 are absolute rights, so if the "real and immediate risk" test is met, anonymity has to be ordered.

But where "real and immediate risk" is not in play, Article 2 is also relevant in another way.

As we have discussed in previous lectures, Article 2 imposes a responsibility on the state to carry out an adequate investigation into state-related killings, which includes adequate involvement of the bereaved family of the deceased – and that may be a strong factor weighing against anonymity.

The other rights that are typically in play are Article 8, the right to private and family life, and Article 10, the right to freedom of expression.

On the one hand, depending on the facts of the case, having their identity become known may have a big impact on a witness's private and family life.

On the other hand, the press and others also have a right to freedom of expression under Article 10, which includes the right to report and comment on the proceedings.

Article 8 and Article 10 are both qualified rights. That means that neither of them is an absolute right. A decision can interfere with your rights under Article 8 or Article 10, but this does not necessarily make it unlawful if the interference is proportionate to a legitimate aim.

In anonymity cases, both Article 8 and Article 10 are typically in play and neither of them has automatic precedence over the other. The court or tribunal has to carry out a balancing exercise

Anonymity and other restrictions on reporting can be a very serious interference with the Article 10 rights of the press. As the Supreme Court said in the case of Re Guardian News and Media in 2010:

"What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed… More succinctly, Lord Hoffmann observed in Campbell v MGN Ltd… "judges are not newspaper editors"…This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."

<u>Inquests</u>

So, let's bring this back to the context of inquests into state-related deaths. It's relatively common for police officers involved in the death to request anonymity.

Sometimes this is because they believe, rightly or wrongly, that they will be in danger of violent reprisals if their identity becomes known.

Sometimes it is because the police force wishes to protect sensitive investigative techniques, or sensitive assets such as undercover officers.

Sometimes the Article 8 rights of the police officers are also relied upon – for instance, they may have a young family and be worried about their children being bullied at school.

As we have already seen, in any such inquest the starting point is open justice, and any departure from that starting point has to be properly justified.

If there is a real and immediate risk to the officers' lives – which is a high standard – and giving evidence without anonymity would materially increase that risk, then Articles 2 and 3 will be in play and the coroner will be under a duty to give them anonymity.

If there isn't, then the coroner will have to carry out a balancing exercise, weighing the principle of open justice and the Article 10 rights of the press and others against the arguments for anonymity.

And it isn't a simple binary, yes/no question. Sometimes an officer will be given anonymity so that their identity cannot be reported in the press but will still be seen in court while they are giving evidence.

Sometimes, conversely, the officer will not only be given anonymity but will also be screened from the public and the press while they are giving evidence.

And sometimes, the officer will also be screened from the family of the deceased and even though this is not my experience, I have been on cases where there have been application that the witnesses even be hidden from the family's lawyers.

The coroner has to consider all of these options, while bearing in mind that their duty is to choose the least restrictive appropriate option.

Screening the officers from the family is a particularly serious interference with the principle of open justice.

There are very good reasons why the family of the deceased generally wants and needs to see and hear the officers giving evidence:

- The first is to secure trust in the investigation. If witnesses give evidence behind screens, this will often make families lose trust and confidence in the investigation. They can suspect a cover-up.

- The second is that families often place a great deal of weight on the demeanour and body language of the witness. For example, families at times decide they did not believe a witness because they looked 'shifty', evasive or arrogant. It might be objected that it is the job of the coroner or the jury, not the family, to assess the witness's credibility. But the family inevitably forms a view about the witnesses, and they can really lose trust in the process if they are excluded from seeing the witnesses. This obviously is less so if the family's lawyers who are questioning can see the witnesses, but as I have indicated I have been on cases where an initial application has been made that even the families' lawyers be excluded although I have not thus far know such an application to be successful.

- Remember, part of the point of the Article 2 duty is to keep the family at the heart of the investigation, if the family or their lawyers are excluded from seeing the witnesses it is difficult to say that the family is at the heart of the investigation.

- The third is to secure accountability. For a family, seeing the officers who were responsible for a death stand up in the witness box and have to answer questions, is often one of the most powerful ways of holding the state to account.

- A fourth benefit is to help bring about catharsis. Seeing the officers responsible for a loved-one's death explaining what they did can be an important part of the therapeutic process. In the 2016 case of Hicks, the High Court, quoting the coroner, drew attention to "the power of being in the same room as the person that one holds responsible for a death" and "a personal element that is lost … by not being face to face with that person or with those persons."

This is why it is very important, in my view, that when a coroner is deciding whether to order anonymity and screening, they scrutinise the application properly.

The coroner needs to look at the real reasons for the application and whether they are substantiated by evidence. And even where there is a good reason to order anonymity and screening from the wider public, they should not order screening from the family unless there is a very good reason.

When it comes to state-related killings where a person has died in or following police contact, these principles are particularly important. This is even more so if the deceased was Black. As we discussed in previous lectures, there is a pattern of Black men disproportionately dying at the hands of the police, both in this country and in other countries.

In these cases, there is a particularly strong interest in accountability and transparency. That interest is fundamentally undermined if the family feel that they have been excluded from full participation.

Examples

Let's think about these principles with reference to some of my experiences representing bereaved families at inquests. In both of my first two police shooting inquests, back in the 1990s, the police officers involved were granted anonymity.

The first was the case of James Brady, who was shot dead in 1995 during a bungled robbery at a working men's club, at the age of 21. In the words of his father, James was 'a lad with a love for life' who had left school at sixteen and joined the Army serving for three years as a motor mechanic and also played with the military band.

'Everybody he knew liked him. He was too easily led by his peers.'

The issue in the inquest was whether James' death could have been avoided. The police had detailed information about the planned robbery but failed to arrest the suspects, instead lying in wait for them at the club. Ultimately, James was shot dead when an officer mistook a small black torch he had in his hand for a gun.

James' family believed that he could and should have been arrested outside the club and that his death was avoidable.

In that case, my first ever police shooting inquest, the police marksman gave his evidence from behind a screen and was known only as Officer A. This was made after an application that whilst there was no evidence to suggest any link with the Brady family, it was said that the officers were fearful of the Criminal underworld wishing to take revenge on the officers. Anonymity was granted.

The same was repeated in my second ever police shooting inquest, where a man called Mick Fitzgerald was shot dead in his home by a police marksman as the culmination of a siege situation.

Mick, a former railway worker, was thirty-two years old when he died. Friends and family described him as a big, gentle man, a huge John Wayne fan who collected imitation guns and had even bought a pair of cowboy boots in homage to his hero.

Unfortunately, he suffered from depression. When police were called to his flat by his girlfriend who mistakenly believed that he was being burgled, the police mistook him for an armed intruder and laid siege to the flat.

An officer, believing that he had a handgun, shot him.

At the inquest, the police made an application for anonymity. On behalf of the family, we strongly objected to the officers being given anonymity.

It was pointed out that there was absolutely no threat of abuse from the friends and family of the deceased, and it was insulting to them that this could even be inferred.

However, I was overruled by the coroner who granted the officers anonymity and screening.

This anonymity direction was particularly troubling, and the Bedford on Sunday Newspaper decided to challenge the decision because of the right of the media to see witnesses and the principle of open justice.

It is important to note that in Fitzgerald there were other complaints the family had such as the fact that the coroner had failed to disclose many witness statements, and nor the police radio logs and transmissions.

As we discussed in a previous lecture, in those days bereaved families had no automatic right to disclosure of evidence.

And, most grotesquely of all, when the coroner asked a police officer to demonstrate how he had laid siege to the flat and the officer mimed pointing a gun at him, the coroner raised his hands in mock surrender and laughed. It was unfortunate and the family found it insensitive.

The conclusion of the evidence the coroner decided not to leave any options to the jury and directed the jury that they had no option but to return a verdict of lawful killing.

That case illustrates the problems surrounding why anonymity can be problematic and why anonymity can contribute to a feeling on the part of bereaved families that they have been excluded, marginalised and treated with disrespect.

That does not mean that there is never a good justification for anonymity or screening. But they should never be granted simply on an officer's say-so without proper scrutiny of the application.

The Limits of The Coroner's Powers

I also want to mention that, while a coroner in an inquest can order anonymity and screening, there are some limits to what a coroner can order.

In some other types of judicial proceedings involving highly sensitive information, such as national security information, it is now possible to have a "closed material procedure" where a court holds closed hearings from which some parties are excluded and receives closed evidence that some parties have no access to.

This type of procedure was developed in the Special Immigration Appeals Commission (SIAC) for immigration and nationality cases involving national security issues. It has since spread to other types of proceedings. The Supreme Court held in the 2011 case of Al-Rawi v Security Service that a closed material procedure was not possible in the civil courts without express authorisation by Parliament. The Government then brought forward the Justice and Security Act 2013 which authorised closed material procedures in civil proceedings.

In inquests, however, it is still not possible to have a closed material procedure, as was confirmed in the 2010 case of Secretary of State for the Home Department v Inner West London Coroner.

What this means in practice is that although a coroner can keep the witnesses anonymous and can have the witnesses screened from the family, the coroner has no power to exclude the family from the hearing altogether, or to hear evidence in the absence of the family.

Because of this, there are occasionally cases where the police material involved is so sensitive that a closed material procedure is needed, meaning that an inquest is not adequate. This was the case in relation to the 2012 police shooting of Anthony Grainger by Greater Manchester Police.

Ultimately, Anthony Grainger's inquest was converted into a public inquiry under the Inquiries Act 2005. Inquiries can and do hold closed material procedures.

Self-evidently, this kind of procedure should be a last resort, and indeed it remains rare for an inquest to be converted into an inquiry in this way.

The Dyer Case

Let's go back to inquests. I now want to talk about Andrew Hall, a Black man who died after contact with the police. I will not say anything more about the circumstances of Andrew's death because his inquest is still going on and it would be inappropriate to do so.

But what I want to talk about is the decision of the coroner in Andrew's case to order anonymity and screening. Andrew's partner Natalie Dyer challenged the decision to screen in a High Court case by judicial review that decision was then appealed to the Court of Appeal.

In this case the police sought anonymity and screening, not just from the public but from Andrew's family, because they said they feared violence from a member of the family. That family member was not involved in the proceedings, but the officers perceived a risk that their identities would be disclosed to him. The family, in their submissions strongly disputed that there was any such risk.

The coroner granted the order for screening, and this was challenged his decision by judicial review. In the High Court, the family were successful. The High Court Judge decided that the case for screening all the officers from the family was not made out.

However, the police appealed to the Court of Appeal, and the Court reversed the decision of the High Court in a majority decision. The Court of Appeal was split 2-1 over whether the screening order had been appropriate.

The majority in the Court of Appeal held that the coroner in that case had carried out an adequate balancing exercise and taken the principles of open justice as his starting point.

However, it was noteworthy that the coroner in Dyer had not found that the officers' Article 2 and 3 rights were in play. It seemed to me that it was arguable that the coroner who the High Court and one Court of Appeal judge agreed with that he did not properly weigh up the alleged risks posed by the family – against the powerful public interest in letting the family see the officers.

And I also think the majority of the Court of Appeal was wrong to treat the case as a mere review of the coroner's decision-making process.

I accept of course that in an ordinary judicial review the court simply reviews the legality of the decision-making process; it does not make the decision for itself. But it is well-established in English law that there is an exception to this rule where human rights under the European Convention on Human Rights are at stake. In such a case the court has to decide for itself whether human rights have been breached. And there is also a case at Supreme Court level – Kennedy v Information

Commissioner – which suggests that the same is true when the common law principle of open justice is at stake.

So, we now have conflicting Court of Appeal decisions.

This is particularly troubling as the Dyer case is a binding authority for coroners, and it may set back the fight for open justice in inquests.

Conclusion

This is the last lecture in this series, and I want to wrap it up by saying that throughout this lecture series I have tried to look at the coronial process not through the eyes of lawyers or judges, but through the eyes of the bereaved family.

As we have seen, bereaved families have often been excluded, marginalised, ignored, and treated with disrespect and contempt in the coronial process.

Over the course of my career, I have seen some improvements. But there is still a long way to go.

I am emphatically not saying that there is never a good justification for anonymity and screening of police officers in an inquest.

Sometimes there is a genuine, real threat to an officer's life. Sometimes there are highly sensitive investigative techniques involved, or undercover assets who could be put at risk. So, I do not say that there can never be a good reason for departing from the principle of open justice in an inquest.

But in my experience, there is a danger that the police will ask for anonymity too readily, and they often receive it too readily. The principle of open justice is often given too little weight.

And even where it is necessary to screen an officer from the public and the press, coroners should be very, very reluctant to order screening from the bereaved family of the deceased. Such a decision seriously impairs the right of the bereaved family to meaningful participation in the inquest. It often leaves them feeling like transparency and justice have been denied to them. And it can be insulting, particularly where the justification for the screening is that they or someone they associate with poses a threat to the officers.

I conclude, therefore, by repeating the central message of this whole lecture series: the coronial process needs to centre the bereaved family. The person who has lost a child, a spouse or a parent is entitled to know the truth of what happened. And wherever humanly possible, they should be able to look into the eyes of the person responsible for the death and hear them explain themselves. Too often, our courts have lost sight of that principle.