

The Inquiry into Hyponatraemia-related Deaths

Chairman: Mr John O'Hara QC

RULING OF 13th FEBRUARY 2012 ON AN APPLICATION BY THE DIRECTORATE OF LEGAL SERVICES ON BEHALF OF THE BELFAST HEALTH AND SOCIAL CARE TRUST AND THE REGIONAL HEALTH AND SOCIAL CARE BOARD

1. This is an application by the Belfast Health and Social Care Trust and the Regional Health and Social Care Board (the public bodies). It is to the effect that Mr John Forsythe should not continue to act as an independent expert witness and should not be allowed to give evidence to the Inquiry at its public hearings. The basis for this application is set out in a letter dated 7 February 2012 from the Chief Legal Adviser of the DLS acting on behalf of the public bodies.

BACKGROUND

2. In the course of this Inquiry reports have been obtained from various expert witnesses who were not involved in the treatment of the various children with whom the Inquiry is concerned but who have expertise in relevant specialist areas. Adam Strain died in November 1995 in the Royal Belfast Hospital for Sick Children after kidney transplant surgery. He was four years old. The Inquiry has engaged and obtained expert reports from, among others, a paediatric anaesthetist, a nephrologist and a nursing expert. It has also obtained a report which was co-authored by Mr Forsythe and Mr Keith Rigg. Mr Forsythe is a consultant transplant surgeon and honorary professor specialising in abdominal organ transplantation including liver, kidney and pancreas transplants. Mr Rigg is also a consultant transplant surgeon with a particular interest in adult and paediatric kidney transplant.
3. Their initial report in June 2011 was a 21-page document. They were then asked to respond to various supplementary queries. They did so in October 2011 with a 28-page report. These reports were not shared with the interested parties to the Inquiry nor made public until October 2011 in the case of the first report and November 2011 in the case of the second.
4. In the first report at page 13 the experts were asked:

“Whether the Royal Belfast Hospital for Sick Children had the facilities and resources, both in terms of clinical experience and technological services, to carry out such a surgery in November 1995.”

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The reply to that question has four bullet points, the third of which is as follows:

“It was noted that John Forsythe was recently involved in a review of transplant services in Northern Ireland commissioned by Dean Sullivan, Director of Commissioning. Most of the focus during that review was on the adult renal transplant service but comments were also made about the paediatric service. It is acknowledged that the review was carried out many years following this particular case but some of the comments in the review might be considered to be pertinent.”

5. It will be noted from this that while the authors disclosed the fact of the review they disclosed none of its contents beyond saying that “**some** of the comments in the review **might** be considered to be pertinent”.
6. In the supplementary brief, they were asked to provide a copy of the review or to advise how a copy could be obtained. They replied by stating that their understanding was that the report had been made public to a board meeting of the relevant health authority. If that was confirmed, then they would have no problem in providing the report to this Inquiry. They were further asked to identify the comments which might be considered to be pertinent and to explain why they might be pertinent. Their answer was as follows:
 - “It would seem very strange if one of us had not mentioned involvement in an external review of renal transplantation, which included paediatric transplant services in Northern Ireland given that this public inquiry concerns the death of a young child during a renal transplant procedure.
 - There is a section within that report concerning paediatric renal transplantation. This refers to the difficulty of maintaining a super specialised service every hour of the year for a small number of patients.”
7. It will be noted that:
 - (a) They did not provide a copy of the review.

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- (b) They explained that Mr Forsythe had disclosed his involvement because it might be regarded as strange if he did not do so.
 - (c) The reference to the difficulty of maintaining a service for a small number of patients does not disclose any information which is not otherwise available to the Inquiry. In particular, at pages 14 – 15 of their second report, Mr Forsythe and Mr Rigg referred in detail to a series of documents showing that the population in Northern Ireland (and Wales) was less than the ideal needed to accumulate and maintain expertise. They also referred to a 1999 Northern Ireland report showing that ‘there is not the volume of cases to maintain the expertise of a dedicated paediatric surgeon’.
8. In light of these references in the original and supplementary reports, the Inquiry asked the DLS for a copy of the review. This led to correspondence between October 2011 and February 2012. That started with DLS querying the relevance of the review but the Inquiry has now, on 1 February 2012, been provided by DLS with the two short extracts from the review which counsel for DLS has stated are the only two references to paediatric renal transplantation. Neither reference appears to be controversial particularly in light of the information referred to above.
9. I do not believe that I need to see any further extracts from the review. This Inquiry is not concerned with the broader issues of renal transplant services in Northern Ireland, that is not the focus of the Inquiry.
10. It is, however, relevant to note that the review in which Mr Forsythe took part has been discussed at two public meetings. The first of those was held on 31 March 2011 in Omagh and was a meeting of the Health and Social Care Board. The second and more detailed discussion was at a meeting on 7 April 2011 of the Board of the Belfast Health and Social Care Trust. At pages 10 – 11 of those minutes, which do not record the Board as having sat in camera for that section of the meeting, there are specific references to the “longer term safety and sustainability of the local service”. The remit given to Mr Forsythe and the other surgeon with whom he did the review is set out in the minutes together with a commentary that they had identified a range of issues which required action and investment to ensure delivery of service and effective and sustainable transplant programmes.

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SUBMISSIONS

11. In their submission by letter dated 7 February 2012, the public bodies have contended that the issue is as follows:

“The issue is whether it is appropriate for Mr Forsythe FRCS to continue to act as an independent expert witness retained by the Inquiry and 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”.

12. Insofar as the public bodies contend or imply that Mr Forsythe has acted in any way improperly in informing the Inquiry of the existence of the review, I reject that criticism. It is unfounded by reason of the facts set out at paragraph 7 above and because the review has also been the subject of public discussion at the meetings referred to in paragraph 10 above.

13. The issue identified by the public bodies in the letter of 7 February is then further developed into two reasons which are as follows:

“1. By giving evidence at this Inquiry it is likely that Mr Forsythe will resort to information provided to him in confidence by the Board and Trust during the preparation of the report into renal transplantation services.

2. By accepting an engagement by the Board to carry out a private and confidential review of renal transplantation services in Northern Ireland in late 2010 and early 2011, Mr Forsythe FRCS cannot be regarded as sufficiently independent of the parties involved in this Inquiry.”

14. I see no basis for the first challenge. Even if it did amount to a properly founded challenge, I do not accept that it represents a good reason for excluding the evidence of Mr Forsythe (and by extension Mr Rigg). Mr Forsythe disclosed the existence of the material, not the material itself. Moreover, the material which has now been provided by DLS is neither controversial nor surprising on its face. Rather, it confirms information which was already publicly available and which is specifically referred to in an earlier part of their supplementary report.

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15. The second challenge is further refined in the letter of 7 February as posing the question whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. Translating that test into the circumstances of this Inquiry, do I accept that because Mr Forsythe was engaged by the public bodies in 2010/11 to review renal transplantation services in Northern Ireland there is a real possibility that he will be biased in giving his evidence about issues arising from the treatment of Adam Strain in 1995? I do not see such a risk. If anything, it might be thought that any bias would be in favour of the public bodies rather than against them but there is no objection from Adam's family in their submission dated 9 February 2012. In any event, in all the circumstances and given the history which I have set out above, I do not see where the "real possibility of bias" emerges from.
16. I consider that the position of the public bodies is further undermined by the fact that this Inquiry is inquisitorial, not adversarial. I am also entitled to expect co-operation from all public bodies given that this Inquiry was established by the then Minister for Health in 2004, has been supported by successive ministers since that time and is tasked with investigating what, if anything, went wrong in these cases and what lessons have been and can be learned for the future. We are, therefore, some way removed from a courtroom setting in which adversarial positions are adopted by the parties. If there was any real possibility of bias, which I do not accept, I believe that this fact alone would reduce it considerably.
17. In reaching this decision to represent the application on behalf of the public bodies, I have also considered a further letter dated 10 February from them and a letter also dated 10 February from solicitors representing Mr Patrick Keane, the Consultant Urologist, who carried out the surgery in 1995 on Adam.
18. I do not see that in giving evidence, Mr Forsythe is likely to disclose confidential information of a nature which would be improper or unfair or biased.
19. I also add that even if I thought there was weight in the submissions of the public bodies and Mr Keane, which I do not, I have statutory powers which would allow me to require the production of information if it was relevant even if it is confidential. The confidentiality issue would be most unlikely to defeat the exercise of my statutory power to require the production of relevant documents. The fact that the relevant extracts from the review have been provided has been of assistance in making it unnecessary for me to exercise my statutory powers.

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20. In making this ruling I have considered all the legal authorities relied on by the public bodies and the representatives of Adam's family as well as my own research into the law in this area generally.

**JOHN O'HARA
CHAIRMAN**

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