Neutral Citation Number: [2010] IEHC 193

THE HIGH COURT

2009 209 SP

IN THE MATTER OF SECTION 40 OF THE NURSES ACT 1985

AND IN THE MATTER OF IRENE BRENNAN, A REGISTERED MIDWIFE

BETWEEN

IRENE BRENNAN

APPLICANT

AND

AN BORD ALTRANAIS

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 20th day of May 2010

The applicant in these proceedings is a midwife registered under No. 90018 of the register of nurses and midwifes maintained by the respondent. She trained as a nurse and subsequently as the midwife in the United Kingdom, qualifying as a nurse in 1992 and as a midwife in 1995. She attained the equivalent status of a clinical nurse manager in the United Kingdom and in 2001 she took up a position of staff midwife in Wexford General Hospital.

These proceedings arise out of the tragic circumstances that accompanied the birth of the third child of Ms. S.W. who presented at Wexford General Hospital on 5th February 2004, for delivery of her baby. A son, L., was born to Ms. W. but, unfortunately, died a week after his birth. An independent inquiry into the circumstances of the labour and delivery of L. was carried out by Dr. John Gallagher and Ms. Pauline Treanor. That inquiry was instigated by the HSE. It concluded that certain aspects of the care afforded to Ms. W. and L. were inadequate and sub-optimal. It was not an inquiry into the conduct of the applicant herein, although counsel on behalf of the applicant noted that there was no criticism of the applicant's care in that inquiry, save for the conclusion that "it would have been prudent to seek advice from medical personnel earlier, especially after 13.00 hours and before 14.50 hours". Subsequently, a Notice of Inquiry was sent to the applicant in March 2008, advising her that it was intended to hold an inquiry in to her fitness to practice pursuant to s. 38 of the Nurses Act, 1985 relating to the applicant's care of Ms. W. during her labour and delivery. Ultimately, the Fitness to Practice Committee (F.P.C.) of the respondent, (the Board) found that some twenty-six out of thirty allegations of misconduct were proved and made recommendations accordingly.

The report of the F.P.C. was considered by the respondent. It was sent back to the F.P.C. in order to obtain more details as to the reasons for the findings of professional misconduct by the F.P.C. A further report was furnished by the F.P.C. and the recommendations of the F.P.C. were confirmed by the respondent. The decision of the respondent made on 11th February 2009, confirming the report of the F.P.C., attached a condition and advised the applicant in regard to her professional conduct, and is now the subject of these proceedings in which the applicant seeks to challenge the decision on a number of legal grounds.

I want to set out some details as to the background in relation to the procedures in respect of the inquiry. The notice of inquiry was dated 3rd March, 2008 and contained a number of allegations against the applicant herein. The F.P.C. heard evidence over 6 days, the 19th, 20th and 21st May 2008 and 10th, 11th and 16th July 2008. The F.P.C. finalised its report on 7th August, 2008 and in its report it found the applicant guilty of professional misconduct in respect of some twenty-six out of thirty allegations. It recommended that the applicant be admonished with a condition that she attend approved courses and provide documentation in regard to that within twelve months of confirmation of sanction by the High Court and proof of same to the Board. A meeting of the Board took place on 19th November, 2008 to consider the F.P.C. report. Following submissions from the applicant the report was sent back to the F.P.C. to enable the F.P.C. to provide reasons for its recommendations and findings. A further report dated the 8th January 2009 was then submitted by the F.P.C. to the Board. There were some changes in setting out more detail of the reasons for the various findings and the report contained an additional statement in the following terms:-

> "The committee in deliberating took cognizance of the expert witnesses and unanimously agreed that midwife Brennan failed in her duty of care to Ms. W. as she failed to direct the care in labour and that she gave undue precedence to Ms. W.'s birth plan. Midwife Brennan in adhering to the birth plan failed to address the care that should have been afforded to a woman with associated risks factors and consulted with the multi-disciplinary team. In doing so, her standard of care fell below the standard expected of a midwife. The committee noted that midwife Brennan through her evidence recognised her deviation from normal practice, however, the committee felt as an autonomous practitioner, a midwife had a duty of care to evaluate, assess and plan care specific to the woman's requirements with the appropriate multi-disciplinary team. Failing to do this midwife Brennan's professional conduct fell short of the required standard expected of a midwife.
>
> The committee recommends that midwife Brennan be admonished in relation to her professional conduct and that she attend approved courses on CTG and documentation with twelve months of confirmation of sanction by the High Court and provide proof of same to the Board."

A further meeting of the Board took place on 11th February, 2009. At that meeting submissions were heard from counsel for the applicant, counsel for the Chief Executive Officer of the Board and counsel for the Board. By letter dated 12th February 2009 the applicant was informed of the respondent's decision namely:-

> "The Board at its meeting on 11th February 2009 considered and confirmed the report of Fitness to Practice Committee of Inquiry.

> The Board has decided that pursuant to s. 41(1) and s. 41(2) of the Nurses Act, 1985 you be advised in relation to your professional conduct and that pursuant to s. 40(1) of the Nurses Act, 1985 the following condition be attached to the retention of your name in the register of nurses:-
>
> > "That you attend approved courses on CTG and documentation within twelve months of confirmation of the sanction by the High Court and provides proof of same to the Board"."

Grounds of challenge to the Board's decision

A number of grounds of challenge to the Board's decision were that out in the special summons herein. I think it is necessary to set out those grounds in detail. They are as follows:-

> 1. The Fitness to Practice Committee failed to provide sufficient reasons for its findings against the applicant in its report to the applicant dated 8th January, 2009.
>
> 2. The Fitness to Practice Committee found the applicant guilty of professional misconduct beyond a reasonable doubt in circumstances where there was an obvious conflict of evidence between the experts and other witnesses called on behalf of the applicant and on behalf of the respondent and where such conflict should have given rise to a reasonable doubt in the mind of the members of the committee.
>
> 3. The Fitness to Practice Committee found the applicant guilty of professional misconduct when the standard against which she was judged – that of a serious falling short of the standard of care expected of a midwife – has never been formulated by the respondent or communicated to the profession.
>
> 4. The respondent had never notified the said standard – that of a "serious falling short of the standard of care expected of a midwife" - to the profession of midwife generally and to the applicant in particular either through its code of professional conduct for nurses and midwives or through its guidelines for midwives or through any other guidance issued by the respondent whether pursuant to s. 51(2) or otherwise. In the premises the application of the said standard to the allegations made against the applicant constituted a breach of fair procedures and a denial to her of natural and constitutional rights.
>
> 5. In so far as the standard applied was the appropriate standard to apply to the allegations against the applicant (and this is denied by the applicant), the findings of the Fitness to Practice Committee against the applicant which record that she "fell short of the required standard" and that "her standard of care fell below the standard expected of a midwife" did not justify the respondent concluding that she was guilty of professional misconduct by reference to this standard.
>
> 6. The respondent wrongfully allowed legal advisors to the respondent's Chief Executive Officer to address the respondent on the merits of the applicant's case and to make arguments thereon at its consideration of the first report of the Fitness to Practice Committee on 19th November, 2008 and at its consideration of the amended report of the Fitness to Practice Committee on 11th February, 2009, thus exceeding the powers vested in the Chief Executive Officer by virtue of s. 38 of the Nurses Act, 1985.
>
> 7. The Respondent through its chief executive officer and its legal advisors acted inappropriately in meeting with an expert witness giving evidence before the Fitness to Practice Committee and through the furnishing of legal advice or otherwise causing that witness to materially alter the conclusions expressed in her reports from ones which would not support findings of professional misconduct in accordance with the standard applied by the Respondent to ones which *prima facie* did support such findings. This constituted a breach of fair procedures towards the Applicant.

The issue raised at 2 above was not pursued before the court for reasons which will become apparent later in the course of this judgment. The applicant seeks to cancel the decision of the Board herein.

It is relevant to note that in addition to the inquiry in respect of the applicant, there was a similar inquiry into a colleague of hers arising out of the same facts and circumstances and the hearing before the F.P.C. dealt with that inquiry at the same time. There was some overlap in the evidence in respect of the applicant and her colleague.

The special summons herein is grounded upon an affidavit of the applicant sworn herein on 2nd March 2009. In that affidavit she set out her background. She referred to the Code of Professional Conduct for Nurses and Midwifes and the guidelines for Midwifes published by the Board. She set out the background to these tragic events and she went on to refer to the independent inquiry carried out by Dr. John Gallagher and Ms. Pauline Treanor. The medical records relating to the labour and birth of Ms. W's son were reviewed in the course of that inquiry, including the cardiotocograph records (CTG). She referred to the conclusions contained in that inquiry to which reference has been made already, namely that "it would have been prudent to seek advice from medical personnel earlier especially after 13.00 hours and before 14.50 hours".

She then outlined the course of events which followed the service of the notice of inquiry issued by the Board herein. She noted that the F.P.C. in the report dated 8th January, 2009 in respect of the applicant's colleague, Ms. Redmond, included an additional statement about Ms. Redmond in the following terms:-

> "The committee in deliberating took cognizance of the expert witnesses and unanimously agreed that midwife Redmond breached her duty of care to Ms. W. as she did not critically evaluate her labour or the condition of the foetus whilst in her care and was waiting for midwife Brennan to return from break. It is the opinion of the committee that as a professional, midwife Redmond did not exercise her judgment as an autonomous practitioner and in doing so her standard of care fell seriously below the standard expected of a midwife. It was noted that midwife Redmond by her own admission stated that she deviated from her normal practice and recognised her duty of care was below standard."

The applicant noted that the findings of the F.P.C. concerning Ms. Redmond are expressed in materially different terms and she expressed the view based on her legal advice that, having regard to the test applied by the F. P. C. and the Board in making findings of professional misconduct against the two nurses, this difference was of significance.

A replying affidavit on behalf of the respondent was sworn by John Murray, the Vice President of the Board who is a community

mental health nurse. In relation to the standard against which the applicant was judged, namely the "serious of falling short of the care expected of the midwife" standard he noted that the expert called on behalf of the applicant before the F.P.C., Ms. Rogan, accepted that she understood that professional misconduct in Ireland was "conduct or care that seriously falls short of reasonable care or conduct" and he further noted that the applicant's counsel made a submission to the effect that the appropriate standard was that set down in the High Court decision of *Perez v. An Bord Altranais* in which it was ruled that to be found guilty of professional misconduct, a nurse must be found guilty beyond reasonable doubt of a serious falling short of the standard of conduct expected among nurses.

Mr. Murray went on to deal with the circumstances in which the report of the F.P.C. dated 7th August, 2008 was sent back to the F.P.C. for the purpose of obtaining further elucidation of reasons for the committee's findings. He then outlined the fact that at the hearing on the 11th February, 2009 as to the appropriate standard applicable in relation to a finding of professional misconduct. He then outlined the fact that senior counsel engaged to advise the Board at the conclusion of the submissions on the issue of the applicable standard advised that the expected standards test did apply and Mr. Murray confirmed that those submissions were accepted by the Board. He exhibited an opinion from counsel for the applicant which was relied upon in support of the arguments as to the appropriate and applicable standard which had been prepared in relation to another hearing before the Board and which had been submitted to the Board during the course of the submissions in this case. He also exhibited an opinion on the same subject which had been provided by the Board's legal advisor.

An issue arose between the parties as to the manner in which these proceedings should be heard. The respondent wished to have the matter dealt with by way of oral re-hearing and the applicant was anxious to have the matter dealt with on the basis of affidavits. Ultimately, a hearing took place before the High Court (Hedigan J.) and an order was made on 28th May, 2009 stating that the appeal did not require a full oral hearing and should proceed on the basis of affidavits filed. The respondent was given liberty to file further affidavits.

A number of affidavits were then sworn on behalf of the respondent by members of the F.P.C. The affidavits are in similar terms and for that reason I propose to refer to the issues raised in one of the affidavits only, that of Cathryn Lee. In her affidavit she referred to the submissions made at the conclusion of the inquiry and she referred to the transcript of the inquiry which demonstrated that there was agreement that the appropriate standard to be applied when determining whether proven facts amounted to misconduct was that of a serious falling short in expected standards. She stated that following lengthy deliberation the F. P. C. found the applicant guilty of professional misconduct on the basis that the proven facts did amount to a serious falling short in the standards that could reasonably be expected from the applicant. She acknowledged that in the second report of the F.P.C. there was no reference to the applicant's deficits amounting to "a serious falling short" and that this contrasted with the report in respect of the applicant's colleague, Ms. Redmond. She stated that:-

> "The FTP Committee was entirely satisfied that the proven deficits in respect of the applicant did amount to a serious falling short of the standard that could have been expected of her. The reason for the difference in wording between the reports is that it was the FTP's Committee's view that the shortfalls attributable to Ms. Redmond were even more significant than those attributable to the applicant, although both clearly constituted misconduct by falling seriously short of standard of conduct expected of midwives."

There was a replying affidavit sworn by the solicitor for the applicant herein referring to those affidavits of the respondent in which she stated that she was shocked at the nature of those replying affidavits and she went on:-

> "In over twenty years of practice I have never come across a situation where members of a statutory committee, such as the Fitness to Practice Committee have sworn affidavits to say that the report arising out of the discharge of those statutory functions (in this case pursuant to Part V of the Nurses Act, 1985) means in effect something other than what is said on the face of the said report. It is at best highly undesirable that a statutory body should purport to discharge its functions in such a manner. In addition it is extremely unfair and prejudicial to a person in the position of the applicant that the members of the Fitness to Practice Committee should purport to alter the meaning of their report, which is the key document upon which the respondent based its decision, after legal proceedings have been instituted challenging that decision."

She pointed out that after the matter had been referred back to the Fitness to Practice Committee they still did not conclude in the report in respect of the applicant that there was a serious falling short of the standard of conduct expected of the applicant.

Having referred to the affidavits sworn herein, it is now necessary to look in some detail at the tragic circumstances at the heart of this case. Ms. W. was a twenty-seven year old woman who was due to give birth to her third child in February 2004. She attended Wexford General Hospital during the course of her pregnancy. Prior to attending the hospital in February 2004 she had furnished a "birth plan" to the hospital by letter dated January 2004. In that letter which was addressed "to whom it concerns" she stated that the birth plan in her notes prior to her daughter's birth in December 2000 applied to this birth as well. She dealt with one additional matter in that letter relating to the issue of a post delivery examination of the uterus. Nothing turns on that specific point. It would be useful however to refer to parts of the birth plan that are relevant. It stated as follows:-

> "I would like the following notes to be taken into account on the birth of my baby. I am happy to go along whatever is necessary for the safe delivery of a healthy baby and a healthy mother but where possible I would like my wishes to be taken into consideration.
>
> On admission:
>
> - I do not wish to be electronically monitored.
> - I do not wish to have my waters broken unnecessarily. (The word unnecessarily was crossed out).
>
> First stage:
>
> - I would like to remain upright and mobile in the first stage of labour.
>
> Second stage:

…

…

• I would like to empty my own bladder as necessary.

• I wish to avoid an episiotomy if at all possible.

• I wish to avoid forceps and ventouse if at all possible…"

Prior to the birth of baby L. Ms. W. had experienced difficulties with her previous deliveries; a forceps delivery in 1997, because of a failure to progress and caesarean section delivery in 2000 by reason of foetal distress.

Mrs. W. was admitted to the hospital at 04.05. The applicant came on duty at 08.30. Mrs. W., as is clear from the birth plan did not want artificial rupture of the membranes to take place and it is clear that she wished to have a natural delivery with the minimum of intervention. Issues arose in the course of the early afternoon over loss of contact registered by the foetal heart monitor. Ultimately medical assistance was called at approximately 14.50. Finally the baby was delivered by Dr. Solomon who had arrived at 15.09. It was clear at that stage that the baby was in distress and required extensive resuscitation. The baby was transferred to Waterford Regional Hospital but tragically died seven days later.

Subsequently, a letter of complaint was sent by Mrs. W. as a result of which a review was instigated by the HSE and carried out by Dr. Gallagher and Ms. Treanor as mentioned previously. Ultimately the respondent issued the notice of inquiry, the subject of these proceedings. The allegations against the applicant as set out in the notice of inquiry did not allege that the tragic death of baby L. was in any way caused or contributed to by the actions of the applicant or her colleagues. The allegations can be summarised as follows: an inadequate monitoring of Mrs. W. during the course of her labour; a failure to appreciate and address the slow progress of labour; a failure to carry out vaginal examinations to ascertain the extent of her dilatation; failure to have regard to Mrs. W's risk factors in the light of her previous medical history; failure to contact a medical practitioner, failure to catheterise Mrs. W. at the appropriate time; failure to perform an artificial rupture of membranes at the appropriate time; failure to ensure adequate monitoring of the foetal heart and failure to react appropriately to abnormal CTG traces. As mentioned previously the F.P.C. found the facts proven in respect of twenty six of the thirty allegations contained in the notice of inquiry and further found that those facts amounted to professional misconduct.

It would be helpful at this point to set out the provisions of s. 40(3) of the Nurses Act 1985, which provides:-

> "A person to whom a decision under this section relates may, within the period of 21 days beginning on the date of the decision, apply to the High Court for cancellation of the decision and if he so applies -
>
> (a) the High Court, on the hearing of the application, may -
>
> (i) cancel the decision, or
>
> (ii) declare that it was proper for the Board to make a decision under this section in relation to such person and either (as the Court may consider proper) direct the Board to attach such conditions as the Court thinks fit to the retention of the name of such person in the register, or
>
> (iii) give such other directions to the Board as the Court thinks proper,
>
> (b) if at any time the Board satisfies the High Court that such person has delayed unduly in proceeding with the application, the High Court shall, unless it sees good reason to the contrary, declare that it was proper for the Board to make a decision under this section in relation to such person and (as the Court may consider proper) direct the Board to attach such conditions as the Court may specify to the retention of the name of such person in the register
>
> (c) the High Court may direct how the costs of the application are to be borne.

I mentioned previously that there was a preliminary issue heard before Hedigan J. on the issue as to whether or not this appeal required a full oral hearing. The court directed that the appeal did not require a full oral hearing and that it should proceed on the basis of the affidavits filed to date. The respondent was given liberty to file further affidavits in respect of the appeal. As can be seen from the affidavit of Ruth O'Connor sworn herein on behalf of the applicant in respect of the preliminary issue, the purpose of proceeding in that way was to enable the applicant to raise legal issues in relation to the process that took place before the Board without disputing the evidential basis of the respondent's decision. As was stated by Ruth O'Connor in her affidavit, the proceedings were "deliberately framed so as to raise only legal issue as to the standard applied by the respondent and whether, if the standard were to be upheld, the recommendation actually made by the Fitness to Practice Committee supported a finding of professional misconduct on that basis. Essentially the applicant forewent the possibility of disputing the evidential basis for the respondent's decision in order of confine the application to purely legal issues that could be fairly disposed of on affidavit."

In the course of submissions as to the consequences of the preliminary ruling, it was submitted on behalf of the respondents that the jurisdiction of the court when conducting an appeal hearing is a *de novo* hearing in respect of which the respondent carries the onus of proof of demonstrating to the satisfaction of the court that the applicant is guilty of professional misconduct and that in effect the alleged errors of law can be cured by the *de novo* hearing to be conducted by this Court. In that context, reference was made to a number of authorities namely in *Re. M., A Doctor* [1984] I.R. 479, *C.K. v. An Bord Altranais* [1990] 2 I.R. 396 and *O'Connor v. The Medical Council* [2007] I.E.H.C. 304. In *C.K.,* Finlay C.J. viewed the approach he had taken in the case of in *Re. M*. and he held that the approach taken in that case was correct. He stated as follows:-

> "In order for the court to be the effective decision-making tribunal leading to a conclusion that the name of a person should be erased from the register or the operation of registration should be suspended, it is, in my view, essential that having regard to the particular facts and issues arising in any case, it is the court who should make the vital decisions.

> In a case such as this undoubtedly is, where the whole question as to whether the applicant is a fit person to remain as a registered nurse depends upon the truth or falsity of evidence as to her conduct and not on any question of standards or rules or principles of professional conduct, it seems to me essential that the High Court must reach its own conclusion as to the truth or falsity of those allegations. In order for it to do so, it must, it seems to me, hear the witnesses, for not on any other basis could it safely reach any such conclusion. Were the matter now to be tried on affidavit, as is contended on behalf of the respondent, and the High Court to be bound by the findings of fact made by the Fitness to Practice Committee, then the effective decision with regard to the erasure of the applicant's name from the register would necessarily have been made by that Committee. The High Court would, in the particular facts of this case, if it confined itself to affidavit evidence, be merely endorsing the procedures of that Committee and, of necessity, accepting its findings of the facts.
>
> I appreciate that there are a great number of cases and, indeed, with regard to the disciplinary proceedings in professional bodies possibly the great majority of cases, in which the issues are not direct issues of fact but rather are questions of propriety, professional conduct, professional standards and the consequences of undisputed facts. In all those cases no necessity may arise in any proceedings under s. 39 of the Act of 1985, for any oral evidence but in the High Court, but in the case of the description which I am satisfied this case is, such a necessity, in my view, arises. I reject the submission that this conclusion has the consequence of making futile or useless the hearing before the Committee. Such a hearing may well in many cases lead to a dismiss of all charges or to a finding acceptably dealt with by advice, admonition or censure. In addition a guarantee of consideration of a charge of professional misconduct by professional colleagues in the first instance is an important contribution to the independence of professions."

Essentially the respondent has said that the grounds of appeal stated to be errors of law are predicated on a misunderstanding of the jurisdiction of the court. These proceedings are not judicial review proceedings seeking to invalidate the respondent's decision. On the contrary the proceedings are in the form of a *de novo* hearing and as such, insofar as it may be found that the respondent's decision contained errors of law, those errors can be cured by the hearing before this Court. Counsel on behalf of the applicant took issue with the characterisation of these proceedings as a *de novo* hearing. She accepted that there may cases in which a full hearing may be required depending on the issues. However, there is nothing to suggest that the form of hearing before this Court is that of a *de novo* hearing. She pointed out that the application is an application to cancel the decision and not an appeal from the decision.

I think it is clear from the decision in *C.K.* that where the issues to be determined on an application to the court involve the truth or falsity of evidence as to conduct then it is clear that oral evidence must be heard by the court. Equally it is clear that there are cases in which the issues involved are not issues of fact but involve questions of propriety, professional conduct standards and the consequences of undisputed facts. The issues in this case are such, as was found by Hedigan J., that can be determined on the basis of the affidavit evidence. Obviously there is an issue as to the extent to which, if there is a finding as to an error of law on the part of the respondent, such error can be corrected on the hearing before this Court. Finlay C. J. clearly contemplated that there could be hearings which required oral evidence and hearings which did not. However, in the light of the passage cited above from his judgement, I have some difficulty with the description of these proceedings as a *de novo* hearing. I will return to this issue later insofar as it may be necessary.

The Applicable Standard

A fundamental issue raised in these proceedings is the question of the test or standard to be applied in assessing whether or not the applicant has been guilty of professional misconduct. Assuming the appropriate test to be that of a "serious falling short of the standard of care expected of a midwife", there is also an issue raised as to the alleged lack of notification of that standard to nurses and midwives. As was pointed out in the written submissions on behalf of the applicant, the starting point for an analysis of whether professional misconduct under the 1985 Act includes an "expected standards" test is the judgment of Keane J. in *O'Laoire v. The Medical Council*, (Unreported, High Court, Keane J., 27th January, 1995), where the case law in relation to the meaning of professional misconduct was considered. Over the years, the professions including the medical, dental, veterinary professions, together with the nursing profession have become subject to legislative controls and as those controls have extended to the various professions, consideration of the meaning of the term "professional misconduct" has occurred. Originally, the concept of professional misconduct was viewed as meaning misconduct which involved an element of moral turpitude – conduct, which was disgraceful or infamous. Now, it is accepted that professional misconduct may include issues as to professional competence. The standard of professional misconduct contended for by the respondent in this case is what is known as the "expected standards test" first formulated in the U.K. case of *Doughty v. General Dental Council* [1987] 3 All E.R. 843. That test was acknowledged as appropriate by Keane J. in the case of *O'Laoire* referred to above. Keane J. in that case reviewed a number of authorities from the United Kingdom and from this jurisdiction and having done so, he identified the applicable principles at p. 106 of his judgment as follows:-

> "From these authorities I think that the following principles applicable can be deduced:-
>
> > 1. Conduct which is 'infamous' or 'disgraceful' in a professional respect is 'professional misconduct' within the meaning of s. 46(1) of the Act.
> >
> > 2. Conduct which would not be 'infamous' or 'disgraceful' in any other person, if done by a medical practitioner in relation to his profession, that is, with regard either to his patients or to his colleagues, may be considered as 'infamous' or 'disgraceful' conduct in a professional respect.
> >
> > 3. 'Infamous' or 'disgraceful' conduct is conduct involving some degree of moral turpitude, fraud or dishonesty.
> >
> > 4. The fact that a person wrongly but honestly forms a particular opinion cannot of itself amount to infamous of disgraceful conduct in a professional sense.
> >
> > 5. Conduct which could not properly be characterised as 'infamous' or 'disgraceful' and which does not involve any degree of moral turpitude, fraud or dishonesty may still constitute 'professional misconduct' if it is conduct connected with his profession, in which the medical practitioner concerned has seriously fallen short, by omission or commission of the standards of conduct expected among medical practitioners."

It is the fifth of those principles identified by Keane J. that is at issue in these proceedings. It is interesting to note that when this matter was before the F.P.C. the applicant and her legal team approached the matter on the basis that the expected standards test was applicable to the allegation of professional misconduct in this case. Subsequently at the hearing before the respondent on the 11th February, 2009, the applicant resiled from this position to argue that, having regard to the decision of the High Court (Kelly J.) in

the case of *Prendiville v. Medical Council* [2008] 3 I.R. 122, it was necessary to have regard to the guidelines of the professional body concerned and that the term "professional misconduct" does not necessarily embody the expected standards test.

In essence, the argument of the applicant is that as the relevant guidelines for nurses and midwives do not expressly provide that an expected standards test is included in the definition of professional misconduct, that test does not automatically apply. The Code of Professional Conduct published by the respondent in April 2000, does not define the standard of professional misconduct. The only reference that is made to professional misconduct is in the following terms:-

> "Any form of sexual advance to a patient with whom there exists a professional relationship will be regarded as professional misconduct."

It can be seen from the principles identified by Keane J. that there are two forms of test applicable to professional misconduct, one being what has been described as the moral turpitude test, namely conduct which is infamous or disgraceful and the expected standards test which is that contained in the fifth principle identified by Keane J.

Having identified those five principles Keane J. went on to say at p. 108:-

> "In considering how these principles should be applied to the facts of the present case, the standards applicable in the medical profession in this country, as laid down in official publications and discussed by various witnesses are clearly of importance and are considered in more detail in a later section of this judgment. It should, however, be pointed out at this stage that s. 69(2) of the Act provides that:
>
> > 'It shall be a function of the Council to give guidance to the medical profession generally on all matters relating to ethical conduct and behaviour.'
>
> The Guide to Ethical Conduct and Behaviour and to Fitness to Practice (3rd Ed. 1989) issued by the Council defines professional misconduct as:
>
> > 'Conduct which doctors of experience, competence, and of good repute, consider disgraceful or dishonourable.'
>
> The principle at 5 above should be seen as modified in the light of that statement."

Unlike the guidelines published for the medical profession, the guidelines of the Respondent do not contain a definition of professional misconduct and as pointed out above the only reference to what can be professional misconduct relates to sexual advances. It is clearly the case that the reference to sexual advances is not the only form of behaviour that can amount to professional misconduct. The guidelines simply make clear that one of the matters that can amount to professional misconduct is any form of sexual advance to a patient with whom there exists a professional relationship. Accordingly, given that the guidelines published by the respondent herein do not contain any definition of professional misconduct, can it be said that the guidelines encompass or exclude either the moral turpitude test or the expected standards test?

The essence of the argument made on behalf of the applicant is that, as Keane J. identified in the principles referred to above, the definition of professional misconduct may encompass within it conduct which falls seriously short of the expected standards of conduct for the relevant profession. It was submitted that in order to come within the definition of professional misconduct regard has to be had to the guidelines issued by the relevant professional body. Where the guidelines do not define professional misconduct as including an expected standards test then such an expected standards test does not automatically apply and the fifth principle identified by Keane J. must be treated as modified. Counsel on behalf of the applicant in making this submission relied heavily on the analysis of the judgment of Keane J. by Kelly J. in *Prendiville*, the decision referred to above.

It is now necessary to look at the decision in the *Prendiville* case in some detail. In that case, the first and second applicants were found guilty of professional misconduct by the F.P.C. It was ultimately decided that no sanction would be imposed on them but that the decision would be published. A number of issues were raised as to the role of the Medical Council, its jurisdiction following a finding by the F.P.C., issues as to fair procedures and natural justice but the issue of interest in the context of this case was the finding by the court that the F.P.C. was not entitled to apply the expected standards test to the applicants in that case and the consideration by Kelly J. of the decision in *O'Laoire v. Medical Council*. Kelly J. referred to the fact that there are two standards of professional misconduct, namely, the moral turpitude standard of conduct and the expected standards of conduct. The F.P.C. in that case had used the expected standards test as opposed to the moral turpitude test. It had been submitted in that case on behalf of the applicants that the appropriate test to be applied was the moral turpitude test. Kelly J. at p. 162 of the judgment stated:-

> "In section A of the guide, which deals with conduct and behaviour, professional misconduct is described at para. 1.5. The definition is as follows:
>
> > 'Professional misconduct is conduct which doctors of experience, competence and good repute, upholding the fundamental aims of the profession, consider disgraceful or dishonourable'.
>
> It is a perfect articulation of the 'moral turpitude' standard.
>
> It is also common case that it was this fifth edition of the guide, which was in force during the time of the allegations of wrongdoing made against the applicants.
>
> The sixth edition of the guide was published in 2004. In this edition, the definition of professional misconduct is different. It reads (again at para. 1.5) that professional misconduct is:
>
> > '(a) conduct which doctors of experience, competence and good repute consider disgraceful or dishonourable; and/or (b) conduct connected with his or her profession in which the doctor concerned has seriously fallen short by omission or commission of the standards of conduct expected among doctors'.
>
> Paragraph (b) is a perfect articulation of the 'expected standards' test.

It is clear that the Fitness to Practice Committee in making its findings, did so by reference to the decision of Keane J. in *O'Laoire v. The Medical Council* (Unreported, High Court, 27th January, 1995).

As the Fitness to Practice Committee relied upon this judgment to make its findings against the applicants, it is necessary to look at it in some detail."

Kelly J. then proceeded to carry out an analysis of the judgment of Keane J. in *O'Laoire*. In the course of his analysis, Kelly J. set out the five principles identified by Keane J. and at p. 164 he stated as follows:-

"It seems clear from the above quotation that whilst Keane J. identified five principles which he deduced by reference to Irish and English case law, the fifth of those principles, in his view, fell to be modified by virtue of the definition of professional misconduct as contained in the third edition of the Council's guide. The wording of the fifth edition of the guide differs from the third edition in that it interposes the phrase 'upholding the fundamental aims of the profession' before the words 'consider disgraceful of dishonourable'. Nothing turns on this.

The fifth edition of the guide post dated the judgment in *O'Laoire v. The Medical Council* [Unreported, High Court, Keane J., 27th January, 1995) by about three years. It was not until the sixth edition of the guide in 2004 that the 'expected standards' test was published by the Council. There can be no doubt, having regard to the wording of the sixth edition of the guide, that from the time of its publication the 'expected standards' test is applicable in relation to professional misconduct on the part of the members of the medical profession.

The applicants argue that that test was not appropriate to be applied in relation to the allegations made against them. They say that whilst Keane J. identified the 'expected standards' test at No. 5 in the principles identified by him from a consideration of (mostly English) case law, he made it clear that it had to be modified in the light of the Council's guide then in force.

The Council argue that the 'expected standards' test was the appropriate test by which to judge the applicants' conduct. They contend that the changes introduced by the Act were similar to those brought about five years later by the Dentists Act 1983 in England, which in turn was considered *in Doughty v. General Dental Council* [1998] A.C. 164. By reference to that decision the Council contends that the 'expected standards' test was in effect as and from the coming into force of the Act of 1978.

If that be so, it is astonishing that in the five editions of the guide published by the Council between its creation in 1978 and the year 2004, nowhere in the definition of professional misconduct is the 'expected standards' test mentioned. It is not until the publication of the sixth edition in 2004, that it is to be found.

The Council argues that the guide is no more than that. To suggest that professional misconduct can only be viewed in the light of the provisions of the guide is to elevate its provisions into legislation, which, it is argued, would repeal the express provisions of the Act of 1978. This would in turn put at nought the intent of the legislature in enacting the Act and would fly in the face of the decision in *Doughty v. General Dental Council* [1988] A.C. 164.

If all that be correct, then why did Keane J. in *O'Laoire v. Medical Council* (Unreported, High Court, Keane J., 27th January, 1995) make it perfectly plain that the fifth principle identified by him had to be modified in the light of the definition of professional misconduct contained in the third edition of the guide?

Doughty v. General Dental Council [1988] A.C. 164 postdates the Act as indeed does the (English) Dentists Act of 1983. It was *Doughty v. General Dental Council* which introduced the 'expected standards' test and applied it, notwithstanding the fact that the Medical Council in its guide of April 1985 had said that the substitution of the expression 'serious professional misconduct' for the phrase 'infamous conduct in a professional respect' was intended to have the same meaning and significance. The Council argued that that same rationale should apply here, and that the 'expected standards' test has been appropriate since the coming into force of the Act of 1978, despite the fact that the test was not invented until the decision in *Doughty v. General Dental Council* many years later. If they are correct in this view, it seems to make nonsense of the sentence from the decision of Keane J. in *O'Laoire v. Medical Council* (Unreported, High Court, Keane J., 27th January, 1995) to the effect that the fifth principle had to be seen as modified in the light of the statement in the Council's guide."

Kelly J. in the course of that passage has neatly encapsulated the issues and arguments that arose in the *Prendiville* case having regard to the issue of the expected standards test and whether it was implicit in the 1978 Act, or indeed in the guidelines published by the Medical Council from time to time. He went on to describe in the following passage the purpose of the guide and that passage is also of assistance in the context of this case. He stated at p. 166 as follows:-

"I accept that the guide published by the Council is no more than that, namely a guide. It is however published pursuant to the provisions of s. 69(2) of the Act, which imposes a function on the Council to give guidance to the medical profession generally on all matters relating to ethical conduct and behaviour. It is not too much to expect that a doctor on consulting the guide would at least be apprised in general terms of what the Council understands professional misconduct to mean. Of course, one is not entitled to look for absolute precision in a guide. The notion of professional misconduct can change from time to time because of changing circumstances and new eventualities. It would be unreasonable to expect the Council to publish a catalogue of the forms of professional misconduct which may lead to disciplinary action. But if a new test is to be applied or a new species of conduct is to be regarded as amounting to professional misconduct, then one would expect the Council to notify its members of that. Indeed, that is precisely what it did by the publication of the sixth edition of the guide in 2004. There would have been no need to do so if the Council's argument here is correct."

Kelly J. then went on to refer to a passage from an English decision and again I think it would be helpful to refer to that passage in detail. He stated at p. 167:-

"Reliance was placed upon the words of Lord Clyde in *Roylance v. General Medical Council* [2000] A.C. 311, where he said:

> 'The expression 'serious professional misconduct' is not defined in the legislation and it is inappropriate to attempt any exhaustive definition. It is the successor of the earlier phrase used in the Medical Act 1858, 'infamous conduct

> in a professional respect', but it was not suggested that any real difference of meaning is intended by the change of words. This is not an area in which an absolute precision can be looked for. The booklet which the General Medical Council have prepared '*Professional Conduct and Discipline; Fitness to Practice*' (December, 1993), indeed recognises the impossibility in changing circumstances and new eventualities of prescribing a complete catalogue of the forms of professional misconduct which may lead to disciplinary action. Council for the doctor argued that there must be some certainty in the definition so that it can be known in advance what conduct will, and what will not qualify as serious professional misconduct. But while many examples can be given the list cannot be regarded as exhaustive. Moreover, the professional misconduct committee are well placed in the light of their own experience, whether lay or professional, to decide where precisely the line falls to be drawn in the circumstances of particular cases, and their skill and knowledge requires to be respected. However, the essential elements of the concept can be identified.'
>
> I have already accepted the impossibility of cataloguing what may amount to professional misconduct. But, to use the last sentence from the passage quoted, the essential elements of the concept can be identified. The Council did not identify the 'expected standards' test until the publication of the sixth edition of its guide. The standard ought not therefore to have, in my view, been applied prior to the Council making its position clear on the matter."

Kelly J. concluded that section of his judgment by saying at p. 168:-

> "In the present case it appears clear that the Fitness to Practice Committee applied the 'expected standards' test by reference to the judgment of Keane J. in *O'Laoire v. Medical Council* without any account being taken of the modification. In my view, they were not entitled so to do, and it is unreasonable and unfair to expect medical practitioners to be subjected to a test of professional misconduct, which the Council had not promulgated or notified to the profession until years after the event."

Kelly J. as can be seen from the passages quoted above, dealt extensively with the decision in *O'Laoire v. Medical Council* and with the application of the expected standards test. In the course of that part of his judgment he also referred briefly to the decision in the case of *Perez v. An Bord Altranais* [2005] I.E.H.C. 400 in which the expected standards test was applied. In that case, O'Donovan J. stated that:-

> "Professional misconduct', so far as a nurse is concerned, is a serious falling short, whether by omission or commission, of the standards of conduct expected among nurses and it is irrelevant that such misconduct may be attributable to honest mistake."

Kelly J. in the course of his judgment in referring to the decision in *Perez* and a number of other cases to which he had referred earlier commented:-

> "None of the judges in question appear to have had their attention drawn to the subsequent dictum of Keane J. concerning the modification of that principle by reference to the guide. Indeed it has to be said that the question was not in issue in those cases. Nobody appears to have adverted to the topic."

Kelly J. is correct in saying that in the *Perez* case, O'Donovan J. did not refer to the modification of the principles by reference to the guide as set out in the judgment of Keane J. in *O'Laoire v. Medical Council*. However it is interesting to note what was stated by O'Donovan J. in *Perez v. An Bord Altranais* at p. 300 of his judgment. Having set out the principles identified by Keane J. he went on to say as follows:-

> "The foregoing begs the question how does one determine what are the standards of conduct expected among nurses? In this regard, the defendant has published a code of professional conduct for nurses and by virtue of the provisions of s. 39(9) of the Act of 1985, the court may have regard to the evidence of any person of standing in the nursing profession as to what is professional misconduct. Accordingly, when determining whether or not the allegations against applicant have been established, I propose to rely on the provisions of the said code of conduct and on the evidence of the several members of the nursing profession who gave evidence before me. In this regard, I am satisfied that the onus is on respondent to prove every relevant fact, save those facts which have been admitted by applicant, and to establish that such facts, so proved, or admitted constitute 'professional misconduct' in the light of the legal principles herein before referred to. Moreover, it has been conceded on behalf of the respondent that the standard of proof required of the respondent is beyond any reasonable doubt."

It is clear from the judgment of Keane J. in *O'Laoire v. Medical Council* and from the judgment of Kelly J. in *Prendiville v. Medical Council* that it is important when considering the principles identified by Keane J. to ask whether or not those principles have in any way been modified by the code of conduct that applies to a particular profession. Kelly J. in *Prendiville* laid particular emphasis in his judgment on the fact that the issue of modification of the principles was not discussed in a number of cases including *Perez v. An Bord Altranais.* There is no doubt whatsoever given the facts of the *Prendiville* case that the Medical Council did not refer to the expected standards test until the edition of its guide to ethical conduct published in 2004. The previous editions referred only to the moral turpitude test. It is also relevant to bear in mind as was noted by O'Donovan J. in the case of *Perez v. An Bord Altranais* that s. 39(9) of the Nurses Act 1985, provides as follows:-

> "On the hearing of an application under this section, the High Court may, if it thinks proper to do so, admit and have regard to evidence of any person of standing in the nursing profession as to what is professional misconduct."

There is a similar provision in the Medical Practitioners Act 1978, at section 46(9).

Counsel on behalf of the respondent in this case has placed emphasis on the fact that a distinction can be drawn between the *Medical Council Guide to Ethical Conduct* (3rd Ed.) which was at issue in the case of *O'Laoire* and in the case of *Prendiville* and the Code of the respondent herein. As Kelly J. noted, there was a definition of professional misconduct in the Guide which was described by him as a perfect articulation of the moral turpitude test.

By way of contrast and as has been pointed out previously, there is no definition of professional misconduct in the Board's Code. The only express reference to professional misconduct is the reference to the fact that a sexual advance to a patient will be regarded as professional misconduct.

I think it is necessary nonetheless to refer to a number of other parts of the Board's Code of Professional Conduct (April 2000). The

first thing to note is that the Code contains a number of passages as to its purpose. It includes *inter alia*, that "the purpose of this Code . . . is to promote high standards of professional conduct". It goes on to say that:-

> "The nursing profession demands a high standard of professional behaviour from its members and each registered nurse is accountable for his or her practice."

It adds:- "the aim of the nursing profession is to give the highest standard of care possible to patients". There are a number of passages dealing with the issue of competence. Competence is described as follows:-

> "Competence is the ability of the Registered Nurse or Registered Midwife to practice safely and effectively fulfilling his/her professional responsibility within his/her scope of practice."

The Code goes on to describe other aspects related to competence. Counsel on behalf of the applicant herein, submitted that the notion of professional misconduct did not inherently include within it competence issues. She referred in that context to a number of statutory comparisons including the provisions of s. 64 of the Unfair Dismissals Act 1977, as amended in 1993, which provides for the dismissal of an employee being justified on the grounds of (a) "the capability, competence or qualifications of the employee for performing work of the kind which he was employed to do" and (b) "the conduct of the employee".

It is not necessary for me at this point to reiterate the body of case law which has been set out and considered in the judgment of Keane J. in *O'Laoire v. Medical Council* and indeed in the decision of *Prendiville v. Medical Council*. It is undoubtedly the case that the concept of professional misconduct was originally understood to be conduct which was infamous or disgraceful in a professional respect. That encapsulates what is described as the moral turpitude test. Ultimately in a series of decisions the expected standards test was crystallised in the case of *Doughty* referred to above. Gradually, the courts were coming to the view as indeed were the professions that professional misconduct could include conduct falling below a level such that no member of a profession of reasonable skill exercising reasonable care would have acted in the same way. Negligence, per se, does not give rise to professional misconduct. The Code in this case does not specifically refer to the expected standards case. It does however provide that a high standard of professional behaviour is demanded from its members and goes on to say that competence is the ability of the registered nurse or registered midwife to practice safely and effectively as set out above. The Code has not modified the concept of professional misconduct in the way the Medical Council Guide was found to have modified the concept in the *O'Laoire* case and in the *Prendiville* case. The significance of those two decisions, it seems to me, is that the Medical Council, following the decision in *Doughty* and notwithstanding the recognition of the expected standards test in that case, chose to give in its Guide to Ethical Conduct a definition of professional misconduct which was expressed in terms confined to the moral turpitude test. In those circumstances, Keane J. and Kelly J., not surprisingly, took the view that the Medical Council had chosen to modify the concept of professional misconduct by reference to its definition of professional misconduct by limiting it to the moral turpitude test. That is not the position here. Having considered the arguments on this particular point, I have come to the conclusion that the appropriate test to be applied in the context of this case is the expected standards test. It is one of the principles identified by Keane J. in the case of *O'Laoire* and there is nothing to suggest that the test has been modified in the Board's Code in the way the court found to be the case in *O'Laoire* and subsequently in *Prendiville*. That test or standard has been applied in the *Perez* case. I am satisfied that unless expressly excluded by a profession's Code or Guide, the expected standards test is encompassed in the meaning of professional misconduct. The Code in this case expressly states that the aim of the nursing profession is to give the highest standard of care possible to patients and that each registered nurse is accountable for his or her practice and deals with issues of competence. The obligations contained in the Code could not be clearer. I cannot accept the argument that the Code in this case could or should be viewed as modifying the 5th principle identified by Keane J. in *O'Laoire*. The final comment I would make on this subject that it is not insignificant that those participating in the hearing before the F.P.C. did so on the basis that the expected standards test was applicable as enunciated in *Perez*, including counsel for the applicant and her expert witness, Ms. Rogan.

I should add that it was submitted to me on behalf of the respondent that the applicant was estopped from relying on this argument given that the applicant had dealt with the matter before the F.P.C. on the basis that the appropriate test was the expected standards test. Given the finding I have made as to the applicable test of professional misconduct, this point is not of any significance.

Notification of the Test

Counsel on behalf of the applicant complained that one could not be found to be in breach of the "expected standards" test if one was never notified or made aware of the test. She relied on a passage in the *Prendiville* judgment to support her contentions in this regard. Kelly J. had commented at p. 166 of his judgment as follows:-

> "It is not too much to expect that a doctor on consulting the guide would at least be apprised in general terms of what the Council understands professional misconduct to mean. Of course, one is not entitled to look for absolute precision in a guide. The notion of professional misconduct can change from time to time because of changing circumstances and new eventualities. It would be unreasonable to expect the Council to publish a catalogue of the forms of professional misconduct which may lead to disciplinary action. But if a new test is to be applied or a new species of conduct is to be regarded as amounting to professional misconduct, then one would expect the Council to notify its members of that. Indeed, that is precisely what it did by the publication of the sixth edition of the guide in 2004. There would have been no need to do so if the Council's argument here is correct."

I think it is important to consider the comments of Kelly J. in the context of the *Prendiville* case. In that case, Kelly J. was dealing with a situation where the Medical Council had communicated to its members, that professional misconduct was "conduct which doctors of experience, competence and of good repute, considered disgraceful or dishonourable". As was pointed out that was a definition which meant that professional misconduct had to be construed as conduct judged by the moral turpitude test. Clearly, if the definition of professional misconduct was to be expanded to include the expected standards test then, as Kelly J. stated, one would expect the Council to notify its members of that change in the meaning of professional misconduct. However the difficulty for the applicant in this case is that, in my view, the principles enumerated by Keane J. in *O'Laoire* have not been modified by the Code published by the respondent in the way that the Medical Council's guide was found to have been modified. In those circumstances this is not a case of a new test being applied or a new species of conduct which is to be regarded as amounting to professional misconduct. I have no difficulty with the concept that if the definition of professional misconduct is to be changed or expanded in a significant way or if an entirely new test as to what is encompassed by the term "professional misconduct" was to be introduced, then in such a situation it would clearly be necessary to notify such change to the members of a profession. In the circumstances of this case, that did not occur and it is my view that the applicant's argument on this basis cannot succeed.

Adequacy of reasons
The first report of the F.P.C. was considered by the Board on the 19th November, 2008. Following submissions from the applicant on that date to the effect that the report did not contain sufficient reasons for the finding of professional misconduct and that the applicant was thereby impeded in properly representing her case to the Board, the report was returned to the F.P.C. to furnish the reasons for it's findings. The 2nd report was then furnished to the Board. That report was considered by the Board at its meeting on the 11th February, 2009, at which the decision, the subject of these proceedings, was made.

A number of points have been made by the applicant in relation to this issue. The first point made is a criticism of the adequacy of reasons furnished by the F.P.C. for the conclusions reached by it. The second point made is that the Board simply affirmed the decision of the F.P.C. stating in its letter to the applicant of the 12th February, 2009, that the Board "considered and confirmed the report of the [F.P.C.]" and that "the reason for the Board's decision is that you have been found guilty of professional misconduct by the [F.P.C.] on the basis of an inquiry and report . . . ." Accordingly, it is submitted that the decision of the Board is tainted by the same inadequacy of reasons provided by the F.P.C.

There is no doubt that there is a significant contrast between the first report of the F.P.C. and its second report. The findings were set out in the form of a document which is not dissimilar to an issue paper. It refers to the first allegation and then breaks down that allegation by reference to a number of headings. The first allegation is:-

> "When you were a midwife on duty at Wexford General Hospital on the 5th February, 2004, you failed to provide or arrange for the provision of adequate or appropriate care for you patient Mrs. S.W. under one or more of the following headings:"
>
> "Failed to ensure that there was any or any adequate or effective or timely
>
> a) Evaluation
>
> b) Monitoring
>
> c) Recognition…"

The facts were stated to be proved in respect of each of the headings in respect of Allegation 1 (i) a) to g) inclusive.

The allegation at 1 (i) f)was:

> "Failed to ensure that there was any or any adequate or effective or timely assessment of the risk factors pertaining to Ms. W."

The facts were found to be proved and the reason for the decision was stated in the 1st report to be "The evidence of Dr. Murphy and Ms. Hughes". In the second report the reason given for this decision was stated to be as follows:-

> "The evidence of Dr. Murphy and Ms. Hughes. Dr. Murphy stated that the obstetric team should have been notified and this was verified by Ms. Hughes' expert opinion where she stated that undue regard was given to Ms. W's birth plan."

Ms. Hughes was an expert called on behalf of the Board. Another example is the allegation that the applicant:-

> "Failed to ensure that there was any or any adequate or effective timely communication with Ms. W. in relation to her birth and/or her changing condition and means, particularly in the context of the slow progress of her labour".

The facts were found to be proved in relation to that allegation and the reason given for that decision was stated to be:-

> "the medical records, Ms. W's evidence and that of Ms. Hughes".

The same reason was given in the second report.

I do not think it is necessary in order to deal with this particular issue to go through each and every allegation made and to examine in detail and to compare and contrast the reasons given in each report. By and large, the reasons given in the second report are more expansive and explanatory.

A particular criticism of the findings of the F.P.C. relates to the fact that the expert called on behalf of the applicant, Ms. Rogan stated that there were parts of the applicant's care that were "slightly less than optimal" but did not go so far as to say that the care afforded to Ms. W. by the applicant fell seriously short of the standard required. Nonetheless, her evidence has been cited as being part of the reason for certain findings. For example, in relation to the allegation that the applicant failed to adequately ascertain or have due regard to Ms. W's risk factors in the light to her previous medical history and/or her previous pregnancies, the facts were found to be proved and the reason for the decision was stated in the first report to be:- "the medical records and evidence from Ms. Hughes and Ms. Rogan".

In the second report, the reason given for this finding was stated to be as follows:-

> "Ms. Brennan failed to direct the care of Ms. W. as she asked to catheterised and was examined vaginally only at her own request. This was corroborated by the medical records and the evidence from Ms. Hughes and Ms. Rogan."

The issue of adequacy of reasons was also considered by Kelly J. in the case of *Prendiville* referred to above. At p. 173 of the judgment he commented as follows:-

> "In my view, the Fitness to Practice Committee was obliged to give reasons for coming to the conclusion, which it did. It was not obliged to provide a discursive judgment, but I accept the applicants complaint that they were left 'absolutely in the dark' as to the basis for the Fitness to Practice Committees findings. That is all the more so in the circumstances where it is clear that, contrary to the requirements of s. 45 (3)(c), the report did not specify the evidence laid before the

Fitness to Practice Committee.

A statement of the reasons for the Fitness to Practice Committee decision would have been essential so as to enable the Council to hear submissions and decide on whether or not it ought to confirm the Fitness to Practice Committees findings. Even if I am wrong in the view which I take concerning the role of the Council, and it is in fact no more than a cypher for the Fitness to Practice Committee save on the question of sanction, the applicants are entitled to know the basis of the decision in the context of an application for judicial review. As was said by Keane J. reasons are necessary in order to ensure that the Superior Courts may exercise their jurisdiction to enquire into, and if necessary, correct such decisions.

In these circumstances, I am satisfied that the decision of the Fitness to Practice Committee is also deficient by reason of the lack of reasons given for its findings."

It was accepted on behalf of the applicant that the F.P.C. is not under an obligation to provide a discursive judgment, but it is required nonetheless to provide a general explanation of the basis for its decision on questions of serious professional misconduct.

It was also submitted that if there was an inadequacy of reasons in relation to the decision making process, the same could be dealt with by the Board in the course of its decision. However, it was pointed out on behalf of the applicant that the Board failed to do so by relying as it did on the findings of the F.P.C. The final contention on behalf of the applicant was that it was insufficient to say as was stated in the second report as follows:

> "The Committee in deliberating took cognisance of the expert witnesses and unanimously agreed that Midwife Brennan failed in her duty of care to Ms. W. as she failed to direct the care in labour and that she gave undue precedence to Ms. W's birth plan . . . ."

It was argued that as there was a conflict in the evidence between the experts that statement was not a sufficient reason for the decision. It was submitted that it appears from the reasons given for parts of the decision of the F.P.C. that the F.P.C. accepted the evidence of the expert witness on behalf of the applicant, yet it relied on that evidence to find against the applicant in circumstances where the evidence of the expert witness called on behalf of the applicant had not concluded that there was a serious falling short of the expected standard on the part of the applicant. Counsel pointed out that the F.P.C.'s reports did not make it clear that there was a conflict on the evidence between the experts. Indeed, it was pointed out that a number of expert reports were submitted to the F.P.C. on behalf of the Board and that of those only one of them formed the view that there was "serious falling short" on the part of the applicant.

Counsel on behalf of the respondent referred to the *Prendiville* decision and to the passage referred to above and contended that there was no need to furnish a discursive judgment. He also contended that there was no absolute rule to the effect that one must state why the evidence of one expert is preferred to that of another. Particular emphasis was placed on the decision of the Supreme Court in the case of *F.P. v. Minister for Justice* [2002] 1 I.R. 164, which was also referred to by Kelly J. in *Prendiville* at p. 172. I propose to refer to a brief passage from that judgment where Hardiman J. said at p. 172 as follows:-

> "Dealing with statutory obligations to give reasons the trial judge said at p. 144 that:-
>
> > 'The Inspector's statutory obligation was to give reasons for his decision and the Courts can do no more than say the reasons must be 'properly intelligible' and adequate as had been held. What degree of particularity is required must depend on the circumstances of each case . . . .'
>
> In the case of administrative decisions, it has never been held that the decision maker is bound to provide a 'discursive judgment as a result of its deliberations'; see *O'Donohue v. An Bord Pleanála* [1991] I.L.R.M. 750 at p. 757.
>
> Moreover, it seems clear that the question of the degree to which a decision must be supported by reasons stated in detail will vary with the nature of the decision itself. In a case such as *International Fishing Vessels Ltd. v. Minister for Marine* [1989] I.R. 149 or *Dunnes Stores Ireland Company v. Maloney* [1999] 3 I.R. 542, there was a multiplicity of possible reasons, some capable of being unknown even in their general nature to the person affected. This situation may require a more ample statement of reasons than in a simpler case where the issues are more defined."

It was pointed out that the allegations herein were specific and that the findings made were broken down to deal with the individual allegations. In the course of the evidence before the., the expert witness, Ms. Rogan, called on behalf of the applicant, made some concessions as to the conduct of the applicant and thus, the F.P.C. was entitled to take her evidence into account. Counsel added that one could see why the particular findings have been made.

I think the law on this issue is clear and it is not necessary for me to add to the position set out by Kelly J. or Hardiman J. referred to above. It is clearly necessary for the F.P.C. to provide reasons for coming to the conclusions reached. In the first instance, it is necessary to provide reasons so that the party affected can consider those reasons and go on to make appropriate submissions to the Board or Council as the case may be in relation to the reasons for the findings. The Board itself must have the reasons for the findings in order to consider whether it should confirm the findings of the Fitness to Practice Committee. Thirdly it is necessary to have the reasons for a decision in order to enable an applicant to consider whether judicial review proceedings may be appropriate. It does seem to me that the very legitimate complaint made in this case by the applicant as to the inadequacy of the reasons contained in the first report of the F.P.C. could have resulted in judicial review proceedings. Such proceedings were not necessary because the submissions made on behalf of the applicant were considered and accepted and as a result a second report was obtained. I have considered the reasons given in the second report of the F.P.C. and am satisfied that those provided sufficient information to the applicant in relation to this matter. It is the case that the applicant furnished lengthy written Factual Submissions to the Board in addition to oral submissions on the legal issues that arose. Clearly, the applicant could not have done so if the reasons provided for the various findings were not sufficiently clear.

I want to consider the approach of the F.P.C. to the evidence of the applicant's expert witness. If one looks at the transcript of evidence given by Ms. Rogan, she was asked about the allegations in the notice of inquiry comprised in allegation 1(i) (a) through to (g) for example and I propose to quote briefly from the questions and answers in that regard during the course of her direct evidence.

> "Q. If I might ask you, you basically say that regular observations were taken, assessment and progress and the evaluation. Ms. Brennan did monitor the maternal heart rate, the temperature, blood loss, assessment, recorded a foetal heart and did appear to take cognisance of 'all the types of delivery as they were noted at the top of the nursing records', in other words taking into account her history Ms. W's history?

A. Yes.

Q. So in all those circumstances you believed that they adhered, that they evaluated and monitored and recognised their treatment, their review, assessment and the communication was of an adequate nature?

A. Yes, I believe the level of observation and care was appropriate to this lady's risk factor, yes.

Q. And you would not have any criticism of those?

A. No." (See day 5, p. 124, qs. 346 to 348).

If one then looks at the second report of the F.P.C. in relation to Allegation 1 (i) (a) through to (g), the facts are found proved in relation to point (a), point (c) point and (d) and as part of the reasons for those findings, reference was made, *inter alia*, to the evidence of Ms Rogan. Ms. Rogan was cross examined extensively on her evidence and reports of other witnesses were put to her. (See for example, Day 5, Q. 518 – 522) While she agreed that certain aspects of the care provided by the applicant were "less than optimal", she did not change her views that the level of care did not amount to a serious falling short. That being so one comes back to consider the argument as to the adequacy of reasons provided. In the second report, the reasons furnished were more detailed than in the first report furnished and the F.P.C. also went further in explaining their findings. As I mentioned earlier, counsel on behalf of the applicant took issue with the phrase that the "Committee in deliberating took cognisance of the expert witnesses and unanimously agreed . . . ." I understand that phrase as being a simple declaration by the F.P.C. that they took into account all the evidence furnished to the Committee by both sides. There would be justifiable criticism of the decision if the F. P.C. had considered only the views of the Board's own witnesses and had ignored the evidence furnished by and on behalf of the applicant. Such a decision would be in breach of natural justice and fair procedures. In referring to the evidence of witnesses under the headings "Reasons for Decision" it seems to me the F.P.C. was doing no more than stating that they had considered the evidence of those witnesses on the particular topic and had then come to the conclusion set out under the particular heading. It has to be borne in mind that the F.P.C. like any other decision maker is entitled to accept or reject any or all of the evidence of any witness, expert or otherwise. It is for the F.P.C. to weigh and assess the evidence of each witness. It might have been more helpful if some explanation of the role of the respective evidence of the various expert witnesses in the decision making process had been given.

At the heart of this issue is whether or not the applicant could, following the amendment of the reasons in the second report, have understood what the position was in relation to the allegations of professional misconduct and the findings in respect thereof? To put it another way, I think the applicant could and did legitimately complain following the preparation of the first report by the F.P.C. that she was left "absolutely in the dark" as to the basis for the findings against her. Following the delivery of the second report, it seems to me that that complaint cannot be made out and that, to some extent, an exercise in parsing and analysing the precise words of the report has taken place. In truth the purpose of giving reasons has been met in the second report. As I have said, it might have been more helpful if the report of the F. P.C. had indicated when the evidence of one witness was preferred over the evidence of another witness but I do not think that this was a fatal error having regard to its findings and recommendations. As I have already said, the applicant was in a position to make detailed factual submissions to the Board following the completion of the second report. Accordingly, I am satisfied that the reasons given in the second report were adequate and that the concerns on the part of the applicant as to the references to Ms. Rogan in the reasons given for the findings are misplaced.

Justification of Findings of Professional Misconduct

The complaint made by the applicant in this regard relates to the concluding paragraph in the second report of the F.P.C. to which reference has already been made. I think however, I should refer to it again as its wording is crucial to this aspect of the applicant's complaint. The conclusion stated:-

> "In doing so her standard of care fell below the standard expected of a midwife. The Committee noted that Midwife Brennan through her evidence recognised her deviation from normal practice. However, the Committee felt that as an autonomous the midwife had a duty of care to evaluate, assess and plan care specific to the woman's requirement with the appropriate multi-disciplinary team. Failing to do this Midwife Brennan's professional conduct fell short of the required standard expected of a midwife."

This conclusion was contrasted with the conclusion in respect of the applicant's colleague whose conduct was described as falling "seriously below the standard expected of a midwife".(*My emphasis*.) In making this complaint, counsel on behalf of the applicant referred to one of the experts called on behalf of the Board, Ms. Hughes, who provided two reports, in one of which she described the level of care provided to Ms. W. as falling seriously short of the required standard of professional conduct expected for a midwife and in the other, earlier, report she described the care provided as "substandard care" and stated that the "overall plan of care provided to Ms. W. was suboptimal".

It appears from the affidavit of the applicant herein that during the course of the hearing before the F.P.C., it emerged that the acting Deputy Chief Executive of the Board and senior counsel met with Ms. Hughes on the 21st February, 2008, to discuss the reports she had completed. Subsequent to that meeting, the reports prepared by Ms. Hughes in respect of the applicant and in respect of her colleague were expressed in different terms. It is stated by the applicant that the conclusions in the first reports are expressed in a manner which would not meet the standard relied on whereas those expressed in the second reports would do so. Counsel on behalf of the applicant made a number of submissions as to the role of expert evidence. I can see nothing wrong in a meeting taking place between a proposed expert witness who will be giving evidence on behalf of a Board for the purpose of discussing, considering, explaining and clarifying a report furnished by that expert. Having received the first report from the expert, there would have been nothing to prevent the Board's legal team in querying whether, having regard to the conclusions in that report that the care afforded was substandard care or was overall suboptimal, the conclusions of the expert were that the care provided amounted to a "serious falling short".

It was submitted on behalf of the applicant that the oral evidence of Ms. Hughes at the hearing reflected her second report but it was suggested that the oral evidence was, in effect, directed by legal advice. It appears from an attendance note that prior to the hearing before the F. P. C., counsel who represented the respondent requested Ms. Hughes to re-draft her report with the following criteria in mind: "Did the midwife's conduct, in this context, fall seriously short of the standard of professional conduct expected amongst midwives". Ms. Hughes was extensively cross examined in the light of the fact that she had furnished two reports in different terms. In the course of cross examination she stated that, to her, care described as suboptimal and care that fell seriously short was effectively the same thing. (See day 3, p. 120) Later she stated:-

> "We can argue about the language but to me this was below the standard and it was seriously short. I was asked whether it met the required standard of professional conduct and in those areas it did not and whether I called it substandard or whether I said it fell short of, to me, there may be a legal basis around this that I am not totally au fait with, but to me it meant the same thing".

She concluded by saying that her view of the handling of the case had not changed but that whilst the language in her reports had changed and the words she used had changed, her entire view of the case remained unchanged. (See p. 125, day 3).

In considering this aspect of the applicant's complaint about Ms. Hughes evidence, it is clear that Ms. Hughes was tested extensively in cross examination as to her opinion on whether the handling of the care of Ms. W. fell seriously short of the standard expected. The fact that two reports had been prepared by her using different terminology was put to her and she expressed herself strongly in the course of that cross examination as being of the view that the standard of care in this case fell seriously short of that required of a nurse in the circumstances of the case. She did not agree that her view had been altered or influenced by the meeting that took place with the Board's legal team as referred to. This matter was dealt with extensively before the F.P.C. She was rigorously cross examined as I have stated and stuck to her view. It was open to the F.P.C. to accept or reject the evidence of the expert witness called on behalf of the Board. It is clear that the F.P.C. accepted her evidence. In those circumstances, I do not think that the fact that two reports were furnished by Ms. Hughes or that the wording in one of those reports was altered subsequent to a meeting with the legal team in any way taints or diminishes the findings of the Committee.

That issue has a bearing on the question set out above in relation to this issue given the fact that the F.P.C did not itself use the word "seriously" in relation to the falling short of the expected standard. As I have said before, it is not appropriate to parse and analyse in detail the decision of the F.P.C. One must have regard to the report as a whole. The report notes at the outset, that it is a report of the Fitness to Practice Committee of an inquiry held under s. 38 of the Nurses Act 1985. It sets out a list of those from whom evidence was heard and from whom legal submissions were heard. It then goes on to set out the allegations made and the findings of the Committee in relation to those allegations. At the conclusion of the findings in relation to the allegations, there is a heading relating to whether or not the applicant is guilty of professional misconduct. That question is answered in the affirmative and sets out the various allegations in relation to which those findings are made. That is the key finding. The definition of professional misconduct does not have to be stated in the report. The second report of the F.P.C. dated the 8th January, 2009, did add to its findings a paragraph having regard to its recommendations in respect of sanctions. That it did not use the word "seriously" does not in my view invalidate the decision as a whole in any way. My view in this regard is not altered by the fact that the conclusion in relation to the applicant's colleague used that word. Ultimately it was a matter for the F.P.C. to consider whether or not there was professional misconduct and that is the finding that was made. This was done following submissions from both sides as to the definition of professional misconduct.

I want to refer briefly to the affidavits of the applicant herein and the affidavit of Ruth O'Connor referred to above. Ms. O'Connor was rightly critical of the contents of the affidavits of Cathryn Lee and the other members of the F.P.C. It is unusual to see an affidavit from a decision maker setting out the reasons for a decision. The justification for swearing such affidavits was no doubt the fact that there was to be a hearing based on affidavit dealing only with legal issues. If there had been an oral hearing before this court, is it likely that the members of the F.P.C. would have attended to give evidence to the same effect as that contained in their affidavits? I think not. I can understand that the members of the Committee were anxious that their decision should not be found to be assailable by some perceived deficiency in its wording which could be put right *ex post facto.* I want to make it clear that I am strongly of the view that this was an inappropriate step for the F.P.C. to take. The decision of the F.P.C. unambiguously found the allegations of professional misconduct to be proven in 26 of the 30 allegations made against the applicant. Had that essential finding not been made by the F.P.C., no amount of subsequent averments on affidavit would have made good such a deficiency. It must be remembered that there was a finding of professional misconduct, a term which encompasses the expected standards test. The reasons for that finding did not have to expressly recite that the applicant had fallen seriously short of the expected standard or any equivalent phrase.

Had there been a deficiency in the wording of the decision of the F.P.C., one may well speculate as to whether or not that deficiency could have been put right by the Board in its decision but it is neither necessary nor appropriate for me to consider that issue.

Role of C.E.O. before the Board

The argument made on behalf of the applicant in this regard was that the functions of the Chief Executive Officer of the Board were to notify the person who is the subject of the inquiry of that fact in accordance with the provisions of s. 38(4) of the Nurse's Act 1985, and in accordance with the provisions of s. 38(3)(b) to "present to the Committee the evidence of alleged professional misconduct or unfitness to practice by reason of physical or mental disability, as the case may be". It was submitted that those are the limits of his statutory function. He is entitled to be present at the hearing before the Board but solely to clarify any issue that may arise but not to undermine any submissions that may be made by the nurse. It was pointed out that the Board had their own legal adviser. The applicant in the affidavit grounding the application outlined her complaint in this regard by saying that the Board wrongfully allowed the legal advisers to the Chief Executive Officer to address the Board on the merits of the case and to make arguments thereon at its consideration of the first report of the Fitness to Practice Committee on the 19th November, 2008 and at its consideration of the amended report of the Fitness to Practice Committee on the 11th February, 2009, thus exceeding the powers vested in the Chief Executive Officer by virtue of s. 38 of the Nurses Act 1985.

By way of response, counsel on behalf of the Board referred to s. 13(7) of the Act, which provides that the Acts of a Committee established under this section shall be subject to confirmation by the Board, unless the Board, at any time, dispenses with the necessity for such confirmation.

Section 39(1) goes on to deal with what occurs after a finding of professional misconduct, namely that "the Board may decide that the name of such person should be erased from the Register or that, during a period of specified duration, registration of the person's name in the Register should not have effect." Section 40 deals with the situation that is applicable on the facts of this case namely the attaching of conditions to retention on the Register. Section 40(1) provides that following an inquiry and report by the Fitness to Practice Committee pursuant to s. 38 of this Act, the Board may decide to attach such conditions as it thinks fit to the retention in the Register of a person whose name is entered in the Register." I do not think it is necessary to reiterate the decisions that have been referred to previously which discuss the role of a Board such as the respondent in this case. It has been said that the Board is not there to rubber stamp the decision of the F.P.C. There was a hearing before the Board at which the applicant was represented and at which lengthy submissions were made on her behalf. It seems to me to be a very unusual contention that in those circumstances a person who has participated in the adversarial hearing before the F.P.C. was not to be entitled to make submissions on the same matter before the Board and was curtailed to attending the hearing before the Board only for the purpose of clarifying any issue that might arise. The hearing before the Board is a substantive hearing. It is not solely for the purpose of permitting the

nurse to make submissions. The applicant in making its submissions on this point relied heavily on the fact that the statutory references to the Chief Executive Officer related solely to the furnishing of the notice of an inquiry and the presentation of evidence to the F.P.C. One might make the comment that nowhere in the statute is there a provision allowing the nurse to make submissions to the Board, just as there is no reference to the Chief Executive Officer having a right to make submissions to the Board. If the hearing before the Board is intended to be a real hearing, then it follows that the parties who had a right to appear before the F.P.C. must equally have a right to appear before the Board. I cannot understand any basis on which the representation of the Chief Executive Officer could be limited to a right to clarify issues as suggested on behalf of the applicant and indeed one wonders how one could even have a right to clarify any matter or issue if the contention on behalf of the applicant is correct. The entire procedure that takes place before the F.P.C. is an adversarial procedure. The Board can subsequently confirm or refuse to confirm the decision of the F.P.C. I cannot see how it could be correct for the applicant or a person in her position to be entitled to make submissions to the Board at its meeting to confirm or otherwise the findings of the F.P.C. in circumstances where that right was denied to the Chief Executive Officer. It is worth noting that in the *Prendiville* case to which much reference has already been made, Kelly J. at p. 148 commented that:-

> "The applicants argue that if the decision of the Fitness to Practice Committee is subject to confirmation by the Council under s. 13(7) that must mean that it can refuse confirmation. It may confirm the decision or, at its option, refuse to do so. In so doing it must exercise an independent judgment. It is not a mere cypher or rubber stamp. It must be open to, and consider on their merits, submissions made (such as was the case here) as to why it ought not to confirm a decision of the Fitness to Practice Committee. This does not involve it in having to re-hear evidence or hear new evidence. But it does involve it in having to consider arguments as to why, on the basis of the evidence tendered, the Fitness to Practice Committee ought not to have found as it did. In the present case the Council shut out any such possibility, regarded itself as bound by the findings of guilt made by the Fitness to Practice Committee and concentrated solely on the question of what penalty, if any, should be visited upon the applicants."

That seems to me to be a clear, accurate and correct statement of the position in relation to the role of the Board in this case. It could hardly be contemplated that a Board such as the respondent in this case or the Medical Council as in the case of *Prendiville* could have considered arguments from one side only as to why a Fitness to Practice Committee ought not to have found as it did. That would be in breach of any concept of natural justice. Consider the analogous position of prosecuting counsel in a criminal trial. Their role is to lay before a jury fairly and impartially the whole of the facts that comprise the case for prosecution and to assist the Court with submissions of law. This mirrors the role of the Chief Executive Officer and his/her legal representatives in a Fitness to Practise enquiry. Although I appreciate that the analogy is not perfect, could one imagine a situation in which, following conviction, only counsel for the accused could be heard at an appeal and counsel for the prosecution could only attend at the appeal for the purpose of clarifying any issue that might arise? That is clearly not the case. I have to reject the submissions of the applicant on this point.

Conclusion

It is now necessary to reflect briefly on the effect of the order of the High Court in these proceedings in relation to the form of hearing to take place before this Court. As already noted it was found that the appeal to this Court did not require a full oral hearing and was to proceed on the basis of affidavits. The position of the applicant has been that she does not seek to dispute the findings of fact and has sought to raise legal issues only. A key part of her application was to avoid the possibility of allowing the respondent to correct legal errors through an oral hearing. Referring back to the decision cited above, *C.K. v. An Bord Altranais*, as to the approach of the court in matters such as this, it was noted that in cases in which "the issues are not direct issues of fact, but rather are questions of propriety, professional conduct, professional standards and the consequences of undisputed facts" it is not necessary to hear oral evidence. Given the approach of the applicant, there are no disputed facts in this particular case. I have considered the legal issues raised on behalf of the applicant and notwithstanding the careful arguments on behalf of the applicant, I am satisfied that the matters raised do not demonstrate any flaw in the procedures followed herein such that the decision of the Board should be cancelled. Accordingly, having regard to the facts and circumstances of this case it seems to me that it was proper for the Board to make the decision made herein and I do not propose to alter or vary or amend the decision of the Board in any way.