Thirlwall Inquiry

RULING ON LIVESTREAMING/LIVE-LINKS

1. A summary of the effect of this ruling is available on the Inquiry website.

2. Public hearings are scheduled to begin at Liverpool Town Hall in September of this year. On 30 April, I wrote to the Core Participants and Media inviting written submissions on the issue of whether or not, in addition to conducting the hearings in public, the inquiry should transmit proceedings to Core Participants and the Media via live links to locations remote from the hearing room and/or broadcast proceedings via livestream to the world at large. The note is at appendix 1 to this ruling.

3. Consideration of the issue takes place in the context of court orders made in R v Letby. There are three orders made in the Crown Court pursuant to sections 45 and 46 of the Youth Justice and Criminal Evidence Act 1999 ('YJCEA'), and an order of the Court of Appeal made pursuant to section 4(2) of the Contempt of Court Act 1981 at the hearing of an application for leave to appeal in April of this year. It may be that by the time of the substantive hearings in this inquiry the order of the Court of Appeal will have fallen away. The orders of the Crown Court remain in force and may only be revoked by the court that made the orders or an appellate court.

4. In short, the order of Steyn J made on 15 January 2021 under ss.45 and 46 YJCEA, deals with the identification of babies as being concerned in proceedings, and the identification of parents as being witnesses in those proceedings. The order of Goss J made on 7 October 2022 under s.46 YJCEA, concerns the identification of several clinical NHS employees (nurses and doctors) as being witnesses in those proceedings and the order of Goss J made on 2 March 2023 under s.46 YJCEA, concerns the identification of a further NHS doctor as being a witness in those proceedings. The orders bind the inquiry as well as the media and the public.

5. I directed that submissions should deal with the following factors:

   a) The importance of the open justice principle in the particular context of s18 of the Inquiries Act 2005;

   b) The need to avoid any risk of breaching orders of the Crown Court;

   c) The need for all witnesses to give their best evidence to the Inquiry;

   d) The need to avoid impeding the ongoing clinical responsibilities of any witnesses who still work in frontline NHS services;

   e) The need to avoid prejudicing criminal investigations or proceedings; and

   f) The practical effect of any suggestions made.

6. I heard submissions from Mr Peter Skelton, KC, on behalf of the parents of babies A, B, I, L, M, N and Q; from Mr Louis Browne, KC on behalf of the parents of babies D, J and K, from Mr Richard Baker, KC on behalf of the parents of babies C, E, F, G, H, O and P, from Mr Andrew Kennedy KC on behalf of the Countess of Chester Hospital NHS Foundation Trust and Mr Jude Bunting KC on behalf of nine media groups (1) Guardian News & Media (who publish The Guardian and The Observer); (2) BBC; (3) ITN; (4) Telegraph Media Group (who publish The Daily Telegraph); (5) Associated Newspapers (who publish the Daily Mail and Metro); (6) News Corp UK & Ireland (publishers of The Sun and The Times; (7) Reach plc (who publish The Daily Mirror and many local newspapers); (8) Sky News and (9) Pressdram who publish Private Eye. All had provided written submissions in advance.

7. NHS England ('NHSE') provided written submissions. They saw no difficulty with livestreaming or live links subject to the need for witness-specific special measures, any other restrictions considered necessary by the Inquiry "including specifically to take account of the need to avoid any risk of breaching orders of the Crown Court and/or the need to avoid prejudicing criminal investigations or proceedings" (paragraphs 6(b) and 6(e)) respectively of the Inquiry's Note re Preliminary Hearing).

8. Ms Kate Blackwell KC, for the senior manager Core Participants, wrote to the inquiry to indicate that the senior managers were neutral on the issue of live linking/live streaming.

9. My note was sent for information to Cheshire Police and the Crown Prosecution Service who acknowledged it, indicated their support for the inquiry, reminded me of the existence of the court orders and of the ongoing police investigations (although with an erroneous understanding that the Crown Court orders would fall away after the retrial. They will not).

10. In response to the written submissions, Counsel to the Inquiry, Ms Rachel Langdale KC, provided written submissions and made brief oral submissions after the advocates for the parents and the media to which I shall refer later in this ruling.

Definition of Terms

11. For the purposes of this ruling livestreaming means the live transmission of the proceedings of the inquiry from the hearing room to the world at large. Using live links/live-linking means the live transmission of the proceedings of the inquiry to individuals who have been given a non-transferrable link to observe the inquiry at a venue remote from the hearing room, within the hearing venue or elsewhere (e.g. at home, at the offices of a solicitor, the offices of a media organisation).

12. I shall deal in order with the factors set out in my note.

Open Justice and Section 18 of the Inquiries Act 2005 (the Act)

13. This inquiry is of profound importance. The Terms of Reference require an examination of matters of deep public concern. This will include close scrutiny of many events, the conduct of people involved and the decisions they made – as well as consideration of broader issues affecting the NHS. The principle of open justice applies not only to the hearings but also to the inquiry's processes.

14. The reasons for the development of the principles of open justice (both at common law and in statute) are well known. It is not necessary for me to rehearse the development of those principles, save to note that between the Clothier Inquiry in

1993 into events at Grantham hospital where Beverly Allitt, a nurse, murdered babies and now, there has been a shift away from private to public inquiries in cases of huge public concern**.**

15. **In R (Wagstaff) v Secretary of State for Health [2001] 1** WLR 292, the Divisional Court (Kennedy LJ and Jackson J) heard a challenge by families of the victims of Harold Shipman on the legality of a decision of the Secretary of State for Health to set up an inquiry using a general power to provide NHS services under Section 2 of the National Health Service Act 1977, rather than a specific power to establish a statutory Public Inquiry. The Health Secretary's decision was quashed for a number of reasons and he was directed to reconsider. In due course a statutory Public Inquiry took place. The court in Wagstaff relied on the observations of Clarke LJ in **The Thames Safety Inquiry** (into the sinking of the Marchioness) endorsing the observations of Sheen J in the inquiry into the sinking of the Herald Of Free Enterprise "it is of great importance that members of the public should feel confident that a searching investigation has been held, that nothing has been swept under the carpet and that no punches have been pulled."

16. The following additional uncontroversial propositions may be derived from the authorities:

    a. Holding hearings in public engenders public confidence because it allows scrutiny both of the process, including the conduct of the tribunal, and of the evidence;
    b. Evidence may come to light as a result of open hearings
    c. Hearing evidence in public makes uninformed and inaccurate comment about the proceedings less likely (see Lord Woolf in **R v Legal Aid Board ex parte Todner [1999] QB 966**).
    d. When a witness gives evidence in public (whether in a court or some other quasi-judicial process, including an inquiry) the evidence is more likely to be candid than if given in private.
    e. The media are the eyes and ears of the public. Through careful observation and fair and accurate reporting those who are unable to attend hearings are

informed as to the process, the submissions and the evidence, leading to greater public understanding.

17. As was said by Ms Langdale KC in her account of the work of the inquiry at the Preliminary Hearing, there has been some fine journalism covering the criminal trial. Documentaries and podcasts as well as detailed fair and accurate court reporting have informed the very large number of people who were intensely interested in the criminal proceedings.

18. Section 18(1)(a) of the Act provides that, subject to any restriction under s.19, "[the Chair] must take such steps as she considers reasonable to ensure that members of the public [including reporters] are able – (a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry". As Counsel to the Inquiry points out, the duty is satisfied if either there is attendance in the Hearing Room or there is 'simultaneous' transmission. All Core Participants who dealt with this issue were in favour of the public and media attending the hearing by being present in the hearing room. Counsel to the Inquiry make the same submission.

19. As I indicated during the oral submissions that is my intention and the hearing venue has been chosen with that in mind. There will be seats in the hearing room for members of the public and for the media. Partitioning will be provided for families who wish to be present in the hearing room, but away from the public gaze. Rightly, no one argued that such an approach would not satisfy my duty under s(18)(1)(a). It more than satisfies that duty and, it follows, the requirements of open justice. Subject to any applications for special measures, witness evidence will be given in the hearing room, in public.

20. Section 18(2) of the 2005 Act makes clear that no recording or broadcast of the hearings is allowed, save as requested by or with the permission of the Chair (and subject to any conditions the Chair may set). My discretion is to be exercised in the context of the Crown Court orders.

The need to avoid breaches of the orders

21. Publication which would breach Section 45/46 YJCEA order is defined in s.63 YJCEA:
"**publication**" includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose any relevant programme shall be taken to be so addressed), but it does not include an indictment or other document prepared for use in legal proceedings
"**relevant programme**" means a programme included in a programme service, within the meaning of the Broadcasting Act 1990.

22. I accept the submissions of Counsel to the Inquiry, with which no one disagreed, that, whether by publishing to the public at large a live-stream, or a live-link, or a live-note (simultaneous transcript), the inquiry would be a 'publisher' of that transmission at common law (meaning *"any person who publishes"*: see the discussion of Warby J in *Aitken v Director of Public Prosecutions* [2015] EWHC 1079 (Admin) at [38]-[73]). The inquiry is legally liable for its publications but has a broad statutory immunity against civil actions pursuant to s.37(1) of the Act. However, as counsel pointed out, such immunity does not extend to immunity from criminal prosecution (e.g. under s.49 YJCEA for breaches of ss.45/46 Orders) or contempt of court, and the inquiry must not breach the ss.45 and 46 YJCEA Orders by including any matter which could identify (as witnesses or otherwise concerned on criminal proceedings) the subjects of those Crown Court orders in any 'publication' as defined by s.63 YJCEA.

Submissions on behalf of the parents

23. All three leading counsel for the families submitted that in addition to the proceedings being heard in public, the hearings should be live streamed, that is broadcast to the world at large. Live links to invited participants would not suffice. They submitted that the public has come to expect livestreaming because that has occurred in a

number of recent and current high-profile inquiries. They described it as "the modern approach" and "the new norm". Counsel went so far as to say that a decision not to livestream would be a "derogation from that norm." I do not accept that. Each inquiry is different. It is for the Chair to determine how to exercise his or her discretion, taking account of all the factors in play. The norm, or more accurately, the fundamental principle, is open justice.

24. I entirely understand, as counsel for the parents submitted, that the parents want people (as well as Letby) to be held publicly accountable for what happened to their children. The Terms of Reference at Part B direct me to make detailed findings about what happened and whether the people involved should have acted differently and whether that would and should have prevented deaths and injury. Those involved have received very searching requests for statements with which they must comply. They will be subject to detailed scrutiny, giving evidence, in public. Where they are accountable I will hold them accountable, publicly. Whether I direct livestreaming worldwide or live links or neither will have no effect on the rigour of my approach, nor on the approach of all who have responsibility for helping me to get to the truth.

25. Counsel for the parents accept that livestreaming to the world at large would involve publication, as defined in the Act. They submitted that the risk of breach of the Crown Court orders could be managed by having a delay on the livestream of (variously) between 15 minutes and one hour. A breach can occur when a witness refers to a person by their name, often through inadvertence. It can also occur where pieces of information which, individually, appear irrelevant to a named person, but when taken collectively identify a person. This is known as jigsaw identification.

26. I accept that a delay in broadcasting, of up to 15 minutes would allow the inquiry to remove a name, inadvertently mentioned, but a delay even of that length affects the ability of the press to report simultaneously and can disrupt the hearing by diverting attention from the evidence.

27. As well as suggesting that on occasion a delay on broadcasting of up to an hour may be appropriate, I was referred by Counsel for the parents to the approach taken in the Undercover Police Inquiry, a huge, long running inquiry. There, a separate legal team scrutinises the live evidence in order to ensure that orders made by the Inquiry Chair are not breached on publication. There, what is at stake (I understand) is the safety and privacy of people involved in the inquiry. The suggestion was that I should direct that the same or a similar approach be taken by this inquiry. I cannot accept that. It is not reasonable to look to the public purse to fund another team of lawyers to carry out a specialist exercise in order to facilitate livestreaming to the world when open justice is already secured in the arrangements for a public hearing. The fact that this was suggested indicates that the advocates recognise that the risk of breaches is real. I do not accept that this is a risk the inquiry should take. Not only is there a significant risk to the inquiry itself, I take account of the human cost of a breach. For a parent, who has already suffered so much, to be identified online, is unthinkable. I do not need to spell out the consequences for people who have made it clear from the outset that their privacy must be respected and protected. The proposed applications for special measures on behalf of the parents who may give evidence reinforce my view.

28. The final submission from all three counsel for the parents was the most eye catching. It was to the effect that livestream broadcasting would reduce or dispel toxic and offensive conspiracy theories. This submission was unsupported by evidence and I reject it. Searching for truth is not a characteristic of conspiracy theorists. Like those who promulgate fake news they search for information which supports their world view. When they find none, they manufacture it, often using and distorting video footage to be found on the internet. I say no more about their activities.

Submissions from Counsel to the Inquiry

29. Counsel to the Inquiry submitted that I should exercise my discretion and allow simultaneous transmission of the proceedings to all Core Participants, their lawyers and the media (on application and with appropriate undertakings) via live links to other rooms in the same building as the hearing room and to locations remote from the hearing

venue – e.g. solicitors' offices, media offices, homes. This would not involve publication within the meaning of the Act (because it is not to the public at large or to a section of the public). It would allow Core Participants to participate in the way they chose. It would be open to the media to report proceedings as they occur and to make application to broadcast excerpts. It would be open to witnesses to make applications for special measures, as appropriate.

30. Mr Bunting KC firmly supported the suggestion that live links should be provided, with no delay, to Core Participants and the media. He did not suggest that this was in any way a derogation from open justice. His submissions were to the contrary effect. He reminded me that the media know the identities of all the people who are the subject of the orders, as their representatives were there when the orders were made.

31. Most parents had indicated, through counsel, that they would choose to participate from a location away from the hearing venue. Others wanted to be in the Hearing Room. Of critical importance was that wherever they were, they should have instant access to proceedings so that they could instruct their lawyers whenever necessary. The arrangements suggested by Counsel to the Inquiry would permit that.

The need for all witnesses to give their best evidence to the Inquiry

32. As I said earlier, it is generally accepted that a person giving evidence in public is more likely to be candid than someone who is giving evidence privately. There is little information about whether there is a difference in the quality of evidence when the witness knows it is being broadcast live across the world or, perhaps worse, to family, neighbours, work colleagues, and so on.

33. I accept Mr Skelton KC's submission that the hardest part of giving evidence, particularly for those who have not previously done so, is being required to speak publicly in an unfamiliar room full of unfamiliar people with everyone looking at you. He recognised that the overlay of knowledge that the evidence is being broadcast to the whole world would bring an additional layer of stress. However, he did not think that this knowledge would "tip the balance" by which was meant, I infer, that it would

tip a witness over the edge into being unable to give their best evidence. In my view the extent to which broadcasting of all the inquiry hearing to the world affects a witness probably depends on a number of factors, including the personality of the witness, what they are going to say and how they think people hearing it will respond. I would accept that the thought of being observed by family, neighbours, work colleagues or others is unlikely to settle nerves.

34. It is unsurprising that many of the staff at the hospital, when informally asked about giving oral evidence responded with anxiety and concern. Some of them gave evidence at the criminal trial so their experience has been of a very adversarial process. In their written submission the legal team for the Hospital observed that there was a "*real risk that witnesses feel inhibited by the knowledge that their evidence is being livestreamed or broadcast".* That is a reasonable observation. The submission continued, *"that they may be less inclined to speak frankly and with candour; and may be more defensive than they otherwise would. This could have a detrimental impact on the Inquiry's ability to fulfil its terms of reference*". This passage unsurprisingly attracted considerable adverse comment, as was inevitable. Mr Kennedy readily acknowledged it was badly written. I make it plain that, notwithstanding their nerves, I expect all witnesses, doctors and nurses included, to tell the truth, to make every effort to assist the inquiry when giving evidence and to reflect thoughtfully on what happened. Candour and frankness should be a given. This extends to the witnesses for the corporate bodies, including the DHSC and NHSE.

35. Whilst I accept that knowing evidence is being broadcast live to the world may increase nervousness, I do not have a sufficient evidence base upon which I can rely to determine whether or not it would detrimentally affect the quality of the evidence given. Nor do I know whether a witness would be affected in the same way or differently knowing evidence is being transmitted live to certain individuals and may be broadcast at some stage. For those reasons, I leave that issue out of account in coming to my decision.

The need to avoid impeding the ongoing clinical responsibilities of any witnesses who still work in frontline NHS services

36. I would expect the inquiry team to give advance warning of hearing dates so that witnesses with clinical responsibilities can attend to give their evidence whilst keeping disruption to a minimum. I have already dealt with the need to achieve best evidence. There is nothing to add under this heading. Applications for special measures may be made and I will consider them in due course.

The need to avoid prejudicing criminal investigations or proceedings

37. All parties are aware of ongoing investigations and proceedings. The inquiry maintains a close liaison with Cheshire Police. There is no reason to think that this factor adds anything to the points made earlier under headings a-c.

CONCLUSION

38. I accept the submissions of Counsel to the Inquiry. As well as avoiding the problems arising from the live broadcast of evidence that I have described, the transmission of proceedings via live links reduces the risk of breaches of the Crown Court orders to the same level as hearing the proceedings in public. The links will be granted on application and on undertakings to all Core Participants and the media. The links would be permitted to rooms in the same building as the hearing room or to locations remote from the hearing venue.

39. Using links allows the transmission of proceedings to continue without delay, so that simultaneous reporting may take place. Control of the footage would remain with the inquiry (unlike worldwide streaming over which I would have no control).

40. I accept that, although not necessary to achieve open justice, this process would add to the quality of the participation by Core Participants. They can watch proceedings without being in the room. The proceedings can be recorded so they can watch at a time convenient to them. This is of particular importance to parents who are working or have caring responsibilities. It also makes it easier for the media to report fairly, accurately and in a timely fashion. In addition, there will be a live transcript in the hearing room.

The transcript (redacted where necessary) will be uploaded to the inquiry website at the end of the day, or as soon as possible after that.

41. Mr Bunting KC made it plain on behalf of the media that he agreed with the suggestions made by Counsel to the Inquiry. It formed no part of the oral submissions of the media that there should be worldwide live streaming, nor was it suggested that a failure to order this was in some way a derogation from open justice.

42. Mr Bunting KC asked that there should be a process developed so that decisions could be made about the broadcasting of clips from the hearings without interrupting the flow of the inquiry. I am content that such a process be developed. It should be designed to achieve swift decisions at minimal additional cost.

43. Counsel to the Inquiry also submitted that the use of mobile phones in the Hearing Room should not be permitted – so that they would not be used to take photographs or to record (via audio or video or both) any part of the hearing. They submitted that the media should be permitted to use laptops. I have reflected on that submission and taken account of the submissions about it from the parents and of the media.

44. I agree that those two groups may use mobile phones in the Hearing Room, as well as the lawyers for the Core Participants. Obviously, phone calls may not be made during hearings but I accept that the parents, who will not be sitting next to their lawyers, may need to message them and vice versa. I also accept that they will not seek to record proceedings or take photographs. As to the media, I accept that mobile phones are essential tools for reporters. I was assured that they would not seek to record proceedings or to take photographs and I shall make directions to that effect in respect of all attendees. I accept the submission that the public should not be permitted to use their mobile phones in the hearing room and I shall make a direction to that effect. I do that to protect the integrity of the hearings, and because it will be impossible to police the difference between harmless messaging and messaging that risks undermining any of the court orders.

45. I am satisfied that these arrangements will allow effective participation in and public scrutiny of these proceedings.

Thirlwall LJ
Chair
24 May 2024

Appendix 1

THIRLWALL INQUIRY PRELIMINARY HEARING - 16 MAY 2024

1. For the substantive hearings there will be a hearing room to which the public will have access (either in the room or via live link to another room in the same building).
2. The technology is available to allow:
   (a) live links to venues controlled by the Inquiry which are remote from the hearing room (within the same building or elsewhere) to allow the public and press to attend the Inquiry without being in the hearing room.
   (b) live links issued for remote viewing (e.g. from the offices of NHS and media organisations) in accordance with a simple application process, including undertakings. No recording or copying or onward transmission of a live link will be permitted without the express authorisation of the Inquiry.
   (c) livestreaming online, worldwide.
3. No decisions have yet been taken as to whether some, or all, of the evidence should be transmitted by live link or broadcast via livestream. Any parents of the babies named on the indictment who give evidence are likely to be permitted to do so subject to special measures.
4. All hearings will be transcribed. Transcripts will be made available online, and will be uploaded as soon as possible after the close of proceedings on any given day.

   Submissions
5. Written submissions are invited from CPs and media organisations in respect of the nature and scope of any transmission or broadcast of the substantive hearings.
6. It is **directed:-**
   i) that any such submissions be sent by email to the Solicitor to the Inquiry by no later than **4pm on 9 May 2024**. Written submissions are not required but oral submissions at the Preliminary Hearing will not be permitted unless written submissions are received in accordance with this direction.
   ii) that whilst the overall content of the submissions is a matter for counsel, the submissions must deal with the following factors:
   a) The importance of the Open Justice principle in the particular context of s18 of the Inquiries Act 2005;
   b) The need to avoid any risk of breaching orders of the Crown Court;
   c) The need for all witnesses to give their best evidence to the Inquiry;
   d) The need to avoid impeding the ongoing clinical responsibilities of any witnesses who still work in frontline NHS services; and
   e) The need to avoid prejudicing criminal investigations or proceedings.
   f) The practical effect of any suggestions made.
7. Special measures for those who require them will be available as described in the vulnerable witness protocol. There may be other circumstances in which particular measures need to be taken to achieve best evidence. This will be considered on a case-by-case basis nearer to the substantive hearings.

Thirlwall LJ, Chair
30 April 2024