

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 13/04/2010

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Donaldson's (Richard Alexander) Application (Leave Stage) [2010] NIQB 47

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

AND IN THE MATTER OF A RULING OF THE SENIOR CORONER FOR
NORTHERN IRELAND MADE ON 5 OCTOBER 2009 RELATING TO THE
INQUEST TOUCHING UPON THE DEATH OF MR WILLIAM MARTIN AT
BELFAST CITY HOSPITAL ON 14 NOVEMBER 2001

TREACY J

Introduction

[1] The applicant is Richard Alexander Donaldson who is a surgeon and registered medical practitioner. He is seeking an order of certiorari to quash the decision of the Senior Coroner on 5 October 2009 that Professor Neal should be called as a witness at the inquest into the death of William Martin. He is also seeking an order of mandamus directing the Senior Coroner to recuse himself from the Inquest.

[2] The grounds for relief are:

- (a) **The Senior Coroner's decision to call Professor Neal as an expert witness at the Inquest was *Wednesbury* unreasonable and/or procedurally unfair by reason of the following matters:-**

- (i) Professor Neal had previously been engaged to give expert opinion evidence on behalf of an individual Surgeon in defamation proceedings - against the Applicant - concerning the death of William Martin; and in the course of that instruction enjoyed access to documents (including witness statements from Clinicians who are due to be witnesses at the Inquest) and information (including verbal information and instructions) in respect of which legal privilege is now claimed by that Surgeon (who is not himself to be a witness at the Inquest), so that these materials are unavailable to the Applicant or his legal representatives and other interested parties to the Inquest;
- (ii) As a consequence of the claim of privilege Professor Neal has failed (and/or is not prepared) to disclose the totality of the sources of material (or the material itself) which he has seen and considered relating to the death of William Martin and which had influenced his opinion;
- (iii) Professor Neal is therefore unable to fulfil the duties of an independent medical expert in Court proceedings, namely to identify his source material and the basis of his opinion such that any interested party will not be in any way disadvantaged in attempting to cross-examine him and test his opinion and evidence;
- (iv) Further, Professor Neal is unable to demonstrate the transparency required of an independent medical expert; and the Senior Coroner did not, prior to his decision that Professor Neal should be

a witness, carry out any proper examination of the information and materials which Professor Neal had seen, heard or learned of in the course of his instruction in the defamation proceedings to properly determine whether there was any potential conflict of interest;

- (v) As a result of the claim of privilege being made to prevent disclosure of documents and the previous instruction of Professor Neal in adversarial defamation proceedings, Professor Neal is an apparently biased witness and, further, the use of Professor Neal as an expert witness gives rise to apparent bias on the part of the Senior Coroner;
 - (vi) Professor Neal is/was only one of three medical experts of the same discipline to be called to give evidence at the Inquest and, given the objections to his evidence because of the appearance of bias and his inability or refusal to comply with the duties of an independent expert, coupled with the lack of objection to the other experts of the same discipline, his evidence became unnecessary to the fulfilment of the Senior Coroner's duty of due inquiry into the death and threatened the fairness and integrity of the Inquest.
- (b) The Senior Coroner erred in law and/or misunderstood or misapplied the test for apparent bias (that of the reasonably informed observer) in respect of the evidence of Professor Neal, in that he judged the issue of bias on the basis of what Professor Neal himself said in reply to questions as to understanding his duties (and did so during a

private telephone call between the Senior Coroner and Professor Neal with no attendance note disclosed to interested parties and no right to question afforded to them).

- (c) The Senior Coroner erred in law and/or failed to take a relevant consideration into account (or gave it manifestly insufficient weight so as to act *Wednesbury* unreasonably) in that he misunderstood the relevance and significance of the claim of legal privilege to the issue of admissibility of the evidence of a witness (Professor Neal) who was restricted by such claim from disclosing the basis of his opinion - a fundamental requirement for an expert witness giving opinion evidence.
- (d) The Senior Coroner was wrong in law, and his statement to this effect was *Wednesbury* unreasonable, that the evidence of Professor Neal should be heard at the Inquest because it was in the same vein as two other experts. Insofar as this *was* the case then his evidence was superfluous and unnecessary; and insofar as it was *not* the case then the Senior Coroner was wrong to so declare it and in any event to rely on such a statement as a reason for admitting the evidence.
- (e) The actions of the Senior Coroner in the conduct of the pre-Inquest Hearings - and particularly in respect of (i) issues of expert evidence (both admitting that of Professor Neal and the dismissal of the evidence of Mr Skidmore) and (ii) the potential criminal liability of the Applicant - give rise to a clear case of apparent bias.
- (f) The Senior Coroner erred in law, left a relevant consideration out of account and/or acted in a procedurally unfair way in determining to admit the evidence of Professor Neal in circumstances where he had not seen the letter of instruction or

**instructions given to Professor Neal in the
defamation proceedings.**

[3] As appears from the pleaded grounds at the core of this judicial review is the claim that the [so far] successful exercise of a claim for privilege in respect of the withheld documents fatally undermines Professor Neal as an independent expert medical witness – because he cannot, it is alleged, disclose the basis of his opinions which are therefore immune from fair and effective challenge. It is also claimed that the Senior Coroner should recuse himself, in the circumstances, on the grounds of apparent bias. This latter ground was elaborated on (and, in my view, extended) following further written representations received following the inter partes leave hearing.

Background

[4] Before turning to the detailed grounds upon which relief is sought it is necessary to understand some of the background. The inquest arises from the death of William Martin who was a patient in Belfast City Hospital who underwent an operation on 14 November 2001. The applicant was the lead surgeon at the operation. The deceased had been admitted to the hospital for the purposes of an operation under the applicant's care. Complications arose during the operation leading to additional surgeons becoming involved in the procedure. Mr Martin exsanguinated during the operation (see para 5 of grounding affidavit).

Involvement of Professor Neal

[5] Professor Neal is a Professor of Surgical Oncology at the University of Cambridge and Honorary Consultant Urological Surgeon. He has been a Consultant Urologist since 1988. His involvement in investigations into and reports on the treatment of the deceased began in 2002. In 2002 he was engaged as an expert to, inter alia, furnish a report to Carson & McDowell who were representing Mr Keane (another Consultant Urologist) in defending defamation proceedings brought by the applicant. Those proceedings related to comments made by Mr Keane in relation to the treatment provided to Mr Martin by the applicant.

[6] Mr Keane instructed solicitors to defend those proceedings and in an amended defence he contended that there were serious deficiencies in the preparations for and conduct of the operation. These proceedings were subsequently discontinued by the applicant with an order for costs made against him. In the course of preparing his report he was furnished with a "detailed letter of instruction" and statements from Mr Sami and Mr Carey (and, it would appear, Mr Keane) whom, I am told, are important witnesses in the forthcoming

inquest [see paras.13-14 of grounding affidavit on pp 128-129 of the Bundle]. The report [No 1] relating to the defamation action has been disclosed but not the instructions or statements which are the subject of a claim for legal professional privilege.

[7] His next involvement was in 2004 when Professor Neal was approached by the PSNI who were reviewing the deceased's case. He performed a review of the case and produced a report which was sent to Alistair McCartan, Belfast CID. This report was not substantially different to the report prepared in the defamation proceedings. In his police statement dated 6 December 2004 Professor Neal stated:

“... I carried out a review of an operation performed by Mr Donaldson Belfast City Hospital on patient William Martin. Subsequently I produced a report which I have annexed to this statement. My opinion remains the same as to the conduct of this operation. This represents gross negligence”.

His involvement with the PSNI gave rise to a further report [No 2] entitled “Draft - Report for the Northern Ireland Police Force” [pp 6-16 of the Bundle].

[8] During interviews of the applicant following his voluntary attendance at Antrim Serious Crime Custody Suite on 16 June 2005 Professor Neal was engaged as an expert witness for use in downstream monitoring during the course of the interviewing process.

[9] Finally Professor Neal was engaged by and produced a detailed report [No 3] for the Senior Coroner who has decided that he should be called as a witness. That report contains the usual expert's declaration¹ and a declaration as to his previous involvement in the deceased's case².

¹ (1) I understand that my overriding duty is to the Court, both in preparing, submitting evidence and giving oral evidence. (2) I have set out in my report what I understand to be the case from a careful review of the written evidence provided to me based on my role as an expert. (3) I have done my best in the preparation of this report to be accurate and complete. I have included all matters, which I regard as relevant to the case and the opinion I have expressed. All of the matters on which I have expressed an opinion are within the field of my expertise. (4) I have drawn to the attention of the Court all matters of which I am aware, which might affect my opinion. (5) Wherever I have no personal knowledge, I have referenced the source of factual information.

² I have indicated clearly in my previous statement that I had the following involvement in the case of Mr Martin dating back to 2002.

2002

[10] Under cover of letter dated 5 October 2009 to the Senior Coroner Professor Neal enclosed a document outlining the particular documents he used in the preparation of the report [No.3] which he had sent *to the Senior Coroner* on 7 February 2008. They include statements which formed part of the report *from the police* to the PPS including Mr Sami and Mr Carey (see paras 8.2, 8.3, 10.9 and 10.10 [Bundle pp 36-37]).

[11] The decision of the Senior Coroner to call Professor Neal was challenged by the applicant on grounds of irrationality and procedural unfairness. The gravamen of that complaint is the alleged inability of Professor Neal to comply with the duties of an independent medical expert to identify his source material and the basis of his opinion so that it can be properly tested. This complaint arises out of the decision of Mr Keane (the successful defendant in the defamation proceedings) refusing to waive privilege in respect of documents which were furnished to Professor Neal in the course of his instructions and prior to the preparation of his *first* report into the treatment of the deceased. The withheld documents include the detailed letter of instruction and the statements from Mr Sami, Mr Carey and Mr Keane.

[12] As far as the first aspect of the challenge is concerned, largely encapsulated in Ground 3 (a)(i)-(iii), the Senior Coroner in his written argument submitted:

- (i) That the first report from Professor Neal was the PSNI report;

Approached by Carson & McDowell Solicitors who were then representing another urologist in the case of Mr Martin. I produced a report of the case based on a review of the case notes *and other documents*. I understand these other documents are the subject of legal opinion as to whether they may be the subject of legal privilege.

2004

I was approached by the Northern Ireland Police Force who was reviewing Mr Martin's case. I performed a review of the case and produced a report of the case which was sent to Alistair McCartan, Belfast CID. This report was not *substantially* different from the report I sent to Carson & McDowell. I had access then to the documents subsequently contained in the report sent by the police to the PPS.

2005

I was asked by the Belfast CID to attend an interview of Mr Donaldson being carried out. I was present via a remote video link. In June 2005 a statement was sent to the Northern Ireland Police.

19 September 2006

I met the Public Prosecution Department in Belfast to discuss Mr Martin's case.

- (ii) The only, *inter alia*, report which will concern the Inquest was the report Professor Neal prepared for the Senior Coroner;
- (iii) That Professor Neal is bound by the claim of legal professional privilege not to disclose; and
- (iv) That the applicant failed to demonstrate how the withheld material could have a bearing on the report for the Senior Coroner. They relied on the wide discretion conferred on the Senior Coroner in relation to the witnesses he can call to give evidence.

[13] The applicant challenged each of the four reasons maintaining that whilst Professor Neal is not at fault nonetheless the maintenance of the claim for legal professional privilege has the effect of precluding him from discharging his duties as an independent expert – identifying all material relied upon in reaching his decision. They also drew attention to what they characterise as two important misconceptions relating to the chronology of Professor Neal’s reports and the significance of this first report for the Senior Coroner. They submitted that what was important is *when and by whom* Professor Neal was *first* instructed and *with what material and instructions*. His report in the defamation proceedings was the first in time by two years and this meant that Professor Neal had reached an opinion on material provided to him in highly contentious defamation proceedings. There is evidence, they submitted, that Professor Neal saw statements from Mr Keane and from Mr Sami and Mr Carey. None of those statements have been disclosed in the inquest because of the claim for privilege. The applicant contends that the only inference is that the material provided to him included prejudicial comment on the applicant otherwise, they submitted, there would be no basis to claim and hold on to privilege six years after the conclusion of the proceedings. The importance of this was that having used the withheld documents informing his original opinion that information could not be discarded when giving later opinions on the same matter to the PSNI and Senior Coroner.

[14] In the latest report to the Senior Coroner Professor Neal has indicated that he relied upon the evidence of Mr Sami and Mr Carey (as outlined at para 9 above). The applicant complains that he has seen statements from them which no-one else has and that this is therefore procedurally unfair. For similar reasons, relying on *Toth v Jarman* [2006] EWCA Civ 1028, it was submitted that the decision as to whether an expert had a conflict of interest was one not for the expert himself but for the Court after submissions by the parties and that when the material he has seen cannot be examined by the Senior Coroner or the parties

the effect is to deprive them of that decision and that that can only mean the exclusion of the evidence. In respect of the claim of apparent bias they submitted that an observer would feel there is something to be kept secret by not waiving privilege and that can only be something detrimental to the applicant and that if Professor Neal has seen and been influenced by it, even unwittingly or subconsciously, then his evidence should be excluded. The applicant also relied upon the alleged disparity of approach in relation to the evidence of Mr Skidmore as a ground of apparent bias on the part of the Coroner.

The Law re Privilege

[15] Mere reference to a document in an expert report does not waive privilege in that document. A convenient summary of the applicable principals is set out in Matthews & Malek, *Disclosure*, 3rd Edition at para 12.19 the authors state:

“A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the contents of the document are being relied on, rather than its effect.”

[16] At para 12.22 [dealing with references in the reports of experts] it is stated:

“On principle it seems that the same rules should apply as with written evidence, i.e. that references to privileged material and a witness statement or experts report will amount to a waiver of that privilege if they amount to a ‘deployment’ of such material. It seems there cannot be such a deployment in a witness statement or experts report without at least *reference* to the contents of their privileged material and *reliance* placed upon them.”

See also *Bournes Inc v Raychem Corp & Anor* [1999] 3 All ER 154; and *Orr v Crow* [2009] NIQB 17 where the Court adopted the approach adumbrated in *Bournes* namely that mere reference to a document does not waive privilege and that there must at least be reference to the contents and reliance.

[17] The applicant contended that as there was neither reference to the documents in the medical reports which have been disclosed nor any evidence of reliance privilege has not been waived. Whilst there may have been no reference

to the documents in the medical reports I doubt whether that circumstance alone in the context of this case would be sufficient. In his 2002 report Professor Neal has obviously had access to a significant body of information which is not referred to in his report which includes the statements from Mr Sami and Mr Carey and also possibly Mr Keane.

[18] It is known that Professor Neal did rely on other witness statements of Mr Sami and Mr Carey in relation to the police reports and also in relation to the report that he prepared for the Senior Coroner. Therefore it is unlikely that he would not have placed reliance on the statements that were furnished to him from those sources when preparing his first report in the defamation proceedings. In my view, if asked, Professor Neal may confirm that he did rely on the withheld statements of Mr Sami and Mr Carey when providing his original reports just as he did in his later reports and if that were established then the basis for the claim for legal professional privilege may not exist. In those circumstances Professor Neal would not be bound by legal professional privilege, it might be argued, and the withheld documents could be provided to the Senior Coroner and then to the applicant. In that scenario the complaints of the applicant would largely fall away. Accordingly, this is a matter which may need to be raised by the parties before a Coroner on notice to Mr Keane who is asserting the privilege.

[19] In light of the above the proper course is, since much of the applicant's argument is predicated on the basis that the documents withheld on the basis of legal privilege compromise the role of Professor Neal and of the inquest itself it must surely first be examined whether these documents are properly withheld on the basis of legal privilege. The proper course may therefore ultimately require examination, in a procedurally fair manner, of the claim for privilege.

Application for Recusal

[20] In para 3 of the Senior Coroner's skeleton argument it was erroneously stated that Professor Neal's first report was for the PSNI. This mistake is repeated in para 10. This was not an insignificant error because once Professor Neal had formed a view in 2002 based on the material he had then received this was inevitably likely (put at its lowest) to influence any future reports. It appears to have been on that incorrect basis that the Senior Coroner sought to argue that the only report which will concern the inquest is the report which was prepared for the Senior Coroner. Unless it has been predetermined that lines of enquiry in relation to the origin and genesis of his first report are to be precluded from examination it seems to me that these are matters which are highly likely to be canvassed in the course of argument before the Coroner. The resolution of the

scope of questions in that respect will depend on the outcome of a properly examined claim for legal professional privilege.

[21] In relation to the other principal ground of challenge, namely that the Senior Coroner should recuse himself on grounds of apparent bias, the basis of this claim has altered from the pleaded ground of challenge.

[22] Consequent upon the recent judgment in *R (Carol Pounder) v HM Coroner* [2010] EWHC 328, [handed down after the oral leave application was made in this case] further written submissions were lodged by the parties in response to that judgment. In para.7 and 8 of the applicant's supplemental skeleton argument it appears the applicant has raised a new basis upon which to challenge the Senior Coroner on grounds of apparent bias. In my view this will require the Order 53 Statement to be amended.

[23] The gravamen of the new complaint is encapsulated at para.13 of the applicant's skeleton argument where they submit that if the Senior Coroner has already determined he is preferring Professor Neal because he has the highest qualifications and is regarded as pre-eminent that he must recuse himself as the inquest would become pointless in the light of such preference and determination.

[24] In the supplemental skeleton argument filed on behalf of the Senior Coroner it has been stated that "it was considered, on the basis of his stated qualifications and experience that he was 'pre-eminent in the field'. It is submitted there was sufficient evidence contained in this document to allow the Senior Coroner to make this decision." The issue of course that the applicant raises is whether or not it was appropriate to make this "decision" at this point. The same skeleton argument goes on to state at para 13(e):

"The Senior Coroner did not state that he found Professor Neal's report to be 'the most useful and helpful' report. What he did state was that:

'Professor Neal seems to me 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 I find, of all the reports, ... it particularly useful to me in reaching an understanding of what had happened.'"

[25] The impugned comments appear, at least arguably, to express a preference for an expert who has not already given evidence and whose views (certainly as to whether gross negligence is established) differ from the other experts who it is proposed to call as witnesses. The role of Coroner is not confined to making findings of fact (itself of great significance) but also of proactively engaging with the PSNI/PPS – something which the Senior Coroner has legitimately, in the discharge of his duties, already done. And again, equally legitimately, he has signalled he will do in the future depending on how the evidence in the inquest unfolds.

[26] In his skeleton argument at para 18 the Senior Coroner submitted that given the absence of a jury there was even less danger of Professor Neal’s views having a disproportionate underlying influence. The effect of the expression of any apparent preference for a particular expert witness is a matter which requires to be examined.

The Test for Bias

[27] The test for apparent bias was summarised in *ARA v Lovell* [2009] NICA 27 when Kerr LCJ stated:

“The leading authority on apparent bias remains *Porter v Magill* [2002] 2 AC 357. The principle stated by Lord Hope of Craighead in paragraph 103 of his opinion is still the locus classicus on this issue: -

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

Having referred to this statement, in *Re William Young* [2007] NICA 32, this court said at paragraph [6]: -

“The notional observer must therefore be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker was biased. In this context, it is pertinent to recall Lord Steyn’s observation in *Lawal v Northern Spirit Ltd* [2003] UKHL 35,

quoting with approval Kirby J's comment in Johnson v Johnson (2000) 201CLR 488 at 509 that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.'"³

[28] The relevant background includes the following *combination* of circumstances:

- That Professor Neal was engaged as an expert in earlier defamation proceedings for the defendant Keane in proceedings which were initiated by the applicant;
- That Keane, six years later, continues to assert legal professional privilege in respect of documents upon which, in all probability, Professor Neal relied when preparing his first report in 2002;
- That the Coroner has been legitimately active in the context of this case in promoting proper scrutiny of whether the applicant should be prosecuted;
- That Professor Neal was engaged by the PSNI to conduct downstream interviewing when the applicant was being interviewed by the police at Antrim Serious Crime Suite. This itself a process which commenced with a referral from the Coroner to the PSNI in light of the new material which had come to light in respect of the previous witness relied upon by the PPS namely Mr Skidmore;
- The fact that the Coroner has on a number of occasions during the currency of the present inquest legitimately reaffirmed the role of the Coroner in liaising with the PSNI and the PPS in relation to issues of, for example, gross negligence in the light of the evidence heard and determined at the inquest;
- The clear preference expressed by the Coroner for the report of Professor Neal and his stated pre-eminence. Pre-eminence is defined in the Oxford English Dictionary to mean "surpassing all others".

³ See also para.12 of the Judgment of Burnett J in *R (Carol Pounder) v HM Coroner* [2010] EWHC 328

[29] In my view it is at least arguable that the fair minded and informed observer, having considered the facts and background of this case would conclude that there was a real possibility that the tribunal was biased.

Conclusions

[30] Accordingly, I have been persuaded that the applicant has demonstrated an arguable case in respect of all grounds and leave is therefore granted.