Neutral Citation Number: [2010] IEHC 74

THE HIGH COURT

JUDICIAL REVIEW

2008 549 JR

BETWEEN

BERNARD BINGHAM AND VIOLA BINGHAM

APPLICANTS

AND

BRIAN FARRELL

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on the 19th day of March, 2010.

1. This application is for an order of *certiorari* quashing the verdict of the Dublin City Coroner made on 12th November, 2007 that the underlying cause of death of the applicants' son was *epilepsia partialis continua* due to an underlying progressive neurological disorder consistent with a mitochondrial defect. The applicants further seek an order directing another inquest.

2. On 19th January, 2009 the applicants were given leave to seek judicial review in these terms by order of Mr. Justice Edwards. The grounds allowed were as follows:-

> (1) The death certificate of our son, Mirek Bingham, does not reflect the summary and verdict given by the respondent on the 12th November, 2007 at Dublin City Coroner's Court. An error thus exists on the face of the death certificate issued on behalf of the respondent and the information supplied by the respondent.
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> (2) The record of verdict does not accurately reflect the summary and verdict given by the respondent on the 12th November, 2007 at Dublin City Coroner's Court. An error thus exists on the face of the record of verdict issued by the respondent.
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> (3) The death certificate and record of verdict are factually incorrect based on all the evidence available. An error thus exists on the face of the death certificate and record of verdict issued by the respondent.
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> (4) The respondent stated the underlying condition to be a "neurological disorder consistent with a mitochondrial disorder". The respondent came to this conclusion based on genetic tests carried out by the respondent's pathologist who carried out the genetic tests without the knowledge or permission of the respondent and without the knowledge or permission of the applicants. The respondent gave permission to the pathologist Professor Michael Farrell for a limited autopsy and histological examination only. No permission was sought or given by the respondent or Mirek's next of kin to carry out genetic testing. The Coroners Act 1962, as amended, at s. 33(2)(b) provides that a coroner may request the Minister to arrange "*a special examination by way of analysis, test or otherwise*". The respondent erred in allowing genetic testing to be entered into evidence when permission had not been granted by the respondent or next of kin.
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> (5) The respondent's finding that the underlying condition was a "*neurological disorder consistent with a mitochondrial defect*" was based on unreliable and inconclusive tests and fabricated evidence. The PCR Analysis carried out by the respondent's pathologist was carried out by an unaccredited laboratory. The mitochondrial testing should have been carried out by a molecular genetics testing centre. The post mortem muscle tissue upon which the respondent accepts PCR Analysis to have been carried out providing a "*firm diagnosis as to the medical cause of death*" does not exist. An error thus exists on the face of the death certificate and record of verdict issued by the respondent.
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> (6) The respondent failed to call relevant witnesses as laid out in s. 26 of the Coroners Act 1962, as amended, despite written and verbal submissions by the applicants. The respondent failed to call witnesses who may have given evidence or an opinion that delay in diagnosis in treatment were the cause of Mirek's death.
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> (7) The respondent failed to fully investigate all the evidence available and refused to accept and examine the protocol for treating seizures. The respondent failed to investigate the possibility that delay in diagnosis in treatment were the cause of death, which therefore constituted the lack of an effective investigation by the respondent.
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> (8) The respondent erred in judgment by engaging Professor Michael Farrell to carry out the post-mortem, given that the pathologist was a colleague of Dr. Tim Lynch, Consultant Neurologist, responsible for Mirek's neurological care and given that Professor Farrell was assisting Dr. Lynch prior to Mirek's death in diagnosing Mirek's neurological condition. Section 52(2)(b) of the Coroners Act 1962 provides that s.52(2)(a) "*shall not apply to a registered medical practitioner who is a pathologist on the staff of or associated with, a hospital save where the coroner considers the conduct of such practitioner in relation to his attendance on the deceased person is likely to be called into question at the inquest*".
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> (9) The respondent led witnesses away from evidence relating to the possibility that delay in diagnosis and treatment were the cause of death and led the witnesses towards "evidence" of a mitochondrial disorder and *epilepsia partialis continua*. The family of Mirek Bingham were entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

3. The applicants are the parents of the late Mirek Bingham and are lay litigants. They have drafted their own proceedings. Objection has been taken to the presence in their grounding affidavit of hearsay and to their advancing their own medical opinions against those

of qualified medical experts. It was hoped to redact their papers in this regard but this has proved problematic. Whilst bearing in mind the inadmissibility of substantial portions of their grounding affidavit herein, it seemed better that I read everything, screening out anything I thought inadmissible. The alternative was a lengthy preliminary hearing going through voluminous documentation. In the end no problems appeared to me in this respect that would adversely affect one side or the other bearing in mind the very limited nature of the review available herein.

The background

4. Mirek Bingham was born on the 25th May, 1983. He was one of three children of the applicants. His two siblings were sisters. Whilst his two sisters were healthy children, in the opinion of Dr. Maura King, Consultant Paediatric Neurologist, at Temple Street Hospital, to whom he was first referred in 1989, Mirek had some serious underlying health problems. Dr. King in consultation with other consultant neurologists, confirmed he had a progressive neurological disorder, probably a genetic *spino cerebella ataxia* with neuropathy. She considered in the summer of 1999 that given a marked deterioration in his condition in recent times, he would not live very long. She explained at that time to the applicants that he might have a rare diagnosable mitochondrial disorder (see page 5 of her deposition). Owing to serious problems connected with this condition, on the 4th October, 1999 Mirek underwent a procedure known as a Hellers myotomy at the Mater Hospital in Dublin. This was intended to alleviate a swallowing difficulty from which he was suffering. Although the procedure was itself uneventful, on 7th October, 1999 he developed contractions or twitches in his back muscles. At first these were diagnosed as segmental myoclonus. These appeared as seizure like episodes and following consultation with Dr. Tim Lynch, Consultant Neurologist, were given a working diagnosis as pseudo seizures. These seizures were managed in accordance with the diagnosis and Dr. Lynch's advice.

On 21st October, 1999 in the later afternoon, Mirek was found to be having another seizure like episode but with more serious complications. MRSA appears to have been present at this stage. Later that evening Mirek took a very serious turn. He had a respiratory arrest on the ward. He was removed to the ICU. The working diagnosis was at this stage revised to *epilepsia partialis continua* with secondary generalised epilepsy. He remained in ICU for 72 days and passed away on the 31st December, 1999.

5. The coroner, having been notified of the death, directed a post-mortem and nominated Professor Michael Farrell (no relation) to do it. The respondent, in nominating Professor Farrell, had in mind the need to have this post-mortem carried out by a pathologist unconnected with the Mater Hospital. This was so because the family had developed a problematic relationship with the Mater Hospital staff. Professor Farrell is Professor of Neuropathology at the Royal College of Surgeons in Ireland and a Consultant in the Department of Neuropathology at Beaumont Hosptial.

6. In the result, following the post-mortem, Professor Farrell's opinion was that death was caused by "*disseminated intra-vascular coagulopathy characterised by involvement of kidney, spleen, skin and lung. That was considered the terminal event. There was widespread death of nerve cells throughout the brain which Professor Farrell attributed to an energy deprivation state within the nerve cells and brought about by a combination of a severe seizure disorder superimposed on the background of generalised neurologic disorder most likely of mitochondrial origin".*

7. Following this post-mortem, the inquest opened on 6th December, 2001 and was adjourned. The hearing was subsequently adjourned on sixteen occasions. It finally commenced on 15th November, 2006, was continued on 20th December, 2006, was adjourned twice more and was concluded on 12th November, 2007. The reason for most of these adjournments was that the applicants had made a complaint to An Garda Síochána concerning the death of their son. The investigation of this complaint had to be investigated and this did not conclude until 2006. The result of the inquest was a finding by way of a "narrative" or "findings" verdict. This, according to the coroner, was because of the complexity of the case and the obvious sensitivity involved. He considered a simple descriptive verdict such as "death by natural causes", whilst accurate, might have been too limited. A more detailed verdict seemed called for.

8. The verdict given was:-

> "… The late Mirek Bingham, who was aged 16 years at the time of his death, died at the Mater Hospital, Dublin 7 on the 31st December, 1999. The proximate cause of death was disseminated intra-vascular coagulation and that, of course, was the terminal event. The underlying cause was widespread neuronal loss and gliosis due to an energy deprivation state within nerve cells, brought about by refractory, by a refractory seizure disorder, which commenced as focal symptomatic seizures becoming generalised and ultimately of a status epilepticus nature and/or hypoxic ischaemic encephalopathy.
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> The late Mirek Bingham suffered from a progressive neurological condition which was characterised as spino-cerebellar degenerative disorder consistent with a mitochondrial defect. The late Mirek Bingham underwent a Hellers myotomy at the Mater Hospital Dublin on the 4th October, 1999 for achalasia of the cardiae.
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> On the 7th October, 1999 Mirek Bingham first developed contractions of the back muscles, which was originally diagnosed as segmental myoclonus. An EEG performed on the 21st October, 1999 confirmed a right-sided epileptic form focus and the formal diagnosis was revised on that date to epilipsia partialis continua with secondary generalised epilepsy.
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> Now earlier on the same date, that is the 21st October, 1999, Mirek Bingham suffered a respiratory arrest which followed a seizure, wherein his breathing ceased, and I am quoting from the evidence, over 60 for over 60 seconds. Subsequent treatment in the Intensive Care Unit at the Mater Hospital continued for a period of 72 days, wherein Mirek Bingham remained ventilator dependant and died on the 31st December, 1999 and I make findings to that effect."

The cause of death was formally recorded in the death certificate as follows:-

> (a) Disseminated intravascular coagulopathy.
>
> (b) Epilepsia Partialis Continua.
>
> (c) Progressive Neurological Disorder consistent with a mitochondrial defect.

9. The applicants' challenge to the verdict of the coroner is made on nine grounds. The respondent in his submissions usefully and I believe accurately categorises these into three different groups and I propose to follow that categorisation:-

> (I) Statutory illegalities
>
> Specific alleged illegalities attendant upon the inquest, i.e.

(a) genetic tests carried out by the pathologist Professor Farrell or at his request as a part of the post-mortem examination constituted "special examination" within s. 33 of the Coroners Act 1962. Such examination the applicants allege requires permission of the Minister of Justice which was not obtained. Evidence obtained thereby was unlawful, they argue, and thus the verdict should be set aside.

(b) The respondent failed to call witnesses in contravention of s. 26 of the Coroners Act 1962.

(c) Under s. 52(2)(a) and (b) of the Coroners Act, Professor Farrell should not have been nominated to conduct the post-mortem because he was a practitioner who had attended the deceased within one month before the death and was not exempted from this exclusion under s. 52(2)(b) because his conduct in relation to that attendance was likely to be called in question at the inquest.

(II) Irrationality grounds

Factual inaccuracies in the verdict and death certificate. These relate to typographical errors in part but in the main reflect the applicants' case that the verdict simply is wrong because false evidence was given by the Consultant Neurologist Professor Farrell. In the applicants' case the medical evidence is therefore wrong being based on unreliable, inconclusive and fabricated evidence. Those grounds may, I think, be accurately categorised as "irrationality grounds".

(III) Fair procedures

The applicants alleges the coroner failed to investigate all the evidence available and refused to accept and examine "the protocol for treating seizures", and failed to investigate the possibility that delay in diagnosis and treatment were the cause of death. They also allege the coroner led witnesses away from evidence relating to the possibility that such delay was the cause of death and led them toward evidence of a mitochondrial disorder and epilepsy. In more general terms, they allege the coroner conducted the hearing unfairly and did not take sufficient time with his verdict.

10. The respondent pleads that the applicants have not brought their proceedings promptly or within six months. Without prejudice to this plea, the respondent rejects each and every one of the grounds advanced by the applicants and opposes the granting of any relief. He denies any unfairness. He argues the applicants really seek to appeal the decision and to re-open the inquest in this Court. The respondent rejects any allegation of irrationality and argues that he conducted the inquest in a fair and proper manner and, more particularly, that there was relevant evidence before him upon which he could base his decision. He argues the applicants were given a full and comprehensive hearing and were represented by a solicitor and counsel who at no stage during the hearing contended that there was any breach of fair procedures or that they were in any way inhibited or constrained in representing the applicants.

The statutory framework

11. The relevant sections of the Coroners Act 1962 are as follows:-

"Section 17 –: - "17. - Subject to the provisions of this Act, where a coroner is informed that the body of a deceased person is lying within his district, it shall be the duty of the coroner to hold an inquest in relation to the death of that person if he is of opinion that the death may have occurred in a violent or unnatural manner, or suddenly and from unknown causes or in a place or in circumstances which, under provisions in that behalf contained in any other enactment, require that an inquest should be held."

Section 19(1):- "19. - – (1) Where a coroner -

(a) is informed that the body of a deceased person is lying within his district, and

(b) is of opinion that that person's death may have occurred suddenly and from unknown causes, and

(c) is of opinion that a post-mortem examination of the body of that person may show that an inquest in relation to the death is unnecessary,

he may cause the examination to be made and if, in his opinion, the report of the examination shows that an inquest in relation to the death is unnecessary it shall not be obligatory upon him to hold an inquest."

Section 26 – (1):- "26. - (1)A coroner may, at any time before the conclusion of an inquest held by him, cause a summons in the prescribed form to attend and give evidence at the inquest to be served on any person (including in particular any registered medical practitioner) whose evidence would, in the opinion of the coroner, be of assistance at the inquest."

Section 30 : - "30. - – Questions of civil or criminal liability shall not be considered or investigated at an inquest and accordingly every inquest shall be confined to ascertaining the identity of the person in relation to whose death the inquest is being held and how, when and where the death occurred."

Section 31 – (1):- "31. - (1) Neither the verdict nor any rider to the verdict at an inquest shall contain a censure or exoneration of any person.

(2) Notwithstanding anything contained in subsection (1) of this section, recommendations of a general character designed to prevent further fatalities may be appended to the verdict at any inquest."

Section 32:- "32. – The record of the verdict returned at an inquest shall be signed by the coroner holding the inquest and, where he is sitting with a jury, by the foreman of the jury."

Section 33 – (1):- "33. – (1) A coroner may, at any time before or during an inquest, cause to be made a post-mortem examination of the body of any person in relation to whose death an inquest is to be or is being held.

(2) A coroner may request the Minister to arrange—

(a) a post-mortem examination by a person appointed by the Minister of the body of any person in relation to whose death the coroner is holding or proposes to hold an inquest, or

(b) a special examination by way of analysis, test or otherwise by a person appointed by the Minister of particular parts or contents of the body or of any other relevant substances or things, or

(c) both such post-mortem examination and special examination,

and he may make such request whether or not he has exercised any other power conferred on him by this Act of causing a post-mortem examination of the body to be made."

Section 50:- "50. - – (1) Where, in pursuance of this Act, a coroner—

(a) holds an inquest …

(b) …

(c) …

he shall furnish the appropriate registrar of births and deaths with a certificate containing such particulars for the registration of the death as may be prescribed after consultation with the Minister for Health and the death shall be registered accordingly.

…

(3) Where there is an error in a certificate furnished by a coroner under subsection (1) of this section, he may issue an amending certificate to the registrar and the error shall thereupon be corrected by the registrar in the register of deaths."

Section 52: - "52. - – (1) Where a coroner causes under this Act a post-mortem examination of a body to be made, the following provisions shall have effect:

(a) save as provided by the next following paragraph of this subsection, the coroner shall cause such examination to be made by one (and not more than one) registered medical practitioner,

(b) if the coroner considers that that practitioner will require the assistance of another registered medical practitioner in making the examination, he may cause such assistance to be given by one other (but not more than one other) registered medical practitioner,

(c) where the coroner causes such assistance to be given, he shall furnish the Minister with a statement of his reasons for considering it to be necessary, and

(d) if the coroner summons or requests such other practitioner to give evidence at an inquest on the body, he shall furnish the Minister with a statement of his reasons for considering that evidence to be necessary.

(2) (a) A post-mortem examination under this Act shall not be made by a registered medical practitioner who had attended the person in relation to whose death an inquest is to bhe or is being held within one month before the person's death.

(b) Paragraph (a) of this subsection shall not apply to a registered medical practitioner who is a pathologist on the staff of, or associated with, a hospital save where the coroner considers that the conduct of such practitioner in relation to his attendance on the deceased person is likely to be called in question at the inquest."

The nature of an inquest

12. I have been referred to the following cases in which the nature, function and procedure of inquests have been judicially considered: *Ramnseyer v. Mahon* [2006] 1 I.R. 216; *Eastern Health Board v. Farrell* [2001] 4 I.R. 627; *Northern Area Health Board v. Geraghty* [2001] 3 I.R. 321; *Morris v. Dublin City Coroner* [2000] 3 I.R. 592; *Hanley v. Cusack* (Unreported, High Court, McGuinness J. 10th June, 1999); *Farrell v. Attorney General* [19989] 1 I.R. 203. From these decisions the following principles may be deduced in considering the nature, function and procedure of inquests:-

(a) The inquest is an inquisitorial process, it is not an adversarial process.

(b) 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.

(c) In an inquest, 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. There are no parties and nobody is allowed to take position or give notice of a position as to the "how, when and where" of the death.

(d) The prohibition on any adjudication as to criminal or civil liability should not be construed in a manner which would unduly inhibit the inquiry.

(e) The inquest may properly investigate and consider the surrounding circumstances of the death, whether or not the facts explored may, in another forum, ultimately be relevant to issues of civil or criminal liability.

(f) If a coroner's inquest were to extend its inquiries beyond the circumstances, including the proximate cause of death, in which the death occurred, it would become an inquiry of a different nature and one which was not envisaged by the Oireachtas in enacting the Act of 1962. The holding of such an inquiry is unwarranted and wholly at odds with the general policy underlying the legislation.

(g) The rules of natural justice apply to inquests. However, the right to fair procedures does not exist in a vacuum. The coroner has a wide discretion as to how to conduct an inquest.

(h) The courts have expressed a marked reluctance to hold that an inquisitorial procedure whose verdict cannot impose civil or criminal liability of any sort on any person requires the full panoply of natural justice requirements, for instance, of disclosure in advance of the hearing.

(i) Persons with a legitimate interest may propound a version of the facts which accords with those interests. One may wish to seek to establish facts tpending to deflect blame; one may wish to pursue a version which tends to suggest that the death occurred other than due to mere accident or natural causes. One may simply wish to have a verdict which is neutral as regards any such considerations. All of these respective considerations are legitimate.

(j) Persons represented at an inquest are entitled to an appropriate level of fair procedures. They are entitled to be present, to call witnesses and to cross-examine. But all of this is subject to the overriding consideration that they are assisting in an inquiry into the facts and are not either responding to or making a charge. They are subject to the directions of the coroner, who is entitled to conduct the hearing in his discretion, while respecting the legitimate interest of interested persons to pursue lines of inquiry.

The scope of judicial review
13. The classic exposition of the scope of judicial review is to be found in the dictum of Lord Brightman in *R. v. The Chief Constable of North Wales, ex parte Evans* [1982] 1 WLR 1155 at pp. 1173-117460:-

> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power … Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

This passage was approved by the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. At page 70, Finlay C.J., dealing with the principles upon which the court in judicial review could intervene to quash the decision of an administrative officer or tribunal on grounds of unreasonableness or irrationality cited the *dicta* of Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 as follows:-

> "1. It is fundamentally at variance with reason and common sense.
>
> 2. It is indefensible for being in the teeth of plain reason and common sense.
>
> 3. Because the court is satisfied that the decision maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

Finlay C.J. went on to state at page 72:-

> "I am satisfied that in order for an applicant for judicial review to satisfy a court the decision- making authority has acted irrationally in the sense which I have outlined about so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."

In a more recent case, *Power v. An Bord Pleanála* [2006] IEHC 454, Quirke J. observed:-

> "The courts will not intervene by way of judicial review to quash decisions of administrative tribunals (such as the Board) in the absence of evidence of illegality. The function of the court in an application for judicial review is limited to determining whether or not an impugned decision was legal not whether or not it was correct.
> It is decidedly not a function of this Court to substitute itself for the Board for the purpose of determining whether it believes that the decision made was the correct one. This Court has neither the jurisdiction nor the competence to undertake such an exercise."

Further in *Lowe Taverns (Tallaght) Ltd. v. South Dublin County Council* [2006] IEHC 383, in a case dealing with the role of the Taxing Master, McGovern J. observed:-

> "The courts should be slow to interfere with the decisions of such a specialist tribunal and should operate on the basis of *curial deference* and judicial restraint."

The above principles are clearly applicable to the role of coroner. The coroner is a medical practitioner and a barrister. He is the clearest possible example of a specialist tribunal. Whilst the courts must always be alert for illegality or want of jurisdiction, it is particularly appropriate to accord to the coroner a curial deference in regard to his role in construing the medical evidence before him.

The decision of the Court
14. As promised, I have taken the time to read entirely through the voluminous papers submitted by the applicants in this case. It is indeed a very sad story and one can imagine the emotional trauma endured by the applicants as they watched their sixteen year old son die over a period of three months from the first seizures on the 7th October, 1999 through to his death on the 31st December, 1999. That was an ordeal one would wish on no one. It clearly also was an ordeal for their son who suffered considerable distress throughout this period.

Delay
15. I have come to the conclusion that the applicants moved with all due promptitude in this case. The applicants first brought their motion on the 28th May, 2008. The verdict sought to be challenged had been delivered on the 12th November, 2007. The death certificate was registered on 30th November, 2007 and issued to the applicants on 3rd December, 2007. On the 4th December, 2007,

the applicants contacted the Legal Aid Board for advice on challenging the coroner's verdict. I think it fair to say the period limited for taking judicial review commenced with the verdict, i.e. 12th November, 2007. Under Order 84, rule 21 of the Rules of the Superior Courts the time limited where the relief sought is *certiorari* is six months. The application should have been brought by 12th May, 2008. It is, therefore, out of time by sixteen days. The court may extend the time where it is satisfied there is good reason.

Herein it seems the applicants formed an intention to seek judicial review one day after receipt of the death certificate in respect of their son. In the time intervening they communicated with the Legal Aid Board with the aim of obtaining legal aid. This application became a complex and protracted one. Eventually, they decided to bring the proceedings themselves. I think there probably does exist some inadequately explained periods of delay but, I am of the view that in light of the tragic circumstances of this case and the ordeal endured by the applicants, including the long and no doubt emotionally draining inquest, it would be unjust to dismiss the proceedings for delay., I consider in the unusual circumstances present here there exists good reasons for the court to extend the time for bringing judicial review under Order 84, rule 21.

16. I will consider the grounds raised herein in the three categories which I have indicated above I consider was appropriate;

Statutory illegalities:
Were the genetic tests carried out by Professor Farrell unlawful being a "special examination" within the meaning of s. 33(2)(b) of the Act of 1962 and therefore requiring the permission of the Minister. There is no definition of "special examination" provided in s. 33. There is also no restriction on the power of the coroner to direct a post-mortem. In *Hanley v. Cusack* (Unreported, High Court, McGuinness J., 10th June, 1999), the learned Judge noted the Acts did not define the extent and nature of the post-mortem examination nor did any regulations. She noted:-

> "It is clear from the statutory provisions set out above that the directing or requesting of a post-mortem examination is a matter for the discretion of the Ccoroner (sectionss. 19 and 33). The holding of an inquest, in contrast, is mandatory where the coroner is of the opinion that the death may have occurred in the circumstances set out in s. 17 of the 1962 Act."

It seems from this analysis and from the wording of the section itself that the ordering and directing of the post-mortem lies within the discretion of the coroner. I am unaware of any authority requiring him to limit the nature of investigation to be carried out by the nominated pathologist. Any such restriction would seem to make no sense and to run counter to the whole point of the post-mortem which is to ascertain the cause of death. Limiting the power of the coroner or the pathologist to conduct further examination and research could hardly advance that aim. The coroner in his affidavit avers that he considers such "special examination" to refer to forensic tests by the State pathologist or a scientist in the State Forensic Science Laboratory in relation to ballistics and such matters in which the normal pathologist would have little or no expertise. This, in fact, seems the most obvious meaning of "special examination" and I find, therefore, that the special examination carried out in this case at the behest of Professor Farrell was not one requiring the authorisation of the Minister.

17. The special tests to which the applicants take exception were those carried out in Paris in 2001 in the Hopital des Enfants-Malades by Dr. Pierre Rustin. It seems so obvious it hardly needs stating that Professor Farrell's action in seeking the advice of the French doctor is highly creditable. It is hard to understand how anyone could object to such necessary further investigation. The further complaint that the evidence that Professor Farrell gave in this and other connection was fabricated is unworthy of the applicants. The muscle biopsy material was obtained not as the applicants seemed to think the Professor was saying from the post-mortem, but was obtained from an in vivo biopsy. As is apparent from the transcript of the inquest, Professor Farrell continued to search long after the death of Mirek, for a conclusive answer as to why he died. These tests were a part of that search. Even if all this were not so, the wide powers of the coroner to conduct the inquest which is a fact finding exercise are such that a defect in form in, for instance, failing to obtain permission for a test would not, in my view, vitiate the verdict.

18. As to the alleged failure of the coroner to call relevant witnesses, no objection was made at the hearing by the representatives of the applicants in this regard and such cannot be made at this stage. Nonetheless, the coroner has sworn that he called all witnesses relevant. He did not consider to be relevant witnesses who sought to attribute blame to the hospital. He specifically avers that he did, in fact, consider the report of Professor Kirkham submitted on behalf of the family. He, therefore, in sworn evidence avers that he called all witnesses relevant to the issue as to how Mirek died. In extracts from the transcript of the evidence of Dr. Lynch, which I have appended to this judgment, it is clear that the doctor in question gave very detailed evidence and the coroner by way of in-depth questioning elaborated on that evidence Dr Lynch was extensively cross-examined by Dr. Mills for the applicants. That evidence demonstrated that Mirek's seizures/twitching that commenced on 7th October, 1999 were misdiagnosed then as pseudo seizures. This misdiagnosis was not corrected until after his very serious respitatory seizure on 21st October, 1999. From the applicants' position all that was missing was evidence that this was due to the negligence of Dr. Lynch. Since neither exoneration nor attribution of blame could form a part of the coroner's verdict, I agree with the coroner that any witnesses in regard thereto would not be relevant. In the evidence primarily of Dr. Lynch and Professor Farrell, the coroner had all the evidence he needed to establish the cause of the death of Mirek.

19. As to the complaint Professor Farrell was not a proper person to be nominated to carry out the post-mortem, this is based on the applicants' contention that he was a colleague of Dr. Lynch and assisted him in diagnosing Mirek's condition and, therefore, was covered by s. 52(2)(a) because he "attended " Mirek. They further alleged the coroner erred in nominating him because under s. 52(2)(b) he would be a practitioner whose conduct might be called in question at the inquest.

It seems to me the applicants misconstrue the two sections. Section 52(2)(a) excludes a doctor who attended the deceased from doing the post-mortem. All that is alleged by the applicants is that Professor Farrell received samples from Dr. Lynch in an effort to determine Mirek's condition prior to his death. In no sense could this be interpreted as "attending" Mirek. As to s. 52(2)(b), this section allows an exemption for such a doctor as would be barred under s. 52(2)(a) but who is on the staff of the hospital as a pathologist. Such a doctor may be nominated save where he himself might be the subject of inquiry as to his conduct. Professor Farrell was not in the first place precluded under s. 52(2)(a) because he was not in attendance on Mirek prior to his death and so s. 52(2)(b) does not arise. Even if it did, the second part of the section would not apply because he was not on the staff of the Mater Hospital.

In reality, Professor Farrell was chosen by the coroner because he was aware the applicants had problems with the staff of the Mater. The Coroner wisely and in deference to the applicants' sensitivities chose an independent outside pathologist. Professor Farrell was one of the most eminent practitioners in Ireland who was Professor of Neuropathology at the Royal College of Surgeons in Ireland and a Consultant in the Department of Neuropathology at Beaumont Hospital. He was by any measure an excellent choice and was not a person to whom s. 52(2)(a) or s. 52(2)(b) applied.

The irrationality grounds
20. As noted above, these proceedings are not an appeal in which the High Court re-hears the evidence and comes to a determination that the coroner was wrong and therefore the decision may be quashed. There is a far higher bar to be scaled. The applicants must satisfy this Court that there was no relevant evidence before the coroner to support the finding he made. The reasons for this high bar is because it is the coroner and not this Court which has been given the role of conducting an inquest and, in this case, deciding what the cause of death was. This Court has neither the jurisdiction nor the competence to fill that role. In this case it is in my view an unreal proposition that the coroner did not have such evidence before him. He had ample evidence upon which he could and did rely to support his decision. It is presumably because of this presence of an overwhelming body of evidence before the inquest that the applicants are driven to make allegations against Professor Farrell that he fabricated evidence and gave false evidence. These are wild and irresponsible allegations and are grounded upon nothing other than the applicants' mistaken view that the muscle biopsy taken from Mirek was taken post-mortem. It was, as has been already pointed out, taken in vivo (whilst he was still alive). It is patently obvious from the transcript of his evidence that Professor Farrell gave full detailed evidence as to all the scientific complexities attendant upon this case. He quite forthrightly stated that his view of the cause of Mirek's death was the best he could do. If anyone had a better view he invited them to put it to him and he would try to address it. Neither the applicants' counsel nor anyone else took him up on this.

21. The allegations made in relation to a mistake on the face of the dDeath cCertificate relate firstly to unfortunate errors that crept in at typing stage. They have been rectified. The main ground under this complaint is that the verdict is wrong as a judgment of how Mirek died. In this regard, this complaint may be considered as coming within the previous main complaint of irrationality dealt with above at paragraph 20. Far from being wrong, in my view, on the evidence that was before him, the cCoroner could have come to no other verdict. In any event the question for the court is not whether the verdict was correct but rather whether it was lawful. The verdict was certainly a rational one and therefore it was lawful.

Fair procedures
22. The applicants were represented at the inquest by a solicitor and counsel. Counsel was qualified both as barrister and medical practitioner. He took a very prominent role in the proceedings and closely questioned each of the two main witnesses, Dr. Lynch and Professor Farrell. He made no complaint at any stage of any unfairness in the procedures. Upon this fact alone the applicants' case must fail. However, noting the tragic background to this case and taking account of the fact they are now lay litigants, notwithstanding the central flaw in their case in this regard, I have read closely through the entire of the transcript in order to see if it is possible to find any evidence of unfairness in the procedure followed. I append to this judgment extracts from that transcript that I find give a very clear flavour of the nature and conduct of the hearing. The interplay between coroner and counsel, in my view, demonstrates beyond any doubt that the allegations made of unfair procedure in this matter are completely without foundation. The evidence from the transcript is all the other way. Dr. Mills seems to have been accommodated in his questioning at every turn save in two incidences. The first of these was at pp. 64/65 of the transcript of 20th December, 2006, and was concluded by Dr. Mills expressing satisfaction. Only the second of these was of any relevance. Dr. Mills suggested to Dr. Lynch at p. 143 of the transcript of 20th of December, 2006, that he had closed his mind in relation to there being an organic cause for Mirek's seizures. The coroner disallowed the question and Dr. Mills moved on without protest. It is little wonder he did not object at any time that he was being unfairly restricted because it seems to me that on any fair reading of the transcript the coroner went out of his way to accommodate Dr. Mills.

23. In regard to the coroner's alleged leading of witnesses away from evidence of fault and toward a verdict of a mitochondrial defect, the witnesses quite clearly gave whatever evidence they wished. The coroner's close questioning of Professor Farrell is quite striking in its effort to probe and fully understand the obviously highly complex evidence that was being given. There is, in my view, no substance whatever in this claim either.

24. In relation to the delivery of his verdict,; counsel for the applicants was invited to and did participate fully with the other counsel and the coroner in discussions about the nature of the verdict and what its contents should be. When the coroner delivered it, no issue was taken by Dr. Mills who appeared for the applicants. The fact the coroner delivered the verdict quite quickly after his discussions with counsel is not a real or proper ground to challenge it. The fact that no challenge was made at the time is enough to dispose of this point. However, it is a point of no substance herein because I am satisfied the coroner had ample time to digest the evidence he had heard and had extended discussion with counsel as to its form and content immediately prior to its delivery.

Summary
25. This being an application for judicial review and not an appeal, the role of the court is restricted to determining whether the decision was lawful. It is not open to the court to consider whether it was correct. To do that would be to usurp the jurisdiction given by the Oireachtas to the coroner. I reject the delay ground which was raised by the respondent in this case because I consider it appropriate in the special circumstances herein to extend the time to allow the applicants bring judicial review.

I find the special examination challenged is not a special examination under s. 33 and upon this ground the examination was not unlawful and evidence based upon it was admissible. The special tests carried out in Paris by Dr. Pierre Rustin of the Hopital des Enfants-Malades was properly done and, in my view, a very desirable and creditable further attempt to investigate the cause of death in this case. I find the coroner has wide discretion owing to the nature of the inquest with regard to the calling of witnesses. In my view all relevant witnesses were called. The coroner states in his affidavit that he did in fact read and consider Professor Kirkham's report and I accept that. This point fails in any event because at the time of the inquest no objection was made by counsel on behalf of the applicants. In relation to the objection under s. 52 that Professor Farrell was not an appropriate person to conduct a post-mortem, I reject this ground on the basis it is misconceived. Section 52 does not apply to Professor Farrell because he was not in attendance upon the deceased at the relevant time. In relation to the alleged ground of irrationality, in my view, the applicants have not even come close to reaching the high bar involved in establishing irrationality. There was ample relevant evidence before the coroner upon which he could base his verdict and his verdict was based squarely upon that evidence. It is clear from the transcript that the allegations made against Professor Farrell are devoid of any substance or support whatever. There were typographical errors on the death certificate when first produced. These have now been rectified. The broader allegation that the verdict is wrong may be considered on the same basis as the irrationality ground, i.e. there was ample relevant evidence before the coroner upon which he could base his verdict. It is not for this Court to assess that evidence – that is the role of the coroner. In relation to fair procedures, in the first place it is not open to the applicants to make this challenge because they were fully and capably represented at the inquest and made no objection there through their counsel. In any event, having carefully perused the transcript, it is clear to me that there is no basis whatever for this complaint. It is also clear from the transcript that the coroner did not lead the witnesses in any direction. They gave their own evidence both in prepared depositions and in oral evidence. The coroner's extensive and close questioning of them was clearly designed to understand, analyse and evaluate. It is further not open to the applicants to challenge the manner in which the verdict was delivered. It was delivered following full discussion with counsel for the applicants and no point was taken by him with either the form or content. The verdict appears a careful one based squarely upon the evidence that was heard by the coroner.

It is for the reasons summarised in this paragraph but set out in more detail in the main body of the judgment that I refuse the claim for the relief sought.

Approved: Hedigan J.

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 549 J.R.]

BETWEEN

BERNARD BINGHAM AND VIOLA BINGHAM

APPLICANTS

AND

BRIAN FARRELL

RESPONDENT

APPENDIX

Appearances:

For the Bingham family: Dr. S. Mills, B.L.

For Dr. King and Dr. Marsh: Mr. S. Noonan, S.C.

For Dr. Lynch: Mr. M. Conlon, B.L.

The following are extracts which I consider provide an accurate indicator of the nature of the inquest in the case herein.

1. The first day – 14th November, 2006 – the afternoon. Starting at p. 53, Mr. Mills refers to the omission of certain clinical details on the notes relating to Mirek's admission to ICU on 21st October, 1999. The exchange commences at p. 53 with a reference to the question involving criticism of the witness, Dr. Lennon. Dr. Mills agrees his question should be struck off the record and apologises for the question. The exchange, however, continues for the following pages until page 60. At p. 57 the coroner states he does not wish to restrict Dr. Mills "at all". Ultimately following discussion the exchange concludes at p. 60 with the coroner indicating the question will be answered, although by somebody else.

2. Dr. Mills commencing his cross-examination of Dr. Marsh at p. 81 in relation to the three toniclonic seizures. At p. 87 Mr. Noonan objects to the question and Dr. Mills withdraws it. The question in fact is subsequently answered at p. 93 and Dr. Mills says that he is satisfied at p. 94.

3. At p. 102 Dr. Mills refers to a list of witnesses that the family consider might be appropriate. The coroner indicates he already has that list. Dr. Mills states to the coroner that he has discretion in this matter in respect of any witnesses that he may wish to call.

4. 20th December, 2006 – Dr. Timothy Lynch gives his evidence commencing at p. 11. He outlines the patient's history which he says is a complicated one. He refers to a nerve and muscle biopsy that was performed on the 4th October, 1999 at p. 19. He gives a full and detailed history leading to the death of Mirek. This history concludes at p. 27. He is questioned by the coroner on his evidence until p. 41 of the transcript. At p. 41 the witness is cross-examined by Dr. Mills. This cross-examination continues until p. 55 when there is an objection by Mr. Conlon. The coroner allows Dr. Mills to continue with his question. At p. 62 in response to a further objection from Mr. Conlon, the coroner permits Dr. Mills to continue, saying "I don't want to restrict you unduly". At p. 64/65 in debating whether an EEG was performed on the night of the 11th/12th October, there occurs what appears to be one of the only two occasions in which the coroner sustains an objection by Mr. Conlon to Mr. Mills' cross-examination. He does so on the basis that after Mr. Conlon says this witness has already said he can't recall whether an EEG was considered or not and that he has in fact answered the question. In response to this, the coroner indicates he has to be careful of the jurisdiction and Dr. Mills replies "No, absolutely, no I am happy to proceed coroner, to move on". He is invited by the coroner to address him subsequently on issues but says that he is happy to move on really to establish the issue of whether it was done and whether it was considered. Throughout this period of the transcript there is every indication that the coroner is assisting Mr. Mills in questions to the witnesses. At p. 71 in answer to a further objection from Mr. Conlon, the coroner states "yes but I think at the same time counsel is entitled on behalf of an interested party to challenge the evidence …". At p. 72 the coroner is clearly helping Dr. Mills again until Dr. Mills accepts that the coroner can go no further (p. 73). At p. 79 again in response to an objection from Mr. Conlon, the coroner states "… I mean I do accept the, the, what you are saying Mr. Conlon but at the same time evidence can be challenged but again not to, for the purpose of ascribing liability or exoneration in this court but simply as a fact." Further, at p. 84 following objection by Mr. Conlon, Dr. Mills is allowed to continue. At p. 89 the coroner again takes Dr. Mills' side. Again at p. 95 the coroner allows Dr. Mills' question over the objections of Mr. Conlon. Further, at p. 97 the coroner allows an answer over the objection of Mr. Conlon. Further, on p. 99 in relation to the EEG taking two days, the question was allowed. Further at p. 105 the coroner overruled the objections of Mr. Conlon. On the following pages, Dr. Mills is allowed to explore the diagnosis of epilepsy on the 21st October, 1999. On p. 107 the witness agrees it was the first time an

epileptiform basis for the seizures was established by electrical criteria. But that alone does not make a diagnosis of epilepsy – it is multi-factoral. The witness agrees that by the 21st the patient had epilepsy, see p. 108 and p. 110. At p. 113 again over objection the question is allowed by the coroner concerning the likelihood in hindsight that Mirek was likely to have developed focal seizures on the 7th October. At p. 114 the witness agrees with Dr. Mills. At p. 115 the coroner appears again to be assisting Dr. Mills, "no, I think that, that is the evidence, isn't it?". At p. 117 Dr. Mills is allowed to put the question as to whether the witness accepts that Mirek spent fourteen days under his care with worsening seizures. At p. 117 the witness agrees with the coroner that the seizures were waxing and waning. An objection at p. 119 by Mr. Conlon is dealt with in a neutral manner in that the coroner decides it is a matter for submissions. At p. 130 Mr. Conlon objects to questions in regard to arranging the transfer to Beaumont Hospital. The coroner continues the questioning after this objection until Dr. Mills, at p. 133, tells the coroner the point is dealt with.

At p. 143 there occurs the second occasion when the coroner disallows a question by Dr. Mills to the effect that Dr. Lynch had closed his mind in relation to his diagnosis. This appears to me to be the only occasion on which the coroner disallowed a question of Dr. Mills because on the first occasion the question was in fact answered.

At p. 148 the coroner states "… I am simply trying, I think there are issues with the family that I am trying to address but I do say that they may not be relevant to my function, but I am trying to clarify matters so that the families don't go away feeling that we haven't addressed all of their concerns."

5. At p. 169 Professor Michael Farrell commences his evidence. Professor Farrell, over the following pages, gives his evidence as to the cause of death and is closely questioned by the coroner until the inquest is adjourned.

6. 12th November, 2007 – the inquest is resumed. Dr. O'Riordan is the first witness and gives his evidence commencing at p. 7. He is cross-examined by Dr. Mills until p. 25 without interruption. Dr. Barry Cosgrove is called to give his evidence next at p. 25. From p. 31 he is cross-examined by Dr. Mills. At p. 34 Mr. Conlon objects to Dr. Mills asking a question that requires a speculative answer. The coroner who is initially reluctant goes on to ask the question himself and obtains an answer that Dr. Mills is happy with, see the top of p. 37. On p. 41 Mr. Conlon objects again and again the coroner allows Dr. Mills to ask the question. At p. 46 – again there is an objection – again the coroner pursues the question and Dr. Mills indicates satisfaction.

At p. 48 Dr. Mills says to Dr. Cosgrove "you and Mr. Riordan have answered all the questions I have".

At p. 49 Professor Michael Farrell continues his evidence from the 2oth of December 2006. The coroner continues intensive questioning of Professor Farrell. Dr. Mills cross-examines Professor Farrell from p. 76 onwards. At p. 78 Mr Conlon objects to the line of questioning but the coroner does not agree with him and allows this line of questioning.

Objections continue on p. 80 and onward concerning Alpers Disease as a possible cause of death. The dispute over this is concluded at p. 87 when the coroner indicates that Dr. Mills has an answer and the answer is no. The discussion, however, continues on that topic. It seems fully investigated as a possibility.

From here up to p. 95 all the evidence given by Professor Farrell is indicative that mitochondrial disease studies are advancing all the time as is the understanding of it. At the top of p. 95 Dr. Mills says nothing substantial arises from the Freedom of Information requests.

At p. 100 there are further objections from Mr. Conlon but at p. 101 the coroner permits Dr. Mills to proceed with his questions.

At p. 106 Professor Farrell expresses his essential view in this tragic case:

"… if there is a better alternative explanation for all of the events throw it at me and I will try and deal with it, but in my view this I think is the best explanation I can come up with to explain everything."

In this section of his evidence Professor Farrell expresses the opinion that this boy had some degree of mitochondrial disorder and this is the best explanation he can come up with to explain everything – the boy had a neurodegenerative disorder and was probably put into a situation in surgery, hypoxia, which triggered seizures in neurons that already had a lower threshold and those seizures begat other seizures and they progressed into a status epileptica cycle. He did not have seizures before he came into hospital, so this was an acquired disorder that evolved in hospital over time and then accelerated. It was like an irreversible cycle.

At p. 108 Professor Farrell is questioned by Mr. Conlon. Following that there is further questioning by the coroner in relation to the origin of the seizures, i.e. an event triggered a refractory cycle of seizures because of an underlying condition having lowered the threshold for the development of refractory epileptiform seizures. Why did he not come out of these seizures? Because some underlying subtle abnormality prevented it.

"… all I am trying to say is that, I am trying to just explain it all as best I can, if there is a better alternative explanation let me have it and I will try and deal with it as well but we still have to explain everying".

At p. 112 the coroner commences to outline the evidence and asks for counsel's assistance if he says anything wrong.

Paragraph 118 – Dr. Mills raises two errors in the coroner's summing up.

(a) The notes show as late as the 19th that Mirek had a seizure and that an EEG confirmed that.

(b) The notes show the seizures woke him from sleep whereas the coroner says the seizures ceased when he was asleep.

The coroner thanked him for these corrections and adopted what he said. The coroner moved on and continued.

At p. 122 the coroner asked Dr. Mills for help in relation to his formulation of Professor Farrell's evidence. He agrees that Dr Farrell seems to favour the seizure disorder as the trigger for the more recent neuronal loss.He thinks it would be superimposed on the main cause. He also mentions the presence of MRSA. The coroner thanks him for this although he says there is no evidence of that (presumably he is referring to the MRSA). He then described them as comorbidities.

At p. 124, Mr. Noonan suggests it is a case for a narrative verdict.

Mr. Conlon agrees and suggests the verdict should indicate that Mirek had a lower threshold as a result of the mitochondrial disorder.

The coroner agrees and goes on to say he thinks it was the seizure, the refractory intractable seizures that caused the neuronal loss that led to Mirek's unconsciousness and subsequent death.

At p. 127 Dr. Mills also outlines his view of what Professor Farrell's evidence was. The coroner agrees with him.

Dr. Mills goes on to outline grounds for a possible finding of "medical misadventure". He is very specific in this application. He describes this as "an unintended result of an intended action".

The coroner invites a reply from Mr. Conlon. He disagrees. No evidence exists that an earlier diagnosis would have made any difference. He disagrees this could be characterised as an unintended result of an intended action.

At p. 130 Dr. Mills reiterates his submission. He characterises Professor Farrell's evidence as being "very fair" in relation to the possibility of a vicious cycle developing where initial seizures if untreated can become more generalised seizures. The coroner agrees that this is what Professor Farrell says.

Dr. Mills continues and states again that in relation to causation, Professor Farrell gave very fair evidence. He continued that where seizures went undiagnosed for as long as they did, it is open to the Court to make the finding of medical misadventure.

Mr. Conlon reiterates his disagreement with this.

At p. 133 Mr. Noonan intervenes – even if the seizures were misdiagnosed, it would be wrong to come to such a verdict.

The coroner indicates his view that it cannot be said that any alleged delay in making diagnosis affected the outcome.

At p. 136 and p. 137 Dr. Mills expands his submission and focuses on the failure to do a test that would have allowed his condition to be diagnosed. This was the intended action. "We will never know whether if he had been diagnosed on the 8th or the 10th or the night when he was first admitted to ICU it would have made any difference".

At p. 145, the coroner having retired, returned to outline what he intended to say:-

He does this through to p. 147. Having outlined his proposed verdict, he asks Dr. Mills if anything arises. Dr. Mills responds "I don't believe so".

Following this at p. 147 the coroner delivers the following verdict:-

> "That the late Mirek Bingham, who was aged 16 years at the time of his death, died at the Mater Hospital, Dublin 7 on the 31st December, 1999. The proximate cause of death was disseminated intra-vascular coagulation and that, of course, was the terminal event. The underlying cause was widespread neuronal loss and gliosis due to an energy deprivation state within nerve cells, brought about by refractory, by a refractory seizure disorder, which commenced as focal symptomatic seizures becoming generalised and ultimately of a status epilepticus nature and/or hypoxic ischemic encephalopathy.
>
> The late Mirek Bingham suffered from a progressive neurological condition which was characterised as spino-cerebellar degenerative disorder consistent with a mitochondrial defect. The late Mirek Bingham underwent a Heller's myotomy at the Mater Hospital Dublin on the 4th October, 1991 for achalasia of the cardiae.
>
> On the 7th October, 1999 Mirek Bingham first developed contractions of the back muscles, which was originally diagnosed as segmental myoclonus. An EEG performed on the 21st October, 1999 confirmed a right sided epileptiform focus and the formal diagnosis was revised on that date to epilepsia partialis continua with secondary generalised epilepsy.
>
> Now earlier on the same date, that is the 21st October, 1999 Mirek Bingham suffered a respiratory arrest which followed a seizure, wherein his breathing ceased, and I am quoting from the evidence, over 60, for over 60 seconds. Subsequent treatment in the Intensive Care Unit at the Mater Hospital continued for a period of 72 days, wherein Mirek Bingham remained ventilator dependent and died on the 31st December, 1999 and I make findings to that effect."