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10th February 2012

Mr John O'Hara QC
Chairman
The Inquiry into Hyponatraemia-related Deaths
Arthur House
41 Arthur Street
BELFAST BT1 4GB.

Dear Mr. Chairman,

Re: Adam Strain.
The Matter of Professor John Forsythe.

We enclose submissions on behalf of the family of Adam Strain in the above.

Yours faithfully,

Hunter Associates.

(2)

In the Matter of Professor John Forsythe and the Inquiry into Hyponatraemia-related Deaths

Submission on behalf of the Family of Adam Strain

A. *Introduction*

1. One must start with the terms of reference of the Inquiry.

2. The report of Professor John Forsythe is extremely relevant to the "care and treatment of Adam Strain".

3. No period of time is defined as regards the procedures, investigations and events, which followed the death of Adam Strain. Thus it may be argued that the procedures in place in 2011 are just as relevant, if not more so, than those, which were in place in 1995.

4. The Inquiry is given a discretion to examine and report on any other matter, which arises in connection with the Inquiry.

5. The Inquiry is required to make such recommendations to the Department as it considers necessary and appropriate.

B. *The Issues raised by the Trust*

1. The issues set out by the Trust are:
   (a) whether it is appropriate for Professor Forsythe FRCS to continue to act as an independent expert witness retained by the Inquiry;
   (b) whether he should give evidence at the Inquiry;
   having regard to his previous involvement in the private and confidential review of renal transplant services in Northern Ireland.

2. In addition, the Trust submit:

> The independence of an expert appointed by the Inquiry is clearly relevant to the issue of the independence of a tribunal, the appropriate test is that applied in *Porter v Magill* [2002] 1 All ER page 465, at paragraph 103. The question is whether a fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility of bias.

3. However, it is important to remember that Professor Forsythe:
   (a) is not a member of the Inquiry Panel; and
   (b) is not an advisor to the Inquiry.

4. The family of Adam Strain do not accept that there is any substance in this point and would refer, by way of example, to the comments of Simon Brown LJ at paragraphs 64-65 of his judgment in the English Divisional Court case of *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [2003] QB 794, namely:

> 64 The claimants' third and final contention is that the Lessons Learnt Inquiry "lacked the appearance of independence" because Dr Anderson "was a former adviser to the prime minister" and "would be provided with a secretariat based in and staffed in part by employees of the Cabinet Office" and because his "freedom to determine the procedures to be adopted by the inquiry would be fettered" as a result of the government's prior decision that it would not sit in public and that it would have no right to publish internal government papers.
>
> 65 I am not sure whether to describe this ground of challenge as courageous or regrettable. Certainly it seems to me quite hopeless. No one suggests that Dr Anderson is in fact biased or lacking in independence with regard to his task. As to the perception of independence, Dr Anderson's only previous contact with government was a short-term appointment as a special advisor to the prime minister on contingency planning in relation to the "millennium bug". In this case, as in that, Dr Anderson has responded to the call and emerged from retirement to work without remuneration. To suggest that his independence is "tainted by his past association with the prime minister" is (at best) ill-judged. His secretariat is made up of seconded civil servants (and one member from industry), none of whom have any previous involvement with foot and mouth disease. True, some have been seconded from the Cabinet Office which is said to be "at the heart of *827 government", but Dr Anderson has made it amply plain that his secretariat is independent of government and will remain so. As to Dr Anderson's freedom to determine the inquiry's procedures having been fettered, the point is misconceived. Naturally, in agreeing to hold this inquiry, Dr Anderson had to accept the parameters within which it was to be conducted. I find it impossible to see, however, how this can be said to compromise his appearance of independence. If that were so, it would follow that no one could ever conduct such an inquiry with the appearance of independence. This attack, in short, is not upon Dr Anderson, but upon an inquiry in this form. In my judgment, no fair-minded and informed observer could or would conclude that Dr Anderson lacked independence. I add only this: it would have been perfectly open to the Secretary of State to appoint someone to chair this inquiry who was plainly not independent of government. As I have already endeavoured to explain, there was no obligation here on government to set up any particular form of inquiry at all. As it is, however, I am satisfied that Dr Anderson both is and appears truly independent of government.

5. In *Hayes v McGuigan* [2011] NICh 6, Deeny J had to consider whether or not an expert witness retained by one of the parties was truly independent. He stated, *inter alia*:

> [7] His duty to be independent and to assist the court is not, it seems to me, necessarily or inferentially undermined by the fact that he may act in several other proceedings for the party concerned.
>
> I readily accept that in certain circumstances even a professional person might be prohibited from acting as an expert before the court.
>
> That would be so if they had agreed to act on the basis that their fee would be larger if the client succeeded in his proceedings than if the client failed.
>
> It would be so, in my view, if the expert had some other financial interest in the outcome e.g. if he were the owner of the premises which were sought to be licensed in a licensing case, as has actually occurred. The granting of the licence may increase the value of the premises and create a conflict of interest for an otherwise independent witness. It would seem to me improper for him then to give evidence before the court as an independent expert.
>
> A person may not be an appropriate expert witness if they are a full-time employee of the party, which wishes to call them. That would not normally be acceptable unless they were possessed of some particular skill which made it very difficult to replicate their expertise. (They might still be a witness of fact.)
>
> Another witness might by his reports or by his conduct have shown such bias in favour of one party that it is better for the court to declare that little or no credence would be given to his evidence and that the party who had wished to call him would be better with a genuinely independent witness but that would not be a common occurrence.
>
> The witness, of course, has to have expertise in the field with regard to which he is giving evidence. I set these matters out for assistance in case the issue arises in other cases. There is a valuable note on the topic in *The Ikarian Reefer* [1993] 2 Lloyd's Rep.68 at p.81.

6. None of the above issues arise in respect of the Inquiry.

7. The position of an expert witness was also reviewed by the Supreme Court in *Jones v Kaney* [2011] AC 398. Lord Collins stated, *inter alia*:

> 99 There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to

> perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion, which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client. If, however, he gives an independent and unbiased opinion, which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court. But he will be in breach of the duty owed to his client.

8. Lord Hope stated, *inter alia* at paragraph 155 (albeit in the context of a dissenting judgment):

> ... In *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, 81 Cresswell J said, of the duties and responsibilities of experts in relation to the party and to the court, that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation, and that an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. He referred, in support of these propositions, to Lord Wilberforce's observations in *Whitehouse v Jordan* [1981] 1 WLR 246, 256 and those of Garland J in *Polivitte Ltd v Commercial Union Assurance Co plc* [1987] 1 Lloyd's Rep 379, 386 and Cazalet J in *In re J (Child Abuse: Expert Evidence)* [1991] FCR 193.

8. Lord Dyson stated, *inter alia*:

> 99 There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion, which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client. If, however, he gives an independent and unbiased opinion, which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court. But he will be in breach of the duty owed to his client.

9. The family of Adam Strain also note the very relevant comments of Professor Forsythe where he states, *inter alia*:

Keith Rigg and I felt that those central to your Inquiry should be aware of the review that Professor Chris Watson and I had carried out on renal transplant services in Northern Ireland in 2011. This is not because of any central relevance to the Inquiry but for two other reasons. First, the general principle of declaration for the purposes of transparency and secondly because the review contains some details which help set the delivery of a renal transplant service in context.

10. The family of Adam Strain:
    (a) draw attention to the fact that no complaint was made by the Trust as regards the independence or otherwise of Professor Forsythe until very recently – notwithstanding the fact that his involvement was disclosed by the Inquiry in October 2011 in their report 203-002-035.
    (b) respectfully submit that there is no substance in the points being raised by the Trust on the issue of alleged bias.

C. *The Issue from the Perspective of the Family of Adam Strain*

1. The family submit that the correct issue is whether or not the information obtained by Professor Forsythe during the course of the alleged "private and confidential review of renal transplantation services in Northern Ireland" should be put before the Inquiry.

2. On the one hand, Professor Forsythe has indicated that "some of the comments on the review might be considered to be pertinent" to the Inquiry; on the other hand, the Trust claims that "the report was not and has not been published and the duty of confidence owed by Professor Forsythe, FRCS, to the Board in respect of this report remains intact".

3. The Trust is, in effect, seeking the equivalent of a restriction order under 19 of the English Inquiries Act 2005.

4. The Inquiry is governed by paragraph 4(3) of Schedule A1 to the Interpretation Act (NI) 1954, as amended. Thus the issue becomes whether or not the Trust would be entitled to prevent production of the internal confidential review in a court of law.

5. The family of Adam Strain submit that it is significant that Lord Saville required the journalist, Toby Harnden, to disclose his sources in the Bloody Sunday Inquiry and the Billy Wright Inquiry required Ian Paisley Jnr, MLA, to disclose the identity of his informant.

6. It is respectfully submitted that vis-à-vis the Inquiry, any duty of confidence owed by Professor Forsythe to the Trust would be overridden by the Public Interest, as represented by the Inquiry: see generally *Lewis v Secretary of State for Health* [2008] EWHC 2196 (QB)

D. *Generally*

1. The family of Adam Strain also wish to draw attention to the fact that the Inquiry is an inquisitorial and not an adversarial process.

2. The family of Adam Strain would ask the Trust to remember the following functions of the Inquiry:
   (a) to establish the facts.
   (b) to ensure accountability.
   (c) to learn lessons.
   (d) to restore public confidence.
   (e) to provide an opportunity for reconciliation and resolution.
   (f) to develop policy.

3. Thus the family ask for both the inclusion of Professor Forsythe and any documents, which he believes relevant to prevent further deaths occurring.

E.J. David McBrien Bar Library 9 February 2012