HENDERSON CHAMBERS

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Administrative Court considers the use in an inquest of statistical evidence and the absence of clear cause of death on the issue of whether or not to leave causation to a jury

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In *R (on the application of Chidlow) v HM Senior Coroner for Blackpool and Fylde and others* [2019] EWHC 581 (Admin) the Administrative Court (Hickinbottom LJ and Pepperall J) quashed a coroner's decision that it was not safe to leave the issue of a causal link between a delay in the deceased receiving medical treatment and his death to a jury. The decision considers the second limb of the '*Galbraith* Plus' test in the context of the question of whether causation could be proved by statistical evidence as to the prospects that the deceased might have survived had he received medical attention in good time. The Court concluded that (1) the lack of a clear cause of death will not, of itself, prevent a jury from being able to consider the possible causal effect of a delay in treatment, and (2) although bare statistical evidence alone is not sufficient to prove causation, where there is apparently credible additional evidence as to causation then it will usually be proper and safe to leave causation to the jury.

Background and expert evidence

1. The deceased, Mr Bibby, died of a cardiac arrest during an admitted delay in the response of the North West Ambulance Service NHS Trust (NWAS). On arrival, paramedics found that he was asystolic (i.e. there was no electrical activity from his heart) and he was not breathing, and he was certified dead at the scene. At the inquest, a joint report by three pathologists agreed that the cause of death was unascertained. In addition a consultant in Critical Care & Emergency Medicine, Dr Andrews, was asked to address the question of whether the deceased would have survived had he arrived at Accident & Emergency in a timely manner.

2. Dr Andrews concluded that it was impossible to reach a diagnosis other than to say that the deceased became critically ill for a period of at least 25 minutes before the cardiac arrest, but that arrhythmia was the most likely diagnosis. As to survivability, Dr Andrews' evidence concluded that the deceased's chances of survival would have initially modestly but incrementally increased from the paramedics arriving at an earlier stage of cardiac arrest, through arriving before the onset of cardiac arrest through to the patient arriving in the Emergency Department (ED) prior to any cardiac arrest. His evidence made reference to overall rates of return of the circulation for groups of patients according to data from the NWAS, UK and United States, and to data from studies in the United States. He emphasised that the deceased may have died even if he had reached the ED alive, but opined that his chances of survival would have increased very significantly above zero and that it was likely he would have more than likely survived [sic] rather than died given the most likely cause was an arrhythmia.

3. Dr Andrews' oral evidence at the inquest was that if treated by paramedics prior to cardiac arrest, the deceased's chances of survival would have been

markedly increased irrespective of the underlying diagnosis, and that *"You don't have to have a diagnosis in front of you to provide emergency care and also to save a patient as well."*

Coroner's ruling

4. The coroner ruled that a possible causal link between the admitted delay by NWAS in attending and Mr Bibby's death should not be left to the jury because, in the absence of knowing the medical cause of death, it would be unsafe to put before the jury the possibility of returning a conclusion of neglect by reason of the delay. He stated that *"It cannot be established, in my judgment, that the rendering of care would have prevented the death if we do not know what the cause of death was."*

The Administrative Court's findings

5. The Administrative Court referred to the two-part '*Galbraith* Plus' test for coroners giving jury directions as to the conclusions and findings on particular matters that are properly open to the jury upon the evidence, as set out by Haddon-Cave J (as he was then) in *R (Secretary of State for Justice) v HM Deputy Coroner for the Eastern District of West Yorkshire* [2012] EWHC 1634 (Admin). Pursuant to that test, a coroner must (1) ask whether there is evidence upon which the jury properly directed could properly reach the particular finding, and (2) consider whether it would be safe for the jury to reach the conclusion or finding upon the evidence. As noted by Haddon-Cave J, the second limb arguably provides a *"wider and more subjective filter."*

6. The Court noted that the second limb of the test was at the heart of the proceedings, since the coroner (as characterised by counsel) (1) accepted that there was evidence as to a possible causal link between the admitted

delay in the dispatch of a rapid response vehicle by the ambulance service and death upon which a properly directed jury could make a finding of causation, but (2) maintained that he was nevertheless right not to leave the question to the jury because it would have been unsafe for the jury to find causation upon the evidence in this case.

7. As to causation, the Court considered that, as a matter of law, the question of a causal link between the delay in the attendance of the ambulance service and death should have been left to the jury in this case if there was sufficient evidence upon which the jury could safely find that, on the balance of probabilities, such delay had more than minimally, negligibly or trivially contributed to the death. The coroner also had a discretion to leave to the jury causes of death that were merely possible but not probable.

8. The Court also considered the question of whether causation could be proved by statistical evidence as to the prospects that the deceased might have survived had he received expert evidence in good time. After reviewing authorities in the area of clinical negligence and referring to the editors of *Clerk & Lindsell*, the Court identified the following principles:

    a. In deciding whether to leave an issue of causation to a jury, a coroner should consider both limbs of the '*Galbraith* Plus' test, and causation should be left where there is evidence upon which the jury could properly and safely find that, on the balance of probabilities, the event or omission had more than minimally, negligibly or trivially contributed to death.

    b. In considering the second limb of the test, a coroner must have regard to all relevant evidence which may include, in addition to evidence relating to the particular deceased and the circumstances of his or her death, general statistical evidence drawn from population data such as the rate of survival in a particular group.

c. Such general statistical evidence alone is, however, unlikely to be sufficient. Being a figure in a statistic does not of itself prove causation.

d. Where there is apparently credible additional evidence of causation which, if accepted, together with the general statistical evidence could properly lead the jury to find on the balance of probabilities that the event or omission more than minimally, negligibly or trivially contributed to death then it will usually be proper and safe to leave causation to the jury.

9. In the current case, Dr Andrews' evidence was based not only on statistical evidence, but also on his own experience, his reading of the other medical evidence and his understanding of the available evidence as to the deceased's condition when attended by the police and the ambulance service. The Court held that the coroner had erred in concluding that the lack of a clear cause of death meant that any evidence as to survivability was necessarily speculative, and therefore unsafe, which prevented the jury from being able to consider the possible causal effect of the delay in treatment. The coroner should have left the issue of the causative effect of NWAS' admitted delay in attending to the deceased to the jury.

Comment

10. This decision will make it easier for families of the deceased to argue that causation of death is a matter that should be left to the jury. The lack of a clear cause of death will not, of itself, mean that a jury cannot consider causation has been proved. Statistical evidence, though insufficient to establish causation by itself, may be taken into account in the context of all the relevant circumstances if it is supported by additional apparently credible evidence of causation which, if accepted together with the statistical

evidence, could properly lead the jury to find on the balance of probabilities that the event or omission more than minimally, negligibly or trivially contributed to the death in question.

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