Neutral Citation No: [2010] NIQB 144 | *Ref:* **TRE8080**

Judgment: approved by the Court for handing down | *Delivered:* **17/06/10**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY RICHARD ALEXANDER DONALDSON FOR JUDICIAL REVIEW

_____

TREACY J

Introduction

[1] I have already set out the background to this judicial review in my earlier ruling on the leave application [2010] NIQB 47. Following the grant of leave the applicant lodged an amended Order 53 Statement with an additional ground.

[2] The applicant has raised three broad challenges to the decision of HM Senior Coroner:

(i) The rationality of the Senior Coroner's decision to call Professor Neal as a witness;

(ii) An allegation of apparent bias arising from the alleged disparity of treatment, procedurally and substantively, as between the manner in which he dealt with Professor Neal (whom he has decided to call) and Mr Skidman (whom he has decided not to call);

(iii) An allegation of apparent bias said to arise from the Coroner's comments on 5 October 2009 when he stated "Professor Neal seems to be pre-eminent in his field of expertise and his report, so far as I am concerned, is a very detailed report and I must say, of all the reports, I found it particularly useful to me in reaching an understanding of what happened." From this it is said that the Coroner has apparently pre-determined issues regarding the status and quality of Professor Neal's evidence.

[3] The first general point I would make is that who the Coroner calls as a witness is a matter for him. Whilst it is common case that such decisions are, in principle, amenable to judicial review, the circumstances in which a successful challenge on grounds of irrationality (as alleged here) could succeed are likely to be very rare.

[4] There is no doubt that the evidence of the impugned witness, Professor Neal, is highly relevant to the issues to be considered at the forthcoming inquest. Indeed his CV appears to mark him out as distinguished in his field. His first involvement in the events surrounding the medical treatment of the deceased commenced in 2002 when he was engaged by Mr Keane, Consultant Urologist, to provide an expert opinion in the context of defamation proceedings brought by the applicant arising out of critical comments made by Mr Keane of the applicant with reference to his treatment of the deceased.

[5] I note that the defamation proceedings were subsequently withdrawn by the applicant. Following that involvement Professor Neal was later engaged by the PSNI to furnish a report and to assist the police in downstream monitoring of police interviews of the applicant regarding his treatment of the deceased.

[6] He was then engaged by the Coroner and issues have arisen relating to the inability of Professor Neal to release and/or obtain and release documentation and information furnished to him which is the subject of a claim for legal professional privilege by Mr Keane – an inability, it is said, which makes him unsuitable as an expert witness, inter alia, because of the restrictions this will impose on those representing the applicant to conduct full cross-examination and on the Coroner to investigate any potential conflict of interests as well as generating an appearance of bias in selecting such a witness when others (not subject to such handicaps) are available to give evidence.

[7] During the course of the current hearing I was informed that Mr Keane has waived the privilege attaching to, and his solicitors have disclosed to the Senior Coroner, all of the documents furnished to Professor Neal for the purpose of preparing his reports in the defamation proceedings, the reports having been sent by Professor Neal to Mr Keane's solicitors under cover of letters dated 2nd July and 21st October 2002. In addition Mr Keane has waived the privilege attaching to, and his solicitors have disclosed to the Senior Coroner, the reports that were prepared by Professor Neal in connection with the defamation proceedings.

[8] So far as the report to the Coroner, which will form the basis no doubt of the evidence to be given by Professor Neal, is concerned, Professor Neal has already identified all of the documents upon which he relied in preparing that report and copies of all of that documentation have already been made available to the applicant and his legal advisers.

The First Ground of Challenge

[9] Irrationality is a high threshold not easily crossed in the context of the Coroner's wide (but not unfettered) discretion as to who he chooses to call as witnesses. Professor Neal is not and was not refusing to hand over any documents. He has completed the usual expert declaration and has refuted any suggestion of a conflict of interest in his giving evidence. The former claim for privilege (now abandoned) was that of Mr Keane. In any event, the applicant now has all the documents in respect of which privilege had previously been maintained. In any event, as I have already observed, all of the documents that were relied upon by Professor Neal in preparing his report for the Coroner were furnished to the applicant and his legal advisers. Since this is so there can be no question in my view of the expert not being able to discharge his duties to the Court or of the applicant being under any forensic disadvantage. Nor indeed can there be any serious suggestion that the investigation by the Coroner will in any respect be handicapped by the use of Professor Neal as a witness.

[10] The more I listened to the applicant's challenge the more concerned I became that the application sounded very much like a tactical effort to constrain the Coroner's wide discretion as to whom to call so that another expert thought by the applicant to be more favourable to his position would be called in his place. Sometimes the argument smacked of "anybody but Professor Neal".

[11] In my view the decision of the Coroner to call Professor Neal cannot be condemned as irrational. On any showing Professor Neal is well placed to give relevant evidence on the issues which are likely to arise. The applicant and his legal representatives will have a full opportunity to cross-examine the Professor about all relevant matters within the appropriate scope of the inquest. Moreover, as I have already stated they have been furnished with all of the documents upon which Professor Neal relied in furnishing his report to the Coroner. Accordingly, the first ground of alleged irrationality is rejected.

The Second Ground of Challenge

[12] I have great difficulty with the disparity argument not because it was not raised in terms of the relevant correspondence or at the October oral hearing – only crystallising in the form of a specific amended ground following the grant of leave. My difficulty is that the applicant accepts that the decision not to call Mr Skidmore was not irrational but contends that even if (as I have now held) the decision to call Professor Neal was not irrational the disparity argument can nonetheless succeed. How to legally correct decisions (one to call Neal and the other not to call Skidmore) can nonetheless found a successful submission of disparity and result in apparent bias eludes me.

[13] In any event to make good any argument based on disparity would require a comparison of like with like and that is simply not the case. It is not, as the

respondent pointed out in their skeleton argument, remotely surprising that the Coroner had concern about Mr Skidmore in view of the contents of his letter to him dated 5 November 2007 where he stated as follows:

> "Mr Donaldson states that he discussed the operation that he was to perform on Mr Martin with the patient. I agree with Mr Gingell that such discussions almost certainly occurred. The fact that Mr Donaldson did not record these conversations is unfortunate, but the comments of Professor Neill [sic] and others on this matter show the unfortunate rise of defensive medicine over the course of the last 20 years. The important thing is that if an experienced surgeon states that he has held these conversations with the patient then that statement should be accepted. It is not up to younger consultants to second-guess the statements or the motivation of a senior colleague. Patterns of practice vary from decade to decade as well as from generation to generation. Changes in such practice should not be described as grossly negligent but should be recognised as sequential and evolutionary factors. Professor Neill [sic] and Mr Gilliatt [sic] should recognise that custom and practice in surgical management and treatment are based on training received from ones experienced seniors to which is added modifications based on improvements in scientific knowledge and techniques ..."

[14] On any showing these comments raise questions about Mr Skidmore and whether he could fulfil the independent and impartial duties of an expert. As the respondent pointed out at para.13 of their skeleton argument the fact that a younger colleague should accept without question both the motivation and the statements of a more senior doctor seriously undermined confidence in the judgment of that expert.

[15] Nor was it unreasonable of the Senior Coroner to take the view that Mr Skidmore should have disclosed his involvement in proceedings which ultimately ended up in the House of Lords particularly in view of the summary of the facts of the case at paras. 3 and 4 of the Judgment of Lord Steyn.

[16] Accordingly the second ground of challenge is not made out.

The Third Ground of Challenge

[17] As far as the third ground of challenge is concerned the applicant accepted that if there had been no issue about disclosure of the formerly withheld documents this third ground would not have been raised. In other words, even if the Coroner had said what he said on 5 October these comments would not have independently led to the applicant mounting a challenge. Logically, as it seems to me, if the first and second grounds of challenge are not made out it is difficult to see how they can then be prayed in aid to substantiate the challenge on the third ground which, on its own, would not, as I understand it, have generated a challenge.

[18] Nonetheless the Court must deal with the case presented. My judgment is that the Coroner's remarks are insufficient on their own or taking the entire context into account to realistically support the conclusion of an appearance of bias.

[19] There was considerable focus on the use of the word "pre-eminent" however Ms O'Rourke acknowledged that she would have had less difficulty if the Coroner had used the word "distinguished" or some comparable epithet. Although in my ruling on the leave application I referred to the dictionary definition it is plain that the word is frequently used to denote "distinguished" an epithet I believe all accept as being appropriate in light of the CV of Professor Neal. The fact that his CV and the clarity of his report influenced the decision of the Coroner to call Professor Neal is hardly surprising. The notion that a fair-minded observer possessed of the requisite characteristics would regard the Senior Coroner as tainted by apparent bias as a result of these comments is not in my view sustainable. These were perfectly legitimate matters for the Coroner to take into account in his decision to select whom he should call as a witness. It must also be borne in mind that the Senior Coroner was not expressing or purporting to express a view on the quality of the evidence which Professor Neal had not yet given. His comments were directed towards his CV and the utility, in terms of understanding complex medical matters, of his reports. For the reasons he gave the Coroner was expressing a preference for Professor Neal as the witness to be chosen to give evidence. He was not and could not reasonably be regarded as expressing any view as to the conclusions Professor Neal had drawn not least of all because Professor Neal had yet to give evidence and be examined and cross-examined in the usual way. The Coroner will of course, like any judicial officer, assess and evaluate the evidence in its entirety which will include any examination and cross-examination of Professor Neal by advocates who have had access to his reports and all of the material upon which he relied in arriving at his expert opinion.

[20] I therefore reject the third and final ground of challenge.

[21] In these circumstances the judicial review must be dismissed.