The jury questionnaire and other matters

Question concerning the behaviour of the supporters

Introduction

1. I would like, very shortly, to explain, not least to the families, how we have arrived at the present position regarding the topic of the behaviour of the supporters.

The nature of these proceedings

2. These are wholly fresh proceedings. Whatever the history, every aspect of the disaster has had to be considered completely afresh. There has been a wealth of evidence, some never previously considered, placed before the jury. The decisions they have to make must be based solely on that evidence. Any legal decisions I have to take during the case similarly have to be based on that evidence. In arriving at those decisions, the law does not permit me to take into account the views of other courts or tribunals or inquiries, or the background of the proceedings (unless adduced as part of the inquests). The law requires me to act dispassionately and with fairness to all Interested Persons solely on the basis of the evidence heard in these inquests.

What has happened so far

3. Ninety-six people were crushed to death as a direct consequence of an influx of fans caused by the opening of exit Gate C. It was opened to try to relieve a dangerous situation which had arisen outside the turnstiles in Leppings Lane. How that dangerous situation arose; how, as the evidence suggests, the police came to lose control of events outside the turnstiles, is inevitably an important and integral part of any inquiry into how the ninety-six people came to die. Many witnesses have given evidence. Some suggested the behaviour of the crowd played little or no part in the dangerous situation and the loss of control. Some including local residents, club staff, police officers and some (although few) supporters described the behaviour of some supporters in such terms that it could have contributed to the dangerous situation. Some suggested that such behaviour as there was which could have contributed to the dangerous situation should reasonably have been foreseen by the police.

4. It is quite plain I could not prevent interested persons from pursuing with witnesses the topic of the behaviour of the crowd if that is what they chose to do. I could not shut out this evidence. A decision to do so could not have been legally sustained.

5. The evidence having been heard, I had then to decide whether it was sufficient for the jury to consider. It was clear there was no question of the disaster having been caused by hooliganism, as I have repeatedly said to the jury. Neither was there any coherent evidence of a conspiracy to force entry to the ground. However, having carefully and anxiously considered all the evidence, I concluded it was for the jury to decide what part, if any, the behaviour of the supporters contributed to the dangerous situation outside Leppings Lane. It is the jury, not me, which decides the facts. As I put it in my ruling of 2 September 2015 (paragraph 120), "It would be no kindness to the families to prevent the jury dealing with an issue when, as it seems to me, the law plainly requires that they should. Moreover…there is much to be said for the jury finally putting these matters to rest. I have no doubt they can be trusted fairly to do so."

6. I decided that the jury should be asked a question about it and subsequently, decided its form. The families now submit no question should be asked.

The relevant questions

7. Question 3 deals with the "Policing of the Match and the Situation at the Turnstiles." It asks whether there was any error or omission which caused or contributed to the dangerous situation developing at the turnstiles. It states among the "considerations" which the jury "may bear in mind," whether the behaviour of the supporters and their arrival pattern made the task of policing more difficult. There is also a box in which the jury may, if it wishes, give an explanation for its answer to the question.

8. Question 7 asks, "Was there any behaviour on the part of football supporters which caused or contributed to the dangerous situation at the Leppings Lane Turnstiles? Answer 'yes' or 'no.'" It then asks the same question in terms of "may have caused or contributed to the dangerous situation." It finally states, "If your answer to either of the questions above is "yes"" please answer the following question. Was the behaviour on the part of the football supporters unusual or unforeseeable?" It then sets out a list of possible "considerations" for the jury to consider.

The submission of the families

9. The families now submit that question 7 is not necessary because the jury can adequately and properly address the subject of any behaviour of the supporters when answering question 3. They can explain their answer in respect of the dangerous situation at the turnstiles. A separate question places undue emphasis on it. I shall

shortly refer to a number of the points made by Mr Mansfield and Mr Weatherby on behalf of the families.

10. Mr Mansfield accepted that the conduct of the supporters was something which the jury had to consider. Nevertheless he submitted a question should not be asked about it. It is a topic which is over-emphasised in the present draft of the questionnaire. He referred to what he described as the false police narrative regarding the topic. He submitted the issue only related to a minority of the fans. He was critical of the way their case was put (to be precise, was not put) by those representing the match commanders. He was critical of the wording of question 7. He had too some criticisms of the drafting of the considerations suggested to the jury when reaching their decision on question 7.

11. Mr Weatherby, while respecting my ruling on sufficiency of evidence, submitted it did not inevitably lead to a freestanding question. It should instead have led to a focus on the effect of supporter behaviour on the police management of the turnstile area. Given there was no evidence of a concerted plan and that football hooliganism played no part in the disaster, the only relevance of supporter behaviour was in respect of the police management of the turnstiles. That did not justify having a freestanding question. He emphasised that the fans were not an homogenous group, unlike some of the Interested Persons. They were not represented. The question moreover imports responsibility on at least some of those who died, a substantial proportion of whom came in through Gate C.

My view

12. There is no dispute but that I should sum up the evidence relating to the behaviour of the supporters outside the turnstiles. The only issue is whether there should be a specific question about it. It seems to me there are a number of problems with the submission that question 3 adequately deals with the topic.

13. Question 3 does not require the jury to give any reasons for its decision. It may say nothing at all about its view as to any possible part the supporters played in the loss of control by the police. There would then be nothing (whether positive or negative) in its narrative of what happened about this important issue. That would not reflect what I have previously said or the view I still hold. There would then be no public resolution of the issue as I said there should be. It is also noteworthy that the families accept the jury should be able to express critical comments about the behaviour of

supporters when explaining their answers to question 3, and indeed, should be invited to do so at that point. If that is right, it is difficult to see a strong objection in principle to their being asked a specific question on the subject.

14. I shall not go through the detail of Mr Mansfield's criticisms of the wording of the considerations under question 7. I remind myself that these questions are not pleadings. They do not form part of an indictment. They are, as Mr Weatherby observed, the practical means of eliciting the jury's conclusions on particular topics. They are the product to a great extent of an iterative process involving the Interested Persons. I agree with Mr Hough: the considerations under question 7, while no doubt not perfect, are not inappropriate or unfair and are suitable for their purpose.

15. I cannot in short accept the submissions made. I shall however mention some of the points which were raised.

16. As to the suggested false narrative, the jury have heard evidence about it. It will form part of their consideration of the case.

17. There are currently six questions about the behaviour of the police. There is one about the behaviour of the supporters. That does not amount to the topic being "centre stage" as it was suggested.

18. In opening this case I posed as a possible topic which the jury might have to consider, "What was the conduct of the fans or some of them, excluding those who died? Did that play any part in the disaster? I phrase it in that way because I do not believe that anyone will suggest that the conduct of those who died in any way contributed to their deaths." It has thus been clear from the start of the inquests that this may be a topic for the jury to address.

19. During the inquests we have examined the movements of each of those who died with great care. There has been no evidence at all to call into question the behaviour of any of them. There is considerable positive evidence to the contrary. I do not agree that the question as posed imports responsibility on any of those who died.

Some changes which can be made

20. All that having been said, it does seem to me some changes may usefully be made. I agree with Mr Hough that it is not necessary to have any mention of the behaviour of the supporters in the possible considerations under question 3.

21. Question 7 suggests as a consideration whether the behaviour "had any effect on the dangerous situation…" Plainly, it is only if the effect was significant that it is of any relevance. In essence, this goes to the meaning of words "may have…contributed" which appear in many questions. In my view there should be added to the notes for the jury a direction to the effect that any contribution must be significant.

22. Finally, it seems to me that the final part of question 7 should read, "If your answer to either of the questions above is "yes," please answer the following question. Was that behaviour unusual or unforeseeable?"

Other topics

23. I turn now to other topics. Given the time pressure, I shall take each relatively briefly.

The question concerning defects in the stadium

24. Question 8 is directed at the Club. In summary, as set out in the first part of the question, it asks whether there were any features of the design, construction and layout of the stadium which the jury consider dangerous or defective and at least contributed to the disaster. It is said the jury could consider whether "the presence of pitch perimeter fencing and radial fencing which created the pens on the west terrace" contributed to the disaster. The Club submit that pitch perimeter fencing was commonplace in the 1980s and not regarded as dangerous; that Mr Cutlack, the expert witness, did not suggest that radial fencing was dangerous or defective.

My view

25. Pitch perimeter fencing was commonplace. No blame could attach to the Club for having it. Radial fencing was less common. The jury could conclude the problem at Hillsborough, was the combination of pitch perimeter fencing, radial fencing, gates in the radial fencing which were not indicated and could not be seen once the pens filled, and no warning to those entering the tunnel that there was no practical means of escaping the pens once committed to entering them. Many witnesses spoke of not realising what the situation was when they went into the central pens. I agree therefore with Mr Hough that the jury could conclude that in the circumstances of

Hillsborough the combination of the pitch perimeter and radial fencing was dangerous. They could also conclude that those dangers required addressing. I suggest the following change. The consideration should read, "The presence in the particular circumstances of Hillsborough of pitch perimeter and radial fencing creating the pens on the west terrace and any contribution it made to the disaster."

26. If, as Mr Beer submits, such a suggested consideration adds nothing (which I do not accept), his clients would not be prejudiced.

Conduct of the Club before the day of the match

27. It does not seem to me, as is suggested by the 77 families, that there should be added to question 10 for the jury's consideration whether the Club fulfilled its duties as a holder of Safety Certificate. The considerations under question 8 adequately deal with the issue. They refer to capacity figures for the pens, whether there should have been dedicated entrances and the issue of monitoring. A generalised question relating to duties would not seem to me to help.

The directions on manslaughter

28. Following different submissions, Mr Hough amended the original of the draft route to verdict. A few issues remain.

29. As far as the families are concerned, the most important suggested change relates to paragraph 4 of the legal directions. It presently reads,

> **"Fourth, you must be sure that the breach of Mr Duckenfield's duty of care which caused the deaths amounted to "gross negligence."**
> Under this head you have to consider whether you are sure Mr Duckenfield's breach of his duty of care to the supporters was so bad, having regard to the risk of death, as in your view to amount to a criminal act or omission.
>
> In other words, for gross negligence to be proved, you have to be sure, first, that Mr Duckenfield's breach of his duty of care was so bad as to amount to a criminal act or omission and, second, that a reasonably competent and careful match commander in Mr Duckenfield's position would have foreseen a serious and obvious risk of death to the supporters in the central pens of the west terrace."

30. Mr Wilcock on behalf of the 77 families submits that the second paragraph beginning, "In other words…" should be deleted. So too does Miss Williams on behalf of Mrs McBrien. On the other hand, Mr Weatherby, on behalf of 22 families submits that the first paragraph should be deleted and the second in consequence begin, "For gross negligence to be proved…"

31. Mr Wilcock and Miss Williams submit that the jury is not required to be sure of an objective risk of death to return a decision of unlawful killing. The submission relies on the speech of Lord Mackay of Clashfern in *Adomako* [1995] 1 AC 171 at page 187C, where he stated,

> "*The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it could be judged criminal….*
> *The essence of the matter, which is supremely a jury question, is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission*."

32. They submit that (as the headnote suggests) the risk of death is identified as a factor to consider in the evaluation of whether the conduct was so bad as to amount to a criminal act or omission. The foreseeable risk of death is not a prerequisite. Insofar as there is any difference between the Court of Appeal cases of *Gurpal Singh* Case No: 98/3983/Z4 and *Misra* [2004] EWCA Crim 2375 and *Adomako*, the House of Lords decision should take precedence.

33. Mr Rathmell on behalf of the match commanders submits some different changes should be made. As to foresight of the risk of death, he agrees it should be within the directions, but as a separate topic and earlier on. He submits that the Chief Coroner has provided guidance in paragraph 12 of his first Law Sheet, where, as the third element of manslaughter there is set out separately the need to be sure of the risk of death. He submits moreover that the direction should be modelled in its entirety on paragraph 12.

My view

34. In my view the law on gross negligence manslaughter is now settled. It was clearly set out by Lord Justice Judge in *Misra*. Having considered in paragraphs 48 to 51 the

authorities, the approach of the Director of Public Prosecutions and academic disagreement between the editors of Blackstone and Professor Smith, Lord Justice Judge (as he then was) said (in paragraph 52),

> "*In our judgment, where the issue of risk is engaged, Adomako demonstrates, and it is now clearly established, that it relates to the risk of death…In short, the offence requires gross negligence in circumstances where what is at risk is the life of an individual to whom the defendant owes a duty of care. As such, it serves to protect his or her right to life.*"

35. It is unnecessary to refer in any detail to other authorities. Suffice to say that the Court of Appeal was equally clear in *Gurpal Singh*, as was Lord Justice Kennedy in *Lewin* [2002] EWHC 1049 (Admin). In my judgement these authorities are not inconsistent with *Adomako*.

36. In my view therefore the present direction correctly incorporates and sets out the legal position. Although I shall shortly indicate some minor drafting changes which should or may be made, I see no reason to change it. It is clear and correct. It is not necessary to follow the order set out in the Chief Coroner's guidance (which in any event is not intended to be a draft direction).

37. As to minor changes, I agree one of Mr Wilcock's suggestions should be followed. In paragraph 3, 'death' should be changed to 'deaths' and the rest of the sentence deleted.

38. I do think too that these directions should be part of and at the end of the questionnaire, as Mr Weatherby suggests. I do not agree that the bullet points of relevant factors, which in an earlier iteration were part of the direction, should be re-instated. They are matters which may feature as part of the summing-up, but are not appropriate in a written legal direction, as the Chief Constable and the match commanders had submitted.

39. I see no problem, contrary to the submissions of Miss Barton on behalf of the Chief Constable and Mr Rathmell, with paragraph 2 of the draft directions (dealing with Mr Duckenfield's duty of care), referring to a *careful* (my emphasis) and competent match commander. Mr Rathmell thought due care would be unobjectionable. It seems to me, as Mr Hough submitted, careful merely reflects that a duty of care requires the

exercise of reasonable skill and care. Moreover, a competent match commander is a careful one.

40. Mr Rathmell was concerned that there is not enough in paragraph 2 of the present draft to reflect that Mr Duckenfield must not be blamed for the conduct of others as I set out in my ruling on manslaughter. That is something I will deal with clearly in my summing up. The legal direction as presently drafted is sufficient.

41. Mr Rathmell submits, in respect of the concept of gross negligence, that there should be added the phrase, "*in all the circumstances*" as set out in by Lord Mackay in *Adamoko*. Mr Hough was content to include them. So am I.

42. Finally, Mr Rathmell submits that the reference in paragraph 4 to a criminal act or omission should be strengthened. In the 1925 case of *Bateman* there was reference to showing "*such disregard for the life and safety of others as to amount to a crime against the state*." In *West Yorkshire v Secretary of State for Justice* [2012] EWHC 1634 Hadden-Cave J referred to showing "*such disregard for the life and safety of others as to amount to a crime against the state."*

43. In my view there can be no objection in what is intended to be a clear and succinct legal summary setting out the test as adumbrated by Lord Mackay in *Adomako*. I do not think a change is required in this respect.

Calling additional witnesses and associated matters

44. Mr Weatherby (with whom Mr Roche on behalf of the 77 families agrees) submits I should call further evidence.

Mr Thorne

45. I agree that Mr Thorne's formal evidence dealing his calculations of timing should be read. That can be done very shortly.

Ms Nicol (formerly PC Richardson)

46. Ms Nicol has made a fresh statement. I shall summarise it very shortly indeed. She says she believes she saw Chief Superintendent Wain when she was put under pressure when giving her first account. She says too that before she gave evidence to the Taylor Inquiry, Mr Metcalf and senior officers repeatedly asked questions about

the behaviour of supporters and urged officers to stick to the factual evidence. It is submitted I should call her to give this evidence.

47. I agree with Mr Hough that calling her would not be justified. Her evidence relates to evidence gathering, not of central significance in the case. She is not certain of her identification. She did not know Mr Wain at the time. She identified him as a result of seeing a photograph of him at a time when he gave evidence to the inquests in the evidence gathering phase. There is detailed documentary evidence that Mr Wain was not engaged in gathering statements on 17 April 1989, when Ms Nicol says she saw him. If Ms Nicol were re-called, so too would Mr Wain and Mr Metcalf. That would lead to opening up a series of collateral issues. It would in my view be wholly disproportionate now to do so.

Cherry Daniels

48. Ms Daniels told West Midlands Police, in the aftermath of the disaster, that Liverpool fans told her of an incident in which other fans shouted obscene remarks at those treating a casualty whose clothes had come off. Ms Daniels is thought to be the daughter of an SYP officer called Inspector Sumner. The suggestion is that she invented this evidence to support Inspector Sykes who spoke of such an incident and could well have known Mr Sumner. There is too a suggestion she falsely reported on actions of Liverpool supporters.

49. It is my clear view Ms Daniels should not be called. Again, there is a danger of opening up a collateral issue of very limited relevance to the inquests. The IPCC, in a helpful note has indicated, first that other witnesses with no connection to Mr Sykes agree with him and, second, the fact that Ms Daniels may have been Mr Sumner's daughter does not mean she lied to support Mr Sykes.

AV compilation

50. I shall not deal with the question of a compilation of AV footage. Once we have a compilation I will decide when it should be played. Neither shall I say anything at the moment about giving the jury individual compilations in respect of each of those who died.

Suggested site visit

51. I am not at present persuaded that a further site visit should take place or that the jury should be asked it they want one. I have no doubt that if they do, they will ask. They have not been slow to raise points.

Conclusion

52. As I said at the hearing, it seems to me presently unnecessary to deal with the other issues which remain. Most should be capable of being dealt with by agreement.

John Goldring
17 December 2015