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IN THE CORONER'S COURT IN NORTHERN IRELAND

IN THE MATTER OF AN INQUEST TOUCHING UPON THE DEATH OF NOAH DONOHOE

RULING ON QUESTION 9 OF THE QUESTIONNAIRE

ROONEY J (*Sitting as Presiding Coroner*)

The test for causation of death

[1] The test for causation of death is set out in *R (Tainton) v HM Senior Coroner for Preston and West Lancashire* [2016] EWHC 1396 (Admin) (my emphasis):

> "It is common ground that the threshold for causation of death is not the same thing as the standard of proof required to prove causation of death. In cases such as this, the latter is proof on the balance of probabilities. It is agreed that the threshold that must be reached for causation of death to be established, is that the event or conduct said to have caused the death must have "more than minimally, negligibly or trivially contributed to the death" (see e.g. *R. (Dawson) v. HM Coroner for East Riding and Kingston upon Hull Coroners District* [2001] EWHC Admin 352 … Putting these two concepts together, *the question is whether, on the balance of probabilities, the conduct in question more than minimally, negligibly or trivially contributed to death*."

[2] In this case, the issue is whether the question of causation can be left with the jury with particular regard to the time that Noah died and depending upon that determination whether the alleged acts or omissions on the part of the PSNI caused or contributed to Noah's death.

Article 2 in causation

[3] There is an additional test regarding causation in article 2 inquests. The test for causation of "damage" under the Convention is not the same as the common law test. In the article 3 case, *O'Keefe v Ireland* [2014] 59 EHRR 15, the Grand Chamber of the ECtHR approached causation and breach in the following terms at paras [149]-[150]:

> "… it was not necessary to show that 'but for' the state's omission, the ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm, was sufficient to engage the responsibility of the state."

[4] The same principles apply in respect of article 2 inquests. In *Sarjantson* [2014] QB 411, Lord Dyson held that it is not necessary to demonstrate that, had the authorities acted in a manner compliant with their *Osman* duty to protect individuals from a real and immediate risk to life under article 2, the steps taken would, in fact, have prevented a loss of life. The fact that a response would have made no difference is not relevant to liability.

[5] In *R (Lewis) v Mid and North Shropshire Coroner* [2009] EWCA Civ 1403, the Court of Appeal determined that in article 2 cases a coroner has the option, but not a duty, to direct a jury to consider any "fact or circumstance which could have caused or contributed to the death but cannot be shown properly to have done so" (see para [34]). The court emphasised that whilst the coroner or the jury was required to make findings in relation to failures of training and systems in suicide prevention in prison in order to satisfy article 2, "the question is whether it should also form part of the jury's verdict is it a question of domestic law?" The Court of Appeal decided that in the circumstances the making of a report to prevent future deaths on the issues was sufficient to satisfy article 2.

[6] The Divisional Court expressed a further opinion on this principle in *R (Tainton) v Southern Coroner for Preston and West Lancashire* [2016] EWHC 1396. The court firstly confirmed that it is right that a coroner has discretion as to whether to put certain causation questions to the jury. In that case, the Divisional Court agreed with the coroner that it was not safe to leave the jury to consider the question of whether a delay in diagnosis of the deceased's cancer caused or accelerated his death because "there were too many unknowns in the factual history" (see para [68]). It is noted that the court also agreed that it was unsafe to ask the jury to consider whether the delay "possibly" accelerated the death in the circumstances.

[7] Turning to the facts of this article 2 inquest, in my view, two questions have to be considered. Firstly, when did Noah die? In my view this is a question for the jury. Secondly, depending on the jury's determination is there evidence that the

alleged acts or omissions of the PSNI possibly made any contribution to Noah's death. In answering this second question, I have a discretion, not a duty (see *Lewis*), whether to leave this question to the jury. The discretion must be exercised reasonably and fairly.

[8] It is for the jury to decide the statutory question as to when Noah died. The jury will clearly be directed that they have to reach their findings on the balance of probabilities. The jury are entitled to draw their inferences from the evidence. I am not satisfied with the PSNI submission that, based on the *Galbraith Plus* test, there is insufficient evidence on which a jury could find, on the balance of probabilities, when Noah died.

[9] The time when Noah died, as determined by the jury, will plainly have an impact upon whether there is evidence that the alleged PSNI failings probably or possibly made any contribution to Noah's death. These issues will be reasonably and fairly considered in my summing up to the jury. The jury will be directed that they cannot make any finding that any act or omission of the PSNI caused or contributed to the death unless they are satisfied that the act or omission occurred before Noah died. In this regard, I have to trust the jury will comply with my directions and return a lawful verdict.