

Neutral Citation No: [2023] NICoroner 8

Ref: HUM12194

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

Delivered: 08/06/2023

IN THE CORONER'S COURT IN NORTHERN IRELAND

IN THE MATTER OF AN INQUEST INTO THE DEATHS OF
LAWRENCE JOSEPH McNALLY, ANTHONY PATRICK DORIS AND
MICHAEL JAMES RYAN

RULING ON DISCLOSURE AND PRIVILEGE

HUMPHREYS J

[1] An issue has arisen in the course of these inquest proceedings relating to the evidence given by former military witnesses ('FMWs'). A number of the FMWs were interviewed under caution by the Royal Ulster Constabulary ('RUC') in the days following the killings at Coagh. None of them made any reference in interview to an alleged bullet strike mark to the wing mirror of the Beford lorry which had contained a number of the FMWs.

[2] The relevance of such a strike mark is that it may represent evidence that a bullet was discharged from one of the weapons carried by the deceased.

[3] In 2022, the FMWs prepared statements for the inquest with the assistance of their legal representatives. I had previously ruled in [2022] NICoroner 5 that the provision of evidence by this route did not render the inquest non-compliant with the provisions of article 2 European Convention on Human Rights (ECHR).

[4] In his statement, Soldier J states as follows:

"I recall that before I left the location I was shown the tubular frame of the lorry's wing mirror on the passenger side, near where I fired my first shots, which had a strike mark (bullet damage). The photograph at exhibit 1 shows the strike mark I recall seeing. I do not recall who showed the strike mark to me."

[5] Soldier K states:

“I walked around the lorry to check it and I saw a strike mark at about head height on the arm of the nearside wing mirror. This would have been from an incoming round. This is shown in the photograph at exhibit 2.”

[6] During the course of his oral evidence to the inquest, Soldier J was questioned about the provenance of the reference to the strike mark in his statement. The transcript of the evidence is as follows:

“CORONER: Who told you about the strike mark on the wing mirror and revived your memory of it?

WITNESS: It was mentioned by one of the...barristers.”

[7] The representatives of the next of kin (‘NOK’) have contended that this gives rise to questions about the statement-taking process and relates to an important issue in the inquest, namely whether the deceased fired any shots.

[8] As a result, they sought clarification from the solicitors acting for the FMWs about the circumstances in which this came to pass and also disclosure, to the coroner in the first instance, of the notes of the consultations with Soldier J.

[9] In response, Devonshires, the solicitors instructed by the FMWs, take issue with the implicit suggestion that there has been some impropriety in the statement taking process. They assert that, at all times, both the solicitors and counsel concerned have acted strictly in accordance with their professional duties and responsibilities.

[10] It is also contended that the notes of consultations are subject to legal advice privilege and/or litigation privilege and there has been no waiver of privilege by the FMWs.

Does Legal Advice Privilege Apply?

[11] Legal advice privilege attaches to confidential communications between solicitor and client which come into being for the dominant purpose of giving or receiving legal advice. It matters not whether litigation is in existence or contemplated.

[12] This species of privilege has been broadly construed. Lord Carswell stated in *Three Rivers v Bank of England (No. 6)* [2004] UKHL 48:

“The work of advising a client on the most suitable approach to adopt, assembling material for presentation of his case and taking statements which set out the relevant material in an orderly fashion and omit the

irrelevant is to my mind the classic exercise of one of the lawyer's skills. I can see no valid reason why that should cease to be so because the forum is an inquiry or other tribunal which is not a court of law, provided that the advice is given in a legal context: see Lord Scott's opinion at para 42. The skills of a lawyer in assembling the facts and handling the evidence are of importance in that forum as well as a court of law. The availability of competent legal advice will materially assist an inquiry by reducing irrelevance and encouraging the making of proper admissions. As Lord Phillips of Worth Matravers himself expressed it in his Chairman's Note on Lawyers in connection with the BSE tribunal:

‘Lawyers are experienced in gathering documentary evidence and have the skills essential to ensure that witness statements cover the relevant ground, without becoming unnecessarily prolix.’” [para 114]

[13] There is no reason that the provision of legal advice in the context of a coroner’s inquest should be treated any differently. The context of the instant inquest includes the potential for future civil and criminal proceedings.

[14] There is no doubt that the relationship of solicitor and client exists between Devonshires and the FMWs. It is also reasonable to assume that the consultations which took place between solicitor and client entailed the giving and obtaining of legal advice. The product of those consultations will have been, inter alia, the drafts of witness statements but this does not detract from the principle that the purpose of the meetings was to give advice and the notes taken will reflect this. Furthermore, there can be little doubt that both solicitor and client will have treated these consultations as confidential.

[15] I am therefore satisfied that the notes sought by way of disclosure are subject to legal advice privilege.

[16] In *PCP Capital Partners v Barclays Bank* [2020] EWHC 1393 (Comm) Waksman J considered the circumstances in which legal advice privilege may be found to have been waived. It was argued that by referring to legal advice in the course of evidence the bank had waived the privilege which otherwise attached to it. The judge held that legal advice privilege is an important protection which is not to be easily lost. He analysed the relevant test as follows:

“Finally, I rely upon a decision of Mr Justice Males as he then was in the case of *Mid-East Sales v United Engineering* [2014] EWHC 892. I start at paragraph 15 of

the judgment. He refers to waiver and *Hollander on Documentary Evidence*, where the authors noted a distinction between a reference to the fact of legal advice and reliance on the content of that advice. Males J went on to say:

‘That distinction reflects a policy not to hold that there has been a waiver without good reason and to confine cases of waiver to cases where the party said to have waived is relying on the content of the legal advice for some purpose. Sometimes the distinction is drawn between reference to legal advice and deployment of it. The overriding principle is one of fairness, that if the content of legal advice is deployed or relied upon in order to advance a party's case, then fairness may require that disclosure of that advice be made available so that the court can properly assess that assertion.’”

[17] In this case, there has been no deployment of legal advice by the FMWs in order to advance their case. There has been a reference to material brought to their attention in the course of consultation. This has not been relied upon for any purpose. In such circumstances, I am satisfied that there has been no waiver of privilege.

[18] Absent waiver, and the privilege being an absolute one, the notes cannot be the subject of any disclosure requirement in the course of this inquest.

Does Litigation Privilege Apply?

[19] Litigation privilege applies to documents created for the dominant purpose of use in litigation, actual or contemplated. In *Re Ketcher and Mitchell* [2020] NICA 31, the Court of Appeal held that inquests are fundamentally inquisitorial processes and litigation privilege does not therefore apply. It must be the case in many inquests that criminal or civil proceedings are possible or likely, but this does not detract from the proposition that the dominant purpose of the creation of the notes was not the litigation, but the inquest.

[20] I therefore find that litigation privilege does not apply to the documents sought by way of disclosure.

Conclusion

[21] Having found that legal advice privilege does apply, I reject the NOK's application for disclosure.