NEW STYLE PRE-INQUEST REVIEWS AND ARTICLE 2

Discussions after the recent Inquest Team Seminar showed that many pre-inquest reviews still follow a dated traditional format.

GENERAL OVERVIEW

I suspect this is due to a combination of reasons; the first is that until we have been exposed to an advocate who seeks to make significant yards out of such hearings, we do not necessarily realise it can be and is done in a different way. Secondly, depending on our Coroner, it may well be that local custom and practice has lagged a little behind more contemporary approaches to such hearings.

I am in no doubt that with the 'professionalisation' of the role of Coroner, in essence, now being appointed as a judicial post, the pace of change and the pressure to milk the most progress out of pre-inquest reviews will increase. Therefore, it will be necessary to have in place, a game plan, an angle, a mission statement – call it what you will, from a very early stage in the proceedings, to help inform our decisions at PIRs. It will also be necessary to have prepared in the knowledge that that the advocacy at PIR, in shaping the case, may have a crucial impact when the verdicts are finally given. It of course raises the stakes in terms of mistakes, unpreparedness or lack of clarity in our instructions.

However, despite this increased demand on our preparation time and advocacy skills, this change does give us a window of opportunity. During the transfer phase from old to new, if we attend our PIR, ready to make forceful points as to the shape and style of the forthcoming inquest, those who are less prepared, those working under the 'old' style, may not be ready to challenge an advocate's polished submissions. The effect of such an imbalance in approach being that significant concessions may be extracted or potentially tricky avenues of examination put to bed at this early stage. This may be especially so if the Coroner is also working under the old style.

ARTICLE 2

The importance of being prepared to argue at PIRs has gained heightened importance when Article 2 issues may play a part in any eventual inquest. As the reader will be aware, Article 2, is addressed in Section 5, Coroners and Justice Act 2009.

The relevant matters to be ascertained are, or are phrased thus;

(1) The purpose of an investigation under this Part into a person's death is to ascertain:
(a) who the deceased was;
(b) how, when and where the deceased came by his or her death;
(c) the particulars (if any) required by the 1953 Act to be registered concerning the death.

Clarification is then given as follows;

(2) Where necessary in order to avoid a breach of any Convention rights…, the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.

Taking a peek at the authorities that examine the area, one of the leading (and contemporary) cases which encapsulates the ethos of ***R (Middleton) v West Somerset Coroner [2004]*** is ***R (on Application of Smith) v HM Asst Deputy Coroner and Another [2009]***. Arising from this case (and others), the following question is neatly posed;

"*What does the Convention require of a properly conducted official investigation involving a possible breach of article 2?*

It is clear that an uninformative, overly restrictive procedure is unlikely to satisfy the requirements of Article 2.

An example of this stance is ***R (on application of Amin) v SSHD [2003]***; where the court stated that it is necessary that "*those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others*".

Amin also reviewed a number of European authorities and drafted the following propositions to be borne in mind when deciding upon Article 2 inquiries/inquests;

i. *Where a person in good health when detained is killed it is incumbent on the state to provide a plausible explanation of what occurred;*
ii. *Must be an effective official investigation which must ensure the accountability of the state agents or bodies… and the investigation must be capable of leading to a determination of whether any force used was justified;*
iii. *Must be an appropriate element of public scrutiny and the next of kin must be involved in the process;*
iv. *Independent, effective and reasonably prompt investigation.*

As the readers of this article can well appreciate, such propositions, if adopted, can lead to a very wide all-encompassing examination as to the circumstances of an individual's death.

Middleton as referred to above, also highlighted the fact that both individual 'agents of the state' who use lethal force must always be a matter of greatest seriousness, and, systematic failures (as per ***Amin***) may also call for no less important or even more complex investigations.

The inclusive approach was maintained in ***Smith***, as referred to above, where the family of a member of the Territorial Army, serving in Iraq sought an Article 2 inquiry/inquest and argued that the usual 'in custody' Article 2 should be extended to include serving soldiers;

Smith, applying the following judgment in ***R (on Application of JL) v SoS for Justice [2008]***:

"*Plainly patients who have been detained because their health or safety demands that they should receive treatment in the hospital are vulnerable…, not only by reason of their illness which may affect their ability to look after themselves but also because they are under control of the hospital authorities. Like anyone else in detention they are vulnerable for exploitation abuse bullying and all the other potential dangers of closed institution.*"

decided that in the circumstances, an Article 2 inquest was appropriate. Therefore it would seem that where the state is the puppet master, where it dictates where, when and how an individual should live, in essence, restraining an individual's liberty (used in the widest sense of the word), then an Article 2 inquest is likely to apply.

This assessment would seem to be borne out by a counter finding in the case of ***Richard Rabone v Pennine Care NHS Trust (2009)*** where a voluntary mental patient, who discharged herself and then committed suicide. No Article 2 obligations attached to the NHS trust in this case.

CONCLUSIONS

The above article is not intended to scare, deter or to put an individual off undertaking advocacy at the PIR. It is intended to explore the ramifications, or potential ramifications of decisions we make prior to and during the hearing. As stated above, this 'new style' presents opportunities as well as risks.

Where previously the advocacy and decisions made (if any) could be described as treading water in calm seas, to continue the analogy; the waters are now far choppier and the flora and fauna beneath us, may have a little more bite.

The thumbnail analysis of Article 2 above is an example of the depth of preparation now necessary before embarking upon PIRs. The way we prepare for those Pre-Inquest Reviews must be slicker and more robust, and we must be in a position to begin lobbying for 'our' verdict at this relatively early stage. We must be fully versed in Article 2 (and other areas outside the remit and word count of this article), bearing in mind its particularly wide application within the authorities. We must be on top of our brief, almost as if we were trial ready, in order to be able to properly shape a case, from conception to verdict.

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