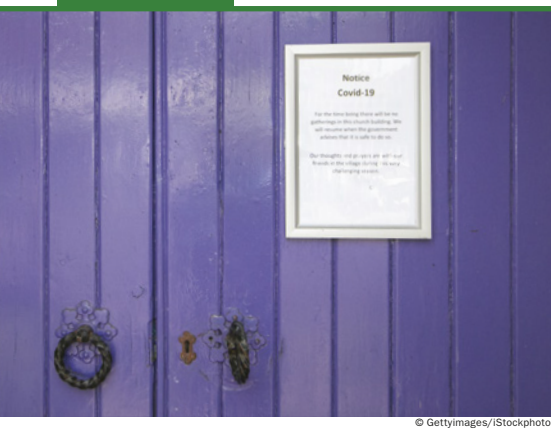
Coroners, coronavirus & controversy

The investigation of many individual COVID-19 deaths is likely to give rise to significant controversy, says David Regan



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With news that civil actions against the Department for Health and Social Care have already been commenced arising from its management of the response to the coronavirus, the investigation of many individual COVID-19 deaths is likely to give rise to significant controversy. A large proportion of the work in England and Wales falls upon the Coroners' Service, which has been ably assisted by clear, well-reasoned and helpful guidance provided by the chief coroner. However, identifying which COVID 19 deaths are unnatural—and thus require coronial investigation and inquest—is not straightforward. It is likely to give rise to a number of challenges.

Deaths caused by exposure in work give rise to the greatest difficulty. Clinicians and care workers have already died of the disease. When deciding whether or not she has a duty to investigate, a coroner must do so if she has reason to suspect that the death was contributed to by some human error. But in many cases this will be difficult to judge at such an early stage—particularly where our knowledge of the virus is still young. Families may seek to circumvent this filtering process by seeking to establish that such a death should be regarded as meriting the inquest conclusion of industrial disease, and as therefore unnatural and requiring investigation irrespective of any fault.

In England and Wales, the role of the coroner is to investigate deaths which are either violent or unnatural, occur in state detention or are of a cause which is unknown (s 1(2) of the Coroners and Justice Act 2009). The vast majority of deaths from COVID-19 are due to the natural progression of a naturally occurring disease. The fact that COVID-19 is a notifiable disease does not render it unnatural (notifiable under the Health Protection (Notification) Regulations (2010 SI 2010/659)). While a death arising from a notifiable disease would normally require a coroner to sit with a jury, this has been expressly removed in the case of COVID-19 (s 30 of the Coronavirus Act 2020), and in any event the mere fact that a jury would be required to be empanelled to hear an inquest, does not itself trigger the requirement for a coronial investigation and inquest.

COVID cases are unusual, in that testing provides knowledge of the actual pathogen, where in the past many causes of death may simply have been given as variants of respiratory disease. As COVID 19 itself is a natural cause of death many COVID deaths are—perfectly properly—not reported to the coroner. This contrasts with the situation in Scotland, which does not have coroners and where investigations into certain categories of deaths are carried out by the procurator fiscal. The lord advocate has directed that all COVID-19 or presumed COVID-19 deaths where the deceased might have contracted the virus in the course of their occupation, or was a resident in a care home where the virus was contracted, are to be reported to the procurator fiscal. The difference in approach may well lead to challenge in England and Wales.

Investigation

What then would amount to an unnatural death, requiring investigation? The guidance issued by the Ministry of Justice in the Notification of Deaths Regulations 2019 (SI 2019/1112) informs doctors that: 'A death is typically considered to be unnatural if it has not resulted entirely from a naturally occurring disease process running its natural course, where nothing else is implicated.' Those last words are crucial. In some cases—most likely workplace exposure—there may be reason to suspect a relevant human failure, such as a failure to provide personal protective equipment at work. If this threshold is met, a coronial referral would be required.

The chief coroner's detailed guidance advises coroners to conduct a filtering process focusing upon whether there is reason to suspect a culpable human failure. The difficulty coroners face in carrying out this task is that there is presently no real benchmark against which to judge the acts or the system operated in any particular workplace. Inevitably given the presently limited knowledge regarding COVID-19, this will come later.

As a result—to circumvent any preliminary determination—it may well be alleged by families that COVID-19 deaths in the workplace properly merit the inquest conclusion of 'industrial disease', are thus unnatural, and require to be subject to inquest regardless of any human failure. 'Industrial disease' is one of the standard short form conclusions specifically available to coroners (and their juries) when conducting an inquest. Such conclusions are there to answer the statutory question of 'how when and where the deceased came by his or her death' (s 5(1) of the Coroners and Justice Act 2009). If a coroner had reason to suspect that the death was due to industrial disease, that fact alone would require an inquest, without any filtering process of investigation regarding potential human failings. This is because the death would be unnatural, even though arising from a natural agent.

As a term of art, 'industrial disease' is rather antiquated. It has no clear definition. But it is established law that the conclusion of industrial disease is not limited to cases of diseases associated with older forms of industry, such as mesothelioma. There is no prescriptive list of the circumstances in which a conclusion of industrial disease is available at inquest. Historically coroners have been guided to the list of industrial diseases triggering the payment of industrial injuries benefits (the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985/967)) informed by previous versions of the coroner's rules (r 43 of the Coroner's Rules 1953). However, the Divisional Court has held that this list is not exhaustive, that 'industrial disease' as a conclusion has no 'particular refined meaning' and that the conclusion is not limited to those circumstances (*R v HM Coroner for South Glamorgan ex p BP Chemicals* (1987) 151 JP 799). Other fields of law have moved on from the use of the term 'industrial' to that of 'employment related', which might otherwise seem to fit better. Certainly, the categories of disease specified in the regulations have evolved to include diseases and occupations which are not strictly 'industrial'. In addition to pathological reactions to chemicals, they also include direct infections from biological agents, such as tuberculosis, hepatitis, and leptospirosis. In the former case, infection in

any workplace is specifically identified.

Clinical, epidemiological, and microbiological knowledge regarding the transmission of COVID-19 is of course presently at a very early stage. However, where hospital and care workers develop infections following contact with COVID-19 positive patients or residents, a coroner may well have reason to suspect that such a death was due to that exposure and arose from the employment. In those circumstances, they were exposed at work to a pathogen which led to their death and coroners—and the higher courts—may well find that 'industrial disease' is an appropriate conclusion. This would for instance place an employee dying of COVID-19 on the same footing as one who died having contracted hepatitis from contact with human blood products at work.

If the requirement to investigate were triggered in this way, every death of an employee from COVID-19 contracted in an employment situation would require coronial investigation and inquest. Without the controlling mechanism of only investigating those cases with reason to suspect a culpable human failure, there is a risk that this could pose a very severe burden on the coronial service. However, this should be capable of control by consideration of any evidence of causation. Those in close proximity with COVID-19 positive patients may well be able to demonstrate it. Those who are simply more exposed to the general population may well not be able to do so. On the balance of probabilities, the care worker feeding a COVID-19 positive patient with no other obvious known exposure might well be able to pass the evidential threshold. In contrast, the shop worker with no direct evidence of a likely source of infection at work might struggle to do so.

Comment

The advantage of treating likely employment related COVID-19 deaths as industrial disease and thus unnatural, would be to avoid the requirement for the coroner to make determinations as to the possible presence of any human failure at an early stage on limited evidence. It would also treat equally all of those care and hospital workers dying following contact with COVID in a clinical setting. As the chief coroner's guidelines ably point out, an inquest is not the right forum for addressing concerns about high level government or public policy.

Following the judgment very recently handed down by the Court of Appeal in *R (Maguire) v HM Senior Coroner for Blackpool and Fylde* [2020] EWCA civ 738 (a non COVID case), it may well be unlikely that any infringement of the state's Article 2 obligations relating to the right to life is engaged within an inquest into a death in a health care setting in this context. Yet, the state's response to COVID will doubtless in time be subject to a thorough national inquiry.

There is much merit in Lord Phillips's dictum that an inquest could for instance properly determine whether a soldier had died because a flak jacket had been pierced by a sniper's bullet, but not whether more effective flak jackets should have been supplied (*Coroner for the Birmingham Inquests (1974) v Julie Hambleton & Ord* [2018] EWCA Civ 2081, [2019] 2 All ER 251). Treating the deaths of care and hospital workers as ones of industrial disease might simplify and accelerate their inquests and allow them to establish the essential facts, so that when in due course the inevitable public inquiry draws conclusions as to the national response to COVID-19, the family of the deceased will be able to place the facts of their particular loved one's death within the matrix of the wider national picture. NLJ

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