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(subject to editorial corrections)**

ICOS No:

Delivered: 06/11/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY LIAM FRIEL
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF AN INQUEST INTO THE DEATH OF
THOMAS FRIEL**

**AND IN THE MATTER OF THE FACTUAL FINDINGS OF A CORONER
DATED 1 DECEMBER 2021**

**Ms F Doherty KC with Mr David Heraghty (instructed by MacDermott McGurk
Solicitors) for the Applicant**
**Dr Tony McGleenan KC with Mr Michael Chambers (instructed by the Coroner's Office)
for the Respondent**
**Mr Peter Coll KC with Mr Andrew McGuinness (instructed by the Crown Solicitor) for
the Ministry of Defence**
**Mr Donal Sayers KC (instructed by McCartan Turkington Breen Solicitors) for Soldier B
(Notice Party)**

ROONEY J

Introduction

[1] Thomas Friel (hereinafter the "deceased") was born on 9 April 1952. In the early hours of 18 May 1973, the deceased sustained a serious injury to his head resulting in admission to the Altnagelvin Hospital, Glenshane Road, Derry, at 1:45am. On admission he was recorded as being deeply unconscious with both pupils fixed and dilated and not reacting to light. He was admitted to the Intensive Therapy Unit. Operative procedures revealed evidence of gross bruising of the brain, oedema and a subdural clot. Despite treatment, his condition deteriorated, and he died at 18:10hrs on 22 May 1973.

[2] On admission to Altnagelvin Hospital, the history given was that the deceased had come home drunk and had fallen downstairs resulting in unconsciousness at about 12:45am. After an operation was carried out by Mr Bennett, Consultant Surgeon, at the Altnagelvin Hospital, he interviewed the deceased's brother who advised him that the original history provided was incorrect and that the injury had been caused by a "rubber bullet."

[3] On 23 May 1973, a post-mortem examination was carried out by Dr Derek Carson, Deputy State Pathologist for Northern Ireland. Dr Carson's report will be considered in more detail below. Specifically, Dr Carson noted a laceration to the left side of the forehead below the hairline. He also noted two sutured surgical incisions on the left side in the temporal and parietal regions. A single surgical incision, 10cm long, was observed on the right anterior temporal region. An irregular area of abrasions, 8cm x 3cm, was also noted on the right upper forehead and right temporal region. Further examination revealed a fracture of the skull running from the prominence on the left side of the head to the midline on the top of the head. Dr Carson observed that this fracture of the skull was distinct from the injuries on the forehead and could not have been caused by the same blow or blows. When the skull vault was removed, quite extensive brain damage was revealed. Dr Carson stated that the brain damage was associated with a fracture and must have been caused by the same injury which caused the fracture. Dr Carson concluded that it was the brain damage that caused the deceased's death.

[4] As a result of his autopsy findings, Dr Carson concluded as follows:

"The interpretation of the injuries is difficult. Even if the abrasions on the right side of the forehead are disregarded, there remains the injury on the left forehead, not associated with a skull fracture or brain injury, and the separate injury on the left side of the skull with its associated brain damage. All these injuries could have been caused by a fall downstairs and, indeed, this view would be supported by the number and severity of the injuries and the fact that there was also some bruising over the lower part of the spine in the neck. On the other hand, the injury on the left side of the forehead could have been caused by the impact of the nose of a rubber bullet. On its own, this injury was not severe and should not have offered a threat to life. The skull fracture on the left side is most unlikely to have been caused by a rubber bullet since it was above the thin temporal bone, which could perhaps be damaged by such a missile. It was much more likely to have been caused by a heavy fall on a relatively flat hard surface. It may be that he was hit first on the forehead by a rubber bullet and then fell heavily striking his head on the ground. This would not,

however, explain the abrasions on the right forehead ...
In conclusion, therefore, it was not possible to say from
the autopsy findings alone which of the two accounts
given for the injuries sustained is the correct one."

[5] The relevant histories provided to Dr Carson are included at pages 7 and 8 of his report. As will be examined further, it seems that Dr Carson must have been in possession of at least a statement or statements from the Ministry of Defence regarding the discharge of a single baton round at a rioter at approximately 1:20am.

[6] On 6 March 1974 a short and perfunctory inquest resulted in an open verdict.

[7] The Historical Enquiries Team ("HET") requested Dr Shepherd, Forensic Pathologist, to review the circumstances of the deceased's death, including a consideration of Dr Carson's post-mortem report, findings and photographs. In his original report, Dr Shepherd concluded that, in his opinion, the photographs showed a fracture to the right side of the frontal region of the skull and that the pattern of injury to the right side of the forehead caused the underlying brain damage to the right side of the brain which was "entirely consistent with the forceful contact with a linear object, such as, a rubber bullet to the right side of the forehead."

[8] As a result of conclusions reached by the HET and Dr Shepherd's report, on 13 December 2013 the Attorney General directed that a fresh inquest should take place.

[9] The Coroner, Mr McCrisken, held an inquest between 1-18 November 2021. The factual findings which are the subject of this judicial review, were delivered on 1 December 2021.

[10] The scope of the inquest was helpfully set out by the coroner at para [30] of his factual findings. It is useful to repeat the scope document at this stage:

"1. This inquest will examine the death of Thomas Friel.

2. The inquest proceedings will consider the four matters listed in Rule 15 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963, namely:

- (a) the identity of the deceased;
- (b) the place of death;
- (c) the time of death; and
- (d) how the deceased came by his death.

3. Related to the 'how' question, the Coroner will consider:

- (i) the evidence of witnesses at or near the scene of the incident in which the deceased was allegedly struck by a baton round;
- (ii) the medical treatment which the deceased received after he was allegedly struck with a baton round and his death;
- (iii) pathology evidence and in particular, pathology evidence relating to the cause of death;
- (iv) evidence relating to the weapon and baton round used in the incident;
- (v) the nature and degree of force used;
- (vi) evidence relating to the scene at which the incident occurred;
- (vii) evidence relating to military activities and operations on and around the time of the deceased's death;

4. The inquest will further consider specifically whether the deployment of the military on the date on which the death occurred was planned and controlled in such a way as to minimise to the greatest extent possible the need for the use of force and will consider whether the actual use of force was justified in the circumstances and whether the level of force used was justified in the circumstances.

5. In considering the planning and control of the operation, the inquest will examine:

- (i) such guidance as existed at the relevant time relating to the use and discharge of rubber bullets;
- (ii) training in the use of rubber bullets prior to the date in question;
- (iii) the army rules of engagement regarding the use of rubber bullets.

6. The inquest will also examine, insofar as is necessary to address the above matters, such evidence as exists concerning the circumstances in which the deceased came to be at the locus of death at the relevant time.”

[11] The coroner conducted a detailed analysis of the evidence, to include written statements of civilian and military witnesses and an investigation report provided by the RUC. In reaching his findings, the coroner gave significant weight to the description of events contained in statements from the military witnesses and, in particular, the timings of those events. The coroner also considered in detail the reports and the evidence of the pathologists, Professor Crane, Dr Shepherd and Dr Swift together with the above-mentioned autopsy report from Dr Carson. With some assistance from the ballistics expert and a consulting engineer, and pursuant to an interpretation of some of the military logs, the coroner reached the following findings:

- (a) The deceased did not sustain his injuries as a result of a baton round discharged by Soldier B at Bligh’s Lane at 1:20 hours on 18 May 1973. Rather, the deceased sustained his injuries during an altercation at Creggan Heights at or about 00:55 hours.
- (b) With regard to the nature of the injury sustained by the deceased, the coroner concluded that the deceased sustained three separate injuries to his head. The first injury, in order of sequence was a blow to the left side of the forehead which was most likely caused as a result of being struck by a missile (possibly a piece of masonry thrown by a rioter) during a disturbance involving a crowd of youths and the army. According to the coroner, this injury to the front of the deceased’s head was of sufficient force to cause the deceased to fall to the ground, possibly unconscious. The coroner concluded that as a result of an accelerated fall onto, probably the road surface, the deceased was caused to sustain a second injury, namely a left sided fracture of the skull and a coup-contrecoup injury to the brain. The third injury to the top of the skull was possibly caused by the fall, although the coroner was unable to state on balance the precise cause of this injury.
- (c) Based on the evidence, the court concluded that on balance, the deceased was not struck with a baton round.

Grounds of challenge

[12] The applicant seeks an order of certiorari to quash the impugned decision and an order of mandamus directing that a fresh inquest be held.

[13] The primary grounds of challenge as provided in the Order 53 Statement are as follows:

- 5(a) Unlawful failure to take into account relevant evidence. In reaching his factual findings, the proposed respondent failed to take into account the central evidence of the soldiers, Seamus Friel and the original map exhibit marked "C8." This constitutes *Wednesbury* unreasonableness in all the circumstances.
- (b) Findings of fact not supported by evidence. The proposed respondent's findings that (i) the deceased died due to being struck by a piece of masonry or equivalent and not a rubber bullet and (ii) that this happened on Creggan Heights were unsupported by any evidence and are therefore *Wednesbury* unreasonable findings.
- (c) Unreasonable exercise of discretion and procedural impropriety. The proposed respondent's refusal to amend the scope of the inquest to include: (i) the original RUC investigation; (ii) the RMP investigation; and (iii) the impact of the RUC-army agreement on lethal force incidents constituted an unlawful exercise of discretion. Thereafter, the fact of, and the manner in which the proposed respondent considered the RUC materials generated by the original investigation for the purpose of arriving at his factual findings constituted procedural impropriety.
- (d) Unlawful restrictions on questioning of Soldier B. The restrictions placed upon the question of Soldier B were in excess of what was necessary to vindicate the right against self-incrimination, they were contrary to common law and hence constituted an error of law.
- (e) Failure to hold an Article 2 compliant inquest. As a consequence of the errors referred to paras 5(a) and (b) above, the proposed respondent has failed to hold an article 2 compliant inquest and has thereby acted unlawfully and contrary to section 6 of the Human Rights Act 1998.

[14] In consideration of the said grounds of challenge, I have benefitted greatly from the comprehensive skeleton arguments on behalf of the applicant, the respondent, the Ministry of Defence and Soldier B (Notice Party). I remain grateful to counsel in respect of their fulsome skeleton arguments and also their succinct oral submissions.

The court's role in a challenge to the coroner's verdict

[15] The role of this court in a judicial review challenge to the verdict of a coroner was considered by Keegan J in *Re Jordan* [2017] NIQB 135 at para [24]:

"[24] In reaching my conclusion I bear in mind the context of this case and the following matters in particular:

- (i) An inquest is not a civil trial or a criminal trial. The imperative is to establish the truth and also in this case to comply with the obligations of Article 2 of the ECHR in terms of an enhanced inquiry.
- (ii) It must be borne in mind that judicial review is not appeal. There is a spectrum of decisions that can be made by any fact finding judge. However, the reviewing court does not quash a decision simply because it might have reached a different conclusion or substitute its own reasoning.
- (iii) In this case it was agreed by all parties that the case should be heard by a judge alone rather than a jury. There was no issue taken as to the Coroner's exercise of discretion regarding this issue pursuant to Section 18(2) of the 1959 Act. The judge was sitting in his role as a Coroner and as such his decision is reviewable.
- (iv) The court is exercising a supervisory function in this case regarding two elements which I paraphrase –
 - (1) whether the inquest was conducted in accordance with law and proper procedure; and
 - (2) given the subject matter, whether it complied with the Article 2 obligations.
- (v) Considerable deference must be paid to a fact-finding tribunal. This is a case where the challenge is to a verdict. The decision maker has to be afforded considerable latitude to decide on the facts of the case having seen and heard witnesses unless the verdict can be categorised as unreasonable in the *Wednesbury* sense or irrational. This is a high threshold.
- (vi) The issue of weight to be applied to relevant factors is clearly a matter for the decision maker and is not interfered with in judicial review see *R(on the application of Khatun) v Newham LBC* [2004] Civ 55.

- (vii) The subject matter is important in any judicial review. The court must always exercise appropriate vigilance to guard against unlawful or irrational decision making. Given that Article 2 is engaged a particularly close scrutiny must be applied.”

[16] The coroner’s investigation is an inquisitorial process. The inquest is not an adversarial proceeding. The coroner exercises a broad discretion with regard to the inquiry. His responsibility is to discharge the statutory duty imposed upon him by conducting an investigation in accordance with the Coroners Act (Northern Ireland) 1959 (“the 1959 Act”) and the Coroners Practice and Procedure Rules (Northern Ireland) 1963 (“the 1963 Rules”). The purpose of the inquest is to answer the four statutory questions, namely (i) who the deceased was; (ii) how; (iii) when; (iv) where the deceased came by his or her death. Where the death is alleged to involve agents of the State, the scope of the inquest must comply with the article 2 ECHR obligation and must be capable to leading to a determination as to whether the use of lethal force was justified.

[17] As stated by Keegan J in *Re Jordan*, in carrying out his statutory duty, the coroner “has to be afforded considerable latitude to decide on the facts of the case having seen and heard witnesses unless the verdict can be categorised as unreasonable in the *Wednesbury* sense or irrational. This is a high threshold.” The learned judge went further to state that the judicial review court “must always exercise appropriate vigilance to guard against unlawful or irrational decision making. Given that article 2 is engaged, a particularly close scrutiny must be applied.”

[18] In *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 AC 430, their Lordships said at [99]:

“99 Where, however, the jurisdiction of the court to entertain an appeal depends on whether it involves a question of fact or law, there is no need to refer to the supervisory jurisdiction of the court in judicial review. The controlling authority is *Edwards v Bairstow* [1956] AC 14, which explains the scope of an appeal on a point of law. It is accurately summarised in *Bryan v United Kingdom* (1995) 21 EHRR 342, 349-350, paras 25, 26. A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant

factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law. The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court. But these are the only significant limitations on the court's jurisdiction, and they are not very different from the limitations which practical considerations impose on an appellate court with full jurisdiction to entertain appeals on fact or law but which deals with them on the papers only and without hearing oral evidence." (underlining added).

[19] The concept of findings of fact unsupported by evidence constituting perversity was considered in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [11]:

"[11] It may be helpful to comment quite briefly on three matters first of all. It is well known that "perversity" represents a very high hurdle. In *Miftari v SSHD* [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury* sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter."

[20] In the *Secretary of State for Education and Science v Tameside* [1977] AC 1014, Lord Wilberforce stated as follows:

"If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made

upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455, per Lord Denning M.R., at p. 493.”

[21] The irrationality test was recently considered and succinctly summarised by Humphreys J in *Craig Thompson’s Application* [2022] NIKB 17, at para [33]:

“[33] In *Re McKinney’s Application* [2022] NIQB 23 the Divisional Court recently approved the rationality test espoused by Lord Woolf in *R v North and East Devon HA ex p. Coughlan* [2001] QB 213:

‘Rationality, as it has developed in modern public law, has two faces: one is the barely known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic.’”

[22] In line with the above authorities, I will proceed to evaluate the coroner’s findings of fact in the context of the stated grounds of challenge.

Evaluation of the coroner’s findings of fact

[23] As stated in paragraph 5(a) and (b) of the Order 53 Statement, the principal grounds of challenge advanced by the applicant are that the respondent unlawfully ignored or failed to take into account relevant evidence and that there was an absence of evidence to support the respondent’s core findings. In essence, it is alleged that the coroner’s finding that the deceased sustained his injuries as a result of being struck with a missile of some sort during an altercation at Creggan Heights is not supported by the evidence. Second, the coroner’s finding that the timings contained in the statements of the soldiers were accurate, particularly the timings that rubber baton rounds were fired on Bligh’s Lane at 1:20 hours (and not earlier as alleged by the civilian witnesses), is not based on a reasonable or rational analysis of the evidence. Third, the coroner’s findings relating to the cause of the deceased’s injuries and in particular that the deceased was subjected to an “accelerated fall” are not founded on any evidence and are perverse findings.

[24] I will now consider the said principal grounds of challenge under the following headings, namely (a) the altercation in which the coroner found the deceased sustained his injuries; (b) the issue of the timings of events, particularly at

1:20 hrs, contained in the statements of the soldiers; and (c) the coroner's findings regarding the nature and cause of the deceased's injuries. I will then consider the remaining grounds of challenge as detailed in the applicant's Order 53 Statement.

(a) *The coroner's finding in relation to the altercation in which the deceased sustained his injuries*

[25] At paras [32]-[180] of his factual findings, the coroner carried out a comprehensive review of the evidence and at paras [181]-[233] he then set out his conclusions on the evidence.

[26] The coroner commenced his conclusions on the evidence by stating at para [181] that he was satisfied on balance that there had been considerable rioting in the Creggan area of Derry during the afternoon of 17 May 1973. Military logs recorded that the army had discharged a large quantity of rubber baton rounds and CS gas. Cars were hijacked, barricades were built and crowds consisting mostly of young people were engaged in rioting on the streets. The coroner stated that the situation settled during the evening so that around 23.00 hours on 17 May 1973, the area was mostly quiet.

[27] The applicant submits that the evidence suggests that the rioting had finished much earlier than 23.00 hours before recommencing later that night. It is submitted that the only reference to public disorder after 19:22hrs and before disorder recommenced later that night is recorded at serial 113 of the army logs which is timed at 21:59hrs. However, this entry does not relate to the Creggan or to any part of the Royal Anglian tactical area of responsibility. The applicant is correct in his assertion that the first record in the logs of any resumption of public disorder is at 00:59hrs, a log entry which will be considered in more detail below. The applicant submits that the stage at which rioting and public order ceased on 17 May and recommenced shortly after midnight on 18 May is contextually significant.

[28] For completeness, it is noted that the regimental log records reveal references to shots fired by paramilitaries during the course of the evening and into the night (see serials 103, 105, 115, 117 and 119).

[29] At para [188] of his conclusions, the coroner stated as follows:

“[188] The timings detailed in the soldiers' statements are centrally important to my findings of fact. It is not entirely clear where some of the timings come from or how the soldiers provided timings which do correlate with each other. It is possible that the RMP completed the timings from military logs which were not available at this inquest and the soldiers did not recall the exact timings themselves. This would not be unusual since a private on the ground involved in an operation with no

radio would hardly be expected to have an accurate recall of exact timings. I heard no evidence on this issue. However, some military logs are available and relevant entries are detailed above. I am satisfied that these log entries are contemporaneous and are likely to be accurate.”

[30] In essence, while acknowledging the passage of time from the incident which gave rise to the deceased’s death in May 1973 and the inquest in 2021, in his attempt to ascertain where and when the deceased sustained his injuries, the coroner relied upon the following:

- (a) The accounts given by the civilian witnesses that the deceased was taken to the home of Mr Deehan at approximately 1:00 hrs and further that the ambulance was tasked at 1:15 hrs before taking the deceased to Altnagelvin Hospital, arriving at 1:45 hrs. In other words, the incident that caused the deceased’s injuries must have occurred before 1:00 hrs on 18 May 1973.
- (b) The accounts provided by Soldiers A, B, C, D, E, and F in their written statements dated 20 May 1973;
- (c) The radio logs for 3 Royal Anglian Regiment on 17 and 18 May 1973 and, in particular, a contemporaneous log which recorded the following:

“00.59 - C/S 22 fired 2 Baton rds at a crowd of 30 at junc Bligh’s Lane/Creggan Hts.”

[31] At paras [77]-[126], the coroner considered in detail the said written statements of the soldiers and the evidence of those who gave sworn testimony to the inquest. The statements made by Soldiers A, B, C, D, E and F were given particular consideration since they had been taken by the Royal Military Police (“RMP”) on 20 May 1973, two days after the deceased was injured and shortly before he died in hospital. These statements refer to a number of incidents which occurred between 00:55 hrs and 1:20 hrs on 18 May. The critical issue for this court is to determine which incident, according to the coroner, led to the death of the deceased.

[32] In his assessment of the statements from the military witnesses, the coroner focused primarily on the statement of L/Cpl Rogers (Soldier A). L/Cpl Rogers is now deceased. In his statement dated 20 May 1973, L/Cpl Rogers stated that three sections of soldiers were under his command. At approximately 23:45 hrs on 17 May 1973, he was instructed to deploy his soldiers to patrol and give protection to military who were carrying out repairs to fencing at the Piggery Ridge Army Camp, Bligh’s Lane.

[33] At para [198] of his factual findings, the coroner stated as follows:

“[198] ... I am satisfied that following deployment of the patrol commanded by L/Cpl Rogers at 00.55hrs two groups were involved in throwing missiles including bricks, stones, masonry and glass bottles at the soldiers. During *this altercation* a minimum of four rubber baton rounds were fired. Soldier C recalled being told by Soldier D to fire at a person who was running away but he did not strike this person. Soldier D saw one man fall to his knees and clutch his chest. This man was dragged away by the crowd. Soldier B recalled hitting a youth on the leg. This youth then ran away.

[199] Importantly, I am also satisfied that Thomas Friel sustained his injuries during *this altercation* and not at a later time as previously concluded by the RUC. It does not ever seem to have been considered that Thomas Friel could have been present at this earlier *altercation* and could have sustained his injuries as a result of his involvement. It always seems to have been assumed that he was injured in a later altercation with the soldiers. Perhaps this comes from the RUC conclusions which I have dealt with below.” [Emphasis added]

[34] In paras [194] and [195] of his factual findings, the coroner refers to one altercation when L/Cpl Rogers’ section was ambushed as they proceeded down an alleyway between 83 and 85 Creggan Heights. Reference to L/Cpl Rogers’ statement reveals that 20-30 youths stoned and threw bottles at the patrol causing it to pull back along the alleyway. As L/Cpl Rogers ran past Soldier D, whom he had left to secure the rear of the junction of Bligh’s Lane and Creggan Heights, L/Cpl Rogers ordered him to fire baton rounds to disperse the youths. According to L/Cpl Rogers, Soldiers B and C discharged two baton rounds each towards these youths from a distance of approximately 20-30 meters. It is significant that Soldier B, in what appears to be a description of the same incident at the same location, identifies only 15 youths who were chasing L/Cpl Rogers’ half section. Soldier B claimed in his statement that he “fired two baton rounds at the main group of 15 youths and saw one youth struck on his leg by one round. He held his leg for a few seconds and ran back with the other youths into the alleyway.” It is noted that Soldier B provides no description of the youth who was injured. Also, Soldier B does not state whether the remaining baton round contacted with any person. Soldier B states that the youths threw “various missiles” but gives no description of the said missiles and there is no express reference to pieces of masonry.

[35] At para [196] of the coroner’s factual findings, he stated that he was “satisfied that this incident occurred as reported by the soldiers as is corroborated by the contemporaneous radio log entry.” I have reservations as to the accuracy of this conclusion. The log entry at 00:59 hrs refers to two baton rounds being discharged at

a crowd of 30 at the junction of Bligh's Lane and Creggan Heights. The altercation described by L/Cpl Rogers and Soldier B appears to have occurred at a different location. Despite asserting his reliance upon the said contemporaneous radio log entry, the coroner, in the same para states that "...I appreciate that the radio log (above) does not completely correlate with the soldiers' accounts, but I am satisfied that not every baton round fired was reported via radio." As considered in more detail below, despite the fact that L/Cpl Rogers stated that Soldier C also discharged two baton rounds at the same location, Soldier C failed to give a corroborating account in his statement.

[36] Soldier D, in his statement, states that at 00:55 hrs, instructions were received to move from a track off Bligh's Lane and to move forward to observe Balbane Pass. This section commanded by L/Cpl Rogers, moved out and advanced to the junction of Bligh's Lane and Creggan Heights. Soldier D observed 10/15 youths at the Bligh's Lane junction. Soldier D was then detailed with three men, two of whom had baton guns, to secure the junction. L/Cpl Rogers and the remaining half section advanced towards the alleyway or gap between 83-85 Creggan Heights. Up to this point, the statement of Soldier D more or less accords with that of L/Cpl Rogers.

[37] Significantly, in his description of the same altercation as referred to above by L/Cpl Rogers and Soldier B, Soldier D then gives a contrary account, stating as follows:

"[The patrol] came under stoning and bottling from 20-30 DYH who were on the other side of this gap between the houses and also on Bligh's Lane across from me. [L/Cpl Rogers] and his half section withdrew past me, and L/Cpl Rogers told me to use baton rounds if necessary. A group of about 20 DYH were following L/Cpl Rogers as he withdrew and throwing stones and bottles. I ordered my half section to withdraw after L/Cpl Rogers' half section up Bligh's Lane. As we did so this group followed us continuing to stone us. Just before the track, as mentioned previously, I told both men with baton guns to open fire on the DYH. They fired two rounds each and I saw one man aged 25 years fall to his knees with his hands clasped to his chest. He was dragged away by the crowd, and I joined L/Cpl Rogers on the track and Soldier F joined us with another section about two minutes later."

[38] Therefore, contrary to the altercation described by L/Cpl Rogers and Soldier B, Soldier D states that he did not order the soldiers with baton guns to discharge baton rounds until the patrol had withdrawn up Bligh's Lane, just before the sunken track. Soldier D does not identify the soldiers who discharged the baton rounds, although a reasonable assumption must be that they were Soldiers B and C. Soldier

D stated that a crowd of 20 youths followed the soldiers up Bligh's Lane, continued to throw stones and bottles at the patrol. Significantly, he does not describe any rioter, apart from the youth aged 25 who fell to his knees with hands clasped to his chest. He did not provide any details as to whether the remaining baton rounds struck anyone. Nor does he state that he saw any rioters struck with stones, bottles or any other missiles during the riot.

[39] The statement from Soldier C throws up even more confusion in an attempt to identify the altercation in which the coroner concludes the deceased sustained his injuries. In a written statement, Soldier C states as follows:

"We were given the order to move to the junction of Bligh's Lane/Creggan Heights, this would have been about 00:55 hrs. As we moved forward the DYH at the junction dispersed. On reaching the junction we began to get stoned. We stayed at the junction for a few minutes and were about to withdraw when Soldier D shouted 'there go on', I looked to where he indicated and saw two men running down Creggan Heights from the direction of the Rath. One of the men looked as if he was going to throw something and I fired 1xbaton round at him. I did not observe any strike and the two men ran off. At this time, we were being stoned and Soldier D told us to withdraw. We withdrew back to the track, previously mentioned, still being stoned. It was about this time that Soldier F and another section arrived."

[40] The above excerpt from Soldier C's statement plainly describes another "altercation" which, according to Soldier C, occurred at or about 00:55 hours. This altercation is not mentioned by Soldier D. More significantly, Soldier C makes no reference in his statement to any altercation in the alleyway as alleged by L/Cpl Rogers in which the latter claims that Soldiers B and C fired two baton rounds each towards advancing youths. Further, Soldier C does not refer to another altercation on Bligh's Lane as alleged by Soldier D, when the latter states that soldiers with baton guns (presumably Soldiers B and C) discharged two baton rounds each and that a man aged 25 fell to his knees with his hands clasped to his chest. Although Soldier C admits to firing a total of four baton rounds, at no stage during any altercation does he admit to discharging two baton rounds in quick succession.

[41] Soldier E, in his description of the "altercation" which occurred when L/Cpl Rogers advanced towards Balbane Pass, states that Soldiers B and C fired only one baton round each at a group of 15 youths who were throwing stones and missiles at L/Cpl Rogers and his half section. Contrary to the statements of Soldiers B and C, Soldier E saw a baton round strike a youth who fell, then got up and ran away. Furthermore, contrary to the statement of Soldier D, Soldier E states that the

youths “stopped throwing objects at us after the rounds were fired but as we retreated up Bligh’s Lane.”

[42] The coroner cannot be criticised for his finding that the deceased was injured shortly before 1:00 hrs. As highlighted by the coroner at para [201] of his findings, the civilian witnesses, namely Mr Doherty, Mr Lynch and Mr Deehan, all recalled that they were present at Mr Deehan’s house (85 Creggan Heights) at or about 01:00 hrs when Thomas Friel (the deceased) was already in the house in an unconscious state. Also, the ambulance records show that the ambulance was tasked at 01:15 hrs.

[43] In my judgment, even if I accept for the moment, that the coroner was justified in concluding that the timings in the soldiers’ statements were correct and that he should consider only those incidents described by the soldiers in their statements prior to 01:00 hrs, the fatal flaw in his findings relates to how, when and where the deceased is alleged to have sustained his injuries. The following observations are very relevant. Firstly, as demonstrated in the analysis above of the soldiers’ written statements, the coroner plainly fails to identify the precise “altercation”, in which the deceased was injured. The coroner places particular focus on the statement of L/Cpl Rogers and the log entry at 00:59 hrs which, according to the coroner, corroborates the incident as reported by the soldiers (see para [196]). In my judgment, from the analysis of the soldiers’ statements, such an unqualified conclusion cannot be reached that the “altercation” described by L/Cpl Rogers correlates to the log entry. Secondly, although the coroner refers to only one “altercation” at 00:55 hrs, it is abundantly clear from the soldiers’ statements that a number of different altercations took place at different locations. Thirdly, the statements of the soldiers are littered with inconsistencies relating to the number of rioters at different locations, the number of baton rounds discharged at various locations, the identity of each soldier who it is alleged to have discharged the baton rounds and the location at which the baton rounds were discharged. Fourthly, the statements lack detail as to descriptions of the rioters, to include those struck with a baton round. Significantly, no soldier provides a description of the deceased. Fifthly, the statements fail to give any detail as to the parts of the body at which each baton round was fired and what happened to the rounds which missed their targets.

[44] The highlighted inconsistencies in the soldiers’ statements were not considered by the coroner in his findings of fact. The coroner’s reliance upon the accounts given in these statements and the radio log entry at 00:59 hrs lead inevitably to the conclusion that a central finding of fact relating to the circumstances in which it is claimed the deceased died, is not based upon a reasonable or rational analysis of the evidence. The said radio log at 00:59 hrs does not, as claimed by the coroner, corroborate the accounts given by all the soldiers and, in particular, the altercation in which the coroner states the deceased was allegedly involved.

(b) The timings of incidents at 01:20 hours in the statements of the soldiers

[45] At para [188] of his decision, the coroner stated that “the timings detailed in the soldiers’ statements are centrally important to my findings of fact.” Since, as analysed above, the coroner determined that the deceased sustained his injuries prior to 1:00 hrs, any incidents described in the soldiers’ statements as occurring at 1:20 hrs were not considered relevant to the coronial investigation into the circumstances giving rise to the death of the deceased.

[46] Clearly, as accepted by the applicant, if the ambulance was tasked to collect the deceased at 01:15 hours, then the person struck with the baton round fired at Bligh’s Lane at 01:20 hours could not have been the deceased. By the same token, as stated by the applicant, given the central importance of the timings to the coroner’s findings, if his reasoning with regard to reliance on the timings in the soldiers’ statements is flawed, this will substantially undermine his core findings.

[47] What is the basis upon which the coroner accepted and placed reliance upon the timings detailed in the soldiers’ statements? The answer is found in paragraph [188] of the coroner’s findings where, although the source of the timings was not clear, he accepted the possibility that (a) the RMP provided the timings in the soldiers’ statements and (b) the possibility that the timings were completed from military logs which were not available to the inquest. Furthermore, with regard to the military logs that were available, he was satisfied that the log entries were contemporaneous and likely to be accurate.

[48] The influence and input of the RMP with regard to the statement taking process was noted by the coroner at para [185] when he stated as follows:

“I also heard evidence about how the RMP statements were recorded and the process that followed. I was told that soldiers would sit down with an RMP investigator, and a statement would be recorded detailing the events. The RMP investigator would then pass a copy of the statement to his supervisor. It seems that other details may have been added at this stage. In this inquest the abbreviations ‘DYH’ standing for ‘Derry Young Hooligans’ appear to have been added after the soldiers made their statements since none of those soldiers who gave oral evidence could recall ever having heard this term before.”

[49] Further to the above, it is a reasonable conclusion that the RMP were also responsible for inserting other matters into the soldiers’ statements, such as OS grid references, which would not have been within the specific knowledge of each soldier. Clearly, the input and influence of the RMP officers into the soldiers’

statements, even after the soldiers had signed their statements, is most alarming to say the least.

[50] Due to the input of the RMP, it is not surprising that the timings provided by the soldiers in their statements correlate with each other. As inferred by the coroner, it is unlikely that the soldiers would recall the exact timings.

[51] Ms Doherty KC, in her written and oral submissions on behalf of the applicant, strenuously submits that any reliance on timings, which are based on military logs not available to the inquest, cannot amount to a reasonable finding nor a permissible inference founded upon the evidence. In essence, it is submitted that this is a baseless finding and constitutes pure speculation. Furthermore, Ms Doherty KC argues that the 'uncanny' correlation of the timings in the soldiers' statements clearly demonstrates their unreliability due to the substantial interference by the RMP. It is submitted that a soldier on the ground would hardly be able to have an accurate recall of the exact timings, particularly when the statements from the soldiers were not taken until the late afternoon of the 20 May 1973, when it was clear that Thomas Friel was going to die. The statements were not contemporaneous. In support of this submission, Ms Doherty KC refers to the oral testimony of Soldier F at the inquest, who despite claiming to have a recollection of the events on 17-18 May 1973, could not remember how the time 1:20 hrs came to be inserted in his statement.

[52] The Respondent argues that military logs were available, some of which were detailed by the coroner at para [43] of his findings. At para [188], the coroner stated that he was satisfied that those log entries were contemporaneous and likely to be accurate. This assertion is plainly not contentious, and it is not the subject of any challenge or adverse submission by the applicant. If the incidents described by the soldiers as occurring at 1:20 hrs were reflected in a military log, then clearly reliance on the log and the soldiers' statements would be justified. However, when no confirmatory log is produced, in the absence of other corroborating evidence, I have grave reservations that the coroner was justified in making a finding that the timings were based on military logs not available to the inquest. In an inquest where the timings in the statements of the soldiers were strongly disputed, the coroner wrongly engaged in pure speculation, thereby avoiding careful scrutiny and critical analysis of such a crucial matter.

[53] As referred to in the previous paragraph, the next question is to consider whether there is any other evidence which would lend support to the coroner's finding that the timings of the incidents recorded in the soldiers' statements are likely to be accurate. In this regard, the coroner was referred to a document entitled 'Director of Operations Brief for 18-19 May 1973.' At para [3] of the said document, the following is recorded:

"3 Londonderry

a 21-year-old Creggan man is VSI [very seriously injured] in hospital. It is possible he was injured by a baton round in the rioting at 180100 May which was reported in the previous D of Ops Brief. A man was certainly seen to be dragged away unconscious during the riot."

[54] In an Annex to the said Director of Operations Brief dated 19 May 1973, the following is recorded:

"During the disturbances in the Creggan during the previous day [18 May] a man, thought to have been hit with a round was seen to fall and be dragged away. He was later admitted to ALTNAGELVIN HOSPITAL where his condition is described as serious, and he is not expected to live. He was: THOMAS FRIEL [RC-21] 70 CREGGAN HEIGHTS. He had previously served a prison sentence for rioting."

[55] The applicant submits that the Director of Operations Brief is a very relevant document and that the above highlighted sections contained within the document are plainly pertinent to the death of the deceased. The document makes specific reference to the name, age and address of the deceased. The applicant submits that the document constitutes a contemporaneous and formal recording of the incident involving the deceased in that it raises the possibility that the deceased was injured by a baton round and was dragged away unconscious during the riot. The critical event is timed at 01:00 hrs on 18 May ("180100 May"). It is recorded that the incident was reported in a previous Director of Operations Brief. In fact, the previous Director of Operations Brief does not refer to the incident. If it was reported in a previous document, it seems that that document is no longer available. The relevant entry quoted above from the Annex to the Director of Operations Brief dated 19 May 1973, confirms that during disturbances in the Creggan on the previous day, namely 18 May, the deceased is specifically identified as the "man, thought to have been hit with a round [and] was seen to fall and be dragged away."

[56] I accept this submission made by the applicant in respect of the Director of Operations Brief for 18-19 May 1973. In my judgment, it is clear from this document, that the military were aware that at 01:00 hrs on 18 May 1973, during disturbances in the Creggan area, the deceased was thought to have been hit with a baton round and was seen to fall and be dragged away in an unconscious state. They were also aware that he had been taken to Altnagelvin Hospital. Investigations by the military on 19 May must have revealed that the deceased had served a prison sentence for rioting.

[57] Therefore, in light of the contents of this apparently contemporaneous document, one would have expected the incident to be recorded and timed at 01:00 hrs on 18 May in at least some of the soldiers' statements. An analysis of the timings

of the incidents allegedly occurring between 00:55 hrs and 00:59 hrs in the soldiers' statements has been carried out at paras [31]-[44] above. As far as I can ascertain from the said analysis, no soldier states that during this period at about 01:00 hrs a person was seen to be struck (or possibly struck by a baton round) and was then seen to fall and be dragged away unconscious.

[58] Ms Doherty KC, on behalf of the applicant, urges the court to accept that the incident described in the Director of Operations Brief appears to match the description of a critical event in some of the soldiers' statements, albeit the timing is given at 01:20 hrs. I have reviewed the soldiers' statements. Soldier B states that he fired one baton round at one of three men who were leading rioters as they advanced up Bligh's Lane towards soldiers who were lying in a sunken track. Soldier B stated that he "did not at first see what happened to the man, owing to the smoke from my baton gun, but saw that he had fallen onto his back amongst the many bricks, stones, bottles etc which were in the road" (Bligh's Lane). As Soldier B went to arrest this person, he "saw two other youths dragging the man back towards the junction and into the main body of the rioters. The time was then about 1:20 hrs."

[59] In his statement, L/Cpl Rogers (Soldier A) states that Soldiers B and C fired two baton rounds each in Bligh's Lane. When the rounds were fired, L/Cpl Rogers saw a youth, who was in the front of the main crowd stagger backwards and fall onto his back. L/Cpl Rogers further stated that he "saw the youth who had fallen, being dragged by two other youths into the main crowd of rioters." Although L/Cpl Rogers states that the said incident and the discharge of the baton rounds occurred at 01:20 hrs, a convincing argument can be made that he is describing the incident recorded at 01:00 hrs in the Director of Operations Brief.

[60] Soldier E, in his statement, states that his patrol retreated up Bligh's Lane and they took cover in a sunken track at the side of the lane. From this position they were able to view the Creggan Heights/Bligh's Lane junction and saw about 20 youths congregate. Some of the youths then began to approach along Bligh's Lane and went past the sunken track. Soldier E states that orders were then given by L/Cpl Rogers, and then two baton gunners each fired some baton rounds. Soldier E stated that he could not remember how many baton rounds were fired and did not see any strikes. Significantly, Soldier E states that "it was only later that I heard that one of the youths had been struck by a baton round." No more detail is provided by Soldier E, except to state that the baton rounds were fired over a period of a few minutes at 01:20 hrs.

[61] Soldier F, in his statement, confirms that rioting was taking place in Bligh's Lane and that baton rounds were discharged, some around 01:20 hrs. Significantly, Soldier F states that, "during this part of the rioting, I did not see any of the youths actually fall to the ground and being dragged from the area." It seems clear from this statement that Soldier F was responding to the account provided in the Director of Operations Brief, namely whether he had seen a person, thought to

have been hit with a baton round fall to the ground and then dragged away. To repeat, this incident is reported to have occurred at 01:00 hrs and not 01:20 hrs.

[62] The Director of Operations Brief for 18-19 May 1973 is unquestionably a relevant and potentially significant document. The document was submitted into evidence and was considered at length during questioning of Soldier C. The document refers specifically to the deceased, the possibility that he was struck with a baton round, then falling and being dragged away, possibly unconscious. The critical time for the incident is recorded at 1:00 hrs on 18 May 1973. A description of the incident does not appear in the statements of the soldiers for the period between 00:55 and 01:00 hrs. The document is contemporaneous and was completed before the soldiers made their statements on 20 May 1973. Despite the obvious relevance and significance of the entries contained in the document, particularly in relation to the circumstances in which the deceased sustained his injuries and the timing of the incident, the coroner failed to make any reference or give any consideration to the document in his findings. In my judgment, this omission leads inevitably to the conclusion that potentially relevant evidence was ignored which in turn undermines the coroner's core findings.

[63] Ms Doherty KC, on behalf of the applicant submits that, leaving aside the timings at 01.20 hrs in the soldiers' statements, the events on Bligh's Lane as described by the soldiers, and in particular Soldier B, are in many significant respects consistent with the statement of Seamus Friel taken by Constable Parks on 23 May 1973. Dr McGleenan KC, on behalf of the respondent rejects any suggestion that the parties concerned are describing the same incident. Ms Doherty KC acknowledges that the said accounts given differ in relation to (a) whether the deceased was engaged in riotous behaviour and (b) the range at which the baton round was fired. The differences are significant. However, the differing accounts are unsurprising since they are designed to deflect any blame or responsibility away from the deceased and Soldier B. Despite these differences, Ms Doherty KC submits there are striking similarities in both accounts and that, in effect, in his statement and in his oral evidence, Soldier B is describing the same incident and the inference must be that he discharged a baton round which struck Thomas Friel. According to Ms Doherty KC, further support for this submission is found in the said Director of Operations Brief which closely depicts the account given by Soldier B.

[64] The coroner correctly identified inconsistencies in the account attributed to Seamus Friel in the Derry Journal article dated 22 May 1973. The coroner also highlighted inconsistencies in the purported account from Seamus Friel in a book written by Father Denis Fall and Father Raymond Murray entitled 'Rubber and Plastic Bullets Maim and Kill.' The coroner was clearly entitled to call into question the written and oral evidence of Patrick Curran. The coroner also placed reliance upon the fact that neither Seamus Friel nor Patrick Curran claimed to have seen the rubber bullet that struck the deceased. In response, the applicant makes two points. First, the focus of attention should have been on the statements made by Seamus Friel and Soldier B within a short time of the incident. Close analysis, it is claimed,

reveals striking similarities and support for the assertion that both are describing the same event. Second, the statements of Soldiers B and C contain references to the discharge of rubber bullets at persons, but on no occasion do they actually see the projectile strike a person. Rather, they infer that they struck the targets by their reactions.

[65] Ms Doherty KC further submitted that similarities between Soldier B's description of firing a baton round which causes a person to fall onto his back and the account given by Seamus Friel in his statement made shortly after the incident, find support in the narrative contained within exhibit C8. Exhibit C8 is a map that marks (i) the location of Thomas Friel's home address; (ii) the position of Soldier B at the sunken track; and (iii) a 'X' marking the position of the deceased. Ms Doherty KC argued that it was the coroner's tentative view that this map or plan emanated from the original inquest in 1974. It was further submitted that this map was an acceptance by the MOD that in 1973/4, Thomas Friel was injured by a rubber baton round fired on Bligh's Lane. In their skeleton argument, the MOD raise issues as to the source and provenance of this map, contending that at best the exhibit reflects the subjective conclusion of a police officer or RMP officer.

[66] For the reasons given above, in my judgment, the coroner's steadfast reliance on the timings in the soldiers' statements as "centrally important to [his] findings of fact" was unreasonable in the *Wednesbury* sense. In light of the coroner's acceptance of the possibility that the RMP provided the timings which were included in the soldiers' statements, the accuracy of the timings is questionable. The acceptance by soldiers that the RMP had interfered with or had an input into the statements, even after the soldiers had signed their statements, is disconcerting and must cast some doubt on the accuracy of the timings. The coroner's reliance on the timings, based on military logs which were not available to the inquest, cannot amount to a reasonable finding nor a permissible inference based on the evidence. The coroner's failure to give any or any adequate consideration to the contemporaneous Director of Operations Brief dated 18/19 May 1973 was irrational, since the highlighted sections contained within the document referred specifically to the deceased and raised the possibility that the deceased was struck by a baton round and was dragged away unconscious during a riot at 01:00 hrs on 18 May 1973.

[67] The unreasonable reliance on the accuracy of the timings at 01:20 hrs in the statements of the soldiers have caused the coroner to fall into error, in that potentially relevant evidence was both overlooked and not considered by the coroner into the investigation of the circumstances relating to the deceased's death.

[68] Although it is clear that there are differences in the accounts given by the civilian witnesses, there are also similarities given by the soldiers, particularly Soldier B and Seamus Friel, relating to the discharge of a rubber baton round at Bligh's Lane and its impact on the identified target. It is axiomatic that it is not for this court to express any evaluative judgment or opinion on the accuracy or otherwise of his statements or relevant documentation, including Exhibit C8.

However, by relying unreasonably on the timings contained within the soldiers' statements, the coroner has failed to fully investigate the events alleged to have occurred at 01:20 hrs, particularly in light of the Director of Operations Brief dated 18/19 May 1973, Exhibit C8 and the police investigation.

(c) *The coroner's findings regarding (a) the nature and (b) the cause of the deceased's injuries*

[69] The coroner's analysis of the nature of the injuries sustained by the deceased are detailed at paras [127]-[165] of his findings. These paras provide a comprehensive review of the post-mortem examination by Dr Carson, Deputy State Pathologist for Northern Ireland and the written reports and oral evidence of the pathologists namely Professor Crane, Dr Swift and Dr Shepherd.

[70] A post-mortem examination was performed on 23 May 1973 by Dr Carson. A summary of Dr Carson's report is at para [128] of the coroner's findings is as detailed below:

"[128] In his post-mortem report Dr Carson described the appearance of the scalp as follows:

1. Two sutured surgical incisions, each 6 cm. long, on the left side in the temporal and parietal regions.
2. A single surgical incision, 10 cm. long, on the right anterior temporal region.
3. An irregular area of abrasion, 8 cm. x 3 cm., on the right upper forehead and right temporal region. The long axis of this area of abrasion was more or less horizontal.'

On the forehead he described:

A sutured laceration, 1½ cm. long, surrounded by abrasions within an area of 2½ cm. diameter. The laceration was located on the left side of the forehead below the hairline and 5½ cm. above the inner third of the left eyebrow.

On the undersurface of the scalp there was bruising beneath the wound on the left forehead and around the burr holes. There was also a separate, distinct area of bruising, 10 cm. x 10 cm.

overlying the vertex and left temporo-parietal region.'

The skull was described as follows:

1. Of average thickness and density.
2. A fissured fracture which extended upwards and at first backwards from the upper posterior margins of the anterior burr hole in the left parietal bone. Having passed upwards and backwards for 2 cm. it then turned upwards and forwards, almost at right angles, for a further 7 cm. to end in the coronal sutures, 1 cm. to the left of the midline. The coronal suture was slightly sprung.'

Examination of the brain revealed the following:

1. Soft and swollen with patchy subarachnoid haemorrhage.
2. Cortical necrosis and bruising, in an area 9 cm. x 5 cm., right temporal region.
3. Small secondary haemorrhages in mid-brain and pons.'"

[71] The cause of death as stated by Dr Carson in his autopsy report was "... bruising, necrosis and oedema of the brain associated with a fracture of the skull due to a blow on the left side of the head."

[72] In his review of the pathology evidence, the coroner identified and focussed his attention on three separate and distinct areas of injury, namely:

- (a) the laceration lying within an area of abrasion on the left of the upper forehead;
- (b) an extensive fissured fracture involving the left parietal area of the skull, and which extended upwards and forwards to the top of the front part of the skull;
- (c) an elongated area of abrasion on the right temporal region of the scalp and which extended to involve the upper part of the right forehead.

[73] In his analysis, the coroner summarised Dr Carson's interpretations of the said injuries as follows:

"[131] Dr Carson concluded that the interpretation of the injuries was difficult. He said that even if the abrasions on the right side of the forehead were disregarded, there remained the injury on the left forehead not associated with a skull fracture or brain injury, and the separate injury on the left side of the skull with its associated brain damage. He was of the view that all these injuries could have been caused by a fall downstairs. He was also of the view however that the injury on the left side of the forehead could have been caused by the impact of the nose of a rubber bullet but, on its own, this injury was not severe and should not have offered a threat to life. Dr Carson also stated that the skull fracture on the left side was most unlikely to have been caused by a rubber bullet since it was above the thin temporal bone which could perhaps be damaged by a missile. He felt that it was much more likely to have been caused by a heavy fall on a relatively flat, hard surface. He opined that he may have been hit first on the forehead by a rubber bullet and then fell heavily striking his head on the ground. This however would not explain the abrasions on the right forehead."

[74] Professor Crane had been instructed on behalf of the coroner to consider the post-mortem findings and to provide a report outlining his opinion regarding the cause and mechanism of death. The coroner highlighted that Professor Crane was the State Pathologist for Northern Ireland from 1990 until 2014 and that since 1992, he has been a Professor of Forensic Medicine at Queen's University, Belfast. Professor Crane also told the inquest that he had extensive experience not only in forensic pathology, but also in relation to injuries caused by rubber and plastic baton rounds. Professor Crane told the inquest that as a junior doctor he witnessed many injuries caused by baton rounds and that he was involved in a study in the mid-1970s to compare injuries caused by rubber and plastic bullets to determine which were more harmful. Professor Crane has also given evidence in other inquests concerning deaths resulting from the discharge of baton rounds.

[75] In his analysis of Professor Crane's evidence, the coroner emphasised that Professor Crane stated that his interpretation of the injuries was difficult. However, according to Professor Crane the cause of the death was quite clear, namely that there was unequivocal evidence that the deceased sustained a skull fracture to the left parietal area of the skull associated with bleeding and bruising to the brain itself.

[76] The coroner summarised Professor Crane's interpretation of the injuries as follows:

- (a) The skull fracture was clearly on the left side of the parietal area of the skull and not the right side. The skull fracture could not be related to the injury on the right side of the forehead. The injury to the right temple/forehead area was not associated with any underlying brain injury. The brain injury was subjacent to the left sided skull fracture.
- (b) The areas of abraded skin/scalp suggested contact with some object or surface. Whilst the elongated shape of the abrasion might suggest a tangential strike from an elongated object, according to Professor Crane, the pattern on the skin was not caused by a rubber baton strike (see para [140]). According to Professor Crane the left-sided skull fracture could have been caused by a strike from a rubber baton.
- (c) Although there was no apparent surface injury to the scalp, there was bruising on the undersurface of the scalp and an extensive fracture of the underlying skull (para [143]). Because the left-sided skull fracture was not associated with any obvious external injury, the conclusion must be that it was caused by some form of impact, of significant force to the left parietal region of the scalp (para [144]). The severity of the impact was significant and extensive in that it actually sprung the coronal suture (para 148).
- (d) On the assumption that the fracture to the left side of the skull was caused by a rubber bullet, according to Professor Crane it was not possible to accurately determine the range from which the rubber baton round was discharged solely on the basis of the severity of the head injury. As a matter of common sense, the closer the range the more likely the round will cause injury. In this case, the severity of the injury would indicate a direct impact as opposed to a ricochet. In his opinion, Professor Crane concluded that for a rubber baton round to strike the head and cause a fracture would have been from a range less than the advised 20 metres (para [145]). In his oral evidence, Professor Crane accepted that his experience as to the workings and discharge of rubber baton rounds was limited to his role as a doctor in the A&E Department of the Royal Victoria Hospital Belfast treating people who had been struck by both rubber and plastic baton rounds (para [146]).
- (e) Professor Crane was of the opinion that a simple fall to the ground resulting in a side skull fracture is not common. He said, in his experience, the skull is more likely to fracture at the front or the back (para [148]). Simple falls from a standing position onto a hard unyielding surface would seem unlikely. When skull fractures do occur, they are more likely at the front or the back of the skull and are more commonly associated with accelerated falls onto the ground. With specific regard to the site of the skull fracture sustained by the deceased, Professor Crane's opinion was that such fractures caused by a fall

are less common as a person's shoulder will provide some protection to this area of the skull (para [144]).

[77] In consideration of Professor Crane's oral evidence, the coroner stated that Professor Crane confirmed that skull fractures are more common in accelerated falls but, can also occur in a simple fall. The coroner also stated that Professor Crane said that a brick or a stone striking the skull could have caused the fracture to the left side of the head. In his oral evidence, according to the coroner, Professor Crane also stated that the abrasion to the left side of the forehead was consistent with a fall and that a strike to the left side of the skull could have caused the contrecoup injury to the right side of the head and brain. (Paras [149]-[150]).

[78] At paras [151]-[162], the coroner considered the pathology reports from Dr Shepherd and also his oral evidence.

[79] In his original report, Dr Shepherd concluded that, in his opinion, the pattern of injury to the *right* side of the forehead together with an underlying skull fracture of the *right* side of the head and the underlying brain damage of the *right* side of the brain are entirely consistent with the forceful contact by a linear object, such as a rubber bullet. Furthermore, Dr Shepherd stated that the shape of the abrasion to the right of the forehead was entirely consistent with the shape of a rubber bullet. Dr Shepherd also stated that the injury to the left side of the forehead is more typical of a collapse onto a rough surface and is not consistent with contact from a rubber bullet. Dr Shepherd further stated that an individual who falls downstairs is more likely to sustain other injuries to his body from multiple points of contact with the stairs, walls and other objects. No such injuries were present in this case.

[80] As stated previously, the inquest as directed by the Attorney General for Northern Ireland, was based on Dr Shepherd's pathology report and the conclusions of the Historical Inquiries Team.

[81] As emphasised by the coroner, both Professor Crane and Dr Swift disputed Dr Shepherd's opinion that the deceased had sustained a fracture to the *right* side of the skull and also that the parallel abrasions were a result of a strike by a rubber baton round. In advance of the inquest, the coroner forwarded to Dr Shepherd the reports of Professor Crane and Dr Swift together with post-mortem photographs from both the PSNI and the State Pathologist's Department ("SPD"). In an addendum report, Dr Shepherd conceded that the new photographs reveal a fracture of the left side of the skull and that the fracture line extended from the coronal suture to a vascular groove on the inner surface of the skull where it turns at an approximate right angle downwards and continues to the anterior of the two burr holes. It is also conceded that the coronal suture contains material consistent with the opening (springing) of the coronal suture (see para [156]).

[82] At para [217] of his findings, the coroner summarised Dr Shepherd's oral evidence as follows:

“[217] Dr Shepherd opined at inquest that the abrasion to the right side of the head, in the shape of an outline of a rubber baton round, was indeed caused by a rubber baton round striking the head of Thomas Friel. He considered that a cylindrical object like a baton round could make ‘tramline’ abrasions and the shape of a small triangle seen to the right side of the head. Explaining the injuries Dr Shepherd said that in his opinion the baton round struck the right side of Thomas Friel’s head causing the abrasion and underlying brain damage noted by the surgeons and at post-mortem. The impact of the baton round to the right side of the head had also caused a ‘distortion fracture’ to the left of the skull and the force of this strike had been sufficient to ‘spring’ the coronal suture. Dr Shepherd referred to a Forensic Pathology text book in support of his view that such a ‘distortion fracture’ could occur.

[218] Dr Shepherd is an experienced Forensic Pathologist but in all the circumstances of this inquest the evidence from Dr Carson, Professor Crane and Dr Swift is to be preferred. Faced with the more extensive experience of Professor Crane, in terms of baton round injuries, Dr Shepherd was not prepared to concede that the injury to the right side of skull was in all likelihood not caused by a rubber baton round. During questioning he continued to rigidly stick to his theory of a baton round strike to the head and a distortion fracture of the skull despite the other pathologists casting serious doubt on the likelihood of such an occurrence. The other pathologists drew my attention to that fact that there was little or no bruising or bleeding under the side of the abrasion. Dr Shepherd claimed that he could see evidence of bruising and bleeding. I was not at all convinced about his evidence on this issue.

[219] When Dr Shepherd originally provided his report he said that the triangular shaped abrasion lay directly over the site of a skull fracture on the right hand side of the skull. When it was pointed out to him that there was no fracture on the right hand side of the skull, and when he conceded that he was wrong, he changed his evidence to conclude that a strike to the right hand side of the skull had caused a fracture on the left hand side of the skull. The other pathologists were highly sceptical about this

theory and were at pains to emphasise to me that while so called 'compression fractures' can occur, they are extremely rare."

[83] On the basis of the coroner's analysis of Dr Shepherd's reports and oral testimony, no criticism can be made with regard to his rejection of Dr Shepherd's evidence which, as stated by the coroner, "provoked robust disagreement from the other pathologists who gave evidence in this case." (Paragraph [160]).

[84] Dr Benjamin Swift, Pathologist, was instructed on behalf of Soldier B, a notice party to these proceedings. At para [163] of his findings, the coroner provides a verbatim account of the conclusions reached by Dr Swift. A summary of Dr Swift's conclusions are as follows:

- (a) Dr Swift agrees with the post-mortem report of Dr Carson and also the conclusions reached by Professor Crane, namely that Thomas Friel died due to the effects of a blunt force head injury to the left side of the head, resulting from a skull fracture, bleeding around the brain as well as bruising and swelling of the brain itself.
- (b) The clinical description of a left-sided skull fracture associated with contra lateral subdural haematoma and contusional injury (bruising) to the surface of the right temporal lobe (site of operation) is often referred to as a "contrecoup injury" and is typically seen with heavy falls whereby the head strikes a solid surface and especially when a fall is accelerated beyond the simple effects of gravity. Such a pattern (coup/contrecoup injury) is far less frequently seen in cases of direct impacts from blunt objects.
- (c) According to Dr Swift, the pathology points to the deceased striking the left side of his head against the ground or similar hard surface, the force of the impact being transmitted across the head and creating the damage seen to the opposite side of the brain as well as tearing small veins, thus accounting for the subdural bleeding.
- (d) In Dr Swift's opinion, the means by which the deceased sustained the left-sided skull fracture cannot be identified in this case. One possibility, according to Dr Swift, is that the deceased fell "in response to an impact, stumble or a push." Dr Swift states that intoxication might have put the deceased at an increased risk of falling in response to such an impact, stumble or a push.
- (e) Dr Swift does not exclude the possibility that the deceased fell downstairs. He emphasises that the written materials do not provide a detailed account as to the nature, type or length of the stairs. Without explaining how each and every identified injury was sustained, Dr Swift states that the deceased may

have simply fallen forward down a short set of steps causing him to strike his head.

- (f) In respect of the abrasion and laceration to the deceased's left forehead, Dr Swift states that it "will be in keeping with a collapse to the ground, however, I would not entirely exclude the possibility of an impact from a rubber baton round." If it is accepted that he was struck by a rubber baton round, he may well have struck the left side of his head when falling to the ground.
- (g) With regard to the linear abrasion to the right side of the head although the abraded area possesses the appearance described as a "tramline", he agrees with Professor Crane that it is not consistent with a baton round injury.
- (h) It is possible that the large "tramline" skin changes shown in the post-mortem photographs to the right side were in fact not present at the time of admission and consequently they could not have been caused by the dragging actions of others, as suggested by Professor Crane. According to Dr Swift, the abrasions to the right side of the scalp may have been created during the care of the deceased in hospital.
- (i) In respect of Dr Swift's oral testimony, the coroner stated the following at para [165] of his findings:

"[165] When he gave oral evidence, Dr Swift said that in his opinion there was clearly an impact to the left side of the forehead. Dr Swift said that this injury to the forehead could have been caused by a fall to the ground or by a strike from a brick or stone. Dr Swift said that the injuries to the head might have been caused by a fall downstairs. He was cautious however about this fall being the cause of death since there was a lack of multiple injuries."

Cause of the deceased's injuries

[85] Following his consideration of the pathology evidence in relation to the nature of the injuries sustained by the deceased, the coroner came to the following findings in relation to how the said injuries were sustained by the deceased:

"[226] I am satisfied to the required standard, considering the opinions of all of the pathologists and applying my own not inconsiderable experience as a death investigator, that Thomas Friel sustained three separate injuries to his head.

[227] On balance, the first in order of sequence was a blow to the left side of the forehead. I consider it most likely that this injury was caused by him being struck by a missile of some sort during a disturbance involving a crowd of youths and the army. I am satisfied that Thomas Friel was highly intoxicated when he arrived onto Creggan Heights. He could possibly have been trying to get to Piggery Ridge camp in accordance with the view of Seamus Friel and Patrick Curran. Alternatively, he could have been making his way home along the lower pedestrian section of Blighs Lane from Central Drive when he arrived onto Creggan Heights during a disturbance. However he got there, I am satisfied that while in Creggan Heights he was with the crowd who were involved in stoning the army patrol. It is more likely than not that this injury to front of his head caused him to fall to the ground. The injury, although, not life threatening, was not trivial. Post-mortem examination and photographs showed considerable under scalp bleeding associated with this injury. I am satisfied that it was of sufficient force to have caused Thomas Friel to fall to the ground, possibly unconscious. When he fell he struck the left side of his head and face. The post-mortem photographs show bruising to the left of the face and eye. This accelerated fall onto, probably, the road surface, caused the left sided fracture of the skull and a coup-contrecoup injury to the brain. There was a third injury to the top of the skull perhaps caused by the fall. I am not able to say on balance exactly how this injury was caused.

[228] It is likely that the scene during the disturbance was fast paced, frenzied and chaotic. At least two, and probably more than two, rubber baton were discharged striking at least two people. I am not persuaded, based on the evidence that I have heard, that Thomas Friel was struck with a rubber baton round. It is, of course, possible that he may have been, but I do not consider that this is the most likely scenario based on the evidence which I have heard."

[86] As stated, the coroner found that the injury to the left side of the deceased's forehead was sustained first in order of sequence. Specifically, the coroner concluded that "it [was] most likely that this injury was caused by [the deceased] being struck by a *missile of some sort* during a disturbance involving a crowd of youths and the army." (Para [227]).

[87] With regard to this conclusion the following observations are made. First, the coroner fails to make any attempt to identify the missile which it is alleged struck the deceased in his written findings. At para [198], in his description of the “altercation” in which the coroner claimed the deceased was involved, the coroner stated that he was satisfied that two groups were involved in throwing missiles, including bricks, stones, masonry and glass bottles at soldiers. The coroner went further to state that he was satisfied that the deceased sustained his injuries during this altercation (para [199]). Apart from this general description of potential missiles, the type and the specifications of the missile are not particularised. In other words, the coroner’s written findings provide no assistance as to whether the deceased was struck by a brick, stone, piece of masonry or a bottle. Clearly, such details would be essential since, as considered below, the coroner went further to consider that the impact of the missile was sufficient to cause the deceased to fall to the ground. It is noted that when delivering his written findings, the coroner stated that the missile was possibly a piece of masonry. He failed to provide any further elaboration.

[88] Second, it is clear from the statements of the soldiers and the civilian witnesses that there is no direct evidence that the deceased was involved in stoning the army or that the deceased was struck on the forehead by a missile (whether a piece of masonry or otherwise) as part of a crowd involved in stoning the army as claimed.

[89] Third, there is no evidence from the statements of the soldiers and the civilian witnesses that an unidentified person, involved in the stoning of the army or otherwise, was seen to have been struck by a “missile of some sort” thrown by the rioters.

[90] Fourth, when the nature of the rioting and the various incidents or “altercations” were investigated by the RMP and the RUC in the immediate aftermath, at no stage was it suggested or mooted that the deceased was struck by a missile thrown by the rioters. To the contrary, the view seemingly adopted at the time was that the deceased was potentially struck by a rubber bullet.

[91] Fifthly, it seems that the theory or possibility that the deceased was struck by a missile of some sort emanated not from the direct evidence of the witnesses, but rather from a question asked by coroner’s counsel during questioning of the pathologists.

[92] Sixthly, if the coroner’s view was that serious consideration should be given to the theory that the deceased was struck by a missile of some sort by a crowd during stoning of the army, the parties should have been invited to explore the plausibility of this theory during questioning of all the witnesses, including the soldiers, the pathologists and the engineer. Without providing an exhaustive list, it is likely that the questioning would have included an in-depth scrutiny of the following, namely (a) the precise nature of the missile that allegedly struck the deceased; (b) the position of the deceased when he was struck; (c) the position of the

rioters who it is claimed threw the missiles; (d) the position of the soldiers in relation to both the rioters and the deceased; (e) the precise location of the altercation as determined by the coroner; (f) an enquiry and explanation as to how the deceased sustaining an injury to the front of his forehead, if the persons throwing missiles were behind or at the side of the deceased,

[93] In para [227], the coroner stated that he was satisfied that in Creggan Heights, the deceased was with a crowd who were involved in stoning the army patrol. At paras [31]-[44] above, I have already highlighted the problems in pinpointing the precise location where it is alleged that this altercation took place.

[94] Further in para [227], with regard to the nature of the impact caused by the missile the coroner stated as follows:

“It is more likely than not that this injury to [the] front of his head caused him to fall to the ground. The injury, although, not life threatening, was not trivial. Post-mortem examination and photographs showed considerable under scalp bleeding associated with this injury. I am satisfied that it was of sufficient force to have caused Thomas Friel to fall to the ground, possibly unconscious. When he fell he struck the left side of his head and face. The post-mortem photographs show bruising to the left of the face and eye. This *accelerated fall onto*, probably, the road surface, caused the left sided fracture of the skull and a coup-contrecoup injury to the brain.”

[95] In respect of this particular finding, the following observations and are made. Firstly, to repeat my criticisms above, the nature, size and dimensions of the alleged missile are not identified. These factors are crucial because, according to the coroner, the impact of the missile and the resultant injury to the left side of the deceased’s forehead was of sufficient force to cause the deceased to fall to the ground, possibly unconscious. Secondly, presumably to emphasise the force caused by the missile, the coroner made a finding that the post-mortem examination and photographs showed considerable under scalp bleeding associated with this injury. This finding is not accurate. The post-mortem examination does not refer to *considerable* bruising beneath the wound on the left forehead. Also, as referred to by the coroner at para [142] of his findings, Professor Crane noted the presence of a small laceration that was surrounded by some abrasions to the left side of the upper forehead. There was *slight* bruising of the under surface of the scalp subjacent to this, but the frontal area of the skull was not damaged.

[96] This analysis, in my judgment, undermines one of the coroner’s primary findings that a missile (whatever its description and dimensions) was of sufficient force to cause the deceased to fall to the ground, possibly unconscious.

[97] Professor Crane, in his report and in his evidence stated that the injury to the left side of the upper forehead was not indicative of sufficient force to cause the deceased to fall, in an accelerated manner to the ground. Rather, as noted above, Professor Crane referred to the presence of a small laceration surrounded by some abrasions to this area and slight bruising to the under surface of the scalp. Professor Crane accepts that the irregular streaky abrasion below the laceration would be more consistent with impact on a hard rough surface. Such an impact would not have been caused by an accelerated fall.

[98] At para [221] of his findings the coroner stated that Dr Swift claimed the injury to the left forehead could have been caused by a fall or a missile but doubted that it had been caused by the end of a rubber baton round. Conversely, at para [163] of his findings the coroner referred to Dr Swift's conclusions that with regard to the abrasion and laceration to the left forehead, Dr Swift "would not entirely exclude the possibility of an impact from a rubber baton round."

[99] With respect to the coroner, the evidence is entirely lacking to prove not only that the deceased was struck by a missile (whatever its nature and dimensions) but also that the impact was of sufficient force which resulted in an injury that caused the deceased to fall, in an accelerated manner, onto the road surface causing a left-sided fracture of the skull and contrecoup injury to the brain.

[100] All the pathologists, including Dr Shepherd, agree that the deceased sustained a fracture to the left parietal area of the skull which in turn caused the brain injury. According to Professor Crane, in his expert opinion the left-sided skull fracture was caused by a baton round. In the opinion of Dr Swift, the fracture to the left side of the skull was most likely caused by a fall onto a hard surface. He also stated that the injury to the right side of the deceased's head was caused by a contrecoup injury, typically seen when the head strikes a solid surface during an accelerated fall beyond the simple effects of gravity.

[101] It must be acknowledged that Professor Crane considered interpretation of the injuries to be difficult. Dr Swift also stated that the manner in which the deceased came to be injured cannot be easily identified in this case. He stated that a fall to the ground causing the deceased to strike his head may have been due to the deceased's intoxication. Of course, such a fall would be associated with the effects of gravity and would not normally be associated with an accelerated fall. Dr Swift also stated that any intoxication might have put the deceased at risk of falling in response to an impact, stumble or a push. There is no evidence, nor did the coroner make a finding, that the deceased was subjected to a stumble or a push. With regard to an impact, Dr Swift did not exclude the possibility of an impact from a rubber baton round.

[102] In my judgment, the fatal flaw in the coroner's reasoning is that the evidence does not support a finding that the deceased was part of a crowd involved in stoning

the army and that during an altercation, which cannot be identified and supported by the evidence, the deceased was struck with the missile (whether a piece of masonry or otherwise) with such velocity and force that it caused the deceased to sustain a significant injury thereby causing him to fall in an accelerated fashion, possibly unconscious onto a hard surface.

[103] The court acknowledges that although pathologists accepted that the cause of death was a skull fracture to the left parietal area of the skull resulting in a brain injury, they were uncertain as to the mechanism that led to the skull fracture. Professor Crane's opinion was that the fatal injury was caused by a rubber bullet. Dr Swift's view was that the skull fracture resulted from the deceased striking the left side of his head on a hard surface following an accelerated fall. Despite emphasising the extensive experience of Professor Crane in respect of baton round injuries, the coroner preferred the opinion given by Dr Swift. The coroner was entitled to accept Dr Swift's opinion, provided, in my judgment, that there was cogent evidence that the deceased was struck with a missile with such force that it caused him to fall in an accelerated manner onto the ground and to strike his head. For the reasons given above, the evidence is totally lacking. The finding is wholly unsupported by the evidence, nor can such an inference be made from the facts (see *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5 at para [99]).

Ground 5(c) Reasonable exercise of discretion and procedural impropriety

[104] The scope of the inquest as directed by the coroner is set out by the coroner at para [30] of his factual findings and repeated at para [10] above. The applicant contends that the coroner unreasonably refused to exercise his discretion to amend the scope of the inquest to include:

- (i) the original RUC investigation;
- (ii) the RMP investigation; and
- (iii) the impact of the RUC-Army agreement on lethal force incidents.

[105] In relation to (i) the original RUC investigation, the applicant submits that the coroner did not deal with this matter during the inquest because he had explicitly ruled the police investigation to be outside the scope. Despite requests made by the applicant, no RUC witnesses were called to give evidence about the adequacy of the RUC investigation and the police reports were not considered during the evidential hearings nor during closing submissions. Notwithstanding this, the applicant submits that at paras [210]-[213], the coroner considered in detail the RUC investigation and, in particular, the police reports of DC Parks and DCI McNeill.

[106] In the PAP response and skeleton argument, the respondent fails to adequately address this particular ground of challenge.

[107] As highlighted by the coroner at para [205] of his findings, DC Parks stated in his report that "...from the evidence to hand it would appear that Soldier B fired the baton round which struck the deceased."

[108] In response to this view as stated by DC Parks in his report, the coroner stated at para [207]:

"[207] It would appear from this comment that DC Parks has discounted any possibility that the injuries could have occurred at a time in 'the morning' earlier than the incident reported by Soldier B. It is possible that he does not consider that Thomas Friel was injured when the soldiers engaged with the crowd shortly after 00:55hrs."

[109] It is apparent that the coroner was critical of the conclusions reached by DC Parks and that his criticisms and conclusions with regard to the police investigation were pivotal to his core findings, particularly in relation to the timings of the incident at 01:20 hrs.

[110] The coroner's findings in relation to the police investigation came under the heading "Conclusions on the Evidence." Since there was no evidence given at the inquest regarding the police investigation, which had been ruled out of the scope of the inquest, this constituted procedural impropriety. The exchange between the coroner and Mr Heraghty, counsel for the applicant, during closing submissions on 18 November 2021 did not remedy the defect.

[111] Having carefully considered the submissions from the applicant and the respondent in relation to the nature and extent of the RMP investigation and the RUC-GOC agreement there was no unreasonable exercise of discretion and procedural impropriety within the scope of the inquest, the matters were given adequate consideration by the coroner.

Unlawful restrictions on questioning of Soldier B

[112] The applicant argues that restrictions placed by the coroner on the questioning of Soldier B were in excess of what was necessary to protect Soldiers B's right against self-incrimination and hence constituted an error of law.

[113] Prior to an analysis of this ground of challenge, it is appropriate to set out the relevant statutory provisions relating to the privilege against self-incrimination and thereafter to consider the scope of the privilege.

Relevant provisions

[114] The privilege against self-incrimination in coronial proceedings originated at common law and is now expressly provided for in Rule 9 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963:

- “(1) No witness at an inquest shall be obliged to answer any question tending to incriminate himself or his spouse.
- (2) Where it appears to the coroner that a witness has been asked such a question, the coroner shall inform the witness that he may refuse to answer.”

[115] Section 10(1) of the Civil Evidence Act (Northern Ireland) 1971 provides:

“The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty –

- (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
- (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.”

Scope of the privilege

[116] The privilege against self-incrimination is considered in Leckey and Greer’s *Coroners’ Law and Practice in Northern Ireland* (1998) at paras 9-31 to 9-36 and also in Jervis on the Office and Duties of Coroners, 14th ed at paras 12-34 to 12-97.

[117] From the discussion in Jervis, the following is the summary of the procedure for claiming the privilege against self-incrimination during an inquest hearing:

- (a) Witnesses cannot refuse to go into the witness box on the ground that they might incriminate themselves: they can only claim the privilege after they are sworn, and the question put (see *Boyle v Wiseman* (1855) 10 EX 647).

- (b) Witnesses must pledge their oath that they honestly believe that the answer will, or may tend to, incriminate them (*Webb v East* (1880) 5 EX.D.108).
- (c) The privilege of self-incrimination applies only as regards criminal offences under the law. Witnesses cannot refuse to answer a question which they believe will expose them to civil liability or that it will incriminate someone else (see section 10(1) Civil Evidence Act (NI) 1971).
- (d) It is for the coroner to decide whether or not the witness is entitled to the privilege. Coroners must first satisfy themselves that the answer would tend to incriminate the witness (*Re Reynolds Ex p Reynolds* (1882) 20 Ch D 294).

[118] Where it appears to the coroner that a witness has been asked an incriminating question (that is, a question, the answer to which may be incriminating) the coroner must inform the witness that they may refuse to answer. (see Rule 9 of the Coroners' (Practice and Procedure) Rules (NI) 1963).

[119] Coroners must permit an incriminating question to be put, but if they inform the witness that they need not answer, and the witness chooses not to do so, the question should not be put again, or repeated in a different form. (Jervis at 12-96)

[120] If objection is taken to a question, the coroner should make a note of the wording of the question and of the fact that objection was taken to it. It is the witness who is privileged and not the evidence which they could give. (Jervis at 12-97).

[123] If a witness chooses to answer an incriminating question, they waive their privilege. The coroner should also add that if the witness does answer, they must tell the truth (Jervis at para 12-96).

[124] The privilege against self-incrimination was recently considered by the Court of Appeal in *M4 v The Coroners' Service of Northern Ireland* [2022] NICA 6 at paras [26] to [28].

Application of the privilege against self-incrimination to the present inquest

[125] Soldier B gave his evidence remotely to the inquest. Prior to the commencement of his evidence, the coroner stated as follows:

“MR CORONER: Mr Chambers, could I just stop you, there's one issue I just want to canvas with all of you including Mr Sayers. Shall we give a very general warning to this witness regarding incrimination and incriminating statements at the outset, I'll keep it under, I'll monitor it the entire way through, but it seems to me that we should give him that?

MR SAYERS: I had anticipated standing to ask for it at a point in time perhaps, but I think it might be in order, yes.

MR CORONER: Yes, perhaps if I do that. So, Soldier B, it's the Coroner here, one thing, so first of all thank you for coming along, for engaging with this inquest and for giving evidence to us this morning. Perhaps it hasn't been explained yet that everything, all of the circumstances that surround the death of Mr Friel are open for inquiry and investigation and conclusion at this inquest including whether in fact the rubber baton round that you fired struck Mr Friel or not and that's one of the issues, so nothing is assumed, as I said everything is open for inquiry. But given that you are an interested person at the inquest and there is at least an allegation, and it is just that, that you may have fired a rubber baton round that struck Mr Friel, then it's appropriate for me at this stage to warn you and it's just that, that no one in this court should ask you any questions which may tend to incriminate you. In other words, we shouldn't ask you any incriminating questions and it's my job and my responsibility to guard against that and you certainly shouldn't answer any questions that may incriminate you. Now you have a senior counsel here representing you today who will be alert to all of those things so in that regard we are fortunate to have that protection. But it is just appropriate I thought at this stage to just remind you that if you think any question is unfair or you would like a little bit of time to speak to your legal representatives, I am completely content to give that you time, okay. It's important that you feel comfortable giving this evidence and that you give the best evidence possible that assists everyone including you." [Underlining added]

[126] The warning given by the coroner was plainly wrong in law. It was wrong for the coroner to tell the witness that "no one in this court should ask you any questions which may tend to incriminate you." Rather, Soldier B should have been told that the coroner must permit an incriminating question to be put, but that the witness is not obliged to answer any question tending to incriminate himself. Soldier B should have been told that, if it appears to the coroner that he has been asked a question that may tend to incriminate him, the witness has a right to decline to answer. However, if the witness chooses to answer an incriminating question, the witness waives his privilege and must tell the truth.

[127] Counsel on behalf of the respondent, in both written and oral submissions, accept that the warning given by the coroner at the commencement of Soldier B's evidence was wrong in law. However, it is submitted that once the erroneous warning was given, counsel advised the coroner and thereafter the coroner gave a warning which was correct in law.

[128] I am not persuaded by this argument. In my judgment, once the coroner was advised by his counsel that he had given an erroneous warning, the coroner should have immediately told Soldier B to completely disregard his earlier warning and then, in clear and distinct terms, he should have advised Soldier B as to the correct warning. Such clarification by the coroner at the earliest opportunity would have gone a considerable way to remove any doubt or confusion in the mind of Soldier B in his responses to further questioning.

[129] It appears that further questioning did take place relating to Soldier B's use of a baton gun. Following submissions by counsel, the coroner gave the following warning:

"MR CORONER: Yes, I'm inclined to be particularly cautious on this particular issue and therefore I will warn this witness that it's not that necessarily we've reached this stage but perhaps it is that we've reached the stage in the questioning by Coroner's counsel that you may wish to consider the initial warning I gave you that any answer you give to this question or other questions may, in my view, potentially tend to incriminate you and therefore you should consider whether you want to answer the question or not. Do you understand that? Sorry, I should have indicated to the witness I was speaking to you, I was directing that to you. We've reached the stage where some of these questions may engage your right against self-incrimination and therefore you can consider whether you want to answer this question or not.

WITNESS: Yes, I understand."

[130] The respondent argues that the coroner, in providing this warning, had corrected the previous erroneous warning. I disagree. The problem with the corrective warning is that the coroner refers to his 'initial warning' which, as I stated above, was plainly wrong in law. Since the coroner had failed to take immediate steps to direct the witness to ignore the initial wrongful warning, any subsequent reference to the initial warning would inevitably lead to a lack of clarity, confusion and misunderstanding on the part of the witness.

[131] For the reasons given, the failure to follow the law and the correct procedure for claiming the privilege against self-incrimination during an inquest hearing has undermined the questioning and the oral testimony of Soldier B.

Ground 5(d) - Failure to hold an Article 2 Inquest

[132] The applicant has confirmed that he no longer seeks leave on this ground.

Decision

[133] For the reasons given above, leave is granted on the grounds as stipulated. I will make an order of certiorari and quash the impugned decision of the coroner. I will also make an order of mandamus directing that a fresh inquest should be heard before a different coroner.