Expert Evidence

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What is expert evidence in context of Coroner's Court

Opinion evidence which addresses one or both:

1) Causation of death

2)Conduct of persons whose actions or omissions may have caused or contributed to death.

WHEN SHOULD A CORONER APPOINT AN INDEPENDENT MEDICAL EXPERT?

- Previous case law suggested the test was Wednesbury unreasonableness however latest line of authority: R (Goodson) v Bedfordshire and Luton Coroner [2004] EWHC 2931 (Admin) sets out that test is when failure to do so would result in an insufficient/ineffective investigation.
- Duty likely be higher where Article 2 inquest given State's investigative obligation.
- Broad discretion– to be judged on the facts of each individual case to include consideration of the expertise of the coroner, the nature of the issues and the evidence already obtained/available.

Are there certain cases where independent expert evidence will always be required?

- No – R (Chambers) v HM Coroner for Preston and West Lancashire [2015] EWHC 31 : refused the suggestion that independent psychiatric evidence is required in every prison suicide where there are mental health issues.
- However, where there is a possibility of a finding of criminal conduct involving a professional person expert evidence will be required in relation to the standards applicable to that person's job (Hickenbottom [2007] Inquest LR1).

Practical Justice

- R (Le Page) v HM Assistant Deputy for Inner South London [2012] EWHC 1485 (Admin):
  - Application by family to call an independent expert witness instructed by them was refused.
  - Whilst accepted by the Court that the expert would have added nothing to the medical evidence already called they commented that would have been wiser to have called to allay families suspicion of deliberated wrong doing in the context of an Article 2 inquest.
  - "No duty to call … but in all the circumstances might have been better, not as a matter of law but as a matter of practical justice." "Field in which appearances are generally thought to matter."

What if the Coroner picks the wrong expert?

- R (Duffy) v HM Deputy Coroner for County of Worcestershire [2013] EWHC 1654 (Admin):
  - Former consultant paediatric cardiologist
  - Not been involved with the intensive care of children for some 15 years
  - No up to date relevant experience
  - Unable to comment on causation
  - Interests of justice required adjournment in order to obtain further expert evidence.

Requests to Coroner

- R(Takoushis) v HM Coroner for Inner North London [2005] EWCA Civ 1440:

'If an interested person wishes a Coroner to call expert evidence in any particular case, it is for that person (if at all possible) to identify the witness and put the substance of the evidence which the witness may be able to give before the Coroner so that the Coroner may be able to decide whether or not it is appropriate. Whether or not it is appropriate may well depend upon the evidence of fact…'

IP disclosing their own expert evidence

CONFLICTS ON DISCLOSURE

- Normally obtained and prepared for clinical negligence action / civil claim.
- Should it be disclosed as part of inquest process and if so at what stage?
- What are the risks of disclosure compared to the advantages of disclosure?
- Format of report?

How to use expert report

- Open to IP's to either:

a) Disclose a report with a request that the Coroner permits that expert to be called and/or instructs an independent expert of the same discipline.

b) Retain privilege but use the report obtained to facilitate understanding of the issues or inform upon questioning of witnesses.

Reasons not to disclose

- Report not finalised given Coroner Court timescales.
- Keep powder dry in civil proceedings and avoid early disclosure (inquest evidence may alter view taken in civil proceedings).
- Sufficient evidence without the need to disclose e.g. concession or reports prepared by independent organisations.
- Lay witness evidence may prove more fruitful if individual or organisation does not feel 'under attack.'
- Likely to achieve same result using the report as a basis for questioning.
- Inquest conclusion unlikely to impact negatively on subsequent civil proceedings (distinction between gross neglect and Bolam negligence).
- Report does not assist with gross neglect or causation in the context of the Coroner's Court.

Reasons to disclose

- Conclusion is likely to impact on civil decision e.g BRD as opposed to BofP
- Conclusion could potentially lead to early settlement of a civil claim.
- Risk that insufficient investigation in the absence of the same.
- Expert evidence finalised and unlikely to alter.
- Witnesses/organisations unlikely to make the necessary concessions if raised in questioning.

Onus on IP

- R (Takoushis) v HM Coroner for Inner North London [2005] EWCA Civ 1440:

" If an IP wishes a Coroner to call expert evidence in any particular case, it is for that person (if at all possible) to identify the witness and put the substance of the evidence which the witness may be able to give before the Coroner so that the Coroner may be able to deeded whether or not it is appropriate."

Opening an Inquest

- Expert reports can be disclosed following a refusal to open an inquest:

R. (on the application of Touche) v HM Coroner for Inner North London District [2001] WL 239727: disclosure of independent expert evidence obtained by the family which criticised a failure to undertake blood pressure readings was sufficient to give the Coroner grounds to suspect an unnatural death in that there was a possibility of neglect.

Refusal to permit the evidence

- R (Nicholls) v Liverpool City Coroner [2001] EWHC (Admin) 922 – should have called given disclosure of report containing adverse comments on the standard of care received by the deceased.

- R (Warren) v HM Assistant for Northamptonshire [2008] EWHC 966 (Admin) – decision not to allow family to call a Consultant Psychiatrist they had instructed was not obviously wrong but that an inquest without any evidence from an independent Consultant Psychiatrist and GP would not be Article 2 compliant.

Format of expert evidence may be determinative/ relevant consideration

- In Warren (ibid) the Coroner refused to allow IP's expert on the basis that he was commenting on care in an NHS setting, not in a prison context, but also given that it was not appropriate for the jury to determine issues of liability on the part of individuals.

- "The need to avoid issues going to civil liability, which may of course also depend on evidence of a similar nature, would need to be addressed, but the fact that the evidence may be similar is not a reason for excluding it from the purview of the inquest."

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- N (a child) v HM Coroner for the City of Liverpool [2001] EWHC 922 (Admin):

Refused family request to call Consultant in Emergency medicine on the grounds that the report dealt with Bolam negligence rather than neglect.

"In reality, no precise dividing line between a gross failure to provide basic medical attention and a failure to provide medical attention."

Will depend on the nature of the alleged failure.

Cont …

Consider:

a) Does report/evidence go further than it legitimately can/should in the context of the inquest process?
b) If so should the report be adapted to make, 'coroner friendly' both in terminology and in relation to the appropriate legal test to be applied?

Failure to disclose

- Goodson (ibid) : the family didn't't seek to place expert evidence before the Court. Comment made that had they done so it may have cast a different light on the matter as to whether expert evidence should have been called.

- R (Mulholland) v HM Coroner for St Pancreas [2003] EWHC 2612 (Admin) : part way through the inquest family sought adjournment on basis of evidence from an A&E consultant not before the Court which disagreed with the pathologist's evidence. The Coroner refused the request. After the inquest the family obtained reports from an A&E Consultant and Neurosurgeon showing that deceased would have survived a head injury. Held: no evidence to support gross neglect.

Cont…

- R (Bloom) v HM Assistant Deputy Coroner for Northern District of London [2004] EWHC 3071 (Admin): Family failed to disclose a supportive report and after the inquest obtained a second supportive report and asked for inquest to be quashed. Court made no criticism of the Coroner but allowed application in the interests of justice. They stated that it was not, 'decisive that the applicant could have asked questions or raised issues at the inquest but failed to do so.'

Statistical Evidence

R (on the application of Chidlow) v HM Senior Coroner for Blackpool and Fylde [2019] EWHC 581 (Admin):

- 5 pathologists instructed to ascertain medical cause of death. All agreed unascertainable.
- Coroner called evidence from independent A&E consultant to address whether a delay by the ambulance service in attending was causative of death.
- Expert opined that based on the PM's he was able to exclude a number of possibilities as being the underlying cause for a cardiac arrest.
- He referenced the Denver study, which indicated that 80% of patients attended to prior to going into cardiac arrest survive, in support of his contention that on the balance of probabilities the delay was causative of death.

"Again, having noted Mr (sic) Andrews' evidence on survivability, it seems to me that, in the absence of knowing the medical cause of death, it would be unsafe to put before this jury the possibility of returning any neglect rider. It cannot be established, in my judgment, that the rendering of care would have prevented the death if we do not know what the cause of death was. Further, I am not at all satisfied that the conduct (and I deal with this generally) of the police and/or ambulance personnel is capable of amounting to a gross failure for the purposes of neglect."

- Accordingly the Coroner declined, on the basis that it was Galbraith unsafe, to leave neglect and/or causation (namely whether the delay more than minimally, negligibly or trivially contributed to death).

The Divisional Court

"This case raises the question of whether causation can be proved by statistical evidence as to the prospects that Mr Bibby might have survived had he received expert treatment in good time."

"Causation should be left where there is evidence upon which the jury could properly and safely find that, on the balance of probabilities, the event or omission had more than minimally, negligibly or trivially contributed to death."

"In considering whether it is safe to leave such an issue to the jury, a coroner must have regard to all relevant evidence. In addition to evidence relating to the particular deceased and the circumstances of his or her death, that may include general statistical evidence drawn from population data such as the rate of survival in a particular group"

"As Croom-Johnson LJ put it, being a figure in a statistic does not of itself prove causation."