Neutral Citation No: [2012] NIQB 75

Ref: GIL8607

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

Delivered: 12/10/12

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

JOHN AILBE O'HARA

Plaintiff;

-And-

THE BELFAST HEALTH AND SOCIAL CARE TRUST

Defendant.

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GILLEN J

Application

[1] The plaintiff in this matter is the Chairman of the public Inquiry ("the Inquiry") into hyponatraemia-related deaths which was established on 1 November 2004 by the Minister of Health and Social Services and Public Safety.

[2] The defendant is the Belfast Health and Social Care Trust. It is the successor Trust to the Royal Group of Hospitals Health and Social Services Trust. The defendant includes the Royal Belfast Hospital for Sick Children which is the hospital in which a young girl, who for the purposes of this application and to maintain the privacy of the family I shall describe as X, died on 23 October 1996. The defendant is the Trust responsible for the medical notes and records relating to X's admission to the Children's Hospital on 21 October to 23 October 1996 as well as those of other children that were being treated on the wards specified in the application during that period ("the specified wards").

[3] The plaintiff seeks

- a declaration that disclosure by the defendant of documents and records, including medical notes and records, identified in the plaintiff's Notice to Produce documents dated 25 September 2012 and of the information contained therein, subject to the conditions set out in a schedule attached to

the application, is lawful and in the public interest notwithstanding any obligation of confidence or privacy pursuant to the Human Rights Act 1998 otherwise owed in respect of such documents and information.

- An order that the defendant shall forthwith produce a copy of the documents required by the Notice to its senior counsel to the Inquiry and, if appropriate, the Inquiry's expert consultant paediatrician, for the purpose of inspection and redaction as referred to in the said schedule.
- An order that the defendant, following the redaction of the documents, should forthwith produce to the plaintiff a copy of the redacted documents for the use of the Inquiry.
- An order that there should be permission for any party to apply to the court in connection with the implementation of such order, including any resolution of any question as to whether a particular record or document may be disclosed pursuant to it and/or the terms as to confidentiality by which it may be disclosed.
- in relation to the Rules of the Court of Judicature (NI) 1980, an order to abridge time for service on the defendant of the Originating Summons required by Order 3, that the time for entry of any memorandum of appearance should be abridged accordingly under Order 9(3) and 5(a) of the Rules and that the requirements of Order 28(1)(A) for the filing of the plaintiff's affidavit after the entry of the defendant's Memorandum of Appearance and the affidavit to be filed and served simultaneously with the Originating Summons should be dispensed with.

Background

[4] I am grateful to counsel on behalf of the applicant, Ms Anyadike-Danes QC, for a comprehensive and skilfully argued written skeleton argument which has been diligently researched and purveyed with an even hand throughout. I have leant heavily upon it in setting out the background to this matter. The Inquiry was established under the Health and Personal Social Services (Northern Ireland) Order 1972 by virtue of the powers conferred on the Department of Health, Social Services and Public Safety ("the Department") in Schedule 8. These provisions have been repealed but the powers were continued by virtue of Schedule A1 to the Interpretation Act (Northern Ireland) 1954 as amended. The scope of the Inquiry is set out in its revised Terms of Reference. It is an investigation into the events surrounding and following the deaths of two children who died in 1995 and 2001 (named Y and Z in this application) with particular reference to:

(i) Their care and treatment especially in relation to the management of their fluid balance and the choice of administration of intravenous fluids.

(ii) The actions of the statutory authorities, other organisations and responsible individuals concerned in the procedures, investigations and events which followed their deaths.

(iii) The communications with and explanations given to their families and others by the relevant authorities.

[5] The Chairman has also been given the discretion to examine and report on any other relevant matters which arise in connection with the Inquiry. In the exercise of his discretion, the Chairman included incorporated into the Inquiry's work an investigation into the case of X in precisely the same terms as for Y and Z. Ms Monye Anyadike-Danes has advised the court that that action was taken because hyponatraemia was associated with X's death although the parents of the child were not advised of that until 2004 when they raised queries following a chance viewing of the UTVdocumentary "When Hospitals Kill".

[6] The clinical case involving X was opened on Monday 24 September 2012. Evidence was due to be given by Dr Heather Steen on Tuesday 25 September 2012. The clinical case should have been completed on Thursday 11 October 2012 after three days of evidence from the Inquiry's experts who are all outside Northern Ireland. However , shortly after the hearing commenced, I am informed that Dr Steen's legal team disclosed that there was a potential new source of relevant documents in the hitherto undisclosed medical records and notes of other children that were in specified wards during Tuesday 22 October and Wednesday 23 October 1996 at a time when X was in the Children's Hospital.

[7] Dr Steen was on duty on 22 October 1996 and there are a number of issues to be determined in relation to that. These include where she was during that day, what she was doing and the extent to which she was accessible to her junior doctors and also to Dr Webb who was a paediatric neurologist contacted because of the concerns of her registrar, Dr Sands, about X's neurological conditions.

The documents at issue in this application

[8] This application concerns the medical notes and records of 25 patients who were admitted to the specified wards in the Children's Hospital on 22 and 23 October 1996. They include what the Inquiry has been advised are the medical notes and records of at least 13 children for whom Dr Steen was the named consultant paediatrician. The legal representatives of Dr Steen had expressed the view that at least some of the entries go to the as yet to be resolved issues of whether Dr Steen was actually in the Children's Hospital on that day and if so what she was doing.

[9] Counsel argued therefore that they are prima facie relevant to the work of the Inquiry as they may help to establish Dr Steen's whereabouts and activities together with her availability that day to provide X with the care and treatment she required and to give direction and guidance to other clinicians.

[10] During the course of the hearing at the Inquiry on 25 September 2012, it emerged that the Trust would not provide the Inquiry with a redacted copy of the medical notes and records without first notifying the patients concerned and in the event of not being able to obtain their consent, obtaining a Court Order declaring

that such a step would not constitute a breach of the patients' rights under Article 8 of the European Convention for Human Rights and Fundamental Freedoms ("ECHR"). In those circumstances the Chairman announced that he would issue a "Notice to Produce" to the Trust. He also indicated that if the consent of the patients was not forthcoming by the end of Monday 1 October 2012, then he would make an application to the court seeking a declaration that he is entitled to have a suitably redacted copy of the medical notes and records. The Chairman also addressed the patients who might be contacted in the next few days, seeking to be reassuring about the proposed use and handling of their medical notes and records.

[11] Accordingly the Chairman's Notice to Produce was issued to the Trust pursuant to his powers under the Interpretation Act (Northern Ireland) 1954, Schedule A1 requiring the Trust to provide within five days of 25 September 2012:

> "All documents and records, including the medical notes and records of those patients in the (specified) wards of the Royal Victoria Hospital for Sick Children on 22 and 23 October 1996 which disclosed or are relevant to the whereabouts and activities on those two days of Dr Heather Steen."

In addition the Chairman authorised the Inquiry to provide a "Note to Patients", which the Trust included in the documentation it sent out. This explained that the inspection of their notes and records for those two days was for a very limited purpose and provided reassurance that their privacy would be protected to the maximum degree possible. It also provided a contact number and referred the patients to the Inquiry's website – on which a full transcript for the hearings of Monday 24 September 2012 and Tuesday 25 September 2012 can be read. It also made clear that whilst it was hoped that there would be consent, in the absence of consent the Chairman would make an application to the Court to obtain the notes and records.

[12] Counsel further informed me that the late reference to potentially relevant medical notes and records and the adjournment of the oral hearings at the Inquiry received extensive media coverage including "Good Morning Ulster" and "Evening Extra" on the BBC.

[13] Mr McAlinden QC, who appeared on behalf of the Trust, informed me that the Trust had sent out a detailed letter and a consent form together with the Inquiry's Note to Patients and the Chairman's Notice to Produce to the last known address of all 25 patients or their next- of- kin.

[14] The Trust's letter explains the background, the issues and the relevance of the medical notes and records to the work of the Inquiry. It sets out the steps that will be taken to protect the patients' privacy and provides a helpline number (also operating at evenings and over the weekend) and an e-mail address for queries.

Importantly it made clear that if consent were not provided by close of business on Monday 1 October 2012, then the Chairman would make an application for a court order on Tuesday 2 October 2012. The letter made clear that if anyone wished to object to the making of any such Order by the High Court, it was their right to do so and they should immediately seek legal advice to enable representation to be made to the High Court.

[15] Mr McAlinden informed me that , at the date of this hearing, twelve patients had returned correspondence with a clear indication of consent, two further letters had been received from patients which had not made it clear if consent was forthcoming, one letter indicated consent was withheld (there was a verbal communication with this person who was the sister of a deceased patient whose parents were on holiday at present) and there were five patients who could not be served because the Trust was unable to ascertain their current address. Their last known address had been contacted.

[16] I further elicited from counsel the steps that had been taken to find the five missing patients and I was satisfied that all reasonable steps had been taken in the time available. To publish their names in a newspaper advertisement might well cause the mischief which the Trust is seeking to avoid namely publicise their identity. I add that the Trust had hand delivered letters to the last known addresses.

[17] Counsel on behalf of the Inquiry informed me that it is proposed that the documents in the un-redacted form will be inspected only by the Trust's senior counsel, senior counsel to the Inquiry and, if appropriate, the Inquiry's expert consultant paediatrician for the purpose of redacting them by removing as follows:

(a) All references to the patient's name, date of birth and contact details.

(b) Any reference to the patient's condition and treatment save to the extent that the Inquiry's expert consultant paediatrician considers that they are necessary to indicate what Dr Steen was doing and how accessible she was to other doctors involved in the care and treatment of X. Counsel also assured me that only the redacted documents will be used for the Inquiry's work and to that end will only be provided to the interested parties in the Inquiry and their legal teams on their undertaking not to disclose them further or to make use of them for any purpose other than one associated with assisting the Inquiry with its work. Neither the documents nor the redacted documents will be placed on the Inquiry's website.

[18] Counsel made it clear that it is quite possible that for some of the patients the sole extent of disclosure would involve no more than an initial check of their medical notes and records for the two days by a very restricted group of professionals as that may show there is no reference in them to Dr Steen. For others it may be nothing more than disclosing the fact and time of contact with Dr Steen with everything else being redacted.

[19] Finally, the relief sought includes Orders pursuant to the Rules of the Court of Judicature in relation to "short service" of the Originating Summons (O. 3), "abridgement of time" for the entry of any Memorandum of Service (O. 12 rule 9(3) and 5(a) and dispensing with certain requirements for the filing of the grounding affidavit (O. 28(1)(A)).

[20] It was clear that no issue was taken by the Trust in relation to these procedural matters and indeed it consented to the application.

The legal principles governing this application

[21] I am satisfied that pursuant to Section 23 of the Judicature (Northern Ireland) Act 1978, the court has power to make a binding declaration as of right if it is satisfied that the question for decision involves a point of general public importance or that it would in the circumstances be unjust or inconvenient to withhold the declaration and the interests of persons not party to the proceedings would not be unjustly prejudiced by the declaration. I am also satisfied that I have such power under the court's inherent jurisdiction.

[22] The plaintiff as Chairman of this Inquiry has powers under the Interpretation Act (Northern Ireland) 1954 which provides at Schedule A1, paragraph 4 as follows:

> "**Powers to require persons to give evidence etc**
>
> 4(1) Subject to sub-paragraphs (2) and (3) the person appointed to hold the inquiry may by notice require any person –
>
> (a) To attend at the time and place set forth in the notice to give evidence or to produce any books or documents in his custody or under his control which relate to any matter in question at the inquiry; or
>
> (b) To furnish, within such reasonable period as is specified in the notice, such information relating to any matter in question at the inquiry as the person appointed to hold the inquiry may think fit, and as the person so required is able to furnish.
>
> …….
>
> (3) Nothing in this paragraph shall empower the person appointed to hold the inquiry to require any

> person to produce any book or document or to ask any question which he would be entitled on the ground of privilege or otherwise to refuse to produce or to answer if the inquiry were a proceeding in a court of law."

[23] I am satisfied that an unlawful breach of Article 8 of the Convention would come within the ambit of the reference to "otherwise" referred to at paragraph 4(3) of the 1954 Act.

[24] This application is not concerned with the Data Protection Act 1998 or the duty of confidentiality which arises when confidential information comes to the knowledge of a person in circumstances where he has notice that the information is confidential with the effect that it would be just in all the circumstances that he should be precluded from disclosing information to others (see Attorney General v Guardian Newspapers Limited (No. 2) [1990] 1 AC 109). Counsel has indicated to me that the Trust has acknowledged that it can address its obligations in respect of "data protection" and "confidentiality" through redaction and other steps that the Chairman proposes should be taken to preserve the privacy of the patients concerned. Accordingly this application is not based on the failure of the Trust to comply with the Chairman's notice on either of those grounds.

Article 8 of the European Convention on Human Rights and Fundamental Freedoms

[25] Article 8 of the Convention provides as follows:

> **"Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Principles governing the implementation of Article 8 of the Convention

[26] Counsel have put before me a number of helpful authorities on this issue. I have found particular assistance in –

- R (S) v Plymouth City Council [2002] EWCA Civ. 388.

- A Health Authority v X and Others [2001] EWCA Civ. 2014.

- General Dental Council v Rimmer [2010] EWHC 1049.

- Z v Finland [1998] 25 EHRR 371.

- R (TB) v Combined Court at Stafford [2006] EWHC 1695.

- General Dental Council and Savery and Others [2011] EWHC 3011 (Admin).

[27] From these I have distilled the following principles relevant to this case. First, Article 8 rights are not absolute.

[28] Secondly, a balance must be struck between the various interests involved which include –

- Confidentiality of the information.

- The proper administration of justice. Is there a compelling public interest in the disclosure of the documents?

- The right of access to legal advice.

- The rights of all parties including, as in this case, parents of the children, the Inquiry and the public interest in this Inquiry reaching an informed and expeditious conclusion.

- The rights of children in particular to respect for private life.

[29] Thirdly, any restriction on the right to private life must be in accordance with the law. Are the documents bona fide required for the proper exercise of the Chairman's powers?

[30] Fourthly, disclosure must pursue a legitimate aim as set out in Article 8(2).

[31] Fifthly, above all, the interference must meet a pressing social need and be no greater than is proportionate to the legitimate aimed pursued. Has the intrusion into the patient's privacy been minimised by such steps as redaction and limitation of those to whom it will be disclosed? Is there a less intrusive method possible? Have all adequate safeguards been taken?

[32] Although Article 8 contains no explicit procedural requirement, the court will have regard to the decision-making process to determine whether it is to be conducted in a manner that is fair in all the circumstances. What notice has been

given to the patients of what is intended to occur in respect of their medical notes and records? Have all steps been taken to secure the views of those whose rights are at issue? Have they been involved in the decision-making process to a degree sufficient to provide them with protection of their interests? Have they been given notice of the application together with the date and time? It is important to appreciate that the requirement for this procedural fairness rests on the court. However the Inquiry in my view needs not only to take reasonable steps to identify and notify such patients concerned but also to satisfy the court that it has taken all practical steps within the context of the strong public interest in there being disclosure.

Conclusion

[33] I am satisfied that disclosure prima facie creates a breach of the Article 8 rights of these patients. The private lives of these children who were patients need to be protected so far as possible. The disclosure can only be made if the Inquiry can bring the matter within the ambit of article 8(2).

[34] There is a strong public interest in these records being produced for the purpose of this Inquiry into the death of children. Moreover it is hoped that this Inquiry will help restore public trust and confidence in the quality and standards of care provided by the Health and Social Services. I am satisfied that this case clearly falls within the ambit of Article 8(2) of the Convention and is highly relevant to the issue of the protection of health.

[35] I respectfully agree with the views of Sales J as expressed in the General Dental Council case that where there is a very strong public interest in allowing disclosure of records, for example in the course of a General Dental Council investigation, Article 8 cannot be taken in every case to impose an obligation to obtain an order before the order to produce such documents is made. This is particularly the case if it would impede the smooth running of an Inquiry and deplete its time and resources in a manner which could have a detrimental effect on its effectiveness. However , the sentiments expressed by Sales J were made in the context of a case where the General Dental Council (GDC) wished to establish that the registrar of the GDC, who already had copies of the relevant patient records in his possession, might pass those to the investigating committee of the GDC to enable that Committee to conduct an investigation into the allegation of professional misconduct of a particular doctor. In other words this was an internal disclosure. In a case such as the present, where one public body, namely the Inquiry, is seeking documentation from a wholly separate public body, namely the Trust, I believe that it is appropriate to make an application to the court as has occurred in this instance.

[36] I am satisfied that all reasonable steps have been taken to confine the persons who are to see these documents and that the documents themselves will be heavily redacted to ensure the minimum intrusion into the private lives of these patients.

Counsel has gone into great detail in explaining to me the nature of the redaction, the careful restriction to those who are required to see these documents and the express purpose for which they are required.

[37] I accept that this application is clearly in accordance with the legal rights of the Chairman of this Inquiry to carry out his task pursuant to Schedule 1A to the Interpretation Act (Northern Ireland) 1954.

[38] There is self-evidently a legitimate aim to be pursued by this Inquiry and these records are an integral part of that process.

[39] The steps that have been taken to minimise intrusion are proportionate to the aim pursued. I have been convinced that all proper safeguards have been invoked to minimise the intrusion. No less intrusive method is available.

[40] Finally I am persuaded that all reasonable and practical efforts have been taken to involve these patients within the decision-making process insofar as steps have been taken to notify them of the application and of the opportunity to make interventions if required. I consider these steps have been appropriate in the context of an Inquiry which must proceed with all due haste to ensure the recommendations emanating from this Inquiry are obtained in timely and proper circumstances.

[41] Accordingly I accede to the application before me. I have had an opportunity to view a draft order and I approve that draft.