

Colonel Overbury

Ruling on Allegations

1. Lt Col. Overbury, a qualified lawyer and then Assistant Director of Army Legal Services, went to Northern Ireland in 1972 as the representative of Army Legal Services to assist in preparing army evidence for presentation to the Inquiry conducted by Lord Widgery into Bloody Sunday. In the course of performing this task, Col. Overbury (and the Deputy Assistant Director Major Bailey) interviewed a number of soldiers who had been present on Bloody Sunday and took statements from them. Col. Overbury was also present at a number of interviews of soldiers conducted by staff working for the Inquiry.

2. In a ruling dated 12th October 1999 the Tribunal set out the procedure to be followed in the event that interested parties wished to make allegations against witnesses to the Inquiry. That procedure was as follows:

88. Lastly we deal with the procedure that is to be followed if the interested parties intend to make allegations, in the course of the proceedings, against witnesses to the Inquiry. By "allegations" we mean allegations of misconduct, improper behaviour, irresponsibility or incompetence. The procedure that we propose to lay down is this:

- i. If any of the interested parties seek to make an allegation against any of the Inquiry's witnesses they must give details to the Inquiry of the allegation that they intend to make.*
- ii. The Inquiry will give notice to the interested parties and to the relevant witness or witnesses of any allegations of which it is informed, unless any such allegation is clearly without sensible foundation, or is not within the Tribunal's remit, or there is some other sound reason why it should not be entertained.*

- iii. *The Inquiry may require further information as to the nature of the allegation, or the evidence in support of it, or the basis upon which it is made before notifying the interested parties of it.*
- iv. *None of the interested parties will be allowed, without the permission of the Tribunal, which is unlikely to be given save for very good reason, to pursue an allegation against any of the witnesses unless it has been the subject of a notice given to the Inquiry in good time, as to which see paragraph (v) below. Nor will they be allowed to pursue an allegation, which the Inquiry has declined to notify to the interested parties on one of the grounds set out in (ii) above.*
- v. *Any allegations that are to be made must be notified to the Inquiry so soon as is reasonably practicable and, in any event, in such time as will enable the Inquiry to give notice to the witness concerned at least 3 weeks before the witness is first due to give evidence. The Tribunal appreciates that it will be necessary to have a rolling witness programme so that the interested parties know when any given witness or category of witnesses is first due to give evidence. The Tribunal appreciates that the making of allegations is something that requires careful thought and judgment; that there is much material to consider; and that it may be inappropriate to make an allegation without considering more material than that which prima facie appear to justify the allegation in question. That said, the Tribunal is not prepared to countenance a situation where allegations are made that could and should appropriately have been made at an earlier stage. It will be for those making allegations to satisfy the Tribunal that they were made at the earliest practicable moment. The Tribunal believes that it can trust in the good sense and judgment of Counsel for the interested parties and their instructing solicitors to ensure that any allegations that are to be made are, indeed, made as soon as is reasonably practicable, having regard to the considerations outlined above, and in accordance with the overall objective of this ruling which is that of preventing ambush and surprise.*

- vi. *It is not necessary for the interested parties to adopt for themselves the issues referred to in Counsel's Report No 1, which identifies, with different degrees of specificity, a number of issues that are likely to arise in the course of the Inquiry. But it is necessary for them to use the procedure laid down above if they intend to make a positive case that, for instance, a particular lettered or numbered soldier shot a particular victim. Similarly if any of the interested parties intends, for instance, to make a positive case that a particular witness was shot whilst throwing a nail bomb, they should make an allegation to that effect.*
- vii. *It may be that allegations are sought to be made against witnesses whom the Inquiry had not intended to call. If that is so the party seeking to make the allegation will be expected to have asked that the witness should be called, and to have given notice of the allegation as the reason, or one of the reasons, for him or her being called.*
- viii. *If allegations are to be made against persons who are deceased they must be made as soon as is reasonably practicable and in any event in sufficient time to enable the witnesses who have relevant evidence to give in relation to that deceased to give evidence in the knowledge of that allegation. In practice that means no later than 3 weeks before the first witness whose evidence relates to the death of that deceased. What we have said in (v) above applies, of course, in this context.*
- ix. *This procedure is not intended to be limited to allegations of misconduct on the day. If the interested parties intend to make a positive case in respect of, for instance, the planning for the day e.g. that there was a deliberate plan to engage the IRA, they should make use of this procedure.*
- x. *The fact that the Inquiry notifies any person of an allegation does not imply any view by the Inquiry as to the strength or validity of that allegation. Nor does it imply that the Tribunal or its Counsel will adopt any particular position in respect of it.*

- xi. *Any interested party, who has made an allegation, is at liberty to withdraw it, in whole or in part, at any time. This should be done by notice in writing to the Inquiry. The Inquiry will give notice of the withdrawal of any allegation.*
- xii. *The Tribunal will make any alterations to this procedure that prove to be necessary or desirable in order to secure the overall objective mentioned in (v) above. It will, also, be the arbiter in the event of any dispute in relation to the procedure.*

3. On 23rd August 2002 Madden & Finucane, acting on behalf of a number of families of those who died on Bloody Sunday and some of those wounded, wrote to the then solicitor to the Inquiry a letter headed “*Allegations in respect of Colonel Overbury*” enclosing a list entitled “*Notice of Allegations and Issues re Col. Overbury.*” In the list it was stated that without prejudice to the generality of the allegations already made (one of which, made in December 1999, was that Colonel Overbury had interfered with the course of justice) these interested parties proposed “*to raise the issue*” whether and to what extent Col. Overbury had exercised his power and influence as leader of the Army Legal Services Team at the Widgery Inquiry “*to suppress and/or distort evidence about the events of Bloody Sunday, in particular by:*

- (a) *Causing or permitting his staff to ensure that soldiers made no incriminating or damaging admissions in their statements or testimony;*
- (b) *Suppressing soldiers’ previous inconsistent statements;*
- (c) *Suppressing photographic and film evidence that was inconsistent with the soldiers’ evidence and consistent with civilian evidence;*
- (d) *coaching Soldier V to give false evidence by causing him to retract an account of his conduct that was tantamount to an admission of the murder of a civilian and procuring the fabrication of a false exculpatory account;*

- (e) *coaching Soldier F to give false evidence by causing him to alter his original account and purport to justify the shooting of Michael Kelly;*
- (f) *generally discharging his functions in such a manner as to conceal the truth concerning the conduct of soldiers involved in the events of the day.”*

4. On 13th September 2002 the solicitor to the Inquiry wrote to Madden & Finucane. In the course of that letter the solicitor said this:

“I note that your notice is described as a notice of allegations and issues. It is, of course, helpful, and in accordance with the spirit of the Tribunal’s ruling, to have advance notice of issues that will be canvassed. It is, also, possible that, in the course of canvassing those issues, facts emerge which support an allegation. But an allegation of serious misconduct cannot be transformed into something different by characterising it as an issue as to whether someone has been guilty of such misconduct. The contents of your notice appear to the Tribunal to amount to allegations.”

5. On the footing that Madden & Finucane were in fact making allegations, the solicitor to the Inquiry informed these solicitors that the Tribunal was not satisfied that the allegations should be allowed to be pursued in their present form. The letter went on to request Madden & Finucane to state the basis on which they made the allegations and the evidence said to support them. The letter also made clear that nothing in it was intended to prevent Madden & Finucane from canvassing with the witness, insofar as it had not already been done by Counsel to the Tribunal, the process by which statements were taken; or the particular sequence of events in relation to any particular soldier, but that *“...the Tribunal is, however, concerned to prevent allegations that have no sound basis being made and to ensure that, if there is a sound basis for making them, the witness concerned knows what that basis is.”*

6. Madden and Finucane wrote in reply to this letter on 16th September 2002. In the second paragraph of this letter they said this:

“The Notice was carefully drafted to strike a proper balance between the various duties and obligations imposed on us, including a duty to ventilate the reasonable concerns and suspicions of our clients, the duty to canvass concerns and suspicions with the witnesses to whom they relate most directly, the duty to give the witness fair notice of such concerns and suspicions and the obligation to avoid making positive allegations of grave misconduct without reasonable cause. Paragraph 3 of our Notice does not make a positive case about any of the matters set out therein and does not contain any positive allegations, properly so-called. For this reason the procedure set out in paragraph 101 of the Tribunal’s ruling of 12th October 1999 does not, strictly speaking, apply. However we were anxious to respect the spirit of the ruling and serve a notice that would meet the Tribunal’s objective of preventing “ambush and surprise.””

7. The Inquiry responded to this letter on the following day, informing Madden & Finucane that in view of being told that no positive allegations were being advanced against Col. Overbury, the Tribunal would proceed on that footing. The letter also stated that *“in the Tribunal’s view, on the material presently before them of which they are aware, there are presently no grounds for alleging that Colonel Overbury was guilty of misconduct, as your disavowal of a positive case now acknowledges, and, as things stand, they do not propose to allow you to allege that or do what amounts to the same thing in another form...”* The letter added that:

“In this, as in all cases, nothing is static, and the Tribunal will keep the matter under review. If further material comes forward, which makes it proper to make any such allegations, whether as a result of Colonel Overbury’s evidence or otherwise, the position would change.”

8. In the last of the letters to which we have referred the solicitor to the Inquiry informed Madden & Finucane that since the position had to be made clear to Colonel Overbury, he would be sending a copy of the correspondence to his legal team, and this was duly done.

9. The upshot of this correspondence seems to us to be clear beyond doubt, namely that Madden & Finucane were not advancing any positive allegations against Colonel Overbury. In view of the terms of their letter of 16th September 2002 it seems equally clear that at that stage Madden & Finucane had no reasonable cause to advance any such allegations against Colonel Overbury, a view shared by the Tribunal. Thus when Colonel Overbury came to give evidence, it was on the basis that he was not, at least at that stage, being accused of misconduct.

10. Colonel Overbury gave oral evidence to the Tribunal on 3rd October 2002. Counsel acting on behalf of the clients of Madden & Finucane did not seek to re-open the question whether any of the allegations could be revived against Colonel Overbury, either during the course of the evidence of that witness or at the conclusion of his testimony. In addition, the question whether Colonel Overbury was instrumental in causing soldiers to suppress or falsify their evidence to Lord Widgery's Inquiry was not raised with any of the soldiers from whom Colonel Overbury had taken statements or at whose statement taking he had been present. In fact, nothing more was heard of the matter from Madden & Finucane until the Inquiry itself, in a letter dated 8th October 2003 dealing with a number of witnesses including Colonel Overbury, asked for clarification of the position regarding allegations "*which have been to a greater or lesser degree watered down in the course, or at the end, of the questioning of them, and/or which appear to be unsustainable in their original form,*" so that the parties concerned could be saved the time and expense of dealing in their final written submissions with criticisms that were not in fact going to be maintained.

11. This letter prompted a response from Madden & Finucane dated 18th November 2003. Part of this letter was headed "*Allegations against Colonel Overbury*" under which was set out the following:

"In our notice of 23 August 2002 and our letter to John Tate of 16 September 2002, we set out in some detail the issues concerning Col Overbury, as well as the evidence relating thereto. The allegations we now maintain against Col Overbury may be summarized as follows:

Lt Col Overbury exercised his supervisory role as head of the Army Legal Services team at the Widgery Inquiry to help conceal the truth concerning the conduct of soldiers involved in the events of Bloody Sunday, in particular by

- (a) doing his best to ensure that soldiers made no incriminating or damaging admissions (beyond those already made by them) in their statements or in their testimony;*
- (b) causing soldiers to withdraw or modify incriminating or damaging admissions already made in previous statements e.g. by Soldiers V, 15, 40 and 134;*
- (c) otherwise “ironing out” problems in soldiers’ accounts e.g. those of Soldier F;*
- (d) colluding in the suppression of Army photographs and films that were inconsistent with the soldiers’ evidence and consistent with civilian evidence; and*
- (e) colluding with Counsel for the Army and Counsel for the Tribunal for the purpose of concealing misconduct on the part of the soldiers e.g. in the cases of Soldiers F and V.”*

12. On 2nd December 2003 the solicitor to the Inquiry wrote to Madden & Finucane, pointing out that their latest letter appeared to the Tribunal to constitute, with some alterations, the allegations that they had told the Tribunal in September 2002 they were not making. The letter recorded the Tribunal’s preliminary view that the allegations now made did not appear to be justifiable by the particulars given, that of at least equal concern was the fact that they were not put to Colonel Overbury when he gave evidence, and that the Tribunal might well take the view that it would be unfair to Colonel Overbury for the allegations now to be pursued. The letter ended by informing Madden & Finucane that the Tribunal would give them the opportunity to make oral submissions on the matter.

13. These submissions were made in December 2003. They included submissions relating to somewhat similar allegations against Colonel Overbury raised by the clients of McCartney & Casey, to which we shall turn in due course.

14. On behalf of the clients of Madden & Finucane, Mr MacDonald produced part of his clients' draft final submissions, which repeated and expanded upon the allegations as now formulated. He sought to persuade us that the right course to take was for us to allow the allegations to go forward as part of the final submissions of his clients, and that Colonel Overbury would have a full and fair opportunity to answer those allegations, if he could, in the course of his written reply to those submissions. He submitted that the notice of issues given in September 2002 gave Colonel Overbury full notice of the points that were being raised, so he was not being taken by surprise by the allegations that were now being advanced. He also, perhaps somewhat inconsistently and (as the correspondence reveals) certainly incorrectly, suggested that the reason why they had not put allegations to Colonel Overbury was because the Tribunal had told them not to do so. What the Tribunal had in fact done was to tell Mr MacDonald's clients that since they had stated that they were not advancing any positive allegations they could not do so through the back door by dressing up allegations as "*issues*."

15. What we were anxious to learn from Mr MacDonald was whether there was anything in the evidence given by Colonel Overbury or later witnesses that enabled his clients to assert that the position had changed since September 2002 so that there was now reasonable cause for advancing allegations against Colonel Overbury.

16. So far as Colonel Overbury's evidence is concerned we were taken by Mr MacDonald to various parts of his testimony. For example, Mr MacDonald laid great stress on the fact that when he asked in relation to Soldier V whether Colonel Overbury's primary purpose in dealing with V was to protect the interests of the Army or help to uncover the truth about what had happened on Bloody Sunday, Colonel Overbury answered that it was the first. However, to our minds such an answer does not begin to suggest that Colonel Overbury was guilty of seeking to falsify or conceal evidence. The dichotomy Mr MacDonald seeks to rely upon in his question is not a true one. Protecting the interests of clients and engaging in falsifying or suppressing evidence are two separate things and the former does not establish the latter.

17. As to other parts of Colonel Overbury's evidence, Mr MacDonald suggested that this witness was not telling the truth, which in turn indicated real substance in the allegations. It is not necessary for us to consider these aspects of the evidence in any detail, for it suffices us to say that had there in truth been any real substance, Counsel of Mr MacDonald's experience would not have hesitated in forthwith seeking to persuade us allow the allegations to be put, if not at the end of the evidence, then at least shortly afterwards by way of an application for the recall of Colonel Overbury. We, likewise, found nothing in the testimony of Colonel Overbury that could be said to make it proper for the allegations to be revived at this late stage.

18. As to other evidence, we have already observed that none of the soldiers concerned was questioned whether Colonel Overbury had persuaded or assisted them to give false evidence or conceal material evidence. Mr MacDonald provided us with no explanation for this omission. This is, of course, unfair to the soldiers themselves, for if Mr MacDonald is right, they were parties with Colonel Overbury to serious misconduct. What Mr MacDonald did do, however, was draw attention to the fact that in the context of the allegation of suppression of Army photographs and films, Colonel Overbury had told the Tribunal that the Deputy Assistant Provost Marshal was responsible for the Army photographs, whereas this individual (known to the Inquiry as INQ 1898) has told the Tribunal that he did not have any control over photographs as he did not have sufficient cupboard space for them. In our view this later evidence, considered alone or in the light of all the other material about Army photographs before us (including Colonel Overbury's testimony on the point), does not begin to form a foundation for any suggestion that Colonel Overbury "*suppressed photographic and film evidence that was inconsistent with the soldiers' evidence and consistent with civilian evidence.*"

19. During the course of his oral submissions the Tribunal invited Mr MacDonald to inform the Tribunal of any other evidence emerging after Colonel Overbury's evidence (apart from this witness's own evidence and that concerning photographs and film) that could be said to support the proposition that there was now reasonable cause for making positive allegations against Colonel Overbury. Mr MacDonald did not respond to this invitation.

20. In the circumstances it seems to us that it would be unfair to Colonel Overbury and contrary to our ruling of October 1999 (which was designed to avoid unfairness) to allow allegations not put to this witness to be revived at this stage. To make allegations against a witness and then in effect to withdraw them, to put no allegations to that witness during his testimony, and then nevertheless many months later for no good reason to revive them, seems to us to be self-evidently unfair, giving rise to the very ambush and surprise Madden & Finucane professed to wish to avoid. If in truth there was any substance in the allegations they could and should have been raised long ago, but no attempt was made to suggest that December 2003 was the earliest practicable moment for them to be revived. We have a duty to seek the full truth about Bloody Sunday, but as we have observed on more than one occasion, this duty does not override our obligation to treat witnesses fairly. We have, of course, considered whether we should recall Colonel Overbury, but since we remain unpersuaded that the allegations have any sensible foundation, to do so would run counter to our own ruling of October 1999, would to our minds serve no useful purpose, and would in our view be even more unfair to the witness now than it would have been in September 2002.

21. For these reasons we direct that the allegations identified in Madden & Finucane's letter of 18th November 2003 cannot be raised at this late stage and accordingly must not appear in the final written submissions of their clients.

22. We now turn to allegations that the clients of McCartney & Casey submit they should be permitted to advance against Colonel Overbury. The correspondence with the Inquiry reveals that in recent letters from McCartney & Casey to the Inquiry these allegations have altered more than once in both form and content, but finally in the course of his oral submissions Lord Gifford on behalf of these interested parties put forward as the definitive allegation that Colonel Overbury suggested in the course of interviewing Soldiers 15, 40 and 134 that they should falsify their evidence in order to make it consistent with the Army's case that all firing by the soldiers was justifiable.

23. No notice was given to Colonel Overbury before he gave evidence that McCartney & Casey were seeking to raise this or any similar allegation against him. Lord Gifford sought to explain this by saying that it had not become apparent to him

until Colonel Overbury gave evidence that this officer had interviewed these soldiers. Be that as it may, the fact remains that Lord Gifford did not put the allegation to Colonel Overbury. It is true that he suggested to Colonel Overbury that he may have tried “*to put a spin on some evidence which was otherwise potentially damaging to the Army*” a suggestion that Colonel Overbury rejected, but to our minds this falls far short of the allegation as it is now formulated. To put a “*spin*” on evidence may well merely mean an attempt, not to falsify evidence, but to present it in the most persuasive or attractive way. If it was to be alleged that Colonel Overbury had, in fact conspired to pervert the course of justice, then that should have been suggested in terms. As it is, the transcript reveals that at the time the Tribunal expressed itself as not regarding the questioning by Lord Gifford as putting forward an allegation against Colonel Overbury; and Lord Gifford did not seek to persuade the Tribunal that this was what he in fact was seeking to do.

24. As with Madden & Finucane, no attempt was made to raise the allegation with the soldiers concerned. Nor was it suggested that any later evidence supported the making of such a serious allegation against Colonel Overbury. Likewise, no attempt was made to establish that the allegation was made at the earliest practicable moment. In the circumstances it seems to us that, as in the case of Madden & Finucane and for much the same reasons, it would be unfair to Colonel Overbury and contrary to our ruling of October 1999 to allow allegations not put to this witness to be revived at this stage or to recall Colonel Overbury to deal with them.

25. For these reasons we direct that the allegations identified by Lord Gifford cannot be raised at this late stage and accordingly must not appear in the final written submissions of the clients of McCartney & Casey.

26. We should add this. During the course of the oral submissions it seemed that the question of making allegations against Colonel Overbury was really being treated by both Mr MacDonald and Lord Gifford as an end in itself. As we have repeatedly made clear, the object of looking at the evidence collected for the purpose of Lord Widgery’s Inquiry and the manner in which it was collected and given, is not in order to judge whether or not proper procedures were followed at that Inquiry, but whether the present Inquiry can place any and if so what reliance on that evidence.

We would re-emphasize that it is the latter to which the interested parties should be directing their attention in their final submissions.

27. In this connection, it is important to bear in mind that this ruling is confined to the question whether the Tribunal should allow to be pursued the allegations now sought to be revived against Colonel Overbury. The ruling is in no way concerned with the truth or falsity of the evidence about Bloody Sunday prepared for or given at Lord Widgery's Inquiry and in no way impedes our task of assessing that evidence. Thus, for example, when we come to review the evidence of soldier V and the soldiers interviewed by Colonel Overbury, we shall, of course, consider the role that he played in relation to these soldiers. We shall also consider his role generally with regard to the preparation and presentation of the Army case to that Inquiry. We shall do so to the extent necessary to assist us in judging what reliance, if any, we can place upon that evidence and that of other soldiers. Likewise, nothing in this ruling impedes us in assessing what weight we should place upon Colonel Overbury's own testimony, again insofar as this may be relevant to the same task. As Mr. Elias put it on behalf of Col. Overbury, the ruling leaves unaffected "*all the ordinary tools of forensic analysis*".

Lord Saville

The Hon. William Hoyt

The Hon. John Toohey

14th January 2004