THE HIGH COURT

[2022] IEHC 463

Record No. 2020/8529P

BETWEEN

CLIONA O'KEEFFE AND ALAN DORAN

PLAINTIFF

AND

GOVERNOR AND GUARDIANS OF THE HOSPITAL FOR THE RELIEF OF THE POOR LYING IN WOMEN DUBLIN

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 26th day of July, 2022

INTRODUCTION

1. This judgment deals with a situation where a hospital undertakes a risk management enquiry after an incident in a hospital with the intention of learning from the incident, in order to improve patient care. The question arises as to whether statements made by hospital staff to that enquiry are discoverable by a patient, the subject of the incident, who is suing the hospital? In the alternative, should improving patient outcomes in the future take precedence - by encouraging hospital staff to be as frank or critical as possible to the risk management enquiry in order to improve future patient care, safe in the knowledge that they will not be discoverable?

2. This tension between a litigant finding out what happened in the past on the one hand and seeking to improve future patient care on the other hand is at issue in this case.

3. This issue arises in a sad case where the plaintiffs (the "Parents"), who are the parents of a baby girl (Fiadh), who died shortly after birth, are seeking damages from the Rotunda Hospital (the "Hospital") in relation to the medical treatment provided during the birth. While the Parents have been provided with the Report which resulted from the Risk Management Enquiry (the "Enquiry") conducted by the Hospital, they believe that the statements made to the Enquiry will assist them in establishing negligence on the part of the Hospital staff. Accordingly, they are seeking discovery of those statements made by the Hospital staff to the Enquiry.

ANALYSIS

4. The Parents' case is that the administration of justice and, in particular, getting to the truth of what happened during the birth should take precedence over the confidentiality of any statements made to the Enquiry. They seek the following discovery, which they say is both relevant and necessary for the fair resolution of the proceedings:

> "Copies of all reports, memos and statements concerning the First Named Plaintiff's labour and delivery and the Deceased's death in the possession, power or procurement of the Defendant, their servants or agents, medical Consultants, Midwives or Third Parties acting on the Defendant's behalf as a consequence of the Hospital's Risk Management Enquiry into the incident event."

5. There appears to be little doubt that the statements made by clinicians and other staff to the Enquiry are likely to be relevant to the Parents' case, since those statements relate to the labour and Fiadh's birth, which the Parents allege were negligently handled by the Hospital. It is clear that if these statements were made by a clinician to her lawyer, although 'relevant', they would not be discoverable to a plaintiff as they would not be 'necessary', as they would

be covered by legal professional privilege. The question in this case is whether statements made by a clinician to a risk management enquiry, although relevant, are 'necessary' and so should be discovered to the Parents or whether they are covered by one of the exceptions that apply to discovery.

6. In considering this question, it is helpful to consider the rationale for a different type of non-disclosure, i.e. legal professional privilege. As noted by Finlay C.J. in *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd* [1990] 1 I.R 469 at p. 477:

> "The existence of a privilege or exemption from disclosure for communications made between a person and his lawyer clearly constitutes a potential restriction and **diminution of the full disclosure** both prior to and during the course of legal proceedings which **in the interests of the common good is desirable** for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, in my view, only be granted by the courts and instances which have been identified as securing **an objective which in the public interest** in the proper conduct of the administration of justice **can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.**" (Emphasis added)

7. Thus, in the context of legal professional privilege, it is regarded as being in the interests of the common good that a clinician can be as candid as possible in her statements to her lawyer in order to obtain the most appropriate legal advice and that this takes precedence over the truth-finding function of the courts regarding what happened to a patient in relation to a hospital incident. For this reason, such statements made by a clinician to her lawyer are not disclosed. The question in this case is whether the public interest in the truth-finding function of the courts is outweighed by the interests of the common good in improving patient outcomes by ensuring that a clinician is as candid as possible to a risk management enquiry (including being

justifiably or unjustifiably critical of her own actions or other clinician's actions), just as she would be to her own lawyer.

8. In this case, the staff who made statements to the Enquiry were assured that those statements would be confidential. The Hospital claims that it is in the public interest that clinicians and other hospital staff who make statements to a risk management enquiry should know that they will not be discoverable, in order to ensure that they are as candid as possible so that future patients at that Hospital (and at other hospitals in the State) will learn from any changes in practice which could arise from the frankest possible statements made to that enquiry.

9. The Hospital claims that if staff in the Hospital cannot be assured that their candid and frank statements, regarding what happened, will not be disclosed in any future litigation, then risk management enquiries aimed at improving future patient will be completely undermined. This is because the Hospital claims that complete honesty (such that nothing is concealed out of perceived self-interest) is essential to the working of a risk management enquiry and thus essential to formulating improvements in patient care.

The Enquiry

10. As regards the Enquiry undertaken by the Hospital in this case, the Court was provided with a document issued by the HSE Quality Assurance and Verification Division entitled *Incident Management Framework.* In relation to internal reviews and investigations, this document states at p. 29 that:

> "**In the interests of safety**, reviews relating to incidents should always proceed where possible and in a timely manner."

11. Thus, it seems clear that the purpose of reviews or enquiries such as this one is to improve patient safety for patients in the hospital in the future. This document also states at p. 29 that:

"Systems should be put in place to ensure the seamless conduct of the review including agreement in relation to data protection, **confidentiality,** the sign off of the final report and development of the implementation plan." (Emphasis added)

12. In this regard, uncontroverted submissions were made on behalf of the Hospital that:

- the Enquiry was a private *ad hoc* enquiry to look into the circumstances of Fiadh's birth with the intention of the hospital benefiting from any 'learnings' arising therefrom,
- it was clinician led and did not have lawyers involved,
- there was no power to compel clinicians or other staff to make statements to the Enquiry and so the Enquiry relied on staff being willing to participate,
- any staff member who agreed to make statements was assured of the confidentiality of the statements, which assurance was also contained in a letter to those who participated in the Enquiry,
- the final Enquiry report was provided to the Parents,
- as there was also a coroner's case in relation to Fiadh's birth, the statements of five members of staff of the Hospital, which were provided to the coroner, have also been provided to the parents, and
- the Parents have been provided with all the medical records and notes *etc.* relating to the care provided by the Hospital.

The Law

13. While the staff who made statements were assured that those statements would be treated confidentially, counsel for the parents relied on the case of *Miggin (A Minor) v. Health Service Executive (HSE) & Gannon* [2010] 4 I.R 338 in support of their claim that these

'confidential' statements should nonetheless be disclosed. At para. 16 of his judgment, Hanna J. observed that:

> "Insofar as any conflict lies between the public interest in the production of documents or in the maintenance of their confidentiality, under the provisions of the Constitution such conflict falls to be resolved by the courts."

14. Similarly, the conflict in this case between, on the one hand, the public interest alleged by the Hospital in not disclosing statements by staff to a risk management enquiry, and, on the other hand, the private interest of the Parents in obtaining damages from the Hospital and the public interest in the administration of justice, is a matter to be considered by the courts. This Court must resolve this tension between the pursuit of justice by a person who was allegedly injured by the actions of the Hospital on the one hand, and the fact that, on the other hand, the Parents are seeking statements made to a 'risk management' enquiry, which by its very nature has as its sole purpose learning from mistakes that might have been made in a hospital incident and seeing how risks to patients in the future can be managed and/or reduced arising from the lessons learned.

15. It is clear from *Miggin* at para. 20 that in evaluating the necessity for discovery, there is an overriding interest in the administration of justice. In this case therefore, this Court must consider whether the provision of the statements, which are obviously relevant, are also necessary for the administration of justice or whether it falls under one of the exceptions, just as there is an exception for legal professional privilege. The exception which the Hospital places particular reliance upon is that the staff were assured of confidentiality when making the statements (as occurred in the other reported cases referenced below).

16. However, the Parents place particular reliance on the *Miggin* case. In that case, Hanna J. had to consider whether to allow the discovery of a transcript of the proceedings that took place before the Fitness to Practice Committee of the Medical Council concerning a complaint

against the defendant doctor. The relevant statutory provision provided that the findings of the Fitness to Practice Committee were not to be made public without the consent of the person who was the subject of the enquiry, unless that person was found guilty of professional misconduct. In the *Miggin* case, the defendant doctor was not found guilty of professional misconduct. Nonetheless Hanna J. held that the discovery of the transcript should be permitted as he held that it '*is not disproportionate to [the doctor's] right to confidentiality'* for the discovery to be ordered (at para. 23).

17. There are however some significant differences between the *Miggin* case and this case. In this case it is to be noted that one is dealing with statements made to a clinician-led *ad hoc* enquiry in which lawyers were not involved, whereas in *Miggin,* one was dealing with statements made to the Fitness to Practise Committee set up by statute. In addition, it is relevant to note that the Fitness to Practice Committee sits with a legal adviser and the doctor who is before the Committee is generally legally represented.

18. The Parents also relied on the case of *Gallagher v. Stanley* [1998] 2 I.R 267. In that case, legal professional privilege was claimed by nursing staff to support the non-disclosure of statements of a factual account of an incident, the subject of subsequent litigation, which the matron of the hospital had requested them to prepare. The Parents point out that in that case the hospital claimed that the:

> "[S]tatements were made on a **confidential basis** in order to provide the legal advisors of the hospital with necessary material to advise in the event of a claim". (Emphasis added)

Nonetheless, the Parents point out that those 'confidential' statements were disclosed in that case. However, it is important to note that in that case, legal professional privilege was claimed and the reason those statements were disclosed is because the Supreme Court found that legal

professional privilege did not apply because the sole purpose which motivated the matron in asking the nurses to provide those statements was not in regard to possible litigation.

19. The *Gallagher* case is therefore not directly applicable to the current case since the Hospital is not claiming that the statements made to the Enquiry are subject to legal professional privilege. If they were making such a claim, it seems clear that, on the authority of the *Gallagher* case, such a claim would fail.

20. Rather, the Hospital is claiming that the statements should not be disclosed as they were made on a confidential basis to a risk management enquiry, whose purpose is to improve patient care. In this regard, it is to be observed that in *O'Callaghan v. Mahon* [2006] 2 I.R 32 at para. 89, the Supreme Court, (*per* Hardiman J.) in deciding whether to disclose 'confidential' statements, adopted a balancing exercise in adjudicating on a claim of confidentiality:

> "[O]ne must first look closely at the precise scope and nature of the claim to confidentiality advanced, and determine whether the disputed material is indeed confidential. One must then consider whether such degree of confidentiality as may be found to exist is or is not **outweighed by the public interest**, based fundamentally on constitutional considerations, in according fair procedures to the applicant in the circumstances in which they are claimed." (Emphasis added)

21. In this case, there does not appear to be any dispute regarding the fact that members of staff were told that their statements to the enquiry would be treated as confidential. Thus, in line with the *O'Callaghan* case, the next step is to consider whether it is in the public interest to require the statements to be disclosed, notwithstanding their confidentiality.

Is it in the public interest to disclose statements to a hospital risk management enquiry?

22. There are two aspects to public interest, one is that there is a public interest in the administration of justice and, in this regard, it clearly is in the public interest that the facts relevant to a party seeking justice should be disclosed. However, it seems clear to this Court

that there is also a public interest in ensuring confidentiality to hospital staff so that no obstacle is put in the way of staff in a hospital participating in an enquiry after an incident in the hospital and in seeking to ensure that they are as candid as possible to that enquiry, where the purpose of the enquiry is to improve patient outcomes.

23. In support of its claim that the statements made to the Enquiry should not be disclosed, the Hospital relies on the High Court decision of *O'Neill v. An Taoiseach* [2009] IEHC 119. That case dealt with an application to discover statements made to a Commission of Inquiry into the Dublin and Monaghan bombings in 1974, which was conducted pursuant to the Commission of Investigations Act, 2004. The State objected to the disclosure on the grounds of public interest privilege, namely that the information was provided to the Commission of Inquiry on the basis of absolute confidentiality. Murphy J. refused the discovery and held at para. 7.3 that:

> "I can not accede to the plaintiffs' submission that the defendants should be required, at the very least, to list on affidavit the documents in the archive and to specifically identify any claim of privilege being made in respect of each. To do so would, it appears to me, constitutes **a dilution of the confidentiality promised by the Commission to those who provided the information, a confidentiality which was essential to the discharge of the functions of the private statutory inquiry**." (Emphasis added)

It seems clear that in relying on this case, the Hospital is claiming that confidentiality is essential to the discharge of the functions of a risk management enquiry after an incident in a hospital and that any disclosure of statements to the Enquiry would be a dilution of that confidentiality.

24. The Hospital also relies on the case of *Leech v. Independent Newspapers (Ireland) Ltd.* [2009] 3 I.R 766 which involved a controversy regarding articles published by Independent Newspapers about the award of public contracts to Ms. Leech. There was a public inquiry

ordered by Dáil Éireann and confidentiality was assured to the participants. Independent Newspapers sought discovery of documents generated by the inquiry in order to defend itself from the defamation action brought against it by Ms. Leech.

25. O'Neill J. refused the discovery and at para. 13 *et seq* he stated that:

> "It is clear that the obligation of confidentiality to the individuals who participated in the inquiry cannot, of itself, outweigh the public interest in full disclosure being made. However, as stated by Lord Hailsham of St. Marlebone in *D v. NSPCC* [1987] A.C 171 at p. 230, quoted by Geoghegan J. in *Goodman International v. Hamilton* (No. 3) [1993] 3 I.R 320 at p. 327, "**There are however cases when confidentiality is itself a public interest…"** In this case it is argued that **confidentiality underpinned the other public interest in the effectiveness and viability of *ad hoc* tribunals**. For reasons of practicality such tribunals are a useful if not essential tool in public administration in circumstances where it is necessary to conduct a public inquiry into a matter of public concern, but where for reasons of time constraint or otherwise in the interests of justice or proper expedition, it may not be appropriate to establish a public inquiry under the Public Inquiry Acts. **In order for *ad hoc* tribunals to work, I am satisfied that invariably confidentiality will be essential**. If it were the case that material given to such a public inquiry was capable of being disclosed later, it would, in my opinion, deter persons with relevant evidence from co-operating with the inquiry and as the inquiry **would not have legal powers to compel attendance of witnesses** or the production to it of documents, clearly the **inquiry would fail as an effective method to establish the truth**. This would result in a **serious damage to the public interest in the use of this model of inquiry as an important if not essential tool of public administration**.

Against this is the argument of the defendant that where a plaintiff has taken an action for defamation, that it would be unfair for the plaintiff to enjoy the protection of the public interest in respect of the documentation generated by the *ad hoc* tribunal. This argument, however, ignores the fact that the public interest in the maintenance, effectiveness and viability of the particular form of public inquiry is precisely that, a public interest which could not be defeated merely because a person such as the plaintiff derived a collateral benefit from it. In any event, in my view the plaintiff is not to be seen as in a different capacity from other potential participants in the inquiry. For the inquiry to achieve its objective, the co-operation of the plaintiff was as necessary as the co-operation of others such as the relevant civil servants. In addition, like the civil servants, the plaintiff had an obvious interest in non-disclosure in advance of her proceedings against the defendant, although her interest in this regard was of a different kind to the interest of the civil servants.

I am satisfied that the **viability of this form of public inquiry would almost certainly be defeated if there was a risk of disclosure, where confidentiality had been sought from and granted by the person conducting the inquiry**. In contrast, the public interest in the administration of justice would not be defeated by the denial of the contested documents, in circumstances where the defendant and indeed the plaintiff have available to them considerable resources of evidence, including *inter alia*, the completed Quigley Report." (Emphasis added)

26. As in the *Leech* case, the Enquiry in the present case was an *ad hoc* enquiry with no power to compel the attendance of witnesses or the production of documents and so it is much closer to the facts of *Leech*, than those in *Miggin*. In this regard, as the staff were assured that their statements to the Enquiry would be treated as confidential, it seems to this Court that it is reasonable to assume that in agreeing to participate in a risk management enquiry, they would

have expected that their statements would not be disclosed to a party seeking to sue the hospital and that they would not open to the risk of being called as a witness to any such litigation as a result of their statements to the Enquiry.

27. Like O'Neill J., in relation to the inquiry in the *Leech* case, it is this Court's view that a risk management enquiry would fail as an effective method of improving patient safety, which is not in the interest of the public at large, if it were to transpire that hospital staff, who were assured of confidentiality, were to discover that their statements were not in fact confidential and that they would be disclosed to parties in litigation and indeed that they might, as a result, end up being called as witnesses to that litigation. If this were to be the legal position, it seems clear to this Court that staff in hospitals might be reluctant to participate in risk management enquiries designed to improve future patient outcomes and might be very circumspect in what they say to them, which is not, in this Court's view, in the public interest.

28. It seems to this Court that it is in the interests of the common good that there should be no obstacle or disincentive to hospital staff agreeing to *participate* in an enquiry, whose primary, if not sole, aim is to improve the outcomes for patients in the future.

29. Equally, in relation to *any statements* they make, there should be no disincentive to staff being as frank as possible to that enquiry (just as they would be to their own lawyer). Accordingly, it is this Court's view that regardless of how self-critical or critical of colleagues their views might be, regarding the incident, it is in the public interest of improving patient care that they be encouraged to make those statements safe in the knowledge that any such statements will not be disclosed for the purposes of future litigation.

CONCLUSION

30. All of this means that just as the Parents are not entitled to get a statement about the incident made by staff to the Hospital's lawyers, which might be beneficial to their case (because it is in the public interest that clients can be completely open with their lawyers), so

too the Parents cannot get a statement made to a risk management enquiry about the incident which might be beneficial to their case (because it is in the public interest that hospital staff can be completely open to a risk management enquiry so as to improve patient care in the future).

31. There is clearly a tension between the public interest of improving patient care in the future on the one hand and the public interest in the administration of justice and the personal interests of the Parents pursuing a damages' claim on the other hand. It is this Court's view that the balance is struck in favour of taking every step possible to ensure that there is no obstacle or disincentive to there being full and frank disclosure to a risk management enquiry in a hospital (erring, if necessary, on the side of overly-critical observations) for the greater good of improvements in patient care for the benefit of the public at large who attend hospitals. To grant the disclosure of the statements of staff to a risk management enquiry in a hospital would be a dilution of the confidentiality, which, in this Court's view, is essential to the proper discharge of a risk management enquiry into an incident, such as occurred in this case. Accordingly, this discovery of the statements made to the Enquiry is refused.