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JOHN BURTON LECTURE 2024 - THE MODERN INQUEST

It is both an honour and a pleasure to have been invited to give the keynote address at your annual conference. I want to extend to each of you my own personal welcome to Belfast. I hope that you have had some time to sample a few of the delights the city has to offer and I do hope that you will come back to visit us again.

This Conference takes place some twenty years after the passing of John Burton, latterly Coroner for Greater London's Western District, Coroner of The Queen's Household and past Honorary Secretary of the Coroners' Society. From reading about him, it is obvious that John was a man of great intellect and varied interests, qualifying as a doctor in 1952 and then as a barrister in 1964, and that he brought that intellect, along with compassion, to his duties as a coroner. It is apparent that John was an inspiration to all those who came into contact with him and so I am greatly honoured to be delivering this year's John Burton lecture.

I am going to speak to you today about the modern inquest, from a Northern Ireland perspective. I hope that I have some valuable insight to offer, having served as the Presiding Coroner for Northern Ireland when I was a High Court judge, and from sitting as a Court of Appeal judge in this jurisdiction and on occasion, as a Justice of the Supreme Court.

First, some history.[1] I know that Michelle McGoff-McCann has already treated you to a fascinating insight into the importance of the coroner in 19th century Ireland so I promise to be brief.

In Ireland, as in England and Wales, the office of coroner has a long pedigree. The office appears to have been established in Ireland by the early part of the 13th century, with the first known mention of coroners appearing sometime later in 1264.

Like the coroners of that era in England and Wales, coroners in Ireland were 'keepers of the pleas of the Crown' charged with, among other things, holding inquests upon dead bodies, and their main purpose was to identify and protect the financial interests of the Crown.

It seems, probably due to our shared history, that the office of coroner in Ireland evolved in a similar fashion to that in England and Wales. Indeed, as is the case in your jurisdiction, the 1276 statute *De Officio Coronatoris* is considered to constitute the basis of modern coronial practice in Ireland and, in fact, was not formally repealed until the passing of the Coroners Act (Northern Ireland) 1959.

During the remainder of the Middle Ages, however, the position of the coroner in society went into decline and by 1500, the role had largely been reduced to its modern form, that of holding inquests into sudden deaths. Concerns about what might politely be termed 'declining standards' in those aspiring to hold the office led to legislation in the late 15th and early 16th centuries providing for payment of fees to coroners in the hope that more esteemed characters would be enticed to take up office. That reputation was not entirely dispelled, however, over the coming centuries. In that regard, I can put it no better than the previous Chief

[1] See *Coroners' Law and Practice in Northern Ireland* (1998), Leckey & Greer, Ch. 1

Coroner of England and Wales when he noted in his 10 Year Lecture[2] late last year:

> "It was even worse in Ireland, where the coroners enjoyed – if that's the right word – a reputation for drunkenness and corruption. In 1818, the Reverend Peter Browne, Dean of Ferns, wrote to Prince Frederick, Duke of York and Albany, complaining that coroners in Ireland were, as he put it, 'generally speaking the lowest and most contemptible characters.'"

Not so today, I hasten to add.

Further legislative initiatives followed aimed at improving the status of coroners, culminating in the Coroners (Ireland) Act 1846 which, ultimately, was to provide the basis for the holding of inquests in Ireland, North and South, for over a century.

1959 saw the passing of the Coroners Act (Northern Ireland), the majority of which remains in force here and which, at the time, brought major reforms. Administration of all matters relating to coroners, including appointment to and remuneration of the office, was transferred from local councils to the then Northern Ireland Government. Today, the Northern Ireland Courts and Tribunals Service delivers the day to day support for the administration of justice by coroners and coroners, in common with the majority of Courts and Tribunals judiciary in this jurisdiction, are appointed by the Northern Ireland Judicial Appointments Commission.

Under the 1959 Act, a legal qualification became mandatory for appointment as a coroner. Coroners were permitted to hold inquests only within their own districts, with certain exceptions. The 1959 Act also contains provisions which

[2] Lecture by the Chief Coroner: Death and Taxes - the past, present and future of the coronial service - Courts and Tribunals Judiciary

still stand as to the circumstances in which there is a duty on certain persons to report a death or the finding of a body to the coroner, the circumstances in which a coroner can take possession of a body, the investigations, including post-mortems, which may be carried out on the coroner's behalf together with provisions regarding the conduct of an inquest, including when a jury is mandatory.

This gallop from the Middle Ages to the present day shows us that the pace of change of coronial law, in terms of any legislative response, has a long history of being slow, perhaps even glacial. The primary legislative provisions in Northern Ireland are now some sixty-five years old and inevitably have not kept up with the pace of advances in modern medicine, including in relation to organ donation, nor the evolution of the involvement of the bereaved in the coroner's process.

That is not to say that there has been no change in Northern Ireland since 1959. In 2006, a centralised Coroners Service for Northern Ireland was established with three, now four, full-time coroners being appointed to deal with inquests across Northern Ireland as a single district. The coroners were, and continue to be, supported by a dedicated team of legal and administrative staff as well as Coroners Liaison Officers and, latterly, dedicated Coroners Investigators. Practices and procedures have evolved and, by way of example, the absence of a statutory requirement for disclosure to interested persons has not prevented that from becoming standard practice.

I know that yesterday, Coroner Toal took you through a day in the life of a Northern Ireland coroner and took the opportunity to draw out some of the differences between coronial investigations and the holding and conduct of inquests in our respective jurisdictions. I do not propose to rehearse what Anne-Louise said save to emphasise how much of the day-to-day work of coroners

involves consideration of the societal issues that you face too, and which are not related to our troubled past.

It has also involved considerable work by coroners and the Presiding Coroner by way of practice direction and guidance to deal with case management and other issues that have arisen in recent times. This includes the use of remote links which were essential during the Covid-19 pandemic to keep business going and which continue today as a regular method of taking evidence[3].

Three inquests come to mind by way of examples of the day to day work of coroners here.

The first relates to the tragic death of baby Jaxon James McVey[4], who was stillborn in March 2017, having died during birth. In that case, Coroner Dougan, who I believe is here today, found the death to have been both foreseeable and preventable. In findings that I fear will be all too familiar to this audience, the coroner identified a number of missed opportunities in the care and treatment of the deceased baby and failures on the part of the local health Trust in terms of inconsistencies between protocols and a failure to effectively communicate about the importance of protocols to daily practice.

Moving to drugs-related deaths, again an issue with which you will be all too familiar, my second example is that of the inquest in relation to the death of Mark Neeson[5] who died in 2015 aged 27 from hypoxic brain damage following a cardiac arrest due to cocaine toxicity. The secondary cause of death was restraint, struggling, post-exercise peril, and psychological effects of being detained in the particular circumstances. In that case, the police had not recognised that the deceased was vulnerable, instead approaching him as a

[3] Legacy Inquests - Case Management Protocol; Guidance on Physical Remote and Hybrid Attendance 6 Nov 23

[4] McVey, Inquest into the Death of (Rev1) [2022] NICoroner 11 (bailii.org)

[5] Neeson, In the Matter of an Inquest into The Death of [2020] NICoroner 4 (bailii.org)

violent suspect in need of restraint. In his findings, the coroner highlighted the importance of meaningful training so police officers would be better equipped to recognise and deal with such situations appropriately, noting that the evidence suggested that there needed to be a fresh approach to policing such incidents particularly in light of the number of drugs and/or mental health-related incidents that now occur. To give some context in this regard, official statistics for Northern Ireland released earlier this year show that in the decade between 2012 and 2022, deaths due to drug-related causes rose by 98%, with numbers having peaked in 2020[6]. This tells me that the need for first responders to be trained so they are equipped to deal with situations in which drugs are a factor is becoming more and more acute.

My final example relates to the horrific and tragic deaths of Michael and Marjorie Cawdery[7], a couple in their 80s both of whom died after Thomas McEntee, who was subsequently diagnosed with paranoid schizophrenia, broke into their home and stabbed them both to death. McEntee was found guilty of manslaughter by reason of diminished responsibility and the subsequent inquests examined five incidents over a five-day period leading up to the deaths, each dealing with Mr McEntee's engagements and interactions with police officers and health care staff. The purpose of the coroner's examination was to determine whether any of those incidents had caused or contributed to the deaths. She concluded that Mr and Mrs Cawdrey's deaths were entirely preventable and found that there had been a succession of omissions and missed opportunities, emanating from poor communication and a lack of informed and effective decision making, on the part of police officers and healthcare staff, in their contact, care and treatment of Mr McEntee.

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[6] Press Release for 2022 Drug Related and Drug Misuse Deaths (nisra.gov.uk)

[7] Inquests touching upon the deaths of Lillian Majorie Cawdery and Michael Julien Hope Cawdery.pdf (judiciaryni.uk)

While inevitably tragic, I believe these cases illustrate the vital role that coroners have in casting a spotlight on the outworkings of some the most difficult issues that we face as a society so that lessons to be learned are highlighted and opportunities for practice to improve are identified in order that fewer families find themselves in the situation of losing a loved one in preventable circumstances.

I will move now to focus on what is a unique aspect of modern inquests and specific to Northern Ireland, that is the corpus of domestic and international jurisprudence that has been generated as a result of deaths that occurred during the period of conflict in our recent history known colloquially as 'The Troubles', which I know is of interest.

To give some context by way of background, in Northern Ireland, until the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 came into effect on 1st May 2024, for many years there was an evolving body of outstanding inquests, known as 'legacy inquests' where, in broad terms, the deaths had occurred during, and had some connection to, the Northern Ireland Troubles. These inquests were outstanding either because no inquest had ever been held or because, post the devolution of justice to the Northern Ireland Assembly in 2010, the Attorney General for Northern Ireland of the day had exercised her statutory power to order that an inquest be re-opened. Broadly speaking, the outstanding inquests concerned deaths that had occurred throughout the 1970s, 80s and 90s and have given rise to a seam of human rights-related jurisprudence on the domestic and international stage.

One of the main issues with which the domestic and Strasbourg jurisprudence is concerned is the applicability, or otherwise, of the procedural obligation contained in article 2 of the European Convention on Human Rights in respect of deaths which occurred prior to the coming into force of the Human Rights Act 1998. This issue is explored in a series of Strasbourg and House of Lords and

Supreme Court decisions, a number of which have arisen in respect of deaths which occurred during the Northern Ireland Troubles.

For the today's purposes, the legal background begins on 4 November 1950 when the European Convention on Human Rights came into being. While the Convention was ratified by the United Kingdom on 8 March 1951 and entered into force on 3 September 1953, it was not until January 1966 that the right of individual petition for UK citizens to the Strasbourg courts was introduced. That right, among others, was 'brought home' when the Human Rights Act 1998 came into force on 2 October 2000 which provided, in section 2(1)(a) that, "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights."

Article 2 of the Convention enshrines the right to life and, as the *European Court of Human Rights' Guide on Article 2 of the Convention* states:

> "…. ranks as one of the most fundamental provisions in the Convention, one which in peace time, admits of no derogation under Article 15. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed."[8]

With regard to the article 2 obligations on the state, the Guide goes on to say:

> "Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions. Having regard to its fundamental character, Article 2 of the Convention also contains a procedural obligation to carry out an

[8] Guide on Article 2 - Right to life (coe.int), paragraph 2, citations removed, accessed 22/8/2024

effective investigation into alleged breaches of its substantive limb."[9]

The procedural obligation was first adumbrated in the 1995 decision of the European Court of Human Rights in *McCann v UK*[10] which arose from the deaths of three members of the IRA in Gibraltar in 1988. In *McCann*, it was held that the obligation to protect the right to life, read in conjunction with the states' general duty under article 1 of the Convention to 'secure everyone within their jurisdiction the rights and freedoms defined in the Convention' requires by implication that there should be some form of effective official investigation where individuals have been killed by the use of force by, among others, agents of the state[11]. Hence, *McCann* signalled the birth of the procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb of article 2.

We move forward then to the coming into force of the Human Rights Act 1998 which incorporated the ECHR into domestic law with effect from 2 October 2000.

In 2004, the Northern Ireland case of *In re McKerr*[12] came before the House of Lords. It concerned the death of Gervaise McKerr who had been shot dead by members of the Northern Ireland police force in 1982. The McKerr family brought domestic law proceedings alleging a breach of the article 2 procedural obligation to investigate, in particular the failure to hold an inquest. Applying the European jurisprudence of the time, coupled with the non-retrospectivity provision in the Human Rights Act, the House of Lords found that the substantive article 2 obligation could apply domestically only in respect of deaths

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[9] Ibid

[10] *McCann v United Kingdom* (1995) 21 EHRR 97

[11] *McCann v UK*, paragraph 161

[12] *In re McKerr (Northern Ireland)* [2004] UKHL 12

which had occurred on or after the commencement of the Human Rights Act and accordingly, that this was also the case in respect of the procedural obligation.

A further significant development in the jurisprudence regarding the procedural obligation took place in 2007 when, in the case of *Brecknell v UK*[13], the Strasbourg Court considered whether an obligation to investigate which had gone dormant could revive with the receipt of new information.

Trevor Brecknell was shot and killed along with three others in an attack on a County Armagh bar by loyalist paramilitaries in December 1975. New evidence emerged in 1999 regarding possible police collusion in the murder. The Strasbourg Court reviewed the article 2 requirements in such a circumstance and, specifically rejecting the UK Government's claim that the procedural obligations under article 2 ECHR might lapse with the passage of time, found that new information may revive the obligation, in which case 'the issue then arises as to whether, and in what form, the procedural obligation is revived.'[14].

There then followed the decision of the Grand Chamber of the Strasbourg Court in *Šilih v Slovenia*[15] in 2009. *Šilih* introduced the concept of the 'detachable' procedural obligation under article 2, which is a separate and autonomous duty, binding on the state in circumstances where there is a 'genuine connection' between death and the entry into force of the Convention, referred to as 'the critical date'. By virtue of *Šilih*, a genuine connection could be established, without reference to a temporal limit, where a significant number of article 2 procedural steps have been, or should have been, carried out after the critical date or where there was a need to ensure the underlying values of the Convention. Hence, under the Strasbourg jurisprudence, the article 2 procedural

[13] *Brecknell v United Kingdom* (2007) 46 EHRR 42

[14] *Brecknell,* paragraph 66

[15] *Šilih v Slovenia* (2009) 49 EHRR 37

obligation can apply even where the relevant death is prior to the entry into force of the Convention.

The decision in *Šilih,* and hence the concept of the detachable procedural obligation, was given effect in domestic law in *In re McCaughey*[16], a Northern Ireland case about the scope of a post-October 2000 inquest into two Troubles-related deaths which had occurred prior to the critical date. Applying the Strasbourg jurisprudence by analogy, the Supreme Court concluded that the UK had a detachable free-standing obligation under article 2 to ensure that the inquest complied with article 2 procedural requirements. As coroners, you will be aware that the practical effect of this was that the inquest when determining 'how' the deceased persons had died was not confined to considering 'by what means' but could also to consider 'in what broad circumstances'.

Of note in *McCaughey* is that, although the Supreme Court was free to take a different approach, the 6 – 1 majority chose to apply the Strasbourg jurisprudence by analogy. This was not a direct application of the so-called 'mirror principle', as articulated by Lord Bingham in *Ullah*[17], namely the obligation on national courts to keep pace with the Strasbourg jurisprudence as it evolves over time. Rather, the decision in *McCaughey* is 'by analogy' because it is not suggested that, under the Human Rights Act, a claimant can go back to deaths prior to 14 January 1966, which is the date from which UK citizens have been able to petition the Strasbourg Court directly and which is therefore the 'critical date' for the purposes of the temporal jurisdiction of the Strasbourg Court. The critical date for the purposes of the Human Rights Act is the date it came into force in the UK, 2 October 2000. Therefore, there is a gap, and hence no precise 'mirroring', between a person's right to go to the Strasbourg Court and 'bringing home' the right under article 2 by way of the Human Rights Act.

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[16] *In re McCaughey* [2011] UKSC 20, [2012] 1 AC 725

[17] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323)

Next, the focus moves back to the Strasbourg Court and its 2013 decision in *Janowiec v Russia*[18]. Although *Šilih* had provided the concept of the detachable procedural obligation on the basis of a genuine connection or a Convention values test, there was a lack of clarity. In *Janowiec,* the Grand Chamber took the opportunity to lay down principles in respect of the genuine connection test, the first of which is that the time period between the relevant death, which is the 'triggering event', and the critical date is the most important aspect of the genuine connection test. Second, the time period between the triggering event and the critical date should be reasonably short and, leaving aside where the Convention values test applies, should not exceed 10 years[19].

The third principle to be extrapolated from *Janowiec* is that, apart from the time period, the other relevant factor to consider in relation to the 'genuine connection' test is whether a major part of the investigation has been carried out, or ought to have been carried out, after the critical date. Fourthly, the overall duty is to carry out an effective investigation.

Next, we find ourselves back at the Supreme Court and the Northern Ireland case of *In re Finucane*[20] in 2019 which concerned the killing of a solicitor. There is a long history of litigation by the Finucane family aimed at obtaining an effective investigation into this 1989 death, which took place some 11 years and 8 months prior to the commencement of the Human Rights Act. The murder has been the subject of a number of inquiries, the bulk of which have taken place since the implementation of the Human Rights Act.

The issue before the Supreme Court in the 2019 case was whether the latest inquiry into Mr Finucane's death was article 2 compliant. It was argued that the genuine connection test was not met on the basis that the death had occurred

[18] *Janowiec & Others v. Russia* [GC] - 55508/07 and 29520/09 [21.10.2013]

[19] *Janowiec,* paragraph 146

[20] *In re Finucane* [2019] UKSC 7

more than 10 years before the 2 October 2000. One of my predecessors as Chief Justice, Lord Kerr, in his then capacity as a Supreme Court Justice, gave the leading judgment. Lord Kerr rejected the contention that the 10 year time limit referred to in *Janowiec* was strict and immutable, stating that "the decision as to whether there is a genuine connection involves a multi-factorial exercise and the weight to be attached to each factor will vary according to the circumstances of the case."[21]

Some two years later, the genuine connection test, in particular the temporal question, was back before the Supreme Court in another Northern Ireland case, that of *In re McQuillan*[22]. There were two appeals in *McQuillan,* one of which concerned a 1972 death and the other which concerned the alleged torture of suspected terrorists during 1971 in which the procedural obligation under article 3 was in issue. In *McQuillan* the Supreme Court accepted that the correct approach in domestic law is to apply *Janowiec* by analogy where the relevant critical date, for the purposes of the Human Rights Act, is 2 October 2000. In essence, the Supreme Court's rationalisation of the authorities, putting to one side the Convention values test, was as follows.

Firstly, the genuine connection test requires that there is a reasonably short period between the triggering death and the critical date. Secondly, normally, that time period should not exceed 10 years. Thirdly, for compelling reasons, there can be an extension of a further two years to an outer period of 12 years. The compelling reasons which will justify such an extension are where the original investigation was seriously deficient and where the bulk of investigative effort has taken place after the critical date.[23]

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[21] Ibid, paragraph 108

[22] *In re McQuillan* [2021] UKSC 55

[23] Ibid, paragraph 144

The rationalisation in *McQuillan* is closely analogous to the reasoning in *Janowiec* but differs by allowing an extension of two years, from 10 to 12 years, provided two circumstances, which are slightly differently expressed than in *Janowiec,* are shown to exist: first, an original investigation into the triggering death can be seen to have been seriously deficient, or, one should insert, non-existent; and, secondly, the bulk of such investigative effort which has taken place or, one should insert, ought to have taken place, post-dates the relevant critical date. It should be noted that the second compelling reason goes beyond the standard requirement in *Janowiec* that 'much' or 'a major part' of the investigative effort post-dated, or should have post-dated, the relevant critical date.

Therefore, according to the *McQuillan* rationalisation, the normal rule is that there is no genuine connection if the time period between the relevant death and 2 October 2000 is more than 10 years and even within that period, applying *Janowiec*, it must be shown that a major part of the investigative effort which has, or ought to have, taken place was after the critical date.

There is a genuine connection, however, if the time period between the relevant death and 2 October 2000 is no more than 12 years provided that the original investigation was seriously defective or non-existent and that the bulk of the investigative effort which has, or ought to have taken place, was after 2 October 2000. This rationalisation combines the certainty of two fixed periods, that is 10 years and 12 years, with the flexibility, for compelling reasons, to extend the primary period of 10 years to the outer period of 12 years.

An important feature of that rationalisation – and one might say the driving force behind allowing an extension to 12 years in the circumstances explained in *McQuillan* - was that it accommodated the decision, albeit not the multi-factorial reasoning element referred to by Lord Kerr, in *Finucane*.

Applying that rationalisation, although the facts of *Finucane* fell outside the primary 10 year period required for there to be a genuine connection, they fell within the outer period of 12 years, the period between the death and the critical date being 11 years 8 months. The facts of *Finucane* were compelling because the original investigation was 'seriously deficient' and 'the bulk of the investigative effort' had taken place after the critical date.

That brings me to the 2023 Supreme Court case of *In the application of Rosaleen Dalton*[24], a Northern Ireland appeal in which I sat in the Supreme Court as part of a seven judge panel. *Dalton* concerns the temporal scope of the Human Rights Act 1998 in relation to the procedural obligation under article 2 of the European Convention on Human Rights.

By way of factual background, in summary, on 31 August 1988, Sean Dalton was killed instantly in a bomb explosion in Londonderry, or Derry, a city in the north west of Northern Ireland. The explosion resulted also in the deaths of Sheila Lewis, who died on the same day, and Thomas Curran, who died from his injuries several months later. The incident has become known as the 'Good Samaritan bombing' because, when the bomb went off, Mr Dalton was entering a neighbour's house to check on the welfare of his neighbour. The bomb was planted by the IRA with the apparent purpose of luring members of the security forces into a trap.

Shortly after Mr Dalton's death, there was a police investigation, followed by an inquest held in December 1989. No-one was charged with the murders and the inquest simply recorded the facts of Mr Dalton's death. In February 2005, Mr Dalton's son lodged a complaint with the Police Ombudsman of Northern Ireland which, in broad terms, alleged police misconduct in failing to warn those in the neighbourhood of the bomb. The complaint alleged that this conduct was to protect a police informant. The Police Ombudsman reported on the complaint

[24] *In the application of Rosaleen Dalton* [2023] UKSC 36

eight years later in July 2013 after what was described as a 'wide-ranging and thorough' investigation. That report contained criticisms of the police which were centred upon a failure to advise the local community of the bomb. The Police Ombudsman did not uphold the claim of collusion with a police informant. The report commented that a substantial number of retired police officers refused to co-operate and that documents were missing.

As a result of the Police Ombudsman's report, Mr Dalton's family asked the Attorney General of Northern Ireland to direct a new inquest under section 14 of the Coroners Act (Northern Ireland) 1959. In 2015, the Attorney General declined the request. Rosaleen Dalton, Mr Dalton's daughter, sought a judicial review of the Attorney General's refusal to direct a fresh inquest, alleging that the decision infringed her article 2 rights and was in breach, therefore, of the Human Rights Act. The challenge failed at first instance but succeeded on appeal to the Court of Appeal which declared that an article 2 compliant investigation had not taken place. The Court of Appeal remitted the matter to the Attorney General for re-consideration who appealed to the Supreme Court.

The case before the Supreme Court concerned primarily the extent to which the positive obligation on public authorities to investigate an individual's death under article 2 of the European Convention, as given effect in the UK by the Human Rights Act 1998, extends to deaths which occurred before the Human Rights Act came into force. In Mr Dalton's case, his death occurred 12 years and 1 month prior to the coming into force of the Human Rights Act.

Although the decision of the Supreme Court in *Dalton* was unanimous, unusually, the court gave four judgments, each with different degrees of emphasis and some disagreement as to precisely what the European Court of Human Rights has decided on the temporal scope of the Convention.

Lord Burrows and I gave a joint judgment finding that the genuine connection test was not satisfied on the facts. We did not regard it as appropriate, in

applying the genuine connection test, to depart from the decision in *Finucane*, as we had been invited to do, nor the *obiter dicta* at paragraph 144 in *McQuillan*. The dictates of precedent, and the stability and certainty which it is designed to ensure, mean that caution should be exercised before the Supreme Court decides to overrule itself in accordance with *Practice Statement (Judicial Precedent)*[25]. Similar considerations may apply where the question is whether to reject carefully considered *obiter dicta* of a panel of the Supreme Court.

Particular caution is required where, as was the case in *Dalton*, we were being invited to overturn two cases that were very recent, one involving a seven-person panel of the Supreme Court, and where the facts in question raised particularly sensitive issues. There had been no subsequent legal development, such as, for example, a new case from the Strasbourg court, that cast doubt on those decisions. Additionally, there was relevant ongoing civil litigation. We had not been referred to any academic or other criticism of those two cases. We agreed therefore that the appeal in *Dalton* should be allowed because, applying the rationalisation of the authorities, especially that of the *Finucane* decision that had been given by the Supreme Court sitting as a panel of seven the previous year in *McQuillan*, the genuine connection test was not satisfied. We found that there was no justification or need to overrule *Finucane,* although we did determine that the multifactorial reasoning in *Finucane* was not to be preferred.

Taking the four judgments of the Supreme Court in Dalton together, the following can be determined[26] as the present position in domestic law in relation to the question of the application of article 2 in cases where the death precedes the coming into operation of the Human Rights Act.

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[25] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234

[26] See Press Summary of In the matter of an application by Rosaleen Dalton for Judicial Review (Northern Ireland) - Find case law - The National Archives

First, the decision in *Finucane* has not been departed from, albeit that the Supreme Court in *Dalton* disagreed with the wide multi-factorial reasoning that was adopted in *Finucane*.

Second, the obiter dicta at paragraph 144 in *McQuillan*, with some slight amendments for clarity, set out the correct analysis.

Third, the obligation under article 2 of the Convention to investigate a death is only capable of applying to deaths which occurred within an outer period of 12 years before the HRA came into force on 2 October 2000, unless the 'Convention values' test is met. Accordingly, if the death occurred more than 12 years before 2 October 2000, a court should strike out proceedings alleging a breach of this obligation unless the Convention values test applies. The Convention values test imposes an extremely high hurdle for someone seeking to rely on it. What is principally in mind are serious crimes under international law, such as war crimes, genocide, or crimes against humanity.

As an aside, I note at this point that, in *Finucane*, the Northern Ireland High Court found that the Convention values test had been met. That point did not occupy much space at the Supreme Court and Lord Kerr made no finding in that regard. In *Dalton*, Lord Burrows and I were clear that we disagreed with the High Court's finding given the nature of the acts with which the Convention values test is primarily concerned.

Returning to the law as it stands post-*Dalton*, the fourth principle to be extracted is that, if the death occurred between 10 and 12 years before 2 October 2000, then a claim may only be brought in exceptional circumstances, even leaving to one side the Convention values test. Those circumstances, as explained in *McQuillan* at paragraph 144, are that any original investigation into the death can be seen to have been seriously deficient or non-existent and that the bulk of such investigative effort which has taken place, or which ought to have taken place, post-dates 2 October 2000.

Fifth, the analysis of the law approved by the Supreme Court in *Dalton* combines the certainty of two fixed periods, 10 years and 12 years, with the flexibility, for the compelling reasons explained in paragraph 144 of *McQuillan*, to extend the primary period of 10 years to the outer period of 12 years.

Sixth, if the death occurred less than 10 years before 2 October 2000, then it must still be shown that a major part of the investigation took place, or ought to have taken place, after 2 October 2000.

What then is happening in Northern Ireland now? The Supreme Court's judgment in *Dalton* was delivered on 18 October 2023. On 1 March 2023, the Northern Ireland High Court delivered its decision in the judicial review case of *In re Bradley, Duffy & Ministry of Defence*[27] which concerned three legacy inquests where the core question, as defined by the court, was whether the article 2 investigative obligation applied to each of the inquests as a matter of domestic law. That matter is before the Court of Appeal next week so I will say nothing more about it.

I turn now to touch briefly on the nature of the article 2 procedural obligation. As I stated earlier, *McCann v United Kingdom*[28] introduced the concept of the article 2 procedural obligation and the need for an effective official investigation. The nature of the article 2 ECHR procedural obligation was considered by the Strasbourg Court in *Jordan v UK*[29] and in *Nachova & Others v Bulgaria*[30]. It flows from these decisions that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and to ensure accountability in circumstances which potentially engage the state's responsibility for deaths.

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[27] *In re Bradley, Duffy & Ministry of Defence* [2024] NIKB 12

[28] *McCann v United Kingdom* (1995) 21 EHRR 97

[29] *Jordan v UK* (2003) 37 EHRR 2

[30] *Nachova & Others v Bulgaria* (2006) 42 EHRR 43

What form the investigation takes may vary depending on the circumstances of a particular case. The proper standards of investigation, now well embedded in Convention jurisprudence, are independence, adequacy, promptness, reasonable expedition and participation of next of kin. Furthermore, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.

In Northern Ireland, such investigations have often taken place by way of inquest. Where the death concerns the use of force by state actors, as a number of the legacy inquests do, or did, in order for the investigation to be effective, it must be capable of leading to a determination of whether the force used was justified in the circumstances and to the identification and punishment of those responsible. Inquests have also dealt with the planning and control of state actions to answer the broad question of how the deceased came to die. You will all be familiar with the *Middleton*[31] construction – in an article 2 inquest, 'how' the deceased came to die means 'in what broad circumstances'. The procedural obligation is 'not an obligation of result but of means.'[32]

The subject matter surrounding a death will obviously dictate the form of investigation. For instance, as the Strasbourg Court has found in the Northern Ireland case of *McKerr v UK*[33], among others, in cases of lethal force alleged committed in collusion with state agents, civil proceedings by the next of kin which do not involve identification and punishment of any alleged perpetrator, cannot fulfil the article 2 obligation because in such cases damages are an inadequate remedy. On the flip side, in medical negligence or road traffic accident cases where article 2 is engaged, compliance may be achieved by the

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[31] *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182

[32] *Jordan v United Kingdom* (2003) 37 EHRR 2 at para 107; *Nachova v Bulgaria* (2005) 42 EHRR 43; *In re McCaughey* [2011] UKSC 20, [2012] 1 AC 725; *In re Jordan's Application for Judicial Review* [2014] NIQB 11; [2014] Inquest LR 1.

[33] *McKerr v United Kingdom* (2001) 34 EHRR 20, *Bazorkina v Russia* (2006) 46 EHRR 15, *Al-Skeini v United Kingdom* (2011) 53 EHRR 18

civil proceedings[34]. The choice of investigative method is firmly within the state's margin of appreciation.

The question of the nature of the article 2 procedural obligation has come before the Court of Appeal in Northern Ireland in various guises over the years. In 2023, the Court of Appeal dismissed an appeal arising from a coroner's refusal to grant an application for properly interested person status where it had been asserted that the applicant's article 2 rights necessitated him being afforded such status[35]. In 2022, a military witness in a legacy inquest sought unsuccessfully to have set aside a subpoena on the basis of self-incrimination. One of the reasons the appeal did not succeed was that article 2 was engaged and so, for the investigation to have been effective, it must have been capable of leading to a determination of whether the force in question was or was not justified in the circumstances and to the identification and punishment of those responsible[36].

What then of the future of the modern inquest in Northern Ireland?

Under the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, the majority of outstanding legacy inquests were halted on 1st May 2024. In the King's Speech in July 2024, the Labour Government stated its commitment to repeal and replace the Legacy Act and to set out steps to allow legacy inquests and Troubles-related civil claims to resume. In the meantime, there are 9 legacy inquests relating to 10 deaths which were not caught by the Legacy Act and which are now being progressed to hearing.

Article 2 issues will inevitably continue to arise, not just in legacy inquests but in the day to day business that forms the core of the Northern Ireland coroners' work. Not all of those issues will come before the Supreme Court or the

[34] *Mastromatteo v Italy* (Application No 37703/97) (unreported) 24 October 2002 (Application No 37703/97)

[35] *In re Cummings* [2023] NICA 44

[36] *M4 v The Coroners Service of Northern Ireland* [2022] NICA 6

Strasbourg Court but I have no doubt that the rich seam of jurisprudence arising from inquests and investigations in Northern Ireland will continue to evolve and develop.

I will end by mentioning two final aspects of the modern inquest. First, the parameters for judicial review of coronial decisions. We are quite clear in this jurisdiction that it will be a rare case where case management or procedural issues mid-inquest succeed before the judicial review court. Also, a substantive decision is amenable to judicial review but there are parameters.

In 2017, as a High Court judge, I had occasion to consider this in some detail when I refused leave to apply for judicial review of the decision of the coroner in the inquest into the Troubles-related death of Patrick Pearse Jordan[37]. As I noted then, it has been well-established since the case of *Anisminic Ltd v Foreign Compensation Commission*[38] [1969] 2AC 147 that the verdict of a coroner may be challenged by way of judicial review. However, that is not unlimited, as I went on to note when I said:

> "[33] The Coroner is the fact finder in this case and considerable discretion must rest with him within the legal boundaries of section 31 and Article 2. The issue for this supervisory Court is whether the Coroner has exercised his discretion improperly in some way. The Coroner must be afforded a high degree of latitude in this regard…"

More recently, earlier this year, the Northern Ireland Court of Appeal dealt with the same issue in the case of *In re Thompson*[39] as follows:

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[37] *In re Jordan's Application (Leave)* [2017] NIQB 135

[38] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2AC 147

[39] *In re Thompson* [2024] NICA 39

> "[28] Clearly in interlocutory matters the wide discretion of the coroner is recognised based upon the fact that those aggrieved can challenge at the end of the inquest. That is why reviews from such interlocutory decisions rarely succeed. When a substantive decision is made, it would, to our mind, be entirely unrealistic to disregard the fact that a coroner is an independent judicial office holder exercising a judicial function, however, he or she is not immune to judicial review on public law grounds ..."

Second, and finally, is the emphasis in the work you do on those affected by loss, the bereaved families. Joan Didion in her book, The Year of Magical Thinking, set out with style the effect her husband's death had on her. She said:

> "Life changes fast.
>
> Life changes in the instant.
>
> You sit down to dinner and life as you know it ends
>
> …
>
> I recognise now that that there was nothing unusual in this: confronted with sudden disaster we all focus on how unremarkable the circumstances were in which the unthinkable occurred, the clear blue sky from which the plane fell, the routine errand that ended on the shoulder with the car in flames, the swings where the children were playing a usual when the rattlesnake struck from the ivy. He was on his way home from work - happy, successful and healthy - and then gone."

Whilst the world has changed since the Middle Ages, and inquest practice has developed to meet modern demands, in one sense, the modern inquest is the same as inquests of old as it engages with human emotions and people at a low

ebb in an effort to find some resolution. I know that John Burton understood this human side of the work you do which is, in truth, its most important aspect. Thank you very much for each day when you deal with the problems that life and death presents.