

# **MAJOR INQUIRIES AND INQUESTS – LESSONS AND WARNINGS FROM BLOODY SUNDAY AND HILLSBOROUGH**

**Matthew Hill**

One Crown Office Row

## **Introduction**

1. On 30 January 1972, 13 people were shot and killed in Derry/Londonderry by members of the Parachute Regiment. An inquiry was established into the circumstances of the deaths, chaired by Lord Widgery, then the Lord Chief Justice. His conclusions, which included a “strong suspicion” that some of those who had died had been handling weapons, were widely condemned as a whitewash. The events of the day remained an open sore in the city and beyond. A lengthy campaign by the families, adopted by academics, politicians and journalists, followed. A quarter of a century later a fresh inquiry was ordered. The conclusions exonerated all of those who died, laid blame at state actors for the deaths and vindicated those who had campaigned over the decades. Sadly, many relatives of those who died did not live to see the outcome for which they had fought.
2. On 15 April 1989, 96 people received fatal injuries during a crush at a football match at Hillsborough Stadium, Sheffield. An inquiry was established into the circumstances of the deaths, chaired by Lord Justice Taylor, later the Lord Chief Justice. His conclusions on the causes of the disaster were broadly accepted, with some important exceptions. However the inquests that followed, which returned verdicts of accidental death, were condemned by the families of the deceased, particularly because of the suggestions made in evidence that drunken supporters had caused or contributed to the crush that resulted in the deaths. A lengthy campaign by the families, adopted by academics, politicians and journalists, followed. A quarter of a century later fresh inquests were ordered. The conclusions exonerated the supporters, laid blame at state actors for the deaths and vindicated those who had campaigned over the decades. Sadly, many relatives of those who died did not live to see the outcome for which they had fought.

3. This paper does not seek to present a comprehensive critique of any of the inquiries, inquests and investigations that took place into the events of either of those dreadful days; still less does it seek to present “the truth” of what happened. Instead, it considers the similarities and – more importantly – the differences between the various proceedings that have followed the tragedies, seeking to assess which proved effective, which did not, and why.
4. The paper, and the talk that it accompanies, are presented to lawyers and others with an interest in the role of inquiries and inquests play in contemporary Britain. I am acutely aware that the matters that I approach from a professional, structural and legalistic perspective are points of enduring pain and sensitivity for those who lived through the events concerned. All views expressed are mine alone.
5. The paper considers the following matters in the context of the inquiries, inquests and investigations that took place into the events of Bloody Sunday and the Hillsborough disaster:
  - a. A summary of the events of 30 January 1972 and 15 April 1989, and the inquisitorial processes that followed;
  - b. The fundamental purpose of an inquiry or inquest;
  - c. The importance of the independence of, and trust in, the relevant tribunal;
  - d. The terms of reference and their interpretation;
  - e. The engagement and involvement of the families of the deceased;
  - f. The evidence adduced before the inquiry or inquest;
  - g. The importance of considering the individual within a major public disaster;
  - h. Some thoughts on common themes that may be of general application.

### **Bloody Sunday: the events and the investigations**

6. On 30 January 1972 a large civil rights march took place in Derry/Londonderry, in contravention of a ban on marches and processions. The organisers intended this to culminate in a rally at Guildhall Square, but the security forces erected barriers, manned largely by soldiers, to prevent access. Rioting broke out when the march reached the barriers, as had been widely anticipated. While some of the crowds threw stones, far more proceeded peacefully along the re-arranged route towards Free Derry Corner in the Bogside area of the city. As part of a planned arrest operation, soldiers from 1<sup>st</sup> Battalion the Parachute Regiment (“1 PARA”) passed through the barriers. The nature and limitations of the order that they were given are disputed, but in any event soldiers from 1 PARA entered the Bogside. Those who had been rioting at the barriers fled, catching up with the thousands of marchers who had gathered to hear speeches at Free Derry Corner. The complex series of events that followed were the subject of intense controversy for several decades. Gunshots were fired. In general military witnesses claimed that they were fired upon by members of the Official or Provisional IRA, that they faced individuals throwing potentially lethal nail and petrol bombs, and that they returned fire appropriately. Civilian witnesses, in general, claimed that the soldiers opened fire first and without justification. Within ten minutes, the soldiers of 1 PARA had fired over a hundred rounds. 13 people were killed. A fourteenth casualty who had been injured by gunfire slightly earlier in the day died some months later. A similar number of people were injured.
7. The evidence of the firing soldiers as a whole would suggest that each of those who died was either armed with a life-threatening weapon or were hit by a round intended for such a target. The civilian evidence provided a very different picture: that Jim Wray was shot in the back as he lay on the ground; that Alexander Nash was wounded as he held his dying son, William; that Hugh Gilmour was shot as he ran away from the soldiers; that Gerard McKinney had both of his arms raised when a soldier fired and killed him.
8. An inquiry into the events of 30 January 1972 was established under the Tribunals of Inquiry (Evidence) Act 1921 (“the 1921 Act”). The Tribunal comprised Lord Widgery alone. His terms of reference were taken from the Resolution adopted by both Houses of Parliament, namely:

“That it is expedient that a Tribunal be established for inquiring into a definite matter of urgent public importance, namely the events on Sunday 30 January which led to loss of life in connection with the procession in Londonderry on that day.”

9. He heard the evidence of 114 witnesses in 17 sitting days between 21 February and 14 March 1972. There followed three days for closing speeches, concluding on 20 March 1972. Lord Widgery published his report on 19 April 1972, 80 days after the events that he was investigating. Among his findings were the following.<sup>1</sup>
- a. “To those who seek to apportion responsibility for the events of 30 January the question ‘Who fired first?’ is vital. I am entirely satisfied that the first firing in the courtyard [of the Rossville Flats] was directed at the soldiers.” [§54]
  - b. “I would not be surprised if in the relevant half hour as many rounds were fired at the troops as were fired by them. The soldiers escaped injury by reason of their superior field-craft and training.” [§95]
  - c. “Those accustomed to listening to witnesses could not fail to be impressed by the demeanour of the soldiers of 1 Para ... With one or two exceptions I accept that they were telling the truth as they remembered it.” [§97]
  - d. There was a “strong suspicion” that some of those who were killed or wounded “had been firing weapons or handling bombs in the course of the afternoon and that yet others had been closely supporting them.” This conclusion was based on expert scientific evidence concerning firearm discharge residues. [Summary of conclusions, §10]
10. Lord Widgery did make some criticisms of the actions of soldiers but these were muted, sometimes almost to the point of silence. The number of rounds fired were “sometimes excessive” and “unjustifiably dangerous for people round about.” The identified breaches of the standing order on when to open fire “do not seem to point to a breakdown in discipline or to require censure.” In the circumstances that the soldiers faced “it is not remarkable that mistakes were made and some innocent civilians hit”.
11. The evidence of Soldier H provides one example of the difficulties of Lord Widgery’s report. Soldier H said that while in the car park of a housing development called Glenfada

---

<sup>1</sup> “Report of the Tribunal appointed to inquire into the events of Sunday, 30<sup>th</sup> January 1972, which led to the loss of life in connection with the procession in Londonderry on that day” [“Widgery Report”]. Available via the University of Ulster’s CAIN website at <http://cain.ulst.ac.uk/hms0/widgery.htm>

Park, he saw a gunman at a window. Soldier H fired and the gunman withdrew. He reappeared a few moments later and Soldier H fired again. On Soldier H's account this cycle repeated itself 19 times in succession. Yet the physical and photographic evidence showed only one bullet hole in the relevant window. The evidence of the residents of the flat, which was accepted by Lord Widgery was that the room had been empty at the relevant time. Lord Widgery concluded that the events did not happen as Soldier H had claimed and that there were 19 shots that were "wholly unaccounted for". However, he made no further reference to these shots, or Soldier H's failure to account for them, other than to conclude that some of the firing in this area had "bordered on the reckless".<sup>2</sup> Eight people were shot dead by soldiers firing into or from Glenfada Park.

12. The Widgery Report was immediately branded a whitewash. Public criticism was informed by the work of the Sunday Times Insight team, which published a lengthy article on the events of the day shortly after Lord Widgery reported. This pointed to very different set of conclusions.
13. Inquests were held into the circumstances of each of the deaths on 30 January 1972. The Coroner, Major Hubert O'Neill, returned open verdicts. At the conclusion of his hearings, on 21 August 1973, he also made a statement. In this he gave his opinion that the deaths had been "quite unnecessary", that the Army had "run amok" and that innocent people had been shot and killed. He concluded: "I would say without hesitation that it was sheer, unadulterated murder. It was murder."<sup>3</sup> The Coroner's statement was challenged as being an improper exercise of his powers by the barrister for the Ministry of Defence, Brian Hutton QC (later Lord Hutton). The Reverend Ian Paisley called for Major O'Neill to be dismissed.
14. There followed decades of campaigning led by the families of those who died. In 1997, Professor Dermot Walsh wrote a report entitled "The Bloody Sunday Tribunal of Inquiry: A Resounding Defeat for Truth, Justice and the Rule of Law". This drew upon the statements made by soldiers to the Royal Military Police ("RMP") and the Treasury Solicitor in the days and weeks after Bloody Sunday. These had not been made available to the counsel for the families at the Widgery Inquiry. In Professor Walsh's view, they demonstrated material inconsistencies, discrepancies and alterations. The following year

---

<sup>2</sup> Widgery Report, Summary Conclusions §8

<sup>3</sup> <http://cain.ulst.ac.uk/events/bsunday/chron.htm>

the Irish Government called for a new public inquiry and submitted a dossier to the UK Government in support of its position.<sup>4</sup>

15. On 29 January 1998 the then Prime Minister, Tony Blair, announced that a new inquiry would be set up under the 1921 Act. The Tribunal originally comprised Lord Saville of Newdigate (an English Law Lord), William Hoyt (formerly Chief Justice of New Brunswick), and Sir Edward Somers (a former member of the Court of Appeal of New Zealand). Sir Edward resigned for health reasons and was replaced by John Toohey (former Justice of the High Court of Australia). The terms of reference were to inquire into:

“the events of Sunday 30<sup>th</sup> January 1972 which led to the loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to the events of that day.”

16. In contrast to Lord Widgery’s 80 days, the new inquiry took 12 years to produce its report. Oral evidence was obtained from 922 witnesses, with the written accounts of a further 1,562 being read by the Tribunal. The core bundle of materials ran to some 160 lever-arch files.<sup>5</sup> The final report, published on 15 June 2010, comprised ten lengthy volumes and one comparatively short document entitled “Principle Conclusions and Overall Assessment of the Bloody Sunday Inquiry”. The latter was longer than Lord Widgery’s entire report, which had run to a mere 104 paragraphs and 11 summary points of conclusion. Lord Saville’s inquiry was reported to have cost £195 million.<sup>6</sup>

17. Among the conclusions reached by Lord Saville, Mr Hoyt and Mr Toohey were the following:<sup>7</sup>

- a. “The soldiers of Support Company who went into the Bogside did so as the result of an order by [their commanding officer] which should not have been given and which was contrary to the orders that he had received [from his superior officer].”  
[§5.2]

---

<sup>4</sup> Report of the Bloody Sunday Inquiry [“BSI Report”], vol, X, A1.1.2 to A1.1.3

<sup>5</sup> BSI Report, vol. X, §A1.1.38

<sup>6</sup> <http://www.bbc.co.uk/news/10292828>

<sup>7</sup> BSI Report, Principal Conclusions and Overall Assessment

- b. The first shots fired following the launch of the arrest operation were fired by a soldier. This initiated a mistaken belief among other soldiers that that republican paramilitaries were responding in force to their arrival in the Bogside. [§5.3]
  - c. There was a “serious and widespread loss of fire discipline among the soldiers of Support Company.” [§5.4]
  - d. “The firing by soldiers of 1 PARA on Bloody Sunday caused the deaths of 13 people and injury to a similar numbers, none of whom was posing a threat of causing death or serious injury.” [§5.5]
  - e. “What happened on Bloody Sunday strengthened the Provisional IRA, increased nationalist resentment and hostility towards the Army and exacerbated the violent conflict of the years that followed. Bloody Sunday was a tragedy for the bereaved and the wounded, and a catastrophe for the people of Northern Ireland.” [§5.5]
18. Dealing with the events in Glenfada Park – where according to Lord Widgery some of the firing had “bordered on the reckless” – Lord Saville and his colleagues were forthright:<sup>8</sup>

[3.108] In our view none of these soldiers [in Glenfada Park] fired in the belief that he had or might have identified a person in possession of or using or about to use bombs or firearms ... We are sure that these soldiers fired either in the belief that no-one in the areas towards which they respectively fired was posing a threat of causing death or serious injury, or not caring whether or not anyone there was posing such a threat...

[3.109] All four soldiers denied shooting anyone on the ground. However, Jim Wray was shot for a second time in the back, probably as he lay mortally wounded in the south-western corner of Glenfada Park North. Whichever soldier was responsible for firing the second shot, we are sure that he must have known that there was no possible justification for shooting Jim Wray as he lay on the ground.

[3.110] Private G shot Gerard McKinney in Abbey Park. As we have already noted, his shot passed through this casualty and mortally wounded Gerald Donaghey ... Private G falsely denied that he had fired in Abbey Park. He did not fire in fear or panic and we are sure that he must have fired knowing Gerard McKinney was not posing a threat of causing death or serious injury.”

---

<sup>8</sup> BSI Report, Principal Conclusions and Overall Assessment

19. However, Lord Saville and his colleagues rejected suggestions that the events of the day were the result of a premeditated plan or conspiracy among senior military personnel or politicians.

20. Following the publication of the report the Prime Minister, David Cameron, gave a speech in the House of Commons:<sup>9</sup>

“There is no doubt, there is nothing equivocal, there are no ambiguities. What happened on Bloody Sunday was both unjustified and unjustifiable. It was wrong... what happened should never, ever have happened. The families of those who died should not have had to live with the pain and the hurt of that day and with a lifetime of loss.

Some members of our armed forces acted wrongly. The government is ultimately responsible for the conduct of the armed forces and for that, on behalf of the government, indeed, on behalf of our country, I am deeply sorry.”

21. The Prime Minister’s speech was broadcast live to crowds that had gathered in Guildhall Square, the intended destination of the civil rights march on 30 January 1972. His words – those of a British, Conservative Prime Minister – were greeted with cheers.

### **Hillsborough: the events and the investigations**

22. On 15 April 1989, Kenny Dalglish’s Liverpool side were due to meet Brian Clough’s Nottingham Forest in the FA Cup Semi-Final. The teams were to play at Hillsborough Stadium, home of Sheffield Wednesday. The same clubs had met at the same stadium at the same stage of the FA Cup the previous season. In 1988, Liverpool won 2-1. In 1989, the match was abandoned after six minutes and 96 people received fatal injuries.

23. The immediate cause of the tragedy was clear. Liverpool supporters had been directed to the Leppings Lane end of the stadium in order to enter the ground through turnstiles. Prior to kick off the size of the crowd grew in size to dangerous levels. Police were unable to exercise effective control and the turnstiles did not admit people sufficiently quickly to relieve the pressure. Requests were made to the match commander to open exit gates to allow the fans to enter the ground rapidly in order to retrieve the situation. At 2:52pm, the match commander gave an order that led to Gate C being opened. Over the next five minutes approximately 2,000 people entered through the gate. The majority then went

---

<sup>9</sup> <http://www.bbc.co.uk/news/10322295>



through a tunnel directly opposite the gate that gave access to the standing area, the West Terrace. The terrace was divided into “pens” by metal fences. The tunnel led to the two central pens, 3 and 4, which were already heavily populated with fans. Access to the pitch was prevented by a high, overhanging fence that was designed to stop pitch invasions. As a result of the movement of fans through Gate C, down the tunnel and onto the terraces, the fatal crush occurred.

24. Beyond those basic facts lay the question of what had caused or contributed to the disaster. Why had there been no order to prevent access to the tunnel once the decision to open Gate C had been made? How had the crush outside the stadium developed? Had the planning and preparation for the match been adequate? What role did the design and inspection of the stadium play – the number and efficacy of the turnstiles, the signage, the gradient of the tunnel, the assumed capacity of the West Terrace, the layout and height of the crush barriers and the construction of the fences that formed the “pens”? Was the response to the unfolding emergency by the police, club officials and ambulance staff present at the ground, and those called to it, adequate? Most controversially: what, if any, responsibility did the spectators themselves have for the disaster? Had they arrived unforeseeably late, or tried to enter the ground without tickets. Were they – to use the archaic expression that lingered through the proceedings – “in drink” such that they failed to respond to the reasonable requests of the police?

25. On 17 April 1989, Lord Justice Taylor was appointed by the then Home Secretary, Douglas Hurd, to carry out an inquiry into the events of 15 April 1989. He was assisted by two assessors, Brian Johnson, the Chief Constable of Lancashire, and Professor Leonard Maunder, an engineering professor. His terms of reference were:

To inquire into the events at Sheffield Wednesday Football Ground on 15 April 1989 and to make recommendations about the needs of crowd control and safety at sports events.

26. Lord Justice Taylor divided his inquiry into two stages. The first concerned the events on the day itself. He heard evidence from 174 witnesses between 15 May and 29 June 1989 and also considered written evidence through submissions and letters. He presented an Interim Report on 1 August 1989, and made interim recommendations about preventing further disasters and improving safety in the short term. The speed at which the Interim

Report was produced – some 108 days after the disaster – is in part explained by the fact that the 1989/1990 football season was due to kick off a few weeks later.<sup>10</sup>

27. Among the findings made by Lord Justice Taylor in his Interim Report were the following:<sup>11</sup>

- a. “The main reason for the disaster was the failure of police control” [§278].
- b. The decision by the match commander to open Gate C without closing the tunnel giving access to the West Terrace was “a blunder of the first magnitude” [§231].
- c. The “quality of the police evidence” was “in inverse proportion to their rank” [§279], with some officers being “defensive and evasive witnesses” [§280].
- d. With some “notable exceptions” the senior officers were criticised in the following terms: “neither their handling of problems on the day nor their account of it in evidence showed the qualities of leadership to be expected of their rank” [§280].
- e. The allegations that the fans had caused the disaster due to misbehaviour and drunkenness was rejected. However, Lord Justice Taylor found that “the police case was to blame the fans for being late and drunk and to blame the Club for failing to monitor the pens. It was argued that the fatal crush was not caused by the influx through gate C but was due to [a crush barrier] being defective. Such an unrealistic approach gives cause for anxiety as to whether lessons have been learnt. It would have been more seemly and encouraging for the future if responsibility had been faced.” [§285]

28. The then Prime Minister, Margaret Thatcher, described the report in (then) confidential Cabinet documents as a “devastating criticism of the police.”<sup>12</sup>

---

<sup>10</sup> “The Hillsborough Stadium Disaster: Final Report of Inquiry” (“Taylor Final Report”), §§1 to 6, available at e <http://hillsborough.independent.gov.uk/repository/docs/HOM000028060001.pdf>

<sup>11</sup> <http://hillsborough.independent.gov.uk/repository/docs/HWP000000180001.pdf>

<sup>12</sup> “Hillsborough: The Report of the Hillsborough Independent Panel”, September 2012 (“HIP Report”), Summary §88

29. Lord Justice Taylor concluded that “no valid criticism” could be made of South Yorkshire Metropolitan Ambulance Service (“SYMAS”).<sup>13</sup> His investigation into the emergency response was limited, a point that is discussed further below. He did, however, criticise other organisations and individuals including Sheffield Wednesday (notwithstanding what he found to be a “responsible and conscientious approach to its responsibilities” over the years),<sup>14</sup> Dr Wilfred Eastwood, the engineer who advised the club about the stadium, and Sheffield City Council, who oversaw the safety certification of the stadium.<sup>15</sup>
30. Lord Justice Taylor published his final report on 19 January 1990. The most prominent of its recommendations was for all-seater stadia for grounds above a designated size, a proposal that was subsequently implemented. The effect of this change on the culture of domestic football – the atmosphere of the grounds, the costs of tickets, the causative association with the formation of the Premier League and subscription television services – is keenly contested and outside the scope of this paper.<sup>16</sup> There is also dispute about whether such a dramatic step was necessary then, or remains necessary now. It is, though, perhaps worth noting two points. First, the recommendation for all-seater stadia was only one of the far-reaching proposals made by Lord Justice Taylor about the way that football should be organised. Second, his report came in the context of a sorry litany of stadium tragedies and near-misses in the years before Hillsborough – Wembley in 1923, Burnden Park in 1946, Ibrox in 1902 and 1971, Valley Parade in 1985. As he wrote:<sup>17</sup>

“I hope ... I have made it clear that the years of patching up grounds, of having periodic disasters and narrowly avoiding many others by muddling through on a wing and a prayer must be over. A totally new approach across the whole field of football requires higher standards both in bricks and mortar and in human relationships.”

31. Lord Justice Taylor’s inquiry was the first of many investigations into the events of 15 April 1989 and their aftermath. This paper does not touch on the disciplinary, civil and criminal proceedings that took place between 1989 and 2000 other than to note that no individual was successfully prosecuted in this period and none was subject to a formal professional disciplinary sanction. This was a source of intense disappointment and anger

---

<sup>13</sup> “The Hillsborough Stadium Disaster, 15 April 1989: Interim Report of Inquiry” (“Taylor Interim Report”), §296, available at <http://hillsborough.independent.gov.uk/repository/docs/HWP000000180001.pdf>

<sup>14</sup> Taylor Interim Report, §§289-295

<sup>15</sup> Taylor Interim Report, §§286-288

<sup>16</sup> See Adrian Tompkins, “And the Sun Shines Now” (London: Faber and Faber, 2016), among other works

<sup>17</sup> Taylor Final Report, §138

for the families of those who died and others, including many of those who had been caught in the crush and had survived.

32. Lord Justice Taylor's inquiry did not consider the individual circumstances of each of those who died following the crush at Hillsborough. This was left to the inquests conducted by the Coroner for South Yorkshire (West District), Dr Stefan Popper. These proceedings were to prove highly contentious for a number of reasons.

- a. On the evening of 15 April 1989, Dr Popper ordered blood alcohol tests to be taken for each of those who had died, regardless of age. Many of the deceased were teenagers. The youngest, Jon-Paul Gilhooley, was 10. This decision was part of what was felt by many to be a grossly insensitive process by which the deceased were handled and identified in the aftermath of the disaster. This was compounded by the tortuous way in which their loved ones found out about their loss. Further, the decision to test for alcohol in the context of the claims about "drunken fans" caused distress and hostility.
- b. At an early stage, Dr Popper ruled that those who died could not have been assisted by medical treatment after 3:15pm and hence that he would not investigate beyond that point. He based this conclusion on the pathology evidence that was then available to him, but the decision was nevertheless controversial then, and subsequently. The effect of this "3:15 cut-off" was that the emergency response to the disaster again went largely unexamined.
- c. Dr Popper convened "mini inquests" in which the specific circumstances of each of the individual deaths were considered removed from the context of the wider events of the day. These took place ahead of the "generic" hearings, with the agreement of the lawyers then representing the families. They were completed quickly. They consisted mainly of a pathologist presenting the autopsy findings (including the blood-alcohol test results) and a police officer summarising the evidence of other witnesses. Contentious evidence was excluded, with the indication being given that it would be considered at a later stage. The "mini inquests" were considered to be perfunctory and insensitive. Professor Phil Scraton, author of "Hillsborough: The Truth", wrote that they had a "devastating effect" on most families, quoting one family member as saying that "Any trust I

had went out of the window ... like many other families I thought the mini-inquests insufficient.”<sup>18</sup>

- d. The generic inquests proved still more controversial. The first evidence that was heard came from local pub owners and residents who lived close to the stadium who were asked questions about the alcohol consumption and alcohol-related behaviour of the fans. They were followed by junior and senior police officers, many of whom also spoke about fan drinking and behaviour. The supporters’ block of evidence came after these accounts. The tone throughout was adversarial.
33. At the conclusion of the inquests, the jury were left two verdicts: accidental death or unlawful killing. By a majority of 9 to 2 then returned verdicts of accidental death – those two words forming the entirety of their findings. That determination, and the manner in which the inquests had been conducted and perceived, caused immense anger and frustration among the families and their supporters. According to Professor Scraton, “the overwhelming shared feeling was that a serious miscarriage of justice had occurred.”<sup>19</sup> This was compounded by a sense that a false narrative had gained currency among the media and the public that – contrary to Lord Justice Taylor’s conclusions – the behaviour of the fans had caused the disaster, as exemplified by the infamous Sun headline: “The Truth”.<sup>20</sup>
  34. Dr Popper conducted 95 inquests. The 96<sup>th</sup> person to die as a result of physical injuries sustained on 15 April 1989 was Tony Bland, who had been left in a permanent vegetative state. He died in 1993 after lengthy legal proceedings concerning the withdrawal of treatment, culminating in the decision of the House of Lords in *Airedale National Health Service Trust v Bland*.<sup>21</sup> It is unknown how many other premature deaths have been contributed to by the physical and mental trauma suffered by those who were present at the stadium on that day.
  35. In 1997 the Home Secretary, Jack Straw, established a review of the existing evidence concerning the Hillsborough disaster, to be conducted by Lord Justice Stuart-Smith. This became known as the Stuart-Smith Scrutiny. The Scrutiny was a response to the ongoing

---

<sup>18</sup> P. Scraton, “Hillsborough: The Truth” (Edinburgh: Mainstream Publishing Company, 2009), first published in 1999, p.142 and p.144

<sup>19</sup> Scraton, “Hillsborough: The Truth”, p.151

<sup>20</sup> <https://www.thesun.co.uk/archives/news/919113/we-are-sorry-for-our-gravest-error/>

<sup>21</sup> [1993] 1 All ER 821

campaign led by the families to re-open the investigation of the disaster and to the emergence of fresh evidence, including suggestions that video evidence had been suppressed and that some police statements provided to the Taylor Inquiry had been amended prior to being submitted. The terms of reference were as follows:<sup>22</sup>

“To ascertain whether any evidence exists relating to the disaster at the Hillsborough Stadium on 15 April 1989 which was not available

(a) to the Inquiry conducted by the later Lord Taylor; or

(b) to the Director of Public Prosecutions or the Attorney General for the purpose of discharging their respective statutory responsibilities; or

(c) to the Chief Officer of South Yorkshire Police in relation to police disciplinary matters;

and in relation to (a) to advise whether any evidence not previously available is of such significance as to justify establishment by the Secretary of State for the Home Department of a further public inquiry; and in relation to (b) and (c) to draw to their attention any evidence not previously considered by them which may be relevant to their respective duties; and to advise whether there is any other action which should be taken in the public interest.”

36. Lord Justice Stuart-Smith did conduct meetings as part of his Scrutiny but it was principally a paper-based exercise.<sup>23</sup> He reported in February 1998 and concluded, among other matters, that allegations concerning the suppression of video evidence were unfounded, the 3:15pm cut-off time imposed at the original inquests had not limited the proper inquiry into the deaths, and that while some police statements had been amended prior to their submission to Lord Justice Taylor this did not in any way inhibit or impede the Inquiry’s work (as was demonstrated by the adverse findings made against the police).<sup>24</sup> He concluded that there was no basis for a further public inquiry, or for the quashing of the inquests. This outcome was a further bitter disappointment to the families.

37. In the years that followed, the campaign for further investigation into the Hillsborough disaster continued. In particular, the families and their supporters pushed for the full disclosure of official papers relating to the disaster ahead of the usual 30 year closed period. On 15 April 2009 a memorial service was held at Anfield Stadium, Liverpool, to mark the 20<sup>th</sup> anniversary of the disaster. Andy Burnham, then the Secretary of State for Culture, Media and Sport and an Evertonian, spoke at the service on behalf of the Government. His speech was interrupted by a shout of “Justice for the 96”. This was picked up by many

---

<sup>22</sup> “Scrutiny of Evidence Relation to the Hillsborough Football Stadium Disaster” by Lord Justice Stuart-Smith [“Stuart-Smith Scrutiny Report”], HoC Cm 3878, February 1998, §3

<sup>23</sup> Stuart-Smith Scrutiny Report, §§12-16

<sup>24</sup> Stuart Smith Scrutiny Report, Chapter 7

thousands in the crowd who took up the chant, in what had come to be seen as a turning point.<sup>25</sup> The Government, influenced by Mr Burnham and others, establishing an independent panel to oversee the disclosure of the papers and to produce a report based on them.

38. The Hillsborough Independent Panel (“HIP”) was established in January 2010. It was chaired by the Right Reverend James Jones, then the Bishop of Liverpool. The other members were: Raju Bhatt, founding partner of Bhatt Murphy solicitors; Christine Gifford, an expert in the field of access to information; Katy Jones, a television producer and journalist who had worked on the influential film “Hillsborough” (1996); Dr Bill Kirkup, a consultant in public health and former Associate Chief Medical Officer in the Department of Health; Paul Leighton, a former Deputy Chief Constable of the Police Service of Northern Ireland; Professor Scraton, a criminologist who had researched and written extensively on Hillsborough, Peter Sissons, a journalist and television presenter who had been born and raised in Liverpool; and Sarah Tyacke, who had served as Chief Executive of the National Archives of England and Wales between 1992 and 2005 (among other posts).

39. HIP’s terms of reference were as follows:

- oversee full public disclosure of relevant government and local information within the limited constraints set out in the Panel's disclosure protocol
- consult with the Hillsborough families to ensure that the views of those most affected by the tragedy are taken into account
- manage the process of public disclosure, ensuring that it takes place initially to the Hillsborough families and other involved parties, in an agreed manner and within a reasonable timescale, before information is made more widely available
- in line with established practice, work with the Keeper of Public Records in preparing options for establishing an archive of Hillsborough documentation, including a catalogue of all central Governmental and local public agency information and a commentary on any information withheld for the benefit of the families or on legal or other grounds
- produce a report explaining the work of the Panel. The Panel's report will also illustrate how the information disclosed adds to public understanding of the tragedy and its aftermath.

---

<sup>25</sup> <https://www.youtube.com/watch?v=-z3mBli084Q>

40. The HIP website contains an extensive and searchable archive of the disclosed papers.<sup>26</sup> The Panel published its report in September 2012.<sup>27</sup> Among its conclusions were the following:
- a. The main cause of the disaster was the lack of police control.
  - b. The Liverpool supporters were in no way responsible for the disaster.
  - c. For the first time the ambulance services, SYMAS, was criticised for its response to the disaster.
  - d. There was evidence from the post mortem reports that indicated that as many as 41 of the victims might have survived had the emergency response been quicker.
41. Following the publication of the HIP Report, the Attorney General successfully applied to the High Court to have the verdicts of the original inquests (including that of Tony Bland) quashed under s.13 of the Coroners Act 1988.<sup>28</sup> Fresh inquests were ordered by the Lord Chief Justice, Lord Judge. Investigations were also established into criminal and disciplinary matters, to be undertaken by Operation Resolve and the Independent Police Complaints Commission.
42. The inquests that were held between March 2014 and April 2016 at Birchwood Park, Warrington.<sup>29</sup> Sir John Goldring, a Court of Appeal Judge, was appointed to conduct the inquests, which were heard before a jury. They concluded with a narrative verdict that contained critical findings in respect of the police planning for the match, the way in which the match was policed on the day, the decisions made by the match commander in respect of the opening of Gate C, the design and construction of the stadium, the certification and oversight of the stadium, the conduct of Sheffield Wednesday prior to and on the day, the conduct of Eastwood and Partners (the engineering firm instructed to advise on the stadium), and the response of both the police and the ambulance service to the emergency. Two findings above all others were given particular prominence in the coverage and discussions that followed. First, all 96 supporters were found to have been unlawfully

---

<sup>26</sup> <http://hillsborough.independent.gov.uk/>

<sup>27</sup> <http://hillsborough.independent.gov.uk/report/>

<sup>28</sup> [2012] EWHC 3783 (Admin)

<sup>29</sup> <https://hillsboroughinquests.independent.gov.uk/about-the-inquests/>



killed. Second the jury were asked to consider whether any behaviour on the part of the football supporters may have caused or contributed to the dangerous situation at the Leppings Lane turnstiles. They answered: “No”.

43. The jury also considered the individual circumstances of each of the 96 people who died. They made findings on the medical cause of death and the time of death. The latter was generally given as a period of time. At one end was the last point at which it could be said that the person was probably alive, and at the other was the point at which it could be safely concluded that they were dead. In many cases, this “window” extended beyond 3:15pm.
44. At the time of writing, six individuals have been charged with offences relating to the disaster. These include the match commander, the club secretary for Sheffield Wednesday, senior police officers, and a solicitor instructed on behalf of South Yorkshire Police.

### **The fundamental purpose of an inquiry or inquest**

45. Before turning to the question of what has and has not proved effective, it is worth considering the fundamental purposes of inquiries and inquests, and how they have been construed during the investigations considered above.

### Inquiries

46. Lord Widgery wrote in his 1972 report that:

“The Tribunal was not concerned with making moral judgments; its task was to try and form an objective view of the events and the sequence in which they occurred, so that those who were concerned to form judgments would have a firm basis on which to reach their conclusions.”<sup>30</sup>

47. In April 1998, Lord Saville opened his inquiry into the same events by stating that:

“The Tribunal, Counsel, the Inquiry Solicitor and the Inquiry Secretary all have the same duty. That duty, and the object of the Inquiry, is to seek the truth about what happened on Bloody Sunday. We intend to carry out that duty with fairness, thoroughness and impartiality.”<sup>31</sup>

48. Lord Justice Taylor, opening his inquiry into the Hillsborough disaster in 1989

---

<sup>30</sup> Widgery Report, Part 1, §2

<sup>31</sup> BSI Report, vol. X., p.43

“This is an Inquiry to discover, first, what happened, secondly, why it happened and thirdly, what lessons can be learned and recommendations made. If criticisms are levelled at organisations or individuals which are relevant to these issues I shall of course consider them and make any necessary finding. But it is not the purpose of the enquiry to apportion blame.”<sup>32</sup>

49. The leading text book on public inquiries, *Public Inquiries* [Beer et al, 2011] records the following more ambitious aims, accurately reflecting the greater expectations that now surround such investigations:<sup>33</sup>

“The purpose of a public inquiry may include to establish the facts, to ensure accountability, to learn lessons to prevent recurrence of events in the future, to restore public confidence (or allay public concern), and to discharge the State’s investigative obligations.”

50. Public inquiries also perform a further role, namely putting the evidence and materials that they gather into the public domain. When done effectively, this increases transparency in the inquiry’s procedures and outcomes and – it is hoped – informs the wider public debate about the issues at stake. The rise of the internet, and the decline in deference to judicial opinion, have increased the importance of this element of an inquiry’s work. Lord Saville’s inquiry broke new ground in this respect, reflecting its chair’s interest in information technology and the law.<sup>34</sup> More recently HIP has developed this element further.<sup>35</sup> The resulting websites are an invaluable source of information for journalists, historians, academics and members of the public. An interesting, and welcome, corollary is that the provision of such information in accessible form can lead to debate and indeed criticism of an inquiry’s conclusions, as was shown in particular in respect of the reaction to the Hutton Inquiry into the death of Dr David Kelly.

## Inquests

51. Lord Bingham provided the classic statement of the purposes of an article 2 inquest in the case of *Amin*:<sup>36</sup>

“to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have

---

<sup>32</sup> <http://hillsborough.independent.gov.uk/repository/LJT000000910001.html>

<sup>33</sup> Beer [2011] §2.01

<sup>34</sup> BSI Report, vol, X, p.49

<sup>35</sup> <http://hillsborough.independent.gov.uk/report/appendices/part-4/appendix-1/>

<sup>36</sup> *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51

the satisfaction of knowing that lessons learned from his death may save the lives of others.”

52. This oft-cited passage must, however, be read in light of the four statutory questions that an inquest must address: who died, when where and how.<sup>37</sup> These are specific, limited questions that revolve around the causes of the death of an individual. The statute provides that the coroner or a jury (if there is one) may not “*express any opinion*” on any other matter, save for the information required for the death to be registered. An inquest is forbidden from returning a determination that is framed in such a way as to appear to determine and question of criminal liability on the part of a named person, or civil liability on behalf of anyone at all.<sup>38</sup> The tension between how to reach the destination plotted by Lord Bingham in a vehicle manufactured by the Coroners and Justice Act 2009 is considered further below.

53. It is also relevant to note that Lord Bingham’s words came a decade after Dr Popper’s original inquests into the Hillsborough disaster. That decade had seen substantial developments in legislation and case law concerning the role of inquests, particularly in response to the developing jurisprudence on Article 2 ECHR and the passage of the Human Rights Act.

### Analysis

54. Much more is expected of an inquiry or inquest in 2017 than in the early seventies or late eighties. Lord Widgery’s purist desire for a judge to simply set out an “objective view of the events and the sequence” in order to inform public debate remains at the heart of any investigation. However, the chances of achieving that Olympian goal have to broad satisfaction have diminished due to a paradoxical raising and lowering of expectations. On the one hand, “judge-led inquiries” have become a screen onto which a vast number aspirations have been projected, by the judiciary (as per *Amin*), by politicians, and by the public. There is an expansionist trend in terms of the scope of public inquiries, the nature and extent of their investigations, representation before them, the disclosure that should be provided to parties and the public, and the results expected of them. At the same time, there is a far less deference to the opinion of an individual judge; or put another way, a greater scepticism of the objectivity and abilities of the tribunal charged with investigating and

---

<sup>37</sup> Coroners and Justice Act 2009 [“CJA 2009”]. s.5

<sup>38</sup> CJA 2009, s.10(2)

reporting at an inquiry.<sup>39</sup> Both trends are – to a degree – to be welcomed. Yet they undoubtedly make the task facing a major inquiry or inquest harder. There is a danger that in some instances they could make it impossible.

### **The Tribunal: Trust and independence**

55. Public concern about the selection and suitability of a chair for a public inquiry is not a new phenomenon. In 1972 concerns were raised that that actions of 1 PARA would be considered by a former British Army officer, Lord Widgery. His military service was unsurprising given that senior members of the judiciary at that time would have been of fighting age during World War II. It is also notable that Major O’Neill had also been a British officer, and yet he came to very different conclusions about the events of the day. In the example of Hillsborough, three Court of Appeal judges oversaw three processes that received very different receptions. There is no evidence of which this author is aware that the socio-economic background of these individuals played any significant part in determining the outcome.
56. What does emerge from a review of the different investigations into Bloody Sunday and Hillsborough is that trust is hard won and easily lost. While some steps can be taken to encourage confidence – for example, the use of two Commonwealth judges on the tribunal for the second Bloody Sunday inquiry – it is the work of the inquiry or inquest that will determine the respect that it commands. Here, the role of the tribunal’s legal team is essential. Counsel and solicitors for the inquiry/inquest will undertake the vast majority of the “front of house” work both before and during the hearings: liaising with parties and participants, identifying witnesses, structuring the preliminary and evidential hearings, overseeing disclosure, receiving and responding to formal and informal submissions from the interested parties, and ultimately making submissions and questioning witnesses.
57. Missteps, be they or style or substance, can have a devastating effect both at the time and retrospectively. The Stuart-Smith Scrutiny was undermined at an early stage by a comment made by the judge to a bereaved father. The event is described by Professor Scraton:<sup>40</sup>

---

<sup>39</sup> The role of a jury in returning determinations at certain inquests is considered further below. It is also noted that some communities have always retained a greater degree of reservation about the British judiciary, not least in Northern Ireland.

<sup>40</sup> Scraton, *Hillsborough: The Truth* [2012]

“Unexpectedly, the judge turned to Phil Hammond and, with a wry smile, asked: ‘Have you got a few of your people or are they like the Liverpool fans, turn up at the last minute?’ Phil Hammond was taken aback, not believing his ears. But there was no mistake. Stuart-Smith’s outrageous comment was on tape, word for word. The remark spread among the families like wildfire. Jaws dropped open and there followed a collective outpouring of anger. How could a senior judge come to Liverpool to meet bereaved families and make such a crass and insensitive comment? It had taken over eight years to successfully combat the hurtful and unsubstantiated rumour that Liverpool spectators deliberately conspired to arrive late at Hillsborough; yet there it was, the judge’s first words to the families.”

58. Lord Justice Stuart-Smith subsequently apologised, in person, to many family members. Yet the damage had been done. Views of the Scrutiny were also shaped retrospectively by the discovery of an official memorandum stating that at the outset of the process, the view of the then Home Secretary, Jack Straw, was that:<sup>41</sup>

“[he] does not believe there is sufficient new evidence for a) a new inquiry, b) re-opening the inquest or c) prosecution of individuals. However, he believes that this is not publicly acceptable unless it comes from an independent source.”

59. Twenty-five years earlier, Lord Widgery was invited to No. 10 Downing Street following his appointment as the judge hearing the inquiry into the events of Bloody Sunday. The official minute of that meeting recorded the then Prime Minister, Edward Heath, telling him:<sup>42</sup>

“It had to be remembered that we were in Northern Ireland fighting not only a military war but a propaganda war.”

60. Fairly or otherwise, these official minutes have undermined assessments of the processes that followed. As Beer et al identify,<sup>43</sup> the announcement of a public enquiry may be the source of scepticism as well as optimism – a belief that virtue is being signalled, or that issues are being kicked into the long grass, or passed on to another member of “the establishment” who will do the right thing.

61. The conclusion that those heading a public inquiry or inquest must be independent and open-minded, and be seen to be such, is trite but fundamental. It is also a matter that cuts both ways. Independence, if it is to mean anything, means freedom from undue influence from any of those involved in and participating with the inquiry or inquest, including the victims, their families and supporters.

---

<sup>41</sup> HIP Report, Chapter 10, §2.2.88; Memorandum from Liz Lloyd, Number 10 Policy Unit, to Prime Minister, Tony Blair, 9 June 1997, COO000001200001, p1

<sup>42</sup> <http://news.bbc.co.uk/1/hi/uk/2599433.stm>

<sup>43</sup> Beer et al. [2011], 2.02

62. The exemplar of the independent investigative tribunal is an inquest jury. A jury in any major inquiry will (in theory at least) be a cross-section of society, selected randomly save for the exclusion of those with a potential bias (real or perceived). At the recent Hillsborough Inquests, for example, the hearings were held in a neutral venue, Warrington, and among those excused from jury service were Liverpool supporters and those with close connections to institutional interested persons.
63. Juries are uniquely well-placed to provide binary answers to fundamental questions. However, if their answers are to command respect, they must hear potentially relevant evidence, have that evidence summarised effectively and fairly, and – where the evidence satisfies the relevant evidential threshold – be asked the relevant question in non-leading terms. It is submitted that this is demonstrated by the force of the recent Hillsborough jury’s conclusion at the Liverpool supporters did not cause or contribute to the disaster. The jury must be asked the question and left to weigh the evidence without lawyerly thumbs being placed on the scales.

### **The terms of reference: an effective and comprehensive investigation**

64. Inquiries are bound by their terms of reference, just as violinists are bound by the four strings at their disposal. Both inquiries into Bloody Sunday were convened under the same legislation, with strikingly similar terms of reference (which are set out above). Lord Widgery described his approach in the following terms:<sup>44</sup>

“I emphasised the narrowness of the confines of the Inquiry, the value of which would largely depend on its being conducted and concluded expeditiously. If considerations not directly relevant to the matters under review were allowed to take up time, the production of the Tribunal’s Report would be delayed. The limits of the Inquiry in space were the streets of Londonderry in which the disturbances and the shooting took place; in time, the period beginning with the moment when the march first became involved in violence and ending with the deaths of the deceased and the conclusion of the affair.”

65. Thus Lord Widgery investigated the events of approximately 30 minutes, taking place within an area of less than one square mile. Lord Saville and his colleagues took a markedly different approach:<sup>45</sup>

---

<sup>44</sup> Widgery Report, §3

<sup>45</sup> Bloody Sunday Inquiry Report, Principal Conclusions and Overall Assessment, §1.5

“We found it necessary not to confine our investigations only to what happened on the day. Without examining what led up to Bloody Sunday, it would be impossible to reach a properly informed view of what happened, let alone why it happened.”

66. The latter inquiry considered, among other matters, the historical, political and military context of the events of the day, the planning for the operation, intelligence concerning the role of paramilitary organisations, the legality of the planned arrest operation, the treatment of those arrested on the day, and the manner in which evidence was gathered in the aftermath of the events. Witnesses included those who had served as Prime Minister, Cabinet Secretary, Foreign Secretary, and the Chief of the General Staff.
67. The quid pro quo is obvious and was identified by Lord Widgery. The wider the terms of reference, and the wider their interpretation, the longer the inquiry will take and the more it will cost. This is not just a matter of budget and convenience. Public confidence is undermined both by the expense involved and the external perception, however unjustified, that it is all taking too long and is simply not worth the effort. Where inquiries have arisen because an acute public concern, their ability to allay it will be undermined by a delay in reporting. The Taylor Inquiry demonstrates the conflicting tensions. There was an urgent need to report in light of the possibility that other football stadia may be unsafe. In meeting that need, and producing an interim report within a remarkable 108 days, the Taylor Inquiry inevitably had to rely on the evidence then available and to focus on those areas that seemed to be of greatest significance. Other areas, such as the emergency response and the process by which evidence was gathered, received less attention. This in turn led to criticism of the inquiry for failing to investigate them adequately.
68. Those inquiries and inquests that take place many years after the events in question face different pressures. In the intervening time much will have been said, written and theorised about the contentious events. There will be more matters of public concern to be investigated. This is particularly so when an earlier investigation has been subjected to criticism. Historic inquiries are, to greater or lesser extent, trapped by the processes that preceded them. They may also be accompanied by a greater pressure to make the new investigation “comprehensive” or “definitive” in order to justify the decision to reopen the matter.
69. Even where a wide remit is pursued, its boundaries will be controversial. There will always be other events that could, arguably, be considered: the deaths in Ballymurphy in August 1971 in respect of Bloody Sunday, the policing of the miners’ strike at Orgreave in respect

of Hillsborough. In essence this is a function of history being “just one \*\*\*\*\* thing after another”, to use (most of) the words of Rudge in the *History Boys*. The decision as to where to draw the line will always be difficult and fact-specific. It is, though, worth keeping in mind the limits of the tribunal. The usual role of judges is to find facts, establish causation, and (in public inquiries) make recommendations arising from the evidence. The further they move away from those core duties, the less expertise they bring to the role. Others will be better placed to put the events that they consider within a wider historic or cultural context. Their inquiries can inform public debate, not resolve it.

70. The same point applies with still greater force to inquests. In England and Wales coroners and juries are proscribed by law from giving opinions on matters beyond the four statutory questions of who died, when, where and how.<sup>46</sup> Any coroner who sought to issue a statement akin to that of Major O’Neill after Bloody Sunday would inevitably face a successful judicial review and no doubt also calls to resign. The question of “how” an individual died has been broadened in recent years. First, the decision in *Middleton* and the related provisions of the CJA 2009 require that where there is an arguable breach of the deceased’s rights under article 2 ECHR the inquest must determine “by what means and in what circumstances” the death occurred.<sup>47</sup> Second, and as is discussed above, the wider jurisprudence on article 2 has led to a broadening of coronial horizons. Third, the decision in *Lewis*,<sup>48</sup> and the way in which it has subsequently been interpreted by coroners, has resulted in many inquests commenting on factors that may *possibly* have caused deaths as well as those that probably did so, in essence loosening the burden of proof. Yet the determination of a coroner or a jury is still, in general, limited to matters that are causative of death.<sup>49</sup> Inquests are not public inquiries, or indeed criminal or civil proceedings.

### **Engagement and involvement of the families and victims**

71. One of the more resonant of common themes between the investigations into Bloody Sunday and Hillsborough is the sense among the families of those who died in the disasters that the initial investigations were stacked against them. In part this was a question the amount of representation made available to them, particularly at the original Hillsborough

---

<sup>46</sup> CJA 2009, s.5

<sup>47</sup> *R (Middleton) v HM Coroner for the Western District of Somerset and another* [2004] UKHL 10; CJA 2009, s.5(2)

<sup>48</sup> *R (Lewis) v HM Coroner for the Mid and North Division of the County of Shropshire* [2009] EWCA Civ 1403

<sup>49</sup> A recent, and controversial, exception to this rule has been provided by the case of *R (Tainton) v HM Senior Coroner for Preston and West Lancashire and another* [2016] EWHC 1396 (Admin).



Inquests. Yet it was also about how the inquiries and inquests interacted with them: how much material was disclosed, the opportunity to make submissions and the extent to which they were engaged in the various processes.

72. Disclosure may be among the driest of topics, but in this context it is also one of the most important. At the Widgery Inquiry the failure to disclose statements taken from the soldiers by the RMP and the Treasury Solicitor plainly hampered the degree of examination that they could face and adversely affected on both the quality of the report and its reception. In Hillsborough, the retrospective knowledge that some police witness statements had been subject to amendment led some to question Lord Justice Taylor's conclusions, notwithstanding his withering criticism of the police. In both case, the limitations of disclosure and the way in which controversial evidence was handled by the original inquiries were central to the calls for new investigations.
73. The antidote adopted both by the Saville inquiry and the recent Hillsborough Inquests was to make the process of disclosure as complete and transparent as possible. In the latter case, this was building on the work of HIP, as referred to above. The result was, in both case, an enormous amount of material being made available to interested parties. The recent Hillsborough Inquests even went to the lengths of providing schedules of material that had been considered but assessed as irrelevant, so as to allow interested persons to make representations on that which they had not seen as well as the material that they had.
74. While this approach was broadly welcomed it comes at considerable cost, measured in money and time. The process of obtaining, reviewing, redacting and disclosing thousands of pages of material is painstaking and labour-intensive. Electronic databases will only be as effective as the material and coding that is placed onto them. "De-duplication", in other words efforts to ensure that the same document does not appear multiple times, is enormously helpful, but equally enormously time-consuming. The resources required are not just those of the inquiry or inquest, but also the many public and private organisations that may hold relevant materials. These organisations will of course have other pressing demands upon them. Much of the work involved is invisible to those outside of the inquiry or inquest, potentially a cause of mutual frustration that regular updates can only go so far to resolve. Disclosure is the principal reason why modern inquiries take much, much longer than their predecessors. It is a price that is to be paid for a more transparent, inclusive process. In some instances, including Bloody Sunday and Hillsborough, it is an unavoidable but potentially useful way of seeking to overcome decades of mistrust.

75. To return to a theme, even the broadest of approaches to disclosure will still lead to disappointment at its margins. Material that may be of interest to participants but which is not relevant to the investigation may not fall to be disclosed. Sensitive personal details, including but by no means limited to medical issues, may be withheld. Where an inquiry or inquest draws upon intelligence materials there will almost inevitably be frustration at materials being withheld on the grounds of public interest immunity or because of concerns over the safety and well-being of the source of the information. In historic investigations, the sense that evidence is *still* be kept from the families can be particularly difficult to manage. Inquests face particular difficulties in dealing with secret information given the requirement that all evidence is heard in public. As a result, it has proved necessary in some instances to convert an inquest into a public inquiry in order to allow for “closed” sessions, as occurred for example in the inquests into the death of Alexander Litvinenko.<sup>50</sup>
76. Beyond disclosure, the legal team for the inquiry/inquest will again play a critical role in seeking to engage and liaise with all interested parties, including the families and victims. Regular meetings and ongoing dialogue assist, as does a transparent approach to the work that is being undertaken. This is, of course, a mutual process. The lawyers for participants in inquiries and inquests are not (or should not be) passive recipients of the efforts of others. They have their own roles to play in managing expectations, explaining legal arguments and the processes involved, advising as to what can and cannot be achieved by the investigation, and assisting those who are required to give evidence. The importance of this last role, both for the individuals concerned and the efficacy of the inquiry/inquest as a whole, cannot be overstated. It should never be forgotten that many witnesses are being asked to recount the traumatic events of the worst day of their lives, events that may have affected them profoundly for years and decades thereafter.
77. The question of how those who survived public disasters should participate in the subsequent inquiries and inquests remains a difficult one. In many cases the events will have a profound, life-changing effect on those who were injured and those who narrowly escaped death. Understandably survivors will be interested in the outcome of the investigations that follow and will, in many cases, wish to take part in them. In the Saville

---

<sup>50</sup> For further discussion of the Litvinenko case, and the wider debate about when to proceed with a public inquiry rather than an inquest, see C. Cross and N. Garnham (eds), “The Inquest Book” (Oxford: Hart, 2016), chapter 16, *Inquest versus Public Inquiry* by Isabel McArdle.

inquiry, those who were injured had legal representation. In the recent Hillsborough Inquests they did not, in part reflecting the fact that the latter process was by law constrained to examining the causes of deaths.<sup>51</sup>

78. Survivors will have a role to play in providing evidence of the events in question. Such evidence will no doubt assist the relevant tribunal in addressing the central questions of what happened and why. It will also play a wider role in educating the inquiry or inquest and the public at large about the disaster, telling the story of what it was like on a human level to have been caught up in it. The selection and questioning of such witnesses should be undertaken with care and with regard to best practice on obtaining evidence from potentially vulnerable people.
79. Beyond this, there is a tension between the core role of an inquiry or inquest in forensically finding facts, and the task increasingly projected on to it of allaying wider public concerns and acting as a forum for those affected by the events. The former is likely to require only a relatively small number of survivors to be called to give evidence publicly and then for a relatively limited purpose – something that may cause immense disappointment among the wider group. Further, where the evidence of survivors makes or implies criticism of others fairness demands that they are given an opportunity to respond in evidence and, where appropriate, through questions and submissions at the hearings. The risk of an adversarial or unsympathetic atmosphere thereby increases, as does the possibility of the investigation being drawn into satellite matters that may be of limited relevance to its overall conclusions.
80. There is no way of squaring this circle. The most common solution proposed is more lawyers. It is suggested that this will rarely be an effective answer. The underlying interests of those who survived the disaster and the families of those who died in it will, in most cases, be so similar as to make separate representation at best duplicative and at worst unfair. In either case further representation means more expense and longer proceedings. However, there is also a strong argument that those who have survived disasters should be supported and assisted by the inquiry or inquest in providing evidence where they wish to do so. Not all of that evidence will be given at the hearings, but a public function may be served by providing a process through which individual accounts are obtained, retained and

---

<sup>51</sup> Hallett LJ refused an application for interested person status for the survivors of the 7/7 bombings: see §§130-136 of the ruling of the Coroner's Ruling of 21 May 2010, available at: <http://webarchive.nationalarchives.gov.uk/20120216081134/http://7julyinquests.independent.gov.uk/docs/orders/dec-april-2010.pdf>

– subject to the consent of the individuals concerned and relevant legal considerations – disclosed.

## **The evidence**

81. At the heart of any judicial or quasi-judicial process is the evidence that is adduced. Numerous criticisms were made of the past investigations in both Bloody Sunday and Hillsborough in this respect. Some of these are considered below, together with the efforts made by more recent proceedings to overcome them.
  
82. One of the first questions to arise will be that of who should perform the investigative function to obtain the evidence in the first place. When considering major public disasters involving agents of the state, the ancient question of who guards the guards will almost inevitably arise. Much of the evidence before Lord Widgery came from the RMP, one part of the Army investigating another at a time when, in the then Prime Minister's words, a "propaganda war" was ongoing. In Hillsborough, Lord Justice Taylor had to rely on the work of the West Midlands Police who, in the days before the IPCC, were conducting an investigation into the actions of the South Yorkshire force – i.e. one set of police officers investigating another. The more recent proceedings drew on more structurally independent investigators. Lord Saville and his colleagues instructed solicitors to take statements on behalf of the inquiry. The recent Hillsborough Inquests worked with Operation Resolve, a bespoke criminal investigation into the disaster, and the IPCC to obtain evidence. Memoranda of understanding between the inquests and these bodies were circulated. Notes and transcripts of interviews were disclosed. Transparency and access to materials were again adopted as the best means of overcoming the legacies of previous investigations.
  
83. A further common critique of earlier investigations was the order in which evidence was heard. At the Widgery Inquiry and the original Hillsborough Inquests the tribunal heard a block of evidence from the soldiers or police officers before hearing from those civilians caught up in the disaster. In the Hillsborough Inquests a further complaint was that the evidence of local residents and pub landlords, principally concerning the drinking and behaviour of Liverpool supporters, was also heard before any of the supporters' own accounts.

84. In contrast, Lord Saville and his colleagues heard civilian witnesses before the soldiers, although the contemporary accounts of the latter group had been fully summarised in Counsel to the Inquiry's opening statement and were in any event available to the tribunal from the outset of the hearings. For a professional tribunal the order of evidence is unlikely to influence outcome. Whether the same is true for a law jury is less clear. The recent Hillsborough Inquests, conscious of the previous approach, avoided arranging "blocks" of police and supporter evidence, and instead called witnesses in broadly chronological order. Given the length of the inquests, and the complexity and volume of the evidence, this aided clarity as well as fairness.
85. The role of counsel for the families in examining witnesses is a problematic area. Inevitably, and understandably, the families will want their lawyers to make their case to the witnesses who attend. Equally inevitably, this will mean that the hearings take longer and cost more. This attracted criticism in the case of Bloody Sunday and contributed to the provisions off the Inquiries Act 2005 that now limit the rights of core participants in statutory inquiries to participate in questioning. In theory, the "non-adversarial" nature of inquiries and inquests means that questioning will come predominantly from counsel to the inquiry/inquest ("CTI"). From their neutral perspective CTI are well placed to obtain the factual answers required to provide the tribunal with the knowledge it requires to come to its conclusions and to do so efficiently and effectively. In practice, different participants will have different perspectives that they wish to bring to examination, and closing them down risks limiting or skewing the evidence and alienating the participants. This is particularly so in inquests where no submissions on the facts are allowed.<sup>52</sup> The balance will always be a difficult one to strike. Two observations that may be worth noting are, first, that self-restraint from barristers is at least as important, if not more so, than intervention from the bench, and second, that the efficiency and focus forced on advocates by timetabled questioning can result in more effective advocacy.
86. The role of expert evidence was central to the criticisms of past investigations into Bloody Sunday and Hillsborough. In the former, analysis of firearm discharge residues led Lord Widgery to his conclusion that there was a "strong suspicion" that several of those who had been killed on Bloody Sunday had been firing weapons or handling bombs. This finding, perhaps above all others, caused intense distress and resentment among the families of

---

<sup>52</sup> The Coroners (Inquests) Rules 2013, SI 2013/1616, rule 27.

those who died and the wider critics of the inquiry. The scientific basis on which it rested was comprehensively dismantled during Lord Saville's inquiry. Having considered all of the relevant evidence, the tribunal concluded that none of those who were killed on Bloody Sunday had been posing any threat to soldiers at the time they were killed and that with one exception, they had not been carrying firearms or bombs.<sup>53</sup>

87. As has been noted above, the pathology evidence in the original Hillsborough Inquests led Lord Justice Taylor and Dr Popper to conclude that all of those who died were beyond medical help within a very short period of time following the crush. This resulted in a relatively limited inquiry into the emergency response, and the imposition of the highly contentious "3:15pm cut-off" in respect of evidence heard at the original inquests. Twenty years later, the HIP report concluded that as many as 41 of those who had died may have survived for more than an hour after the crush. This conclusion was based on evidence contained in some post mortem reports that the victims had developed cerebral oedema, a swelling of the brain that indicates ongoing but compromised blood and oxygen supply over a period of at least an hour – in other words, that they were alive but in a very vulnerable condition.

88. The challenge for the recent Hillsborough Inquests was to seek to re-assess the medical, pathology and witness evidence from first principles, at a distance of more than a quarter off a century. This was achieved by obtaining the best possible evidence of each individual's movements and treatment (on which, see below), and then seeking comment on this from a panel of experts who worked co-operatively to an agreed pattern. The inquiry drew on experts in pathology, neuropathology, emergency response and intensive medicine. Experts instructed by the families met with those instructed by the inquiry and evidence was "hot-tubbed" – meaning that usually four experts from two disciplines gave evidence together, commenting and building on each other's findings. The result was that in respect of almost all matters of significance, a consensus emerged and could be explained with clarity to the jury and the wider public. The approach that led to the "3:15pm cut-off" was rejected. However, the experts also found that the references to oedema in the original

---

<sup>53</sup> The tribunal concluded that one of those killed, Gerard Donaghey, had nail bombs in his pockets at the time when he was shot. However, the presence of nail bombs did not cause the soldier who shot him to fire, still less did it justify the shots. It appears that the soldier in question did not see Mr Donaghey, who was hit by a bullet that had passed through Gerard McKinney. The pathology and witness evidence indicates that Mr McKinney, who was unarmed, was shot while he had his hands in the air. He too was killed. See BSI Report, Principal Conclusions and Overall Assessment, §3.108 and following, as cited above. Mr Donaghey's family and others have challenged the finding that he was carrying nail bombs, alleging that they were planted on him after his death.

post-mortem reports were too inconsistent and imprecise to allow for a conclusion that those in whom it had been noted had survived for over an hour. In general, a window for the time of death was adopted, reflecting the limits of the available evidence. Critically, each of those who died was assessed individually. No generic assumptions were made.

### **The importance of the individual**

89. Every public disaster comprises many private tragedies. The inquiries and inquests that follow must balance the need to provide timely answers to questions concerning the fundamental causes of the catastrophe with their role in assessing the circumstances of each individual's death. The task is never straightforward. Where the balance is not found the effect on the credibility and the efficacy of the investigation can be disastrous. The many criticisms of the original inquests into the Hillsborough stem not just from the outcome but from the process that was followed, and in particular from a perceived failure to devote sufficient time and attention to the unique events experienced by each of those who died
90. The recent inquests sought to address this in a number of ways. The inquests opened with "pen portraits" of each of the 96 who died. In most cases these were prepared and read by family members. They contained information about the person's life, their families, their jobs, their interests, and their plans for the future. These memorials were deeply moving and, rightly, placed the victims at the heart of the proceedings. They also served a practical purpose in helping the jury to understand who each person was; at various points throughout the hearings the evidence given about a nickname or particular hobby could be used to help remind the jury of which individual was being discussed. The process also helped to establish a relationship between the inquests and the families. This approach had previously been used in the 7/7 Inquests and has since been adopted by other proceedings. It is important to note that the "pen portraits" were limited to matters of fact about the person who died. Fairness required that they did not contain opinion about the contentious issues that the inquests would address, or evidence about the effect of the loss of the loved one on the family.
91. The inquests were then split into three parts. In the first phase, evidence was called on the generic causes of the disaster. In phase two the individual movements and experiences of each of those who died were explored. In the third phase, the medical and experts

considered the evidence adduced in phase two and gave their opinion on the causes and time of death.

92. A collegiate and innovative approach was taken to phase 2. Counsel to the Inquests prepared “evidence proposals” that set out the witnesses and evidence that they considered to be most relevant to each individual. These were circulated to all interested persons, who were invited to comment and contribute to them. A “further evidence proposal” was then prepared, and circulated in the same way. In a few cases further iterations were also required, until a broad consensus was reached. This approach contained a number of advantages. It helped to present a relatively comprehensible narrative to the jury about what happened to each person, and prevented or minimised the dangers of mistaken identifications. It ensured that the focus of each witness would be on the individual who died; repetitive questions about generic events were discouraged or stopped by judicial intervention. It assisted the experts by presenting them with a collection of evidence that was, for the most part, agreed to be relevant to the individual. Finally, it helped to engage the families – and other interested persons – in the process of the inquests.

93. This approach inevitably required huge amounts of time and resource. The identification of relevant witnesses was a painstaking process that required the officers of Operation Resolve and – crucially – family members to view television footage of the events of the crush and its aftermath in order to identify their loved ones. The footage was then used in interviews of witnesses who saw or treated those who died. Great care had to be taken not to re-traumatise those involved. While many found giving evidence cathartic, the pain involved in watching images of a son, daughter, sibling, spouse or parent in the awful circumstances of the crush at Hillsborough is unimaginable.

## **Conclusions**

94. This paper does not suggest that the more recent investigations into Bloody Sunday or Hillsborough were exemplars, or that the methods set out above are applicable to other inquiries or inquests. Both set records for the amount of time taken and the amount of public money spent. Many of the approaches described above were only possible because this. And of course many still dispute some or all of the findings reached, and criticise the process by which they were obtained.



95. There are, though, a few common themes that may have some general resonance.
96. First, holding a public inquiry or an inquest into a major disaster is an enormous undertaking. The task is a complex, difficult one. It will take time and cost money. All of these points apply with still greater force if the events in question took place many years before, particularly where previous investigations have proved unsatisfactory. Such projects should not be undertaken unless there is a compelling public need for them.
97. Second, independence is the most important characteristic that the tribunal must possess, be it a judge or jury. If that is compromised the whole process will be undermined, prospectively or retrospectively. Any attempt, whether well intentioned or otherwise, to achieve a pre-ordained outcome by loading the dice is potentially disastrous to the credibility and efficacy of the investigation.
98. Third, setting the boundaries of an inquiry or inquest is as important as it is difficult. Too narrow a remit risks leaving relevant areas unexamined, which may in turn distort the historical record and cause lingering resentment. Broad terms of reference carry their own risks. Excessive delay and cost undermines public confidence, the evidence and outcome may lack focus, and the tribunal's authority will diminish the further it strays from its core role of making findings of fact. Wherever the line is drawn there will always be an argument that it should be extended. Inquiries and inquests should contribute to a public debate about the issues on which they touch, but it is unrealistic and counter-productive to strive to be the final word.
99. Fourth, inquiries and inquests must earn the trust and respect of participants and the public alike. They cannot be assumed and should never be taken for granted. Fairness and transparency will assist. Like a student sitting an exam, showing the workings as well as presenting the answer will earn credit.
100. Fifth, and related, a broad approach to disclosure will in most cases assist in building confidence and should improve the quality of the evidence adduced. Where possible, making the disclosure publicly available fulfils an important function in its own right. However, the inevitable quid pro quo is that such a disclosure exercise will make the proceedings longer and more expensive than they would otherwise have been. No modern inquiry will ever produce an interim report within 108 days for this reason alone. Enormous burdens are placed on statutory bodies and other organisations that are already hard-pressed

to perform their public duties. Further, there is a danger that expectations of disclosure may have been raised to unrealistic levels, particularly in respect of access to highly sensitive intelligence materials.

101. Sixth, inquiries and inquests are most effective when they are inquisitorial rather than adversarial. The tribunal and its legal team can do much to engage the families and other participants in the process. However, they cannot achieve this goal on their own. All of those participating in an inquiry or inquest have a role to play, if they chose to do so, in making it a success.

102. Finally, inquiries and inquests are arduous, draining events for all involved in them. Perspective is easily lost. In historic investigations families, victims and survivors may have campaigned for decades to establish the process. They will have extremely detailed knowledge of the events in question, and firm views on them. Huge amounts of hope and expectation may be invested in the outcome. Then, at the very point when they have achieved their goal after years of being ignored or rejected, they have to hand control of the process over to a deliberately dispassionate group of lawyers who seem obsessed with process and procedure. For those lawyers, it is easy to feel battered into a defensive posture. Being fair to all will inevitably mean disappointing some. The responsibility of “getting it right” can seem overwhelming. Frustrations can develop at what feel like unrealistic requests and misplaced criticisms. At darker moments, the sentiment expressed by Charles Babbage can develop:

“Propose to an Englishman any principle, or any instrument, however admirable, and you will observe that the whole effort of the English mind is directed to find a difficulty, a defect, or an impossibility in it. If you speak to him of a machine for peeling a potato, he will pronounce it impossible; if you peel a potato with it before his eyes, he will declare it useless, because it will not slice a pineapple.”

There is no ready solution to this tension, save perhaps for remembering that both sides will almost certainly have a point.

103. These are dangerous times for public inquiries and inquests. They face a paradox: on the one hand, there are ever greater expectations of what they can do; on the other, a growing scepticism of their ability to do it. There are good reasons for both of these pressures. Inquiries and inquests should be transparent, disclosure and engagement are central elements of their work, and it is welcome that they are recognised as important but not sacrosanct processes in our public life. Yet it is very easy to undermine or over-burden

an inquiry, thereby making it harder to construct a robust and enduring outcome. This can be done with good intentions, such as may happen when terms of reference are drawn too widely or too ambitiously. It may be the result of a lazy cynicism that denounces the process as a “stich up” from the start, on the basis of prejudice, politics or ad hominem attacks. And it can happen through carelessness (or worse), where efforts to obtain a preferred result compromise the independence of the body charged with providing it. The study of past endeavours may or may not assist in producing lessons for the present. What it does show, unequivocally, is that where inquiries or inquests fail in their tasks the effect can be devastating both to the individuals involved and the wider public good.

**Matthew Hill**

One Crown Office Row, Temple, London

September 2017

### **About the speaker**

Matthew Hill is a barrister at One Crown Office Row. He specialises in inquiries and inquests, as well as public law, medical law and professional discipline. He has acted as first junior counsel in the Hillsborough Inquests (instructed on behalf of the coroner, Sir John Goldring), and the renewed inquests into the Birmingham Pub Bombings (instructed on behalf of the coroner, Sir Peter Thornton). He is also currently instructed as a lead junior in the Independent Inquiry into Child Sexual Abuse. He has worked on the Detainee Inquiry (instructed by the Tribunal) and the Al-Sweady Public Inquiry. He represents families, institutions and medical professionals at inquests, and he is a member of the Attorney General’s Panel of Counsel.

Before coming to the Bar, Matthew was instructed as the historical research consultant to the Bloody Sunday Inquiry, working first with Counsel to the Inquiry (led by Sir Christopher Clarke), and later with Lord Saville and the Tribunal. He studied and taught modern history at Oxford University, and was a Visiting Fellow at the Australian National University.