

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Tuesday, 25 September 2012

(2.00 pm)

(Delay in proceedings)

(2.43 pm)

Discussion

THE CHAIRMAN: First of all, I want to thank my own inquiry team, the DLS team, and Mr Green in particular for submissions which have been very helpful in trying to work a way through the position that we are now in.

Mr Simpson, Mr McAlinden, yesterday, there was an issue raised about -- it's on the transcript at page 123. It was to the effect that you had previously made enquiries to see whether it was possible to interrogate a computer, and the information given to me at that stage was that it wasn't. Can I now take it that that's not the position?

MR SIMPSON: I wasn't aware of that fact. Maybe Mr McAlinden -- those were his instructions at the time. I will have to check that. That's not the position. We now know that the Patient Administration System can be interrogated by a date process, which is how we have got the information that I can tell you about at the moment, in a moment, whenever you wish.

THE CHAIRMAN: So if you put in a date of 22 October 1996, you know who the patients are in Allen Ward or the

1 overflow?

2 MR SIMPSON: Yes. There is a ward known as the Cherry Tree
3 Ward, which occasionally takes patients if there are too
4 many in the Allen Ward. That exercise has been carried
5 out. Both 22 October 1996 and 23 October 1996 were
6 interrogated in respect of both of those wards. We have
7 available to us the names of the patients, which I'll
8 come to in a moment. Importantly, we also have the name
9 of the consultant under whose name, if I may put it like
10 that, sir, the patient was admitted.

11 I have given to my learned friend for the inquiry
12 the names of the consultants who appear during those two
13 days as the named consultants. I'm currently also still
14 making enquiries to see if any further information can
15 be discovered as to who was on duty or on call on that
16 afternoon and evening. But I have also given my learned
17 friend the names of three consultants who could be
18 contacted by the inquiry team to see if they have any
19 personal record or recollection of being on duty or on
20 call.

21 THE CHAIRMAN: Is that on the Tuesday evening?

22 MR SIMPSON: The Tuesday evening and into the Wednesday --

23 THE CHAIRMAN: -- Tuesday evening from 5 o'clock that we
24 know there was a paediatrician on call, but we don't
25 know who it was.

1 MR SIMPSON: What we have is merely the name of the
2 consultant under whose name the individuals were
3 admitted. It doesn't mean any more than that, but we're
4 making those enquiries and having them carried out. As
5 I say, my learned friend can write to the other three.
6 We're seeking to find out whether or not any further
7 information can be found in respect of that.

8 The files of the patients -- all but one -- have
9 been located and have been seized from Dr Steen's
10 office. So all of those patients who were in on the
11 22nd and 23rd, bar one -- and a search is being made for
12 that one at the moment -- we now have in the Trust's
13 control, possession.

14 THE CHAIRMAN: Can you tell us how many patients we're
15 talking about?

16 MR SIMPSON: I can. 15. Sorry, 15 including
17 Claire Roberts. 14. We have 13 of the files.

18 THE CHAIRMAN: Right. So now you have those, if we discount
19 Claire, so there's 14, and then discount the one
20 unlocated file, that means you have access to 13 files?

21 MR SIMPSON: Yes.

22 THE CHAIRMAN: And it can be told from those in the same way
23 as we can tell from Claire's files who made entries or
24 who was noted as having been active in Claire's case at
25 any stage?

1 MR SIMPSON: One should see all the entries in due course,
2 yes.

3 We were concerned about moving this forward for
4 obvious reasons, sir, and Mr McAlinden and I discussed
5 the prospect of the two of us going through the files
6 and taking a note of every time a doctor or a nurse was
7 named so that we could do that. But we think we fall
8 foul of the regulations and Article 8 if we do that.

9 We are satisfied that so far as data protection is
10 concerned the matters can be got over because of this
11 inquiry and methods of redaction which would ensure
12 there is no identification. The difficulty is
13 Article 8, the rights of all those patients. You kindly
14 made available to us an authority of Mr Justice Sales.
15 I wonder, for the purposes of the record, if I could
16 read two paragraphs of that?

17 THE CHAIRMAN: I think Mr Green takes the credit for that.

18 MR SIMPSON: Then I'm very grateful to my learned friend
19 Mr Green.

20 THE CHAIRMAN: Is that the General Dental Council case?

21 MR SIMPSON: And I hope I am not going to steal his thunder
22 by reading the two paragraphs, as has happened to me so
23 many times, but I think I can safely read the two
24 paragraphs into the record because it sets the scene, as
25 it were, sir, and it's paragraph 64 and 65 of the

1 judgment helpfully provided. As you say, it's the
2 General Dental Council case. It says:

3 "In my judgment, it is arguable that the good
4 practice indicated by Lord Justice Kennedy in Woolgar,
5 a case decided on common law principles prior to the
6 coming into effect of the Human Rights Act, that in
7 ordinary circumstances, the person whose confidential
8 information is in issue should be informed that it is
9 proposed to disclose that information to a professional
10 or regulatory body will be required under Article 8.
11 Against such an argument, it is, of course, significant
12 that prior notification of disclosure was not said to by
13 the ECHR to be necessary in either MS v Sweden or
14 Z v Finland."

15 If I might pause there, sir, MS v Sweden was decided
16 in 1999. Z v Finland was decided in 1997. So the next
17 sentence might make more sense now:

18 "On the other hand, there may be scope for
19 development of the law in this area and for a greater
20 focus on the safeguards for patients where confidential
21 medical information about them is to be used for other
22 purposes, particularly where such information may be the
23 subject of intensive scrutiny by others, as in this sort
24 of case."

25 That's the General Dental Council:

1 "In various contexts involving interference with
2 individuals' Article 8 rights, the European Court has
3 held under the rubric necessary in a democratic society
4 in Article 8(2), that procedural obligations may arise
5 requiring the involvement of an individual in some way
6 before a decision is taken to act to interfere with his
7 rights under Article 8(1)."

8 And it gives an example which I don't think I need
9 to read.

10 Over the page, the third line down of the paragraph:

11 "In a context like that in the present case, it can
12 be said, as Lord Justice Kennedy observed in Woolgar,
13 that taking steps to give patients notice that their
14 records are to be used for professional or regulatory
15 proceedings, it gives them an opportunity to make
16 representations against the public authority making
17 disclosure and to go to court if they feel strongly that
18 disclosure ought not to be made.

19 "It might be argued that this would be an additional
20 safeguard for patients which could be effective, while
21 at the same time being less intrusive and generally
22 costly for a body such as the General Dental Council
23 than would be a obligation for it to apply to court
24 itself in every case.

25 "Even if adoption of such a procedure were now by

1 development of the law under Article 8 to be treated as
2 a legal requirement, it would not, in my opinion,
3 involve imposing greater burdens on the Dental Council
4 than they have sought to discharge on the facts of the
5 present case and which they would propose to discharge
6 in future cases by giving such prior notifications as a
7 matter of general practice. I think that the
8 obligation, if it exists, would be very much along the
9 lines indicated by Lord Justice Kennedy. The General
10 Dental Council would only have to take reasonable steps
11 to identify and notify the patients concerned. It would
12 not be obliged to do so if that was impracticable, as
13 was probably the position for example in Rimmer, in
14 which the entire computerised records of a medical
15 practice had to be subjected to a limited electronic
16 interrogation, or undesirable for some reason of the
17 public interest.

18 "I do not think that any such possible obligation
19 would have required the Dental Council in this case to
20 take further steps to try to track down the four
21 patients who did not reply to its letter seeking their
22 consent. In situations where it is not possible to
23 follow such a prior notification procedure, particular
24 care may need to be taken to ensure that the other
25 safeguards will be effective."

1 So following that, it would seem that modern
2 practice, if I might put it that way, suggests that the
3 individuals should be asked for their consent in the
4 first place.

5 THE CHAIRMAN: I understand the thrust of that, and there's
6 few people who know more about public law than
7 Mr Justice Sales.

8 MR SIMPSON: I agree with that.

9 THE CHAIRMAN: Can I go back to paragraph 64? Five lines up
10 it says:

11 "Particularly where such information may be the
12 subject of intensive scrutiny by others as in this sort
13 of case."

14 These are dental records which were going to be
15 scrutinised to see if the dentist under investigation
16 had been in breach of professional obligations as to the
17 level of treatment which he provided to those patients;
18 isn't that right?

19 MR SIMPSON: Yes. I agree, that's much more intensive.

20 THE CHAIRMAN: What we're actually looking for here is to
21 see if there is any record of Dr Steen being actively
22 involved, whether by being physically present in the
23 wards or being contactable by phone. So the scrutiny
24 here is significantly less intense, isn't it?

25 MR SIMPSON: I couldn't agree more, sir. The difficulty is

1 whether or not access to them at all requires their
2 prior notification to allow them to say, "Sorry, I don't
3 want my records looked at". Then if that's the case, if
4 they refuse, there are judicial review proceedings which
5 can be taken, as in some earlier cases.

6 THE CHAIRMAN: In effect, it's a friendly judicial review --

7 MR SIMPSON: Exactly. It's really the inquiry seeking
8 a declaration that they should have them. As I say,
9 Mr McAlinden and I discussed this and we are quite
10 prepared to look at them and provide an early indication
11 of where Dr Steen was, et cetera, et cetera, but we are
12 fearful of the very fact that we do that resulting in
13 a breach of Article 8 rights. We would be more
14 content -- in fact, I think we would want the direction
15 of either this tribunal, if it feels it can do it, or
16 the court, if that's the appropriate way to do it, if we
17 cannot either contact the individuals concerned or they
18 refuse to provide their consent.

19 THE CHAIRMAN: The other factor which is mentioned by
20 Mr Justice Sales at the end of paragraph 65 is.

21 "... in situations where it is not possible to
22 follow such a prior notification procedure, particular
23 care may need to be taken to ensure other safeguards are
24 in place or --

25 MR SIMPSON: But that's "not possible to"; it doesn't say

1 "not desirable to".

2 THE CHAIRMAN: If we were in any other circumstances, if
3 we were, for instance, six months short of starting the
4 evidence in Claire's case, the route that you're
5 suggesting we go down would be perfectly acceptable.

6 MR SIMPSON: I accept that.

7 THE CHAIRMAN: The obvious difficulty, which I don't need to
8 spell out in too specific terms, is that there is
9 a strain and a stress caused to so many people by the
10 continuation of the inquiry and by repeated delays
11 in the inquiry. That's very evident with the parents,
12 but it's also -- and I should say this for the record --
13 very evident with some of the doctors, nurses and
14 managers who have come to give evidence and other
15 doctors, nurses and managers who have been unable to
16 come to give evidence because of their health.

17 When reading the General Dental Council case, what
18 occurred to me was that we are not in the same
19 circumstances as in this case.

20 MR SIMPSON: I agree with the factual circumstances being
21 different, but the principle may be the same. The
22 inquiry is a public authority and therefore it has
23 obligations in respect of Article 8 just as we have. If
24 you tell us to do it, then we ...

25 THE CHAIRMAN: What I was going to come to was this because

1 I don't think from the papers I've received -- and
2 Mr Green's paper doesn't suggest any contrary route.
3 I think you are slightly revising the note that
4 Mr McAlinden helpfully provided last night for us.

5 MR SIMPSON: We had a bit more time to go through it and
6 discuss it with my learned friend as well.

7 THE CHAIRMAN: I'm not holding you to that because
8 I understand the time pressures in producing it, and in
9 every respect, I agree with it; it's a very, very
10 helpful and concise summary. You'll see what I'm coming
11 to. I can make an order, and I would do that, I would
12 make an order requiring the Trust to provide documents
13 and records which I would pin down quite precisely as
14 to, effectively, the whereabouts and any document or
15 record which gives information about the whereabouts and
16 the activities of Dr Steen on 22 October between 9 and
17 5, because that seems to be the time on which we have
18 a blank at the moment.

19 MR SIMPSON: Yes.

20 THE CHAIRMAN: Under data protection --

21 MR FORTUNE: Sir, I rise at this stage. Before you tie
22 yourself down to between 9 and 5, could you in fact make
23 it from 7.30 onwards? Because there is the possibility
24 that Dr Steen may have been on the ward at about
25 8 o'clock.

1 THE CHAIRMAN: Okay, yes. We can sort out the precise
2 timings.

3 MR SIMPSON: The whole of the 22nd and 23rd.

4 THE CHAIRMAN: Yes. You would be complying with the --
5 there's at least one provision in schedule 2 of the Data
6 Protection Act and at least one provision in schedule 3
7 of the Data Protection Act which means that the Trust
8 would not be in breach of that act.

9 MR SIMPSON: I don't have any problem with the Data
10 Protection Act. I think we can see our way round that
11 quite easily. The difficulty is, the powers that
12 you are acting under, sir, are fairly ancient now.

13 THE CHAIRMAN: Yes.

14 MR SIMPSON: And they're well before the Human Rights Act
15 was enacted.

16 THE CHAIRMAN: I have to consider the Human Rights Act and
17 the implications of that when I'm making any order. The
18 other thing is that if I make an order, the Trust has to
19 decide whether, notwithstanding the fact that it's been
20 required to do something under my powers, whether it
21 should do that or whether, as a public authority,
22 it would be in breach of Article 8.

23 MR SIMPSON: If it was felt that your order was unlawful
24 in the sense of not having legal justification for it,
25 the Trust wouldn't --

1 THE CHAIRMAN: Either you would not comply with it, in which
2 case I would have to challenge you in the High Court, or
3 else you would say, "We don't feel able to comply with
4 it and the inquiry itself is at risk because of the
5 Article 8 issue".

6 MR SIMPSON: I don't think superior orders is a defence any
7 longer.

8 THE CHAIRMAN: No, no, it's not.

9 MR SIMPSON: So for my own part I would be keen to have some
10 judicial guidance if it could be arranged. That would
11 be the ideal situation.

12 THE CHAIRMAN: The other thing is, of course, that is
13 absolutely clear from the reported decisions -- the
14 Dental Council is one, but there are one or two
15 others -- is that every judge who has had to look at
16 this sort of scenario has said, "This is unarguable".

17 MR SIMPSON: I would be astounded if it were otherwise.

18 THE CHAIRMAN: So the problem is we're effectively delaying
19 the inquiry to cover our backs. I don't mean that in
20 a derogatory way.

21 MR SIMPSON: That's right, we are doing that. But also an
22 individual may have very strong views about his or her
23 medical records being made available and may want to air
24 those views. For example, from what I've seen in the
25 names -- the little that I have seen would suggest that

1 some people might be very sensitive about anyone looking
2 at the records. Therefore, ex abundanti cautela,
3 I think I would really prefer some judicial guidance if
4 it could be done.

5 THE CHAIRMAN: There's effectively 13 files and you hope
6 that there will be a 14th file. I presume that the
7 timescale for actually looking through those would be
8 very short. Because it shouldn't really take more than
9 a day or two to see if there's any reference to
10 Dr Steen.

11 MR SIMPSON: My learned friend and I have discussed this and
12 as soon as it is legitimate for us to do it, we will
13 personally do it, and we'll do it in a couple of days
14 maximum. Because there are only two days we are talking
15 about in each file. We can go through the notes and
16 records pretty quickly in respect of those two days.
17 We're only looking for the names of the personnel
18 involved and, for example, my learned friend has
19 suggested we might also want to look in respect of
20 Miss Pollock to see if there's anything if there. We
21 will do all that, but that's not going to take too long
22 if we're legitimately doing it.

23 THE CHAIRMAN: Right. And then when a list is produced, if
24 it is relevant to say, "Patient A, no reference to
25 Dr Steen", "Patient B, no reference ... It is important

1 to know that there are repeated cases where there is no
2 reference to Dr Steen as to one or two where there are
3 some references.

4 MR SIMPSON: If a judicial review is taken -- yes, it will
5 have to be for declaration, I would think. When that is
6 done my learned friend and I, Mr McAlinden, will have
7 discussed what exactly you want from us and we will give
8 you a list of that. There's no difficulty about that.
9 That's not a difficult proposition, in fact.

10 THE CHAIRMAN: Yes. Okay. Do you have anything more you
11 want to add now?

12 MR SIMPSON: No, sir, I don't think so, no.

13 THE CHAIRMAN: Thank you. Mr Fortune for Dr Steen,
14 do you have anything?

15 MR FORTUNE: At this stage --

16 THE CHAIRMAN: I should say, this exchange has been
17 conducted on the basis that I'm talking about a proper
18 search of the records and I will not be receiving
19 whatever documentation was handed to your solicitor last
20 week. Do you understand that?

21 MR FORTUNE: I have understood --

22 THE CHAIRMAN: Good.

23 MR FORTUNE: -- that this was going to be authorised
24 delivery of material. At the moment, we have no
25 submissions. Clearly, you have to decide whether you

1 wish to exercise the power that is available to you.

2 THE CHAIRMAN: Is there anybody else who wants to say
3 anything? I presume, Mr Quinn, your interest is that we
4 get all the information we can, but we get it as soon as
5 we can.

6 MR QUINN: Precisely.

7 THE CHAIRMAN: So if we have to put things back for a few
8 days, it's only for a few days.

9 MR QUINN: [Inaudible: no microphone] few days should be
10 wasted. Those are the specific instructions from my
11 clients.

12 THE CHAIRMAN: Can you see how we can do this without a few
13 days' delay? You understand, I'm not talking about
14 adjourning for a month or two. This has to be done far,
15 far quicker than that.

16 MR QUINN: If the witnesses could be switched around, if
17 there were some accommodation in the timetable.
18 If we look at getting a witness from next week into this
19 week, that could be perhaps one answer to it. All of
20 the parents here today are very, very reluctant to see
21 any delay in this inquiry. Any delay, and I stress
22 that, Mr Chairman. Any delay.

23 THE CHAIRMAN: Yes. I hope it's clear that I share that
24 view.

25 MR QUINN: Yes, of course.

1 THE CHAIRMAN: We have very limited free time between now
2 and Easter. We have tried to make the inquiry more
3 effective and make it work better by sitting a four-day
4 week. That sounds counter-intuitive, but in fact it is
5 better if we sit four days a week rather than five. If
6 we have to run it into five days a week, we will do it
7 because we can then make up time. We will also review
8 things like the number of witnesses we have to call and
9 the extent of the questioning. Not to save witnesses
10 from questioning which is necessary, but in order to
11 perhaps be a bit more focused on what's really in issue.

12 MR SIMPSON: Could I just ask one question while everybody
13 is here? When it can lawfully be done, are all the
14 parties here, including the families, content that
15 Mr McAlinden and I carry out this exercise? We feel
16 it would be better if counsel were to do it so that --
17 you will understand, the families may not understand --
18 there is at least the independence of counsel doing it
19 and the duty that counsel owes to this inquiry and to
20 its own profession. If anyone has any objections to
21 that, tell us now and then we'll have to arrange to do
22 it some other way.

23 THE CHAIRMAN: Just for completeness, in any particularly
24 sensitive or complex case, it is very often the case
25 that it is counsel who conducts an inspection and

1 decides what should be disclosed and what isn't
2 disclosed. If it's non-controversial, straightforward,
3 it will be a client, typically with a solicitor. The
4 more complex and sensitive a process is, the more
5 typical it is that counsel who become involved to do it.

6 MR SIMPSON: It may be that my learned friends would want
7 five minutes to talk to the families to indicate to them
8 what their view about it is. It may not assuage the
9 families' concerns, in which case I would have to find
10 some other mechanism.

11 THE CHAIRMAN: I'm indicating this to help them that what
12 you're suggesting is the normal way to do it. Mr Quinn,
13 if you want time to think about that.

14 MR QUINN: I will have to take instructions about that
15 because there are personnel who have been involved in
16 this case for a long time.

17 THE CHAIRMAN: Yes. Okay. Mr Green, do you want to add
18 anything?

19 MR GREEN: No, unless there are any specific questions which
20 you have for me, sir.

21 THE CHAIRMAN: No, I think your paper was encouraging me
22 down the road which I would be naturally inclined to
23 take, which is just to go ahead and start inspecting
24 without necessarily waiting for notification.

25 MR GREEN: Absolutely. You will note I haven't even

1 mentioned in the note Article 8 because I would suggest
2 that the Article 8 balancing exercise is simply the same
3 balancing exercise as would exist in this context even
4 without Article 8.

5 THE CHAIRMAN: Well, data protection and Article 8 have
6 a fair degree of overlap between them.

7 MR GREEN: Absolutely.

8 THE CHAIRMAN: Then in addition to that, when I exercise
9 a discretion as to what documents I'm requesting, then
10 I also have to take account of that factor.

11 MR GREEN: Of course.

12 THE CHAIRMAN: There's also the issue which was raised in
13 Mr McAlinden's paper last night, which is an additional
14 way to protect the privacy of the children who were
15 being treated 16 years ago is that these documents would
16 not go on the inquiry website. So their distribution is
17 restricted. I presume there would be no objection to
18 that from anybody.

19 MR GREEN: None from me. I hadn't seen Mr McAlinden's
20 paper, I have to say, but I agree with that absolutely.

21 THE CHAIRMAN: That's also what Mr Justice Sales seems to
22 be -- something like that which he seems to be
23 considering when he talks about "other safeguards" in
24 paragraph 65 of the General Dental Council case.

25 MR GREEN: Yes.

1 THE CHAIRMAN: Okay.

2 MR FORTUNE: Sir, I haven't seen Mr McAlinden's paper, and
3 if it's relevant, I ought to have that opportunity.

4 THE CHAIRMAN: Is there any objection to it being shared?
5 Since there is no objection, it will be shared. Will
6 you take it specifically on the basis that it was
7 provided to us at 1.50 am overnight and the last point
8 about Article 8 has been reconsidered in conjunction
9 with more time today to consider it. I will rise for
10 a few minutes and come back as soon as I can. Mr Quinn,
11 if you have an idea about witnesses who might be
12 rejigged --

13 MR QUINN: That's what I was going to discuss in this
14 interval, how it could be done.

15 THE CHAIRMAN: Thank you.

16 (3.10 pm)

17 (A short break)

18 (4.13 pm)

19 Decision

20 THE CHAIRMAN: Thank you for waiting. The only issue of
21 substance which has to be resolved this afternoon is the
22 procedure which is to be followed to obtain access to
23 the medical notes and records of children who were on
24 the Allen and Cherry Tree wards in the Royal Belfast
25 Hospital for Sick Children on 22 and 23 October 1996.

1 Those records will throw some light on the important
2 issue of where Dr Steen was and what she was doing as
3 Claire was being treated, as Claire's condition
4 deteriorated, and as Claire died.

5 Dr Steen's counsel advised the inquiry at
6 yesterday's hearing that Dr Steen had come into the
7 possession of what he described as unsolicited, redacted
8 documents, which threw light on this question. It seems
9 clear to me, though I don't have to decide, that those
10 documents were probably obtained improperly, even though
11 they are probably relevant to the inquiry. I have not
12 seen those documents and do not intend to see them.

13 I can order discovery of the relevant documents and
14 I do intend to do so. But as Mr Simpson and
15 Mr McAlinden, on behalf of the Belfast Trust, point out,
16 such an action involves considerations of Article 8 of
17 the European Convention of Human Rights and, for those
18 of you who are not immediately familiar with Article 8,
19 that is a provision which, in this context, protects
20 each of us from having our medical records disclosed
21 except in limited circumstances.

22 It is clear from the recent case law in England that
23 the recommended current practice is to notify those
24 patients whose records are involved about what is
25 happening, why it is happening and ask for their consent

1 to disclosure. I'm sure that everyone here must think
2 that such consent would inevitably be forthcoming. That
3 may turn out to be the case and I very much hope that
4 it is the case. But there are individuals who may not
5 be easily contacted and there may be other individuals
6 who, for particular reasons, want to have their
7 objections considered or want at least to be notified of
8 what is proposed before it happens.

9 For that reason, I am obliged to allow that
10 procedure to be followed, even in the extremely strained
11 and distressing circumstances of this inquiry at this
12 stage. I will therefore issue a formal order to DLS for
13 tomorrow morning. I understand that the Trust will then
14 contact each patient immediately and seek his or her
15 consent. If the Trust receives no response or a refusal
16 to consent from any individual, I will apply to the
17 High Court next week for a declaration that the Trust
18 will not be in breach of Article 8 by providing the
19 inquiry with the documents in compliance with the
20 inquiry's order.

21 Let me say this for the benefit of those patients
22 who may be contacted in the coming days. At the
23 inquiry, we will take all steps we can to protect your
24 anonymity and your personal sensitive details. We are
25 not particularly interested in those details or in your

1 treatment; our interest in the documents is much more
2 limited. We will also limit circulation even of the
3 redacted documents and will avoid putting those
4 documents on the inquiry website.

5 Assuming that the necessary declaration is obtained
6 from the High Court the documents will be inspected,
7 redacted and given their limited circulation as soon as
8 humanly possible. The hearings will then resume
9 immediately after that. I am aiming for the hearings to
10 resume in the week commencing 8 October, which is a week
11 on which we were due to be here in any event. We can
12 then use the week of 15 October, so that we only lose of
13 rest of this week and next week.

14 We will then have to try to find a way to make the
15 time up. All of this will require the co-operation of
16 the witnesses and lawyers who were scheduled to be here
17 in any event. I apologise in advance for this
18 inconvenience and I'm sure it will some level of
19 personal inconvenience for those who are involved, but
20 I hope you understand that I will have to insist on that
21 inconvenience being tolerated in order to advance the
22 inquiry.

23 We have looked at the idea raised by Mr Quinn just
24 before the break, on behalf of Mr and Mrs Roberts, about
25 rejigging witnesses so that some evidence can continue

1 this week. I think, on reflection, that while that is,
2 in any other situation, an attractive proposition, it is
3 one which would not have any real effect here, partly
4 because it would almost inevitably result in those
5 witnesses being recalled in a couple of weeks' time.
6 I am afraid, for that reason, I am not going to agree to
7 that course, which I do not think serves any real
8 purpose. It seems to me that it would give a facade of
9 progress without really achieving progress.

10 I cannot finish without expressing dismay and
11 frustration about these events and I recognise that my
12 thoughts can hardly compare to those of Mr and
13 Mrs Roberts in particular, but others too. I have to
14 say that I am hugely unimpressed by the failure of
15 various people to provide this information or raise the
16 possibility of obtaining this information through this
17 route before now. I am particularly concerned that
18 there does not seem to have been some greater
19 determination on the part of Dr Steen, who must surely
20 have the strongest possible reason to protect her
21 reputation. What has happened and what has been allowed
22 to happen is beyond defence.

23 Having said that, I have to focus on answering the
24 questions which arise from Claire's treatment and her
25 death, and that is where my focus will remain. I think

1 the only other point I have to deal with now is that in
2 terms of the inspection, I understand that there was
3 some resistance to the idea, Mr Simpson and
4 Mr McAlinden, that the two of you would conduct it
5 alone.

6 MR SIMPSON: I wouldn't be at all surprised.

7 THE CHAIRMAN: I should say for the record that for my part,
8 I don't have any reservations about that, but
9 I understand that you have offered the facility that
10 a member of the inquiry legal team would accompany you
11 when that inspection takes place.

12 MR SIMPSON: We will fit in whatever you direct, sir.

13 THE CHAIRMAN: I'm grateful for that gesture. For those who
14 need any reassurance, that should provide it, but for my
15 own part I do not think such reassurance is required.
16 In any event, I hope that that can be done towards the
17 end of next week. If you receive consent from every one
18 of the patients involved, then we don't need to apply to
19 the High Court. The issue becomes redundant. It might
20 be that we get away without that.

21 If there does have to be an application to the
22 High Court, that can be done, I think effectively, on
23 a friendly basis, as between the inquiry and the
24 Trust --

25 MR SIMPSON: Yes.

1 THE CHAIRMAN: -- but with the court considering any
2 objections which are made by any individuals.

3 MR SIMPSON: There won't be any requirement, for example,
4 for any replying affidavit. We wouldn't be intending to
5 stand in the way. Can I just ask one matter of
6 clarification? You said a formal order tomorrow
7 morning --

8 THE CHAIRMAN: I think there have been letters asking for
9 documents. I think in order to make this process a bit
10 more self-contained, I should issue a formal notice
11 which will be with the DLS tomorrow morning.

12 MR SIMPSON: Would we be at liberty to include that formal
13 notice in any correspondence? Can we send it to the
14 patients when we're sending correspondence so they're
15 aware it's coming?

16 THE CHAIRMAN: Yes. If you want to take extracts from the
17 transcript of what I have just said, I'm more than happy
18 for that to be included as well. I very much hope that
19 any of the patients who receive this request to consent
20 to their records being disclosed would see what the
21 issue is. That's the way I've tried to set it out in
22 what I've just said over the last few minutes.

23 MR SIMPSON: Thank you, sir.

24 MR QUINN: Sir, I do want to add something to that.

25 Mr Chairman, the Roberts family welcome what you have

1 said in relation to the stress that they are under and
2 I would emphasise to this inquiry that they are under
3 severe stress. They have waited 16 years to get under
4 way. They had a very emotive day yesterday. They had
5 difficulties with dealing with the evidence when the
6 evidence was opened. And anyone who saw the television
7 last night and saw the reaction of Mrs Roberts to a very
8 easy question to be answered will understand and
9 sympathise with her reaction.

10 What I want to make clear here is that the
11 non-lawyers find it difficult to understand -- in fact,
12 the lawyers find it very difficult to explain in correct
13 words of explanation as to how this could occur.

14 It would be an understatement to say that someone has
15 been very, very naughty, and how professionals could not
16 realise when documents come into their possession that
17 these documents may have been, as it were, brought up by
18 a system whereby they shouldn't have access to, is
19 really beyond imagination, but from the clients.

20 What they cannot understand is how someone can come
21 into possession of documents and they can't see them.
22 I've spent the last half hour explaining this and I want
23 to make it clear to the inquiry that their lawyers have
24 done their best to explain. But the Roberts just can't
25 see it. They can't see how they can't have access to

1 the documents that are already in the public domain, and
2 I have tried my best to explain what goes on.

3 But what Mr and Mrs Roberts want to emphasise is
4 this: they want to have a speedy result out of what must
5 happen now. For example, they would like to know what
6 sort of notice period the patients will be given, that
7 is the 14 children on the ward. They would like to know
8 how they're going to be contacted, for example. Is it
9 by first class post? Should someone go round personally
10 and deliver the letters to the address? Would that
11 speed matters up? From a commonsense point of view,
12 they want to know what will happen if, for example, the
13 children who may now be 25 years old are having a world
14 tour. All of those things --

15 THE CHAIRMAN: Sorry, let me deal with that. That's the
16 easy point to deal with. I can't afford to wait until
17 somebody who is was in the Children's Hospital 16 years
18 ago, but has now emigrated to Australia is contacted or
19 who is on a two-week holiday trekking round
20 South America is contacted. That is why we will have to
21 go to the High Court either if there's a refusal to
22 consent or if there's no response.

23 MR QUINN: I'm obliged, Mr Chairman, because that's what the
24 parents want to hear and they want to hear you saying
25 it. They're also very grateful for the indication that

1 we can use the week that we were in recess, that is the
2 first weeks of the recess, but obviously the second week
3 will have difficulties for the parents.

4 THE CHAIRMAN: I understand.

5 MR QUINN: And we're very grateful to hear that they may be
6 some rejigging of witnesses if necessary to try and
7 speed the inquiry on, that the evidence will be looked
8 at again to try and put things into shorter form, and
9 that, if possible, we will deal with the matters on
10 a Friday, every Friday if we have to.

11 THE CHAIRMAN: I will try to do that. Everyone will
12 understand why I'm focusing on Mr and Mrs Roberts.
13 I also don't want Mr and Mrs Roberts to think that
14 because we ran late as a result of this documentation
15 issue, we shorten the hearing and one or two witnesses
16 who should have been giving evidence were dispensed with
17 in order to fit within the timetable. When I announced
18 the timetable, I said that if we needed to have more
19 time for anything, we would do everything we could to
20 create the time and we will do that. That doesn't stop
21 us from looking at each of these witnesses in turn and
22 saying, "Do we really need to hear from that witness or
23 the other witness?", and, "For how long do we need to
24 hear from them and how much do we need to hear from
25 them?"

1 MR QUINN: I'm obliged for the public comment on those
2 issues because it does reassure the families in this
3 case.

4 THE CHAIRMAN: Okay.

5 MR SIMPSON: Could I ask about the notice period that my
6 learned friend has raised and what the tribunal thinks
7 is a reasonable notice period to allow people to
8 respond?

9 THE CHAIRMAN: Okay. The letters can be got out tomorrow.

10 MR SIMPSON: I would sincerely hope so. We thought up to
11 five working days, but that's just a suggestion.
12 I don't really know whether three working days is
13 enough.

14 MR QUINN: Three working days would be a reasonable period
15 given the circumstances of this inquiry.

16 THE CHAIRMAN: What I would like is the facility in the
17 letter for the patient to respond -- if there's an
18 e-mail address can be given for a response or a phone
19 number can be given for a response. And if that can be
20 done by close of business on Monday.

21 MR SIMPSON: By close of business on Monday. Yes. If the
22 letters go out tomorrow and they get them on Thursday,
23 that would be two working days.

24 THE CHAIRMAN: Have I picked it up correctly that some of
25 the people are still patients? On and off presumably.

1 MR SIMPSON: Of the hospital? I think so. I'm not sure how
2 many. But certainly there are addresses. They'll be
3 either the current addresses or the last known
4 addresses.

5 THE CHAIRMAN: Is it possible for at least some of these
6 letters to be delivered, Mr Simpson, so people have them
7 tomorrow?

8 MR SIMPSON: I just don't know the answer to that.

9 THE CHAIRMAN: It depends where some of the people are.

10 MR SIMPSON: Well, exactly. I don't know.

11 THE CHAIRMAN: I would like to have the people who are
12 receiving these letters to have them over the weekend
13 and to have some time on Monday to come back with their
14 response. The point about "Monday by close of business"
15 is that DLS can then notify us on Monday evening or
16 Tuesday morning about whether we need to apply to court.
17 We will have a draft application ready to be lodged in
18 court on Tuesday, to which we will add the information
19 which we get from DLS on Monday evening. We will
20 contact the court office in advance of that and
21 say: this may be coming, can it be expedited?

22 MR SIMPSON: There is no opposition in this room.

23 THE CHAIRMAN: There's no opposition between us, but there
24 may be opposition.

25 Could the letter also ask that if the patient

1 objects, the basis for the objection is set out, even at
2 some level? It'll be helpful to everybody to know if
3 it's an off-the-cuff objection or whether there is some
4 specific reason. If there's some specific reason that
5 might be something we can try to work round in
6 redaction. The reassurance to all of these patients
7 is that we have a very, very limited interest in what
8 they were being treated for. What we're looking at, for
9 example, is: was your condition so serious on 22 October
10 that Dr Steen was there and she just didn't have time to
11 come to Claire because she was working with you? That's
12 the sort of information. That should be apparent from
13 the records if that was the severity of an individual's
14 condition that day.

15 MR SIMPSON: Thank you, sir.

16 THE CHAIRMAN: Mr Fortune.

17 MR FORTUNE: Sir, you have made significant criticism of
18 Dr Steen.

19 THE CHAIRMAN: I am concerned. I have also said that I will
20 focus on the issues which I will have to answer as part
21 of the inquiry report.

22 MR FORTUNE: Well, I ought to address that issue, bearing in
23 mind that this is a public hearing.

24 THE CHAIRMAN: Yes.

25 MR FORTUNE: Sir, you will recall that for a very

1 significant period of time, Dr Steen was represented by
2 the hospital. It was known to those who were then
3 advising her that there were the two issues, and indeed
4 requests -- and I understand it was more than one
5 request -- made by those conducting the inquiry for any
6 information that would have placed Dr Steen either in
7 the hospital or on the ward and, in particular, the
8 existence of the ward diary.

9 THE CHAIRMAN: Yes.

10 MR FORTUNE: The information that was forthcoming was that
11 the ward diary no longer existed. It would have been
12 possible for those in the hospital advising Dr Steen to
13 have made proper enquiries of the computer to see
14 whether there was any information forthcoming. You
15 know, sir, that information has been obtained, albeit in
16 an unauthorised way. So the criticism you make of
17 Dr Steen, do you make that aimed at any particular legal
18 representatives? Bearing in mind --

19 THE CHAIRMAN: Sorry, Mr Fortune, I regard the onus in this
20 inquiry as being on the individuals, not being on the
21 lawyers. I have been trying to think about this
22 overnight. If I was in Dr Steen's position, what steps
23 would I have taken or what steps would I have asked to
24 be taken to find out this information, which the inquiry
25 was really pressing for? My concern, which I expressed

1 yesterday, was that when it turned out that the ward
2 diary had been disposed of, that seemed to be the end of
3 the enquiry. And I just don't understand why it didn't
4 occur, say, to Dr Steen to say, "Look, there were other
5 children on the ward that day, let's see if I was
6 treating them". Did she say to somebody, "We can go
7 down that route"?

8 She's the person who may be vulnerable to criticism
9 in this -- I'm only saying "may be" on the substantive
10 issue -- but surely it was available to her to make
11 suggestions as well as for the Trust managers and other
12 doctors to make suggestions? My criticism is not
13 confined to her, or my concern is not confined to her.
14 This is a general issue, but it seems to me to be
15 obviously one in which Dr Steen had a major personal
16 interest.

17 MR FORTUNE: But even if that was correct, sir, and she
18 raised it with those advising her, when represented by
19 the Trust, it would have been down to the Trust to have
20 interrogated the computer as it was clearly proper so to
21 do so, or possible so to do so.

22 THE CHAIRMAN: Yes, okay, I've got your point. Thank you,
23 Mr Fortune.

24 MR FORTUNE: Sir, the other matter -- and it's really
25 a matter raised by my learned friend Mr Quinn. He said

1 that the documents were in the public domain. That is
2 not correct.

3 THE CHAIRMAN: You're correct. I should have said that,
4 Mr Quinn. That's not right. Mr Quinn accepts that.
5 They're not in the public domain. Your team has seen
6 them. I understand they've been shown to the inquiry
7 team and to the DLS team. I have not seen them and
8 nobody else at this inquiry has seen them, and as far as
9 I'm concerned, subject to any representations anybody
10 makes, nobody else should see them. We are going to try
11 to obtain the relevant documents, the relevant
12 information, through the proper route and not sully the
13 inquiry by accepting documents which are questionable in
14 their origin and which we do not have any clear idea of
15 being comprehensive.

16 MR FORTUNE: Sir, can I just turn to a completely different
17 topic? You have said that we will be sitting during the
18 week of 8 October.

19 THE CHAIRMAN: Yes.

20 MR FORTUNE: Does that mean you will be sitting on Friday of
21 that week?

22 THE CHAIRMAN: I think we're going to have to sit on the
23 Fridays, I'm afraid, Mr Fortune. We have to catch up on
24 the days we're going to lose. We have to limit the days
25 we're going to lose and we will just have to do that.

1 MR FORTUNE: Can I then raise this question in relation to
2 the following week. Does the same apply to Friday the
3 19th? Because I am leaving the country on Thursday
4 18 October.

5 THE CHAIRMAN: I cannot say now that I will not sit on
6 Friday the 19th. I did make the point in my comments
7 a few minutes ago that what we now have to do is going
8 to be personally inconvenient to some of us, including
9 me, but that's as may be because we have to move on.
10 I don't expect you to have to discuss this in public.
11 If there is a particular personal reason that you want
12 to provide to me about 19 October, I will consider that.
13 But if we start on 8 October, as I want to, if we sit
14 Monday to Friday, Monday to Friday again, we'll get 10
15 days of evidence and if we had dealt with the evidence
16 over Tuesday, Wednesday and Thursday of this week and
17 the following two weeks of four days a week, we would
18 have had 11 days of evidence. So we'll be very close to
19 being back on schedule. Is there anything else before
20 we finish?

21 MR GREEN: Sir, may I raise one point in, I hope, the spirit
22 of assistance which you have properly exhorted on all
23 the parties and legal representatives. I fully
24 understand the reason why you wish the search conducted
25 by my learned friends Mr McAlinden and Mr Simpson to

1 include some sort of analysis of how serious the
2 conditions suffered by other patients was at the time,
3 so as to try and work out some sort of time frame
4 whereby Dr Steen would likely have been with those
5 patients and in order to give the inquiry some picture
6 as to the competing pressures which she was working
7 under.

8 It has been pointed out to me by Dr Sands, whilst
9 other discussions with the tribunal were taking place
10 a moment ago, that in order for that enquiry to be made
11 fruitfully and in a way that assists you ultimately with
12 your task, it may well assist and may in fact even be
13 required for a clinician to be available to assist
14 Mr McAlinden and Mr Simpson with that task so that they
15 can say, "This is what these records show", as my
16 learned friends can no doubt work out for themselves.
17 But the ramifications from a clinical point of view for
18 this are: it's likely that at least 45 minutes, for
19 example, would be spent by the consultant with that
20 patient, doing X, Y and Z.

21 I simply raise it now so that the inquiry can, if
22 necessary, exhort the trust to put in place practical
23 mechanisms to enable clinical advice to be sought or to
24 be on hand to help my learned friends with
25 interpretation of those records, where necessary, so

1 that we don't end up coming back on the 8th with further
2 lines of enquiry having been opened and the need for
3 those to be pursued with yet further slippage.

4 THE CHAIRMAN: Thank you very much, Mr Green, that's a point
5 which will have to be considered. We can pursue that in
6 discussions beyond this afternoon. As you know, the
7 inquiry has advisers who provided, for instance, the
8 advisers' consolidated report in Claire's case, as they
9 did in Adam's case. It may be that using one or more of
10 those advisers would be the appropriate way to do this
11 if a question arises.

12 MR SIMPSON: It would require only that one person to give
13 evidence, if necessary, rather than a series of
14 clinicians to give evidence, who know nothing about it.

15 THE CHAIRMAN: Yes. The advisers are deliberately not
16 witnesses, but the purpose of the adviser being there to
17 assist, as it's mooted by Mr Green, is to help to form
18 some better idea of what the records mean. We're
19 getting into slightly difficult territory.

20 MR SIMPSON: It is, but at least the advisers know the
21 issues, whereas someone would have to be briefed and the
22 issues explained to them. That at least would save some
23 time and we would have no objection to that proposition.

24 MR GREEN: I was just trying to see if we could identify
25 a solution before we end up tripping up over the

1 problem.

2 THE CHAIRMAN: Exactly. Thank you very much indeed.

3 MS ANYADIKE-DANES: I wonder if I could make one
4 observation, which is really just a correction. It
5 appears on line 16 [of the draft transcript] shortly
6 after you started your judgment or decision this
7 afternoon. I think you said:

8 "At yesterday's hearing Dr Steen had come into the
9 possession of what he [that is her counsel] described as
10 unsolicited, redacted documents."

11 I think, actually -- and it's not an issue for us in
12 particular but it may be an issue later on -- what she
13 came into possession of was actually unredacted
14 documents. Now, as I say, I don't think that's an issue
15 for us because we're not going to be using those
16 documents, but in terms of keeping the record straight,
17 I think that's the position; in fact, I see her counsel
18 nodding. She had unredacted documents, which may be
19 an issue in and of themselves.

20 THE CHAIRMAN: Right.

21 MR FORTUNE: Sir, that's correct. The documents are,
22 in fact, the files which included the medical and
23 nursing notes. The files were inspected, the relevant
24 pages were photocopied, then redacted, and what was
25 handed to my instructing solicitor were redacted pages

1 from those files.

2 THE CHAIRMAN: Okay. Thank you very much.

3 MR FORTUNE: That I thought I made clear yesterday.

4 THE CHAIRMAN: Sorry, I'm obviously at the disadvantage of

5 not having seen the documents or maybe I didn't just

6 pick that up very clearly, but thank you.

7 MR FORTUNE: And that is what I showed my learned friends

8 during the course of discussions yesterday.

9 THE CHAIRMAN: The redacted documents?

10 MR FORTUNE: The redacted documents.

11 THE CHAIRMAN: Thank you very much.

12 MS ANYADIKE-DANES: Mr Chairman, just finally to say that

13 the issue of who should, in terms of clinicians to

14 assist, should look at the files -- I wonder if we might

15 consider that just to make sure that we don't get into

16 a difficult territory of, if somebody had to give

17 evidence of what they saw, who that person might be.

18 THE CHAIRMAN: Yes.

19 MS ANYADIKE-DANES: Thank you.

20 THE CHAIRMAN: Ladies and gentlemen, that is a wholly

21 unsatisfactory end to this week. You all understand

22 what is now going to happen, palatable or otherwise.

23 We will keep you informed through legal advisers and

24 through notices on the inquiry's website next week about

25 what progress has been made about obtaining consents

1 from the patients who have been referred to and/or
2 applying to the High Court, and we'll update the inquiry
3 website every day at 10 am to tell you what's happening.
4 I'm very sorry. Thank you.

5 (4.45 pm)

6 (The hearing adjourned until Monday, 8 October 2012)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I N D E X

| | |
|----|-------------------|
| 1 | |
| 2 | |
| 3 | Discussion1 |
| 4 | Decision20 |
| 5 | |
| 6 | |
| 7 | |
| 8 | |
| 9 | |
| 10 | |
| 11 | |
| 12 | |
| 13 | |
| 14 | |
| 15 | |
| 16 | |
| 17 | |
| 18 | |
| 19 | |
| 20 | |
| 21 | |
| 22 | |
| 23 | |
| 24 | |
| 25 | |

