IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP.445/87

IN THE MATTER of the Judicature Act 1972

A N D

IN THE MATTER of an inquest into the death of NANCY RUTH HENDRIE under the provisions of the Coroners Act 1951

BETWEEN JOHN XAVIER LOUW of Ashburton, Medical Practitionere

Applicant

A N D ALLAN NEIL McLEAN of Christchurch, Coroner

Respondent

Hearing: 10 December 1987

Counsel: J.A. Walker for Applicant
G.K. Panckhurst for Respondent
T.M. Gresson for the Police at Ashburton
Carolyn Risk for the Nurses Association
J.G. Brandts-Giesen for the Ashburton Hospital Board
B.McClelland Q.C. and P.B.H. Hall for the personal representative of Mrs Hendrie

Judgment: 12 JAN 1988

JUDGMENT OF HARDIE BOYS J.

This application for review under s 4 of the Judicature Amendment Act 1972 arises out of an inquest entered upon by the Coroner at Christchurch into the death of Mrs Nancy Ruth Hendrie. In July 1987 Mrs Hendrie was admitted to the Ashburton Hospital for elective surgery to correct a nerve problem in her arm. In the course of the operation she suffered a cardiac arrest. She was transferred to intensive care in Christchurch, but sadly on 13 July she died.

The inquest into her death commenced on 9 October 1987 and after continuing through the next day it was adjourned

to 12 November. On the first days, some attention had been directed to the anaesthetic procedures, and Dr Louw, who was the anaesthetist, was summoned to give evidence at the resumed hearing. On 10 November an application was filed on his behalf that the Coroner make the following orders:

> " 1. AN order that no evidence shall be admitted the substantial purpose of which is to discredit the applicant.
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> 2. AN order that no evidence shall be admitted which tends to discredit the applicant.
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> 3. AN order that no evidence shall be admitted the substantial purpose of which is to attempt to establish civil, criminal or disciplinary liability on the part of the applicant.
>
> 4. AN order that no question shall be asked of the applicant the purpose of which is to discredit, attempt to establish civil, criminal or disciplinary liability or to establish fault or blame on the part of the applicant."

The Coroner dealt with the application on 12 November, and ruled as follows:

> " 1. There is no necessity for the Orders sought. Counsel has the right at any time in regard to any specific question to raise an objection - be it on the grounds of relevance or of tendency to incriminate or generally on the basis that the question for any particular reason is not proper. Because there is no clear authority as to what is a proper question, it must be left to me to deal with matters as and when they arise.

2. My function in this enquiry is to enquire into the circumstances of death. That entails a close analysis of the sequence of events. Counsel for the other interested parties must have the opportunity to test the credibility of that evidence. If in so doing there arises a tendency to incriminate the applicant, so be it.

3. Mr Walker speaks of an apprehension of a need for such orders and refers to the evidence adduced so far. However, he did not point to any specific area that in fact gave him grounds for this apprehension. It should be noted that I have in fact already disallowed some questions. Accordingly I believe that apprehension to be unfounded on the basis of the evidence adduced to date.

4. In summary, I rule that I am not prepared to make the Orders sought because they are too wide and would impose an artificial and unnecessary constraint designed to overcome an evil, as yet only perceived.

5. All Counsel can rest assured that, as I have stated before, I have no intention of allowing this inquest to become a trial. However I do see the absolute necessity of both hearing Dr Lowe's (sic) sworn testimony and the opportunity of testing its credibility, if necessary by vigorous cross examination on behalf of other interested parties."

Dr Louw immediately applied to this Court for a review of these conclusions, seeking first an order in the nature of prohibition, prohibiting the Coroner from admitting evidence the substantial purpose of which is to discredit him; and secondly a declaration that in the exercise of his power to

admit evidence under s 17(4) of the Coroners Act 1951 (which I set out below), the Coroner is not entitled to admit evidence which would tend to discredit him. This application came before Williamson J later that day, and he made an interim order that the Coroner proceed no further with the inquest until the substantive issues had been determined.

The doctor's concern arises from the realisation that some at least of those represented at the inquest are desirous of establishing whether any member of the operating team was at fault. This concern is expressed in the statement of claim in this way:

> " (a) The respondent may admit evidence not legally admissible in a Court of Law.
>
> (b) On the strength of such evidence the applicant and/or others may be implicated in the death of the deceased in any finding which the respondent may make.
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> (c) There is considerable media interest in the death of the deceased, and the reputation of the applicant and/or others may be damaged on the basis of such evidence.
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> (d) Other parties may use the relatively informal nature of the proceedings to try to establish a possible civil, criminal or disciplinary liability on the part of the applicant arising out of the deceased's death."

One of the members of the team, a nurse, has already given her evidence and has been questioned along lines suggestive of some omission on her part. The Nurses Association was therefore made a party to this application, in

order to afford representation for her and the other nurses involved. The surgeon has not yet given his evidence. He was not represented before me. The Hospital Board, whilst represented, took no part in the case. Neither of course did the Coroner. However Mr Gresson on behalf of the Police and Miss Risk for the Nurses Association joined with Mr McClelland for the personal representative of the deceased in submitting that the Coroner's ruling was correct, and that there are no grounds for this Court to interfere. For the reasons which follow, I agree with counsels' submission. Miss Risk made the further point that it would be wrong to impose a restriction part-way through the hearing, after one of the nurses has given evidence and been cross-examined without any such restriction.

Section 4 of the Coroners Act prescribes the principal function of the Coroner as being to inquire, in accordance with the provisions of the Act, "into the manner of death" of any person whose death is reported to him. Section 5 sets out the circumstances in which an inquest must be held; and the purpose of the inquest is stated in s 12 as follows:

> " An inquest shall be conducted by the Coroner for the purpose of establishing -
>
> (a) The fact that a person has died:
>
> (b) The identity of the deceased person:
>
> (c) When, where, and how the death occurred."

The inquest may be held concurrently with any other inquiry or judicial proceedings (s 13(2)), but where there are criminal proceedings under the Summary Proceedings Act 1957 the Coroner is not to give his finding until after their conclusion (s 20(5)). But where, before he has given his finding, he is informed that some person has been charged with causing the

death of the deceased, and he considers the result may have a material bearing on the inquest, he is required to adjourn the inquest until after the completion of the criminal proceedings (s 20)(1)). Section 21 deals with self-inflicted death, and subs (2) makes it clear that a finding that death was self-inflicted may be made. Section 17 deals with the evidence that is given at the inquest, and subs (4) provides:

> " In all proceedings under this Act the Coroner may admit any evidence that he thinks fit, whether or not the same is otherwise admissible in a Court of Law, but no evidence shall be admitted by the Coroner for the purposes of the inquest unless in his opinion the evidence is necessary for the purpose of establishing any of the matters referred to in section 12 of this Act."

It is to be noted that this application is not concerned with the question of privilege: the protection accorded to a witness from having to answer questions that might incriminate him in separate proceedings that may be taken against him. That is a matter that must be dealt with as questions are asked and objection taken: R v McNally [1958] NZLR 1075. What is sought here is a declaration that no evidence may be given by and no questions put to any witness that may in any way tend to show that Dr Louw was at fault, whether in terms of the criminal law or the civil law, or in terms of proper and accepted standards of medical practice. For this purpose, I am asked to define the limits of the Coroner's jurisdiction as they are set by the Act; and then to direct the Coroner to keep within them. In view of the way in which the case was argued, and the importance of the matter, I think it appropriate that I deal with the conflicting submissions presented to me on the jurisdictional issue. But having done that, it would not in my opinion be right for me

then to issue to a judicial officer in advance - for it is not contended that he has yet wrongly admitted evidence - a direction that he remain within his jurisdiction. Unless very strong reason to the contrary is shown, the Court must surely assume that he will.

The issue as to jurisdiction turns on the word "how" - "how the death occurred". That is what the Coroner has to establish (s 12) and the evidence he hears must be limited to that and the other matters in s 12 (s 17(4)). "How" means "in what way or manner", "by what means" (Shorter Oxford English Dictionary). Even considered in the light of the expression "the manner of death" in s 4(1), the word is wide enough in its scope to require one to go elsewhere than the dictionary to determine the issue here, which is how far along the chain of causation is the Coroner to go, and what value judgments is he entitled to pass.

There appear to be no relevant New Zealand authorities but an instructive case from close at hand is Ex parte Minister of Justice, re Malcolm, [1965] NSWR 1598. A workman who had inhaled poison gas was admitted to hospital and some time later died from pneumonia. The relevant statute charged the Coroner to hold an inquest "into the manner and cause of the death". The Coroner's finding was that the deceased died from pneumonia. This finding was quashed and the Coroner was directed to go further. McClemens J saw in the legislation "an intention not to limit the inquiries of coroners only to matters of mere formality but to require the finding of the Coroner to be of social and statistical importance in a modern community". (p 1602). He went on to draw a distinction between on the one hand what may be called

"the terminal cause" or "the mode of dying", e.g., heart failure, asphyxia, and on the other what he called "the real cause of death", namely "the disease, injury or complication which caused death". (p 1603). At p 1604 he cited at length from Jervis on Coroners 9th Edn 83, where examples are given to illustrate the distinction, as well as the difficulties that can arise in ascertaining what was the real cause of death. I do not need to quote these here, but the following proposition commends itself to me: "in so far as the terminal cause of death directly and consequentially follows from a definable event the death should be regarded as being caused by the definable event."

I do not think that the New Zealand statute differs from the New South Wales in this respect. The English statute which Jervis was discussing, is even closer to ours. The finding there is to be "who the deceased was, and how, where and when the deceased came by his death": (s 4(3) of the Coroners Act 1887). The words "came by" perhaps suggest a broader inquiry than the mere "how the death occurred", but when s 4(1) with its expression "the manner of death" is considered, I doubt that there is any material distinction. It is also to be noted that the Coroner's certificate prescribed by the Coroners Regulations 1952 Amendment No.10 (SR 1977/181) refers to how the deceased "came to his/her death".

For these reasons I have no doubt that the Coroner here is required to go beyond whatever event occurred on 13 July to thereupon bring Mrs Hendrie's life to an end. (I should interpose that I am of necessity imprecise in this and some other respects as I know little of the facts or the allegations in the case.) Nor is it sufficient for him to go

back to the cardiac arrest which occurred during the operation at Ashburton. It is his duty to ascertain what brought that about, and, if it can be said to have been the real cause of death, to identify it as such.

The difficult question in the case is whether having identified such an event, the Coroner is required to go further and express a conclusion as to whether in terms of proper practice it ought to have occurred. I use the word "required" rather than the word "entitled" because the Coroner cannot have a discretion as to how far he will go. If it is his duty to express such a conclusion, then he must do it. If it is not, then he is not even entitled to hear evidence on the topic and so cannot express a conclusion.

In the Malcolm case at p 1602, McClemens J referred with approval to a passage from Jervis from which I take this extract about the importance of inquests:

> " They can, and should, afford a quick and cheap method of drawing public attention to circumstances which merit investigation. Suspicious circumstances attaching to a death, even though there is no suggestion of murder or manslaughter, are one example. Thus the relatives of a deceased person may feel that the deceased died owing to the negligence or inefficiency of medical authorities: there have been, for instance, several recent cases connected with the admission of patients to mental or other hospitals. If there has been any dereliction from duty, the facts are brought out into the open for all to judge; equally if the suspicions are unjustified, this also can be exposed and the persons cleared of unjustified suspicion. A properly conducted inquest has advantages in speed and cheapness over alternative judicial proceedings."

As against this, this passage from the judgment of Lord Lane CJ in the unreported case of R v South London Coroner ex parte Gray [1987] 2 All ER 129, 133 is to be noted:

> " The coroner's task in a case such as this is a formidable one, and no one would dispute that; that is quite apart from the difficulties which inevitably arise when feelings are running high and the spectators are emotionally involved and vocal. Once again it should not be forgotten that an inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

It is true that in New Zealand cross-examination by counsel for permitted interested parties is allowed, but that does not detract from the inquisitorial nature of the inquiry, and from the fact that the findings are not conclusive as to the liability, civil or criminal, of any person.

There are of course further differences between the English and the New Zealand procedures. In England, in some cases the Coroner must summon a jury, and there is a specific direction in the Rules that there may be no determination as to the civil or criminal liability of any named person: see the provisions conveniently set out in R v West London Coroner at p 134-5. Prior to the first introduction of this direction in 1977, not only were such determinations permissible under the 1887 Act, but juries at times would actually charge and commit a person for trial on homicide charges. However the circumstances in which a coroner is to hold an inquest are described in much more detail in the English statute than in ours, and they include suspicion of death by homicide, as well as "circumstances the continuance or

possible recurrence of which is prejudicial to the health or safety of the public" - the grounds held to be applicable in R v H.M. Coroner at Hammersmith ex parte Peach [1980] 2-WLR 496. These words might of themselves justify the observations of Jervis, which thus would not necessarily derive from the formula of "when, where, and how the death occurred", which the English and New Zealand statutes share.

Nonetheless, for an inquest to have a useful social function it must I think be able to go beyond the mere medical cause of death. I agree with the comment in Halsbury's Laws of England 4th edn vol 9 para 1110, note 1, that the coroner must also investigate "the circumstances surrounding the death". This must necessarily involve in this case not only a determination of the procedures that were employed, but also a determination as to whether the correct procedures were employed. If the evidence does not enable the Coroner to determine that, then he must not do so. But if it does, then I consider that it is part of his function to do so. This is not necessarily the same thing as allocating blame. That is not the Coroner's function. There are other means of doing that. I see that s 31(3) of the Births and Deaths Registration Act 1951 forbids the Coroner from including in his notice to the Registrar "any matter tending to incriminate any person of any offence". That is left to the criminal Courts under s 20 of the Coroners Act. By the same token it would be wrong for the inquest to become a civil or a disciplinary trial. But if in order to ascertain or explain how death occurred, in the wider sense of the events that were the real cause, the implicit attribution of blame is unavoidable, then, as the Coroner himself observed, "so be it". This was the view taken by

Watkins LJ in R v Surrey Coroner, ex parte Campbell [1982] 2 All ER 545, 555, where in discussing a possible conflict between the duty imposed by s 4 of the Coroners Act 1887 and the Rule prohibiting the determination of civil or criminal liability, he said that the conflict "must be resolved in favour of the statutory duty to inquire whatever the consequences of this may be". As the same learned Judge observed in R v West London Coroner, the difficulty, if there be one, is usually capable of resolution by careful drafting of the finding. And he added:

> " Interested parties may look at the circumstances of the case and seek to draw from them and the verdict an inference or inferences as to blameworthiness on someone's part for causing death. That is almost inevitable. It can be neither avoided nor legislated against. So long as on the face of the inquisition the verdict does not give the appearance of identifying by name or otherwise anyone as blameworthy for the cause of death, r 42 is complied with."

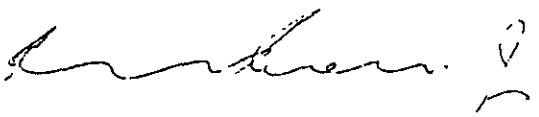
A similar kind of discretion is required in controlling the questioning of witnesses.

It follows that if, to use the terminology of the prayer for relief in the statement of claim, evidence is adduced the substantial purpose of which is to discredit the applicant, in the sense of showing that he was at fault, the Coroner will stop it, for the purpose of the inquest is not to discredit or to blame Dr Louw, but to ascertain how Mrs Hendrie died. If however evidence directed to that topic tends to discredit or place blame on the doctor, that cannot be helped. Similarly with cross-examination of the doctor himself. Counsel are entitled to discredit him in the sense of showing that his evidence should not be accepted. and they are entitled to cross-examine him as to the relevant circumstances; but they

are not entitled simply to show him to have been at fault. I have no doubt that the Coroner is quite able to deal with these points as they arise, to protect witnesses from unfair publicity by resort to his powers to prohibit publication (s 16(1)), and to bring down a finding that is in accordance with, and within the confines of, his statutory function.

For this reason, and because the Coroner's ruling of 12 November neither contains nor threatens any error of law, and because it is quite impossible for me to foresee what may develop at the resumed hearing, I am satisfied that there are no grounds upon which the applicant should have relief.

Accordingly the application is dismissed. I do not consider that it is an appropriate case for costs.



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