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IN THE CORONER'S COURT IN NORTHERN IRELAND

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IN THE MATTER OF AN INQUEST INTO THE DEATHS OF LAWRENCE JOSEPH McNALLY, ANTHONY PATRICK DORIS AND MICHAEL JAMES RYAN

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RULING ON THE ADMISSION OF SIMILAR FACT EVIDENCE

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HUMPHREYS J

Introduction

[1] In *Re Deery* [2017] NI Coroner 1, Colton J stated:

> "[8] However as Stephens J made clear in Re Jordan [2014] NIQB 11 at paragraph [121]:
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> > 'An inquest which does not have the capacity to reach a verdict 'leading to a determination of whether the force used … was or was not justified' would not comply with the requirement of Article 2.'
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> [9] The abundance of case law on this point makes it clear that in considering "the broad circumstances in which the death occurred" an inquest must be capable of leading to a determination of whether the use of lethal force was justified. This should also lead to the further consideration of whether the use of such force and the operation in which it was used were regulated, planned or controlled in such a way as to minimise to the greatest extent possible any risk to life."

[2] The question of whether the use of lethal force by state actors was justified is therefore a central issue for determination in this inquest relating to the deaths at Coagh on 3 June 1991.

[3] Counsel for the next of kin ('NOK') seek to adduce evidence in relation to other instances where lethal force was used by certain of the military witnesses in Northern Ireland, and to cross examine the soldiers in relation to this material. Of those involved in the Coagh incident, disclosure to date has revealed the following:

Soldier	**Involvement**	
B	McCaughey & Grew	8.10.90
	Alex Patterson	12.11.90
G	Loughgall	8.5.87
	Clonoe	16.2.92
I	Alex Patterson	12.11.90
J	Loughgall	8.5.87
K	Alex Patterson	12.11.90
L	McCaughey & Grew	8.10.90

[4] I propose to outline the legal principles which underpin such applications before considering in more detail the circumstances of each individual case.

The Legal Principles

[5] In *O'Brien v Chief Constable of South Wales* [2005] UKHL 26, the Law Lords considered the admissibility of similar fact evidence in the context of a civil claim for misfeasance in public office. The claimant in that action was one of the 'Cardiff Three', wrongfully convicted of murder, and he sought to adduce evidence of alleged misconduct of the same police officers in other criminal investigations. The Lords held that admission of such evidence was subject to a two-stage test:

(i) To be admitted, the material had to be relevant, i.e. potentially probative of an issue in the action;

(ii) Where that test was met, the trial judge must then consider whether it ought to be admitted, bearing in mind, inter alia, the need for fairness to all parties and the interests of justice in avoiding prejudice and the disproportionate increase in the time and cost of proceedings.

[6] It is well established that relevant evidence is evidence which makes a matter which requires proof more or less probable. Relevant evidence is legally admissible, but a judge may, in the exercise of case management powers, nonetheless decline to admit it. As Lord Phillips observed:

> "Equally, when considering whether to admit evidence, or permit cross-examination, on matters that are collateral to the central issues, the judge will have regard to the need for proportionality and expedition. He will consider whether the evidence in question is likely to be relatively uncontroversial, or whether its admission is likely to create side issues which will unbalance the trial and make it harder to see the wood from the trees." [para 56]

[7] There is obviously a spectrum of evidence from convictions or judicial findings through to mere rumour or suspicion of the commission of some particular act. The question then arises as to what role the strength of evidence plays in the two-stage *O'Brien* process. Lord Carswell held:

> "The appellant's fourth suggested requirement, that evidence of the allegations proposed to be adduced as similar facts will be admitted only if they are proven facts, is in my view wrong both in principle and on authority… The strength of the allegations, which may be evidenced by their having been established as proven facts, may come into the scales in the second stage, but it is not necessary in the first stage to require that they be so proven." [para 76]

[8] Their Lordships recognised in *O'Brien* that the second stage may differ when the mode of trial is judge alone rather than by judge and jury. In the latter case, the question of prejudicial effect of the evidence is much more likely to be an issue of concern. In *Re Jordan's Application* [2014] NICA 76, Morgan LCJ commented:

> "Clearly in the absence of a jury the balance may come down differently and more emphasis should be given to the principle that all relevant evidence is prima facie admissible and the judge should give it the weight it deserves."[para 34]

[9] *O'Brien* received judicial consideration in the context of legacy inquests in this jurisdiction from Weatherup J in *Re McCaughey's Application (no 2)* [2012] NIQB 23. In that case, the NOK sought to cross examine a soldier from a specialist military unit ('SMU') in relation to a previous instance of use of lethal force in relation to the death of Francis Bradley in 1986. It was asserted that the evidence disclosed indicated the soldier's evidence was inconsistent with that of the expert pathologist and that Bradley had been shot whilst lying on his back on the ground. At this stage, an inquest had been held into the Bradley death, but a new inquest had been directed by the Attorney General in order to comply with the Article 2 investigative requirement.

[10] The case was advanced to the Coroner that the similarities between the cases was such that cross examination should be permitted in relation to the previous incident. The Coroner held that the material was 'potentially relevant' but did not permit it to be admitted. He found that to do so would be unfair to the soldier and that:

> "there was a very real danger of unfairness in putting questions to soldier A regarding his involvement in the present incident in the context of another contentious and unsettled death, namely the Bradley incident, and he stated that to allow material about that other incident would be more prejudicial that probative." [para 10]

[11] The Coroner also alluded to the potential of the evidence to distract the jury from the task in hand.

[12] Weatherup J rejected the Coroner's analysis, allowing the application for judicial review and remitting the question for further consideration. In doing so, he stated:

> "What are the central issues? Formally they are the who, where, when and how under the statutory scheme. There is really no doubt as to who, when and where or indeed as to how, in the older sense that the two deceased were shot by the soldiers. In the newer sense the how is a broader issue. That broader 'how' concerns the background circumstances and whether the deaths were unnecessary in that they were brought about by a shoot to kill policy. That is the effective central issue. The circumstances of the Bradley incident may inform that central issue in the present case. The Bradley incident cannot be described as a distraction. It is an important aspect of a proper inquiry into whether or not there was a shoot to kill policy. It is recognised as potentially relevant to that issue. If the case of a common soldier in two similar incidents cannot permit of examination of the shoot to kill policy by reference to the other incident then it would seem that there will never be an inquest that extends beyond the facts of the particular case. There is a public interest in inquests serving to allay suspicion and rumour about how deaths occur. One suspicion or rumour that arises in relation to this shooting is that the approach of the soldiers resulted in unnecessary deaths." [para 22]

[13] In *Re Jordan's Applications* [2014] NIQB 11 the applicant sought to quash the verdict in the inquest into the death of Pearse Jordan on a variety of grounds, including the failure to make disclosure of potentially relevant material concerning the conduct of police officers in other cases, namely Stalker Sampson and Neil McConville. Officer V was the head of Headquarters Mobile Support Unit ('HMSU') at the time of the Jordan death in 1992 but was not directly involved in the incident. He had been involved in three incidents in 1982 which were the subject of the Stalker Sampson inquiry. In each case, he was involved in the invention of cover stories which were false and designed to conceal the culpability of security forces personnel.

[14] In 2003 Neil McConville was shot dead by members of HMSU who were under the control of Officer AA and who was also involved in the planning and control of the operation which led to the death of Pearse Jordan. A Police Ombudsman for Northern Ireland ('PONI') investigation had taken place into the McConville death and the NOK sought to cross examine this officer in relation to its findings.

[15] Stephens J outlined the duties of the Coroner in the gathering of evidence and the disclosure of 'potentially relevant evidence' to Properly Interested Persons ('PIPs') This will include:

> "any documents potentially relevant to the credibility of witnesses at the hearing and any documents potentially relevant as similar fact evidence."

[16] In *Jordan* the Coroner determined that the Stalker Sampson reports were not relevant to the issues to be decided in that inquest but held that statements of Officers M and V, given to that inquiry, could be used to challenge the credibility of those officers. Stephens J found that the reports were both potentially relevant and relevant, the former being the test for disclosure and the latter for deployment, and that the coroner's determination was *Wednesbury* irrational. A similar finding followed in relation to the PONI report in McConville.

[17] Having decided that the reports were irrelevant, the Coroner had not engaged at all with the control stage which the learned judge described as a "difficult and finely balanced judgment." The outcome of the control stage could not be described as inevitable and the judge therefore quashed the inquest verdict.

[18] The Court of Appeal upheld the decision to quash the verdict and did not demur from the reasoning of Stephens J.

[19] Horner J ultimately heard the fresh inquest in *Jordan* and delivered his findings in November 2016 [2016] NI Coroner 1. He allowed evidence to be adduced and cross examination to take place in relation to the Stalker Sampson reports and the PONI McConville report. His findings in relation these matters are illuminating:

> "Serious allegations of perjury have been made against the Officer in Command of HMSU, Officer V. There is much force in the PSNI's submission that in the instant case the next of kin are asking the Coroner "to make the findings of fact in support of allegations of the utmost gravity having been presented with only fragments of the evidential material." [para 306]
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> "It is simply impossible for me at this inquest to investigate what might be described as peripheral information. To conclude that Officer V committed perjury before this inquest, when I may not have all the information, would be unfair not just to Officer V but to everyone concerned. No doubt this will be the subject of an in-depth inquiry and determination at the Stalker/Sampson inquests." [para 309]
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> "I consider that the relevance of the Stalker/Sampson incidents and the McConville killing is considerably weakened and undermined by the passage of time that separates them from the killing under present investigation. It is important to concentrate on the evidence before this inquest about what happened on 25 November 1992." [para 310]
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> "It seems to me that regardless of the fact that the McConville incident took place 10 years after the shooting of the Deceased, the facts were so materially different that detailed consideration of what happened offers limited, if any, assistance to this inquest. However, there is one matter which is of particular relevance. In that case the police officer had discharged his MP5 at Neil McConville. But he had inadvertently selected the "automatic" mode on the weapon, rather than the "single shot" and three bullets were discharged. These caused fatal injuries to Neil McConville. The circumstances in which the gun fired automatically bear a striking similarity to what happened in this case." [para 316]

[20] The learned judge was speaking from the experience of the utility of the similar fact evidence in the overall context of the fact-finding exercise in *Jordan*. It is noteworthy that the similar fact evidence in that case consisted of findings, albeit disputed ones, resulting from inquiries into the conduct of police officers.

[21] The Court of Appeal revisited this area in *Re Gribben* [2017] NICA 16, which again arose out of the McCaughey and Grew inquest. The applicant sought to judicially review decisions of the coroner on the basis that the inquest had failed to comply with the requirements of Article 2. One impugned decision related to the refusal to permit cross examination of military witnesses in relation to involvement in other lethal force incidents.

[22] The Coroner had ruled that only the incident involving Solider A and Francis Bradley was potentially relevant. The Bradley death had been the subject of a jury finding at an inquest. The Court of Appeal judgment records:

> "He concluded that he was satisfied that there were a number of similarities between that incident and the incident with which the inquest was concerned in that both occurred at night and both occurred in rural locations where the SAS was concealed and lying in wait. Both incidents involved the use of lethal force by soldiers when they considered themselves to be under threat by a person or persons carrying arms and in neither incident were any shots fired by the deceased. He considered accordingly that the evidence about the involvement of soldier A in the death of Francis Bradley was potentially relevant." [para 27]

[23] However, he ruled that the material should not be deployed at the inquest for the reasons which were rejected by Weatherup J in *Re McCaughey (no 2)* [supra]. In the event, Soldier A did not return to the inquest to be cross examined about the Bradley incident.

[24] At paragraph 50(vi) Morgan LCJ addressed the second stage of the *O'Brien* approach:

> "The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole. The arguments against its admission often concern the risk that the trial will be distorted and the jury distracted, that the evidence may be of little probative value and cause unfair prejudice and that it may unduly extend the length of the trial and cause excessive stress and prejudice to witnesses required to consider matters long closed. Where the coroner is faced with such an application he should carefully analyse and apply the two-stage approach set out by the House of Lords bearing in mind the purpose of

the inquest. The approach to disclosure is, of course, broader than that which arises at the evidential stage."

[25] Additional material was made available to the court, which had not been disclosed to the coroner, and was analysed accordingly. By way of example, the court concluded:

> "[61] Soldier G opened fire on two occasions in lethal force incidents after this engagement. The first was the death of Alex Patterson on 12 November 1990. The material indicates that he opened fire on that occasion after shots had been fired in his direction by terrorists. Although Mr Patterson was killed eight people were detained and as a result three were charged with terrorist offences. This was a return of fire case where arrests were successfully made. It does not assist in relation to a shoot to kill allegation in this case.
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> [62] Soldier G also opened fire in the Coagh incident on 3 June 1991. The circumstances were that three terrorists armed with two AK-47 rifles were driven to a car park in which it was anticipated that they would attempt to murder a person they believed to be a member of the security forces. SAS soldiers had been deployed in the vicinity. As the car approached the car park the deployed soldiers were ordered to stand by. After the terrorists arrived in the car park one emerged from the side of the vehicle with his weapon. A number of soldiers including G who had been deployed in the back of a lorry then received a "Go! Go! Go!" message over the radio which he understood to mean that there was an immediate threat to someone's life. G saw a dark figure with a weapon in the rear seat of the vehicle and opened fire.
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> [64] The question, therefore, is whether the material in relation to G's discharge of his weapon in the Coagh incident can assist in relation to the suggestion that firearms were discharged in the subject incident in an unnecessarily aggressive and unlawful manner. G was never in a position to fire in this case. He was one of two soldiers providing mobile cover. There is no suggestion or evidence that he was involved in the planning of the incident or the deployment of the soldiers on the ground or the roles performed by the relevant soldiers in this incident. He did not arrive at the scene until after the shooting had occurred. In those circumstances we do not

> consider that evidence about the Coagh incident or his conduct in it was relevant. Even if the evidence of his involvement in the Coagh incident had been admitted the Coroner would have been obliged to direct the jury that he had not been present at the scene and had no part to play in the decision to open fire on the deceased. The evidence could not, therefore, have materially affected the determination of the issues before the jury."

[26] The Court of Appeal held that the inquest was not a wide-ranging inquiry into the existence of a shoot to kill policy in engagements by soldiers in specialist SMU's with paramilitaries in Northern Ireland. The material in relation to the other soldiers ought to have been disclosed as being potentially relevant but was not relevant or material to the issues to be determined in the inquest. Even if the scope of the inquest extended to the broader inquiry, it would have required careful scrutiny in the application of the *O'Brien* test.

[27] Ultimately, the European Court of Human Rights ('ECtHR') concluded:

> "…the Court is similarly not persuaded that the decision to prevent the next of kin from questioning the soldiers and other witnesses about these lethal force incidents and to remove references to such incidents in the statements put before the jury prevented examination of those aspects of the planning and conduct of the operation which fell within the scope of the inquest into the killing of Mr McCaughey" (App. No. 28864/18, para [136])

The Similar Fact Evidence

[28] Counsel for the NOK have made it clear that they do not wish to adduce any evidence or to cross examine witnesses in relation to the deaths of McCaughey and Grew.

[29] Soldier B made a deposition in relation to the Patterson killing on 21 October 1997 in which he refers to a surveillance exercise carried out on a target house. He stated that a vehicle approached in front of the house at speed, and he observed gunfire coming from the driver's side towards his position. As it passed, he opened fire and fired five shots towards the rear of the vehicle. He then assisted colleagues in stopping a second vehicle at the scene. Alex Patterson was killed during the course of this incident, with eight others arrested.

[30] Soldier G made two statements in relation to the Loughgall killings. His evidence was that he was tasked with a number of others to go inside Loughgall Royal Ulster Constabulary ('RUC') station as a terrorist attack was anticipated. He took up position at a window and observed the movement of a blue Hiace van and

JCB digger into location outside the station. He says that individuals from the van opened fire at the station and he returned some 38 rounds, striking at least one man. Eight men were killed during the course of this incident. No arrests were made.

[31] Soldier G was also involved in the incident at the chapel car park in Clonoe. Again, he was present as a result of intelligence information that terrorist activity was likely to take place. He states that he was fired upon by the occupants of a lorry and returned fire and then pursued and shot at other individuals on foot. Four men were killed during the course of this incident.

[32] Soldier I was involved in the Patterson killing and also says that he returned fire towards the vehicle.

[33] Soldier J was located near the RUC station at Loughgall and opened fire at a white car and then the blue van, again he says in response to shots fired by the occupants.

[34] Soldier K also fired shots at the car in the Alex Patterson incident, in the stated belief that shots were being fired at soldiers from the vehicle.

[35] Counsel for the NOK contend that this evidence meets the threshold of relevance for similar fact evidence on the basis that, in each case:

(i) The operations were based on intelligence received;

(ii) There was a strong element of pre-planning;

(iii) SMU soldiers lay in wait at the scene;

(iv) Force was deployed instantly and lethally;

(v) There was an overwhelming number of rounds discharged from high velocity weapons;

(vi) The use of lethal force was either ordered or tolerated.

[36] Counsel for the individual soldiers and the Ministry of Defence ('MOD') dispute this, pointing out that there have been no findings made by any court, tribunal or statutory agency in relation to the events at Clonoe, Loughgall or involving Alex Patterson. It is argued that this inquest will not be in a position to make any such findings (at least not without engaging in a full blown inquiry into the other three incidents) and therefore their relevance will not be capable of assessment. The point is made that there were findings in Stalker Sampson and McConville and so the relevance and cogency of the evidence within the *Jordan* inquest could be the subject of judicial consideration.

[37] They also stress that the apparent similarities come about simply because the soldiers are attached to an SMU and therefore will necessarily be engaged in covert, intelligence-led operations.

[38] In light of the comments of Lord Carswell in *O'Brien*, I do not accept that the relevance threshold requires there to be proven or established facts. The authorities to which he referred make it clear that similar fact evidence may consist of unproven assertions, even in the criminal field.

[39] Applying the broad view of relevance set out in *O'Brien*, I am satisfied that the role of each of these soldiers in the three incidents referred to meets that threshold.

[40] It is therefore incumbent on me to carry out the "difficult and finely balanced" exercise of judgment required by stage 2 of the *O'Brien* process.

[41] The first issue to be considered is the strength of the evidence – how probative is it in relation to the issues to be determined at the inquest? In each case, the evidence of the soldiers is that they were returning fire when under attack. This was considered by the Court of Appeal in *Gribben* in relation to the Patterson incident which was treated as a return of fire case in which arrests were made, the court concluding the evidence would not have assisted the NOK's case.

[42] Whilst not preventing the evidence from being relevant, the lack of any proven facts is a matter to be taken into account at stage 2 (per Lord Carswell in *O'Brien*). In each of Patterson, Clonoe and Loughgall, inquests have not yet taken place and there exist no findings which could be relied upon in this inquest. There is a judgment of Treacy J in *McKeever –v- MOD* [2011] NIQB 87 in which the court found that the shooting of the plaintiff by one of four soldiers was not justified. This does not, however, amount to a finding that Soldier G used unjustified lethal force. The NOK stress that I would not be invited to make any findings in relation to the other incidents, but it is difficult to conceive how one could make an assessment of the credibility of the witness or the probative value of the evidence without probing the facts of the other killings.

[43] To do so, one would be in danger of trespassing into the realm which Lord Phillips cautioned against in *O'Brien*. The evidence would doubtlessly be controversial and would be certain to spawn further requests for disclosure of other statements, documents, expert reports and exhibits. Any analysis of the disputed events at another lethal force incident would inevitably therefore greatly increase the burden on this inquest, create delays and increase costs. Delay and further cost are properly to be regarded as inimical to the interests of justice. These harmful impacts must be measured against the modest probative value which any of the evidence could realistically contribute.

[44] The actual experience of the Coroner who ultimately heard the *Jordan* inquest is also germane to this analysis. Having allowed evidence to be admitted and questioning to take place, it is quite apparent that this proved to be of little assistance to him in carrying out the task of answering the statutory and Article 2 inquest questions. The same problem of arriving at conclusions of the utmost gravity on the basis of fragments of evidential material would arise in the instant case.

[45] I have also taken into account the fact that the military witnesses who discharged firearms are likely to have PIP status at the other inquests, thus permitting them to be legally represented, to receive full disclosure of all potentially relevant materials and to challenge any evidence of wrongdoing which is presented against them. The Article 8 rights of those individuals are engaged and any decision maker ought not to make any adverse findings against them unless their statutory and Convention rights have been respected.

[46] I am conscious of the requirement of fairness to the NOK. The planning, control and execution of the military operation which took place at Coagh will be fully and anxiously scrutinised during the course of this inquest. That exercise will not be materially assisted by delving into the disputed and controversial aspects of other incidents where lethal force was used. To do so is likely to lead to a distraction from the task to be carried out by this inquest.

[47] Counsel for the NOK also sought in written argument to make reference to a reprimand which one of the soldiers had received which is now spent and therefore cannot be referred to in court pursuant to the provisions of the Rehabilitation of Offenders (Northern Ireland) Order 1978.

Conclusion

[48] For the reasons set out, I have concluded that whilst the similar fact evidence meets the threshold of relevance, in exercise of my discretion, I have determined that it should be excluded from the hearing at this inquest.

[49] This ruling is necessarily provisional and can be revisited in light of evidence which is adduced at the hearing. The parties remain at liberty to seek to adduce other evidence in respect of either the same or different witnesses if it emerges during the disclosure process or through any other means.