IN THE HIGH COURT OF JUSTICE CO/5554/2017

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

[2018] EWHC 1604 (Admin)

Royal Courts of Justice

Wednesday, 6 June 2018

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

(SIR BRIAN LEVESON)

MR JUSTICE JAY

B E T W E E N :

(1) DIANE HOPKINS

(2) FRANCES RYAN Applicants

- and -

HM CORONER FOR SWANSEA AND NEATH PORT TALBOT Respondent

MS E MARSHALL (instructed by T Llewellyn Jones) appeared on behalf of the Applicants.

THE RESPONDENT did not appear and was not represented.

J U D G M E N T

SIR BRIAN LEVESON:

1 With the leave of Her Majesty's Solicitor General granted on 9 October 2017, these applicants apply pursuant to s.13 of the Coroners Act 1988 for an order quashing the determination and findings of the investigation and inquest into the death of Teresa Mary Pokoyski and ordering a fresh investigation and inquest.

2 The facts can be shortly summarised. Teresa Mary Pokoyski, hereinafter referred to as "the deceased" died on 21 October 2012 at the age of 85 years, at Morriston Hospital.

3 Unfortunately, at the age of 33, she suffered a brain haemorrhage, initially being cared for by her husband and two children. Over the course of the years she thereafter suffered a number of strokes which left her paralysed on the left side of her body, with speech difficulties. She became a full-time resident at a nursing care home in 1996.

4 In about 2007, the deceased was moved to Bromley Nursing Home where both she and her family were very happy with the care provided. Arrangements were made for her to be examined by a speech therapist at Neath Port Talbot Hospital because her difficulties in swallowing had become worse. The therapist recommended that she be fed a smooth puréed diet via teaspoon, leaving very long gaps between mouthfuls without overfilling her mouth. It was also recommended that she avoided talking when eating and drinking and reduced any distractions.

5 In 2012, the deceased and her family were informed that Bromley Nursing Home was closing down and an alternative home was required. The recommendation of the owner of Bromley Nursing Home was the Gnoll Nursing Home to which the deceased moved in August 2012.

6 It is the applicant's contention that following her transfer to the Gnoll, the deceased received inappropriate care which led to her death. It is contended that there had been ongoing difficulties with her care and feeding, for example, the care home manager had been feeding the deceased lying down, thereby causing her to choke.

7 On 17 October 2012, the applicants were informed that the deceased had suffered a serious episode of vomiting. By the following day she was struggling to breathe and she was admitted to Morriston Hospital. The report prompting her admission was that she had aspirated her own vomit at approximately 5.30 p.m. the previous day.

8 Given the amount of time taken by the care home to summon help, the paramedic attending the deceased completed a vulnerable adult referral. Unfortunately, as we have identified, some four days later, the deceased died following a rapid deterioration in her health.

9 On 25 October 2012, a consultant histopathologist, Dr Thomas, conducted a post-mortem examination into the death of the deceased. In his report, Dr Thomas identified the cause of death as “aspiration pneumonia with locally advanced adenocarcinoma of the lung”.

10 There followed an inquest. In her witness statement and in her oral evidence at the inquest, Mrs Diane Hopkins, one of the claimants in this case, confirmed that she had witnessed her mother choking during feeding time at the Gnoll Nursing Home on two separate occasions. The first was 15 August 2012 when she was being fed soup in a reclined position; the second was on 3 September 2012 when Mrs Hopkins witnessed the deceased being fed in a reclined position, which again resulted in her choking and vomiting thereafter.

11 In her witness statement and oral evidence, the second claimant, Mrs Frances Ryan, confirmed the account of Mrs Hopkins and gave further evidence to the effect that on 2 August 2012 the deceased was fed soup which had not been thickened. On the following day she was provided with a meal that had not been purified (puréed?) and on 25 August, a carer fed the deceased tablets while she was in a reclined position resulting in her choking. With regards to 17 October, both Mrs Hopkins and Mrs Ryan confirmed that they called to see their mother, and that upon entering her room one of the carers confirmed that she had suffered a bad episode of vomiting. They described towels surrounding the deceased and noted that she was struggling to breathe.

12 Mr Christopher Collins, a paramedic who attended to the deceased the following day also provided a statement to the inquest. In his statement he said:

> "On arrival at the home, we were met by a staff member who informed us that the patient had aspirated on vomit at approximately 1730 hours they [sic] day before and was noticed to be short of breath this morning…
>
> On arrival back at base I completed a vulnerable adult referral due to the length of time taken to summon help for this patient."

13 At the hearing of the inquest, Mr Collins confirmed this account in oral evidence. A letter was also provided by Mr Andy McNab, the Lead Consultant in Emergency Medicine, which confirmed the evidence of Mr Collins.

14 The post mortem report completed by the consultant histopathologist, Dr Thomas, also formed part of the inquest evidence and he was called to provide oral elaboration upon his report. However, the testimony which he provided did not reaffirm what he had previously said. Rather, he said that given the evidence that he heard up until the moment he was called, particularly in relation to the way in which it was said that the deceased was being fed, he did not feel that it was clear that choking had occurred. In his words, he said:

> "When I wrote the report I was drawing upon the coroner's facts that the patient was feeding and lying down... It said, Teresa was unwell and vomiting and struggling to breath. I think from some of the evidence I have heard here today I don't know whether that is as clear as it was presented to me in the facts or the evidence that the police... So it isn't clear therefore whether choking had occurred. It's clear the patient had vomited, but that does not necessarily mean that they had choked on the vomit."

15 Dr Thomas went on to say that the deceased showed no evidence of giant cell reaction, which indicated that the food material in her lungs may have come from the stomach rather than the result of aspiration. On that basis, he changed his conclusions to include an underlying cancer as a potential causative factor of the pneumonia which led to the death of the deceased.

16 In his concluding remarks, the coroner found that both Mrs Hopkins and Mrs Ryan had provided honest accounts of the events described. He then said the following about the evidence of Dr Thomas, the events that followed, and the overall impact of the ultimate conclusion:

> "In the witness box since he was of the view that the clinical history was not as strong as he was initially provided a new cause of death was

> given, namely (1a) pneumonia caused by (1b) advanced adenocarcinoma of the left lung. Both are natural causes. His view given earlier, and independent of Dr Adesina, echoed that the treating doctor's view that lung cancer can commonly cause pneumonia. Miss Williams for the family was rightly concerned about the change of evidence and wanted to recall Dr Thomas to hear the evidence of the care home staff to ascertain whether evidence of aspiration could be provided to him to consider whether he needed to reconsider his cause of death. This evidence was not forthcoming and Dr Adesina's view was that even if aspiration took place he would be unable to say that that or the pre-existing lung cancer was the cause of the pneumonia. This means that I was unable to make a finding that Teresa had contracted aspiration pneumonia."

17 On that basis the Coroner concluded:

> "The final answer of how Teresa came by her death is that the deceased died from pneumonia caused by locally advanced adenocarcinoma of the lung. The question of whether Teresa aspirated cannot be answered, but if she had it could not on the balance of probabilities be said to be causative of her death."

18 Following the conclusion of the inquest with which Mrs Hopkins and Mrs Ryan were very concerned, they obtained a further medical report from a consultant pathologist, Professor Elizabeth Soilleux, addressing the following questions. First, was it reasonable for Dr Thomas to conclude that the was caused by aspiration pneumonia particularly in the absence of any giant cell reaction? Second, if the answer to the first question is yes, was it then reasonable for Dr Thomas to change his opinion on the evidence of Mrs Hopkins, the nursing staff, Mr Collins, and the other evidence at the inquest?

19 Mrs Hopkins and Mrs Ryan provided Professor Soilleux with the histological slides taken from the post-mortem examination and interpreted by Dr Thomas at the inquest for the purposes of her investigation. She also received all the written statements and oral evidence provided for the inquest. In her report of 6 December 2016, Professor Soilleux concluded:

> "The cause of death is clearly aspiration pneumonia, as abundant food material is present in the lungs. It is in the small airways (both the bronchioles and the alveoli) and it is associated with a very intense inflammatory response...
>
> A giant cell response is not a sine qua non of aspiration pneumonia, as suggested by Dr Thomas at inquest and various different patterns of inflammation can be seen. These include acute bronchopneumonia, bronchiolitis obliterans-organising pneumonia and suppurative granulomatous inflammation, all of which are present here. I would therefore give the cause of death as (1a) aspiration pneumonia, (1b) multiple strokes, (2) adenocarcinoma."

20 On that basis, Professor Soilleux agreed entirely with Dr Thomas's original conclusions as to the cause of death of the deceased. However, she did not agree that it was reasonable for him to have changed his conclusions on the evidence provided to the inquest by Mrs Hopkins the nursing staff, or Mr Collins. In terms she said:

> "Whether or not individuals claimed to have fed Mrs Pokoyski as advised by the speech and language therapist and by Sybil Davis and Mrs Pokoyski's daughters does not alter the fact that she had an incredibly severe aspiration pneumonia that is the worst I have ever seen histologically. Therefore, there was no good reason for Dr Thomas to change his opinion. Indeed there was ample evidence that aspiration occurred as listed in table 1 [that is to say in an earlier part of her report]."

21 With regards to whether or not it was reasonable for Dr Thomas to change his opinion on the basis of any other evidence heard at the inquest, again Professor Soilleux concluded that it was not. In her report she made the following comments:

> "I think the problem is Dr Thomas' lack of knowledge of the pathology of aspiration pneumonia, meaning that he is reluctant to be assertive about this as the cause of death, because he is not very sure of the diagnostic criteria. He explains multiple times during the inquest that one must see giant cells histologically to know that there is an inflammatory response to aspirate food material (usually plant material) to indicate that this food material genuinely caused aspiration pneumonia rather than was food that had passively been removed from the stomach to the airways during movement of the body after death. This is untrue, as one may see multiple different types of inflammation, that may or may not include giant cells, in response to the food material, although Dr Thomas appears unaware of this. All these types of inflammation are in fact seen in this histological material, including giant cells…
>
> Due to Dr Thomas's lack of knowledge of the pathology of aspiration pneumonia, he begins to try and inflate the importance of the cancer as a cause of death during the inquest, even suggesting that the fact it looks locally aggressive and has spread to another part of the lung means it had the capacity to spread elsewhere and/or cause major bleeding, even though it had done neither of these things (see table 2). He then says that he would like to change the cause of death to (1a) pneumonia, (1b) locally advanced adenocarcinoma, which no longer accurately represents the pathological processes occurring, as it makes the assumption that the adenocarcinoma caused the pneumonia, by a combination of local obstruction and perhaps more widespread effects on the immune system.".

22 In her additional comments, Professor Soilleux highlighted that the deceased had food material in her lungs which was at different stages of being broken down, and that the presence of bronchiolitis obliterans-organising pneumonia picture indicates a relatively long standing aspiration pneumonia. On that basis, she proffered the opinion that aspiration had occurred on multiple occasions. This, she stated, would fit well with the descriptions provided by the applicants of how the deceased was being fed at Gnoll Nursing Home.

23 In a letter dated 29 August 2017, Dr Thomas confirmed that he accepted her expert opinion and conclusions. He highlighted that he was a general histopathologist who performed post-mortems with a specialised interest in urological pathology and medical renal biopsies, and was not an expert in pulmonary or autopsy pathology. On that basis, he concluded that the cause of death of the deceased was (1a) aspiration pneumonia, (1b) multiple strokes, (2) adenocarcinoma.

24 It was on the basis of these conclusions that the applicants sought the fiat of the Attorney General and, having obtained that fiat, submit that it is necessary or desirable in the interests of justice that another investigation inquest into the death of the deceased be held, pursuant to s.13(1)(b) of the Coroners Act 1988. That section provides, in relation to an order to hold an investigation, as follows:

> "(1) This section applies where, on an application by or under the authority of the Attorney-General, the High Court is satisfied as respects a coroner ('the coroner concerned') either—
>
> (a) that he refuses or neglects to hold an inquest or an investigation which ought to be held; or
>
> (b) where an inquest or an investigation has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise) it is necessary or desirable in the interests of justice that an investigation (or as the case may by, another investigation) should be held.
>
> (2) The High Court may—
>
> (a) order an investigation under Part 1 of the Coroners and Justice Act 2009 to be held into the death either—
>
> (i) by the coroner concerned; or
>
> (ii) by a senior coroner, area coroner or assistant coroner in the same coroner area;
>
> (b) order the coroner concerned to pay such costs of and incidental to the application as to the court may appear just; and
>
> (c) where an inquest has been held, quash any inquisition on, or determination or finding made at that inquest..."

25 Given the consensus of medical opinion that now exists in this case, it is clear that Teresa Mary Pokoyski died of a cause different to that which is recorded on her record of inquest. This consensus has been reached on the basis of new evidence that was not, and would not have been, available for the investigation or inquiry into her death. It falls fairly and squarely within s.13(1)(b) of the Coroners Act of 1988.

26 It must also, however, be necessary or desirable in the interests of justice that another investigation should be held. I have come to the conclusion that this condition is also satisfied.

27 First, a future investigation into this case can address potential failings to implement the feeding plan initiated for the deceased which may lead to implications in relation to the Gnoll Nursing Home. We make no finding of fact in that regard but merely identify the areas which will fall part of any necessary new investigation. Second, I note the conclusions that Professor Soilleux identified that the deceased had been aspirating food materials for some time. It is clearly in the public interest that those who are cared for in nursing homes are looked after appropriately and with dignity.

28 In the circumstances, the legitimate concerns of the applicants in this case should properly be addressed in the interests of justice by the ordering of a further inquest. In those circumstances, I would quash the finding made at the inquest and order a new inquest to be conducted.

29 There has been some discussion as to the identity of the coroner who should conduct the inquest. I have come to the conclusion that it should be conducted by the Senior Coroner or Acting Senior Coroner, for the Swansea and Neath Port Talbot area, and I so direct.

30 The final issue which falls to be determined is the question of the costs of these proceedings. There is ample authority for the proposition that the general principle is that no costs should be ordered against a coroner if the coroner does not appear in court to maintain the inquisition which resulted from the inquiry conducted provided that any error of law does not call for strong disapproval (see *R(Davis) v Birmingham Deputy Coroner* [2004] EWCA Civ 207; [2004] 1 WLR 2739).

31 However, a detailed examination of that authority provides a number of exceptions. In particular, giving the judgment of the court with which Longmore LJ and Sir Martin Nourse agreed, Brooke LJ made it clear by reference to authorities which he had cited at para.20:

> "All these, and other authorities, were considered by the Divisional Court in *R v Newcastle-under-Lyme Justices ex p Massey* [1994] 1 WLR 1684. By this time a procedural change now permitted the parties to uncontested judicial review proceedings to sign a draft consent order, thereby obviating the expense of a hearing, and the Divisional Court introduced a new rule of practice whereby justices who unreasonably declined to sign a draft consent order might be ordered, if the court thought it appropriate, to pay the costs of the subsequent hearing."

32 Brooke LJ returned to this topic at para.47 where he identified the established practice of the courts was to make no order for costs against an inferior or tribunal which did not appear before it except where there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably decline or neglected to sign a consent order disposing of the proceedings.

33 He went on to say at (iv):

> "There are, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in category (iii) [ie. where the tribunal had appeared in proceedings to assist the court neutrally so that a successful applicant] ... who has to finance his own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting his rights after a coroner (or other inferior tribunal) has gone wrong in law, and there is no other very obvious candidate available to pay his costs".

34 Ms Elizabeth Marshall on behalf of the applicants does not now pursue an application for costs based upon any misconduct on the part of the assistant coroner conducting the proceedings, but rather puts it on the basis that the coroner was invited as long ago as immediately followed the commencement of these proceedings to consent to an order being made by consent. Thus on 7 December 2017 after these proceedings had been issued on 29 November, solicitors acting on behalf of Mrs Hopkins and Mrs Ryan asked the assistant

coroner to confirm whether or not he was prepared to consent to the application. In the event, he declined to do so although made it clear that he did not intend to make representations at the hearing.

35 Having regard to the fact that the evidence before the assistant coroner at the time that he was asked to consent included the claim form in these proceedings and his full recognition that the original histopathologist had reverted to his initial opinion and did not challenge in any measure the evidence that had now been presented by Professor Soilleux, in our judgment it was appropriate for him then to have consented to an order being made in these proceedings. Had he done so, the case could have been put before the court and an order made without the necessity of counsel being instructed and a full trial bundle being prepared.

36 Having regard to those circumstances and the personal circumstances of Mrs Hopkins and Mrs Ryan, we have come to the conclusion that it is appropriate in the unusual circumstance of this case to make a partial order for costs limited to those costs incurred after, but not including, the issue of the claim form. The original statement of costs effectively claimed all the costs including in relation to the application to determine, but based upon the justification for the order which we have made, those costs should not be recovered. In the event, the order for costs is £6,634.10 inclusive of VAT. And that is the order we make against the coroner.

37 Before parting from this case, I add only one further fact. All those others who were represented before the assistant coroner at the original inquest were informed of these proceedings. None other has chosen to appear, each making it clear that they did not wish to make representations. No argument is therefore available at the subsequent inquest that these proceedings have been decided without their having the opportunity to challenge them.

MR JUSTICE JAY: I agree.

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