Neutral Citation Number: [2006] IEHC 238

THE HIGH COURT
DUBLIN

Record no. 2003/6450P

CHRISTINE MCSTAY

PLAINTIFF

THE MINISTER FOR HEALTH AND CHILDREN,

DEFENDANT

IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

Judgment of Mr. Justice T.C. Smyth Delivered On Thursday 15th June 2006.

1. A preliminary issue arises between the parties by virtue of proceedings brought by the Applicant by way of Plenary Summons. The Order of White J. directed that a preliminary issue of law arose as to whether the substantive proceedings between the parties gave rise to a justiciable issue, whereby the Plaintiff may impugn the legality and/or seek damages in respect of the manner of establishment and/or operation of the Post Mortem Inquiry as established by the Respondents.

2. It is agreed that the issue is to be tried on the facts as agreed set out in paragraphs 5, 6 and 7 of the Statement of Claim, to wit: -

> "5. At all material times the Plaintiff was a member of the organisation of Parents for Justice and is the mother of the deceased infant, Ann Marie McStay, who was born on 3rd February 1981 and who died on 21st February 1981.
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> 6. On or about the 3rd day of February 1981, the Plaintiff gave birth to her daughter, Ann Marie McStay, at the Rotunda Hospital, Dublin. The said child died at Our Lady's Hospital for Sick Children, Crumlin, Co. Dublin, on the 21st day of February 1981.
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> 7. In or around the month of February 1999, the Plaintiff, following publicity surrounding the issue of the retention of organs by various hospitals in the State, contacted Our Lady's Hospital, Crumlin, to enquire as to whether or not the said Hospital had retained any of the deceased infant daughter's organs. In and around the 18th December 1999, the Plaintiff was informed by way of telephone call that the brain, heart, lungs and liver of the deceased infant daughter had been retained by the Hospital upon her death in 1981."

3. The foregoing, together with the representations recorded in a stenographer's recording of a public meeting held on 3rd May 2000, the minutes of the meeting with Minister Cowan of 22nd December 1999, the minutes of the meeting of the Department of Health on 13th January 2000, the minutes of the meetings with Minister Martin of 9th and 23rd February 2000, 9th and 28th March 2000 and 3rd April 2000, and particularly the letter to Charlotte Yeates of 27th September 2000from the Department of Health and Children gave rise, on the Applicant's submissions, to a duty of care and/or a claim for misrepresentation of the nature at paragraph (13) of the Statement of Claim vis: "The Defendants, and each of them, in breach of the Plaintiff's constitutional and statutory rights, including the Plaintiff's legitimate expectation that a proper, effective and lawful Inquiry would take place into the unlawful retainer of the organs of her deceased daughter, have negligently and/or by way of misrepresentation, and by way of breach of duty, failed to discharge their undertaking that an effective and lawful Inquiry would take place and failed to protect the Plaintiff's constitutional rights and those of her infant daughter, Ann Marie McStay (Deceased)" - such as to entitle the Applicant to require the Respondents to conduct an Inquiry conferred with powers to compel the production of documents and the attendance of witnesses, and/or any of the declaratory orders set out in the prayer for relief in the Statement of Claim, and/or damages. The contention of the Applicant was that on the assumption that the statements at the meetings and in the letter of 27th September 2000 were made on behalf of the First Named Respondent ('The Minister') were so made and do such (construed as fact) give rise to a legitimate exception to the entitlements aforesaid.

4. The contentions of the Respondents (*inter alia*) were set out in paragraph 20 of the Defence, to wit that: -

> "1. The Applicant enjoys no constitutional or common law entitlement to the establishment of any or any particular form of Inquiry in connection with the matters set forth in the Statement of Claim.
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> 2. The decision whether to establish such an inquiry is a matter for the Executive (and/or in particular insofar as same is to be provided with powers of compulsion of any particular kind) for the Houses of the Oireachtas and/or the Oireachtas.
>
> 3. That the proceedings do not present any justiciable basis on which the Respondents (or any of them) can be compelled to establish any particular form of inquiry, nor on which the Applicant can seek to impugn the legality of, nor seek damages in respect of, the manner of establishment or operation of any inquiry established.
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> 4. The Applicant has and can have no legitimate expectation enforceable in the manner suggested in the proceedings or otherwise, such as to confer a right to any particular form of inquiry."

5. It was common case that on the hearing of the preliminary issue, both parties reserved to themselves the entitlement to make submissions as to the effect of any change of circumstances (since the order of 27th July 2005) as to the existence or the nature of any legitimate expectation. It was in this context that I permitted Counsel to refer and open to the Court the report of Dr. Deirdre Madden on Post Mortem Practice and Procedures (presented to the Minister on 21stDecember 2005 (the Madden Report) and which was in the public domain for some time prior to the hearing on the24th and 28th March 2006: Without the necessity of adding to the papers by a supplemental affidavit. A justice system that becomes bogged down in procedural detail for its own sake or indulges litigants with unnecessary adjournments that confer no real benefit to litigants who are genuinely interested in having their dispute(s) determined is no more ideal than it is fair.

6. Before addressing the legal issues requiring determination, a brief review of the facts disclosed in the principle documents relied upon by the Plaintiff/Applicant is necessary. However, they must be considered in the context that a resolution of the Dáil had been passed on 4th April 2000.

7. The minutes of the meeting of 3rd May 2000 was concerned to note the purpose of the Inquiry. I am satisfied that the purpose of the Inquiry as expressed in its Terms of Reference was to review all past Post Mortem examination policy, practice and procedures to date since 1970, and in particular in relation to organ removal, retention, storage and disposal by reference to prevailing standards both within and without the State and to examine the application of those policies and practices and procedures in hospitals generally and in particular their application to certain stated hospitals. The remit and practices of coroners was to be considered. At the

meeting some persons were concerned to name, shame and claim in respect of alleged past wrongdoing (P.1 l.25; P.3 l.3, 8-9; 12-21,29. P.11, l.20, P.15, l.2, 6, 11. P.15 - the Minister said he could not pre-empt an independent Inquiry (l.26). P. 23 l.16; P.24 l.29-11; P.29 l.2. P.35, l.10; P.39/40. l.28-30/1- 5; p.52 l.10-11; P.56, l.22/23; P.69 l.16-19). By far the greatest debate centred on the nature of the Inquiry be to held.

8. In the 83-page transcript record of the meeting (P.77to 83 deal with matters dealt with in closed session) of 3rd May 2000 it is possible to discern certain themes and positions: -

> 1. The Parents for Justice ('The Group') wished to receive an assurance from the Minister that there would be a two-phased or two-tiered inquiry and that if such failed there would be a statutory inquiry (P.1 l.19-22; p.2, l.23- 25).
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> 2. The Minister made it clear 'that the 1921 (an Inquiry established under the Tribunals of Inquiry Act1921) form of public inquiry was not the best route for dealing with the type of situation, and what we did come up with was a two-tier inquiry, which is a statutory inquiry (p.7 l.11-15). The Minister had an appreciation that the issues of Discovery of documents and compellability were central to the concerns of the Group and stated: "We decided to respond to those two issues addressed to us by the Committee, and we did so via a statutory inquiry, but a different type of one from the '21 Inquiry which was, in essence, an Oireachtas Committee on Health and Children, will have full powers of compellability and discoverability in relation to this Inquiry. So you are looking at a two-phase inquiry where the Senior Counsel, Anne Dunne, will conduct the Inquiry, in the first instance, which has the opportunity to get all the documentation possible, interview people, so on like that, and arrive at findings and conclusions. Then it will automatically go, by resolution of Dáil Eireann, to the Oireachtas Committee on Health and Children, which will have powers under the Compellability Act to call on people to public hearings and to discover all documentation. Now I think that is our most effective route to go." (P.7/8 l.24- 29/1-10).

9. While the Minister was of the view that the Inquiry set up would achieve the purpose, he nonetheless stated that: "If it didn't work we will have another form of statutory inquiry." (P.13, l.28- 30) I am satisfied that in speaking of a two-phased inquiry or statutory inquiry, the Minister did not intend or convey that it would take the form of one set up under the 1921 Act or legislation following on it, but rather if it became necessary an inquiry conducted by the Oireachtas Committee on Health and Children would be held (P.17/18). Again, at P.53 l.14-19, the Minister stated: "I am not convinced, and I remain to be convinced, that the 1921 form of inquiry is the be stand most sensitive route to find out the truth. I think the form of statutory inquiry that I proposed will unearth the truth; it will do it far more effectively and efficiently and sensitively. That is my opinion." The Minister was quite clear in expressing himself: "Now again, our second stage of full public hearings will be heard in the Oireachtas."(P.54 l.12/13). The Minister repeated this again atp.70 l.10: - "There will be a statutory inquiry.... a statutory inquiry full stop. It is a different type of statutory inquiry to the '21 statutory inquiry but it is a statutory inquiry."

10. It is clear that when the meeting went into closed session, Senior Counsel (not the person intended to Chair the Inquiry) addressed the Group and explained(a) what it had hoped would be the structure of the inquiry and (b) what form the inquiry would take as stated by the Minister. The issue of the two tiers of the inquiry are clearly set out and explained to the Group; the first tier was one that would be chaired by Senior Counsel and that whatever would be contained in that report would go, into the second tier, and the second tier was where it is put before the Oireachtas Sub-Committee on Healthcare and Children. Now the benefit of that going before the Oireachtas Committee was that it would have the privileges that are associated with compellability and discoverability."(P.80, l.14-27). The Group were then advised by Senior Counsel as follows:

> "This is what I must make clear to you. There is no discoverability and there is no compellability in Phase 1. Basically, it is not statutory full stop. The Minister is wrong in that, and I think that he -- I don't think he was acting in bad faith, but he is legally incorrect in saying that it is statutory full stop. When he refers to "statutory" he says, well, it goes before the Oireachtas Committee is statutory and he is correct. But the first part is not statutory."

11. The other document stated to give rise to the entitlements contended for by the Applicant is a letter dated 27th September 2000 written from the Department of Health and Children and signed by a Mr. Tony Morris, Principal Officer, Secondary Care Division, to Ms. Charlotte Yeates, Chairperson for Parents of Justice, and is as follows: -

> "Dear Charlotte,
>
> Further to our meeting of 25th inst. and my subsequent telephone conversations with both you and Fionnuala, I wish to confirm the following:
>
> > 1. The Minister is fully confident that the structure and form of the Inquiry as established, which provides for referral to the Oireachtas Joint Committee on Health and Children (which has a statutory basis), will ensure the determination of the facts relating to the issues set out in the Terms of Reference. However, the Minister has confirmed that in the most unlikely event of the Inquiry not meeting its objectives in this regard, he will pursue the establishment of alternative forms of Inquiry including the establishment of a statutory inquiry under the Tribunal Acts, if necessary.
> >
> > 2. The Department is extremely concerned at your reports that some individual parents and relatives are experiencing difficulties and frustrations in accessing information from hospitals. I confirm this Department's determination to ensure that any difficulties in this regard are rectified by the relevant Health Boards/Hospitals. In this regard, I confirm that meeting of CEO's of Health Boards and Hospitals will be convened in the coming weeks to address these issues. This Department will be proposing the establishment of a fully resourced secretariat which will have the sole remit of assisting those parents and relatives experiencing such difficulties.
> >
> > 3. I would like to refer to your assertion that the Chairperson of the Inquiry will not be in a position to link names with activities and will be severely restricted in this regard because she does not have the High Court privilege that a statutory inquiry provides.
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> It is important that your members fully appreciate that while the Terms of Reference do not compel the Chairperson to link the names with activity, neither do they prevent her from doing so. She is entirely free to write her report as she deems appropriate and will have appropriate indemnity from the State to facilitate this freedom.

I trust this is the clarification which you require and if I can be of further assistance, please let me know.

Yours sincerely."

12. The history of the Inquiry, the subject of this litigation, is accurately and helpfully summarised in Chapter 1, paragraph 1.6 (page 20) of the Madden Report as follows: -

> "1.6. The Post Mortem Inquiry was established by a decision of the Government on 4th April 2000.
>
> Ms. Anne Dunne SC was appointed Chairman of the Inquiry on 6th April 2000, this Inquiry ceased to exist on 31st March 2005 following a Government decision to that effect. On that date, Ms. Dunne delivered to the Tanaiste and Minister for Health, Ms. Mary Harney, a report dealing with the three Dublin paediatric hospitals. This report comprised 3,500 pages and was accompanied by 51 box of appendices in the form of submissions from parents (next of kin, hospitals, Health Boards and professional bodies). On the advice of the Attorney General it was decided not to publish this report. On 5th May 2005 the Government appointed Dr. Deirdre Madden to complete a final report on Post Mortem Practice and Organ Retention by 21st December 2005."

The Legal Submissions.

13. Mr. Nesbitt SC on behalf of the Applicant stated that the Applicant's position was that the transactions described in the pleadings and referred to above established a legitimate expectation on her part that an effective inquiry process would take place. In particular, the Applicant placed reliance on the address of Minister Martin at the public meeting between Parents for Justice and the Minister and his advisors held on May 3rd 2000. It was on the basis of the assurances provided to her, the Applicant submitted, that she participated in the work of the Post Mortem Inquiry and made submissions to the Inquiry in or around December 2000. No report of the work of the Dunne Inquiry was made available to the public.

14. The Applicant's submission that the Minister's promise of a two-tier Inquiry with the second phase to be conducted by the Oireachtas Committee on Health and Children was compromised by the decision of the High Court and subsequently the Supreme Court in the case of *Maguire -v- Ardagh* [2002] 1 IR 385. It is stated that the effect of the judgement prevents the Oireachtas Joint Committee from undertaking any second phase of the Inquiry as represented by the Minister. In short, the Applicant's legitimate expectation that an effective inquiry would take place has not been met.

15. The submissions as to duty of care and misrepresentation and legitimate expectation arising from the foregoing are expressed as follows:

A. Duty of care

> That in representing to the Applicant that an effective inquiry would take place and in encouraging the Applicant to participate in such inquiry which reassuring her that there was a commitment to establish the facts surrounding the retention of her deceased child's organs, the Respondents and each of them undertook a duty of care to the Applicant. And in particular the Respondents failed to complete the initial inquiry and publish a report which failed to specify any findings, the Respondents are in breach of duty of such care as exists between them and the Applicant.

B. Misrepresentation

> It is contended that the Minister misrepresented to the Applicant the nature of the inquiry which would be undertaken and in this regard actionable misrepresentation arises. On the basis that a justiciable issue is one which provides a citizen with recourse to the courts (*Deighn -v- Hearne & Ors* [1986] I.R. 603) it was submitted the Applicant in this case brings such an issue before the Court and in this regard establishes a justiciable issue to be determined between the parties.

C. Legitimate expectation

> It is submitted that this ground, which is an aspect of the well-recognised equitable concept of promissory estoppel be held binding on the Minister. In this regard reliance was placed on the decisions in *Webb -v-Ireland* [1988] I.R. 353 at 384 and in particular a passage in the judgment of Lord Denning MR in *Amalgamated Property Company -v-Texas Bank* [1981]3 W.L.R. p. 565 at 575[F]: -
>
> > "When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow them to do so. If one of them does seek to go back on it, the courts would give the other such remedy as the equity of the case demands."

16. In the case of Webb, Finlay C.J. indicated that he was satisfied that: -

> "...an unqualified assurance had been given to the Plaintiff by the Director of the National Museum that he (Webb)would be honourably treated and such was an integral part of the transaction under which the hoard was then deposited in the museum and accepted on behalf of the State and the State could not renege on that assurance."

17. On behalf of the Respondents it was submitted that the power to inquire is an incident of the executive power of the State. In the course of his judgment in *Goodman -v- Hamilton* [1992] 2 I.R. 542 Costello J. (as he then was) stated that: -

> "There is no statutory provision which empowers the establishment of this tribunal either by the two Houses or the Minister. It is established by an administrative act, that is why the order of the Minister of 31st May 1991.*The Government or any Minister can enquire into matters of public interest as part of the exercise of its executive powers*, but if this is done without reference to Parliament, then the inquiry will not have statutory powers which are to be found in the Tribunals of Inquiry (Evidence) Act, 1921, the Tribunals of Inquiry(Evidence) (Amendment) Act 1997, (at 554; emphasis added)."

18. Reliance was also placed on the judgment in *Maguire -v- Ardagh* though to a different effect from that contended for by the Applicant.

19. I am satisfied that as a matter of law it is a matter for the Executive, at least in the first instance, as to whether to establish an inquiry and what form such inquiry is to take if it is sought to confer on such inquiry compulsory powers under the Tribunals of Inquiry (Evidence) Acts 1921-2004 or under the more recently enacted Commission of Investigation Act, 2004 the approval of both Houses of the Oireachtas must be obtained.

20. Mr. Maurice Collins SC for the Minister contended that it was a matter for the judgment or discretion of the Executive as to whether, in any given circumstances, the establishment of any form of inquiry is warranted and, if so, the precise form that inquiry should take. Reliance in this regard was placed on *inter alia Crampton -v- Secretary of State for Health* (unreported Court of Appeal 9th July 1993), R. (*Wagstaff) -v- Secretary of Health* [2001] 1 W.I.L.R. 292, R. *(Persey)-v- Secretary of State for the Environment* [2002] 3W.L.R. 704 and particular to the remarks of Bingham MR(as he then was) in Crampton's case that the decision is "pre-eminently a matter for the judgment of the [Executive]" or as expressed by Simon Brown L.J. in *Persey* "such choices plainly lie within the Executive's discretionary area of judgment."

21. I am satisfied and find as a fact and as a matter of law that neither the Constitution nor any statutory provision (whether a provision of the Tribunals of Inquiry (Evidence) Acts, the Commission of Investigation Act or otherwise obliges the Executive to establish an inquiry or in any given circumstances, still less an inquiry of a particular kind. What is in issue here is truly a power rather than a duty. There is no right in the Applicant or anyone else to have an inquiry or an inquiry of a particular form established by the Executive. The establishment of a tribunal with statutory powers of compulsion, given that such powers arise only upon a decision of the Houses of the Oireachtas, is not a matter that can be forced on by a decision of the courts. In the course of the decision in *Persey* it is stated "[inquiries]... come in all shapes and sizes and it would be wrong to suppose that a single model - full scale open public inquiry -should be seen as the invariable panacea."(P. 726)

22. I am satisfied and it is clear from the agreed facts that is the Minister made a decision to establish anon statutory inquiry with the intention of referring its report to an Oireachtas Committee which has a statutory basis. The Minister clearly considered but decided against seeking to establish a tribunal under the Tribunals of Inquiry (Evidence) Acts, there is no suggestion on behalf of the Applicant in these proceedings that the decision of the Minister was unreasonable in the sense understood in administrative law.

23. Whether a duty of care arises on the part of the Minister in favour of the Applicant: It would appear that there are many authorities which bear on this issue, e.g. *Convery -v- Dublin County Council* [1996] 3I.R. 153 and *W. -v- Ireland* (No. 2) [1997] 2 I.R. 141.However in my judgment the appropriate authority to proceed upon is that of the Supreme Court in *Glencar Explorations plc -v- Mayo County Council* (No. 2) [2002]1 I.R. 84. In that case the Plaintiff had in earlier proceedings successfully brought judicial review proceedings challenging the validity of a blanket" mining ban" imposed by the Council in relation to Croagh Patrick. It then sought damages on a variety of bases. The claim failed in its entirety. A claim for misfeasance in public office was claimed before the High Court but not pursued on appeal, where the principal issue was whether damages were recoverable by the Plaintiffs for negligence.

24. The principal judgment was delivered by the Chief Justice who, after a detailed consideration of a wide body of authority, held that no duty of care was owed by the Council to the Plaintiff, distinguishing the decisions in *Siney -v- Dublin Corporation* [1980] I.R.400 *and Ward -v- McMaster* [1988] I.R. 337 on the basis that, in each of those cases, the Plaintiffs belonged to a category of persons for whose benefit a particular statutory framework had been adopted. The judgment of the former Chief Justice is significant for its reappraisal of the decision of the Court in *Ward -v-McMaster* and the extent to which that decision incorporated into Irish law the liability principles enunciated in *Anns -v- Merton London Borough Council* [1978] A.C. 728 (which had, of course, subsequently been overturned by the House of Lords in *Murphy -v-Brentwood* [1991] 1 A.C. 398). The Chief Justice in the 15:14 *Glencar* case expressed his conclusions as follows: -

> "There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of "proximity" or "neighbourhood "can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the Defendant for the benefit of the Plaintiff, as held by Costello J. at first instance in *Ward -v-McMaster* [1985] I.R. 29, by Brennan J. in *Sutherland Shire Council-v- Heyman* [1985] 157 C.L.R. 424 and by the House of Lords in *Caparo plc -v-Dickman* [1990] 2 A.C. 605. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a "massive extension of a *prima facie* duty of care restrained only by the undefinable considerations"."

25. In the course of his judgment Fennelly J. in the *Glencar* case expressed full agreement with the views of Keane C.J. and his analysis of Irish and English case law stated as follows: -

> "This approach, by making findings of negligence before determining whether a duty of care exists, risks reversing the correct order of analysis. Admittedly, it was the course followed in this court in *Pine Valley Developments -v- the Minister for Environment* [1987] I.R. 23, where it was held that the Minister could not be considered negligent without pronouncing on the existence of a duty of care. The elements of the tort of negligence are the existence of a duty of care, lack of proper care in performing that duty and consequential damage. The lack of care which we commonly call negligence consists in commission or omission of acts. In order to be actionable, the acts or omissions must be such as will reasonably foreseeably cause damage to any person to who the duty is owed. Mere causation is not enough. As a matter of principle, it seems to me that the failure to exercise due care can only be established by reference to a recognised duty. "Then one can know what sorts of fact are liable to cause damage for which one is liable." This dilemma is well illustrated by the passage from the judgment of Kelly J. which I have just quoted. At the beginning and the end of the passage, he concludes that the respondent acted as "no reasonable authority would have done," a test more relevant to the validity of the exercise of statutory powers than to the failure to respect that standard of care which is owed to another to whom a duty is owed. This is consistent with the concrete criticisms made in the rest of the passage."

26. Reliance was also placed on the judgment of Kearns J.in *Kennedy -v- Law Society* [2004] 1 ILRM 178 where the Applicant (a solicitor) had successfully challenged the validity of an investigation which the Law Society had initiated in relation to his practice. He then sought to pursue the Society for substantial damages for misfeasance in public office and for negligence and breach of duty. When the matter came before Kearns J. he had to consider the applicability on whose behalf the Solicitors Accounts Regulations were brought into effect and he expressed himself as holding that they were introduced for the benefit of the public, not for the benefit of the solicitor being investigated under them. The matter went to the Supreme Court where the decision of Kearns J. was upheld and

while the judgment of Geoghegan J., who delivered the sole judgment of the Court, did not deal with the question of matters that he considered did not arise in the Pleadings went on to 15:30 state as follows: -

> "As a general proposition it can safely be said that apart from exceptional circumstances, a body such as the Law Society carrying out a public function in pursuance of a public duty is not liable to a private individual in tort unless the authority in so acting has committed the tort of misfeasance in public office. I will be explaining this tort in more detail later in this judgment but subjective *mala fides* is an essential feature of it. To allow damages to be awarded for breach of an alleged duty of care owed to the individual on the basis of what a reasonable person might have done (and therefore an objective test) would be to undermine the clear limits attached to the tort of misfeasance in public office..."

27. The issue was also considered more recently in the case of *Beatty -v- The Rent Tribunal* [2006] 1 ILRM 164.

28. I am satisfied that in the instant case we are concerned with powers vested in the Executive exercisable by it in the public interest. Matters such as the desirability of holding any inquiry, the form it should take, the subject matter of the inquiry, the nature and extent of the public interest, the likelihood of voluntary cooperation being forthcoming, the desirability, or otherwise, of public hearings, issues of duration and cost are but some of the factors likely to require consideration. In the exercise of those powers the Minister and the Government as a whole no more owe a duty to the Plaintiff or any other individual or individuals than Mayo County Council or the Law Society in the Glencar and Kennedy case earlier referred to. The imposition of such a duty would be wholly inconsistent with and inimical to the due discharge of those powers by the Minister and by the Government.

29. It was submitted that in this context the passage from the speech of Moulten L.J. in *Everett -v- Griffiths* [1921] 1 A.C. 631 (which was cited with approval in *Pine Valley Developments V Minister for the Environment* 15:36 [1987] I.R. 32 and *McMahon V Ireland* [1988] I.L.R.M. 610): -

> "If a man is required in the discharge of a public duty to make a decision which affects by its legal consequences the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public, and then to leave him in peril by reason of the consequences of others of that decision, provided that he has acted honestly in making that decision." (at 695)

30. Accordingly, I am satisfied that it is clear that the Defendants did not owe any duty of care to the Plaintiff such as to entitle the Plaintiff/Applicant to require the Defendants/Respondents to conduct "an inquiry conferred with powers to compel the production 15:41of documents and the attendance of witnesses" and or to entitle her to any of the declaratory orders claimed in the Statement of Claim.

31. Legitimate expectation: This matter was the central plank of the case advanced by the Applicant at the hearing. There are a considerable number of Irish authorities relating to the doctrine of legitimate expectations which, as McCracken J. noted in *Abrahamson -v- Law Society* [1996] 1 I.R. 403 are difficult to reconcile. A particular point of controversy in this jurisdiction and elsewhere is whether the doctrine "can have a substantive effect or whether its role is confined to that of a procedural guarantee."

32. There is authority to the effect that the doctrine protects procedural rights only and cannot be relied onto obtain a substantive benefit. Perhaps the clearest such authority is the decision of the High Court (Costello J. as he then was) in Tara Prospecting Limited -v- Minister for Energy [1993] I.L.R.M. 771 at p. 788, where the judge summarised what he considered to be the applicable principles in the following terms: -

> "1. There is a duty on a Minister who is exercising a discretionary power which may affect rights or interests to adopt fair procedures in the exercise of the power. Where a member of the public has a legitimate expectation arising from the Minister's words and/or conduct that (a) he will be given a hearing before a decision adverse to his interests will be take nor (b) that he will obtain a benefit from the exercise of the power then the Minister also has a duty to act fairly towards him and this may involve a duty to give him a fair hearing before a decision adverse to his interests is taken. There would then arise a correlative right to a fair hearing which, if denied, will justify the Court in quashing the decision.
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> 2. The existence of a legitimate expectation that a benefit will be conferred does not in itself give rise to any legal or equitable right to the benefit itself which can be enforced by an order of mandamus or otherwise .However, in cases involving public authorities, other than cases involving the exercise of statutory discretionary powers, and equitable right to the benefit may arise to the application of the principles of promissory estoppel to which effect will be given by appropriate court order.
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> 3. In cases involving the exercise of a discretionary statutory power the only legitimate expectation relating to the conferring of a benefit that can be inferred from words or conduct is a conditional one, namely, that a benefit will be conferred *provided that at the time the Minister considers that it is a proper exercise of the statutory power in the light of current policy to grant it*. Such a conditional expectation cannot give rise to an enforceable right to the benefit should it later be refused by the Minister in the public interest.
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> 4. In cases involving the exercise of a discretionary statutory power in which an explicit assurance has been given which gives rise to an expectation that a benefit will be conferred *no enforceable equitable or legal right to the benefit can arise. No promissory estoppel can arise because the Minister cannot estop either himself or his successors from exercising a discretionary power in the manner prescribed by Parliament at the time it is being exercised.*"

33. That decision was cited with approval by Carroll J. in *Navan Tankers Limited -v- Meath County Council* [1998] 1 I.R. 166, by Kelly J. in the High Court in *Glencar Explorations plc -v- Mayo County Council* (No. 2) [2002] 1 I.R. 85 and by Finnegan P. in *McAlister -v- Minister for Justice* [2003] 4 I.R. 35. In this context also the decision of the Supreme Court in *Wiley -v- The Revenue Commissioners* [1994] 2 I.R. 160 and in particular the judgment of O'Flaherty J. who cited with approval the decision of the High Court of Australia in *Attorney General for New South Wales -v- Quin* (1990) 170 CLR 1which was relied on by Costello J. in *Tara Prospecting.*

34. It was acknowledged on the Respondents' behalf that a different approach had been adopted in other cases such as *Duggan -v- An Taoiseach* [1990] I.L.R.M. 710 (a case which in my judgment is best understood has turning on its own particular facts) but more particularly in *Abrahamson -v- Law Society* [1996] 1 I.R. 403.

35. The issue was considered by the Supreme Court in Glencar, particularly in the judgment of Fennelly J. Keane C.J. merely noted the divergent lines of Irish authority as to the scope of the doctrine, particularly in relation to the question of procedural v substantive

benefit, considering it unnecessary on the facts to decide which approach was to be preferred. Fennelly J. went further but made it clear that his tentative observations on the issue were obiter.

36. The Applicant referred to the decision of McKechnie J.in *Keogh -v- CAB & Ors* (unreported 20th December 2002), which reviewed the law on legitimate expectation and considered its application to a taxpayer who sought to rely on the "Taxpayers' Charter of Rights" to avoid his failure to tend to his tax affairs as required by law. The taxpayer lost the argument but sought to use the charter to avoid the application of the law. In the instant case the Applicant contended that it is clear that the Minister has exercised his discretion as to how the matter will be dealt with. And that it is his failure to act as he decided to act that is the of the essence of the claim.

37. It was submitted that the there was no answer pleaded as to why he should be allowed to avoid a declaration to this effect or in fact suffer an order directing him to act. In my judgment if the doctrine had any application in the instant case the position is that by having the 'Dunne Inquiry' set up and proceed upon its business, the Minister had honoured the commitment given to the group of which the Applicant was a member. It was a tribunal set up on foot of an earlier decision made before the meeting of 3rd May 2000. Furthermore, the Madden Report, which is in the public domain, and has been for some considerable time, set out the general facts in relation to paediatric Post-Mortem practice in Ireland from 1970-2000. The Dunne Report, together with whatever documentation attends upon it and the Madden Report are to go to the Committee of the Houses of the Oireachtas dealing with Health and Children. That referral is to be made, as is clear from the letter of 7th September 2000 (if necessary) that committee will, on consideration of the reports, make such decision as lies within its jurisdiction as to what course to take. The purpose of the inquiry generally was never to give rise to individual legal claims for members of the group or other persons, but rather to look into the whole question of Post-Mortem practice. That it may have other peripheral consequences is quite a separate matter from the whole question of a duty or legitimate expectation. I do not consider it essential for the purpose of this determination to take a view on the issue whether the doctrine of legitimate expectation can have the effect of conferring an entitlement to a substantive benefit or whether the facts are procedural only, on any view the Plaintiff, in my judgment, falls short of establishing any legitimate expectation. To the extent that the issue does fall to determination, in my judgment, the approach taken in *Tara Prospecting* is correct.

38. The essential ingredients for a claim of legitimate examination have been considered by the Supreme Court in Glencar and also in *Daly -v- Minister for the Marine* [2001] 3 I.R. 513. The jurisprudence in our courts is not radically different from that as expressed by Scott Baker J. in *R (Howard) -v- Secretary of State for Health* [2003] Q.B. 830 at 853: - "strict conditions have to be fulfilled before a legitimate expectation arises."

39. The starting point, in my judgment, is to ask whether there is evidence of a "clear or unambiguous" representation by the Minister or anyone else, that there would be a public inquiry of the sort for which the Plaintiff contents. In my judgment, no, there is no such evidence. The material relied on by the Plaintiff makes it clear that no such representation was ever made. The authorities suggest that the existence of a clearly defined practice may suffice to satisfy this requirement. That, however, is not an argument that the Plaintiff makes. Furthermore in the event that there is no clear practice of establishing statutory inquiries to inquire into all matters of public concern, the Court must be aware that non statutory inquiries have been used and continue to be used in addition to statutory inquiries. While itis again unnecessary to seek to analyse the decision in *Webb -v- Ireland* [1988] I.L.R.M. 565, I take that to be a case of promissory estoppel rather than a true case of legitimate expectation. The observations of Barron J. in *Kenny -v- Kelly* [1988] I.R. 457 indicate that *Webb* was based on the principles of promissory estoppel (p. 463). Notwithstanding what has been considered as obiter by Fennelly J. in *Glencar* I consider what is stated (p. 161-163) as very helpful indicators as to how a court can and should approach this issue. Fennelly J. stated: -

> "In order to succeed in a claim based on failure of a public authority in respect of legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, there presentation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group have acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation *to the extent that it will be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected.* However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

40. (Laffoy J. in *Triatic Limited -v- The County Council of Cork*, unreported 31st March 2006 applied the foregoing propositions.) In the instant case the decision to hold a public inquiry was made prior to the meeting of 3rd May 2000.It is clear from the excerpts earlier referred to, that it was hoped that the inquiry first set up would produce the information required by the Terms of Reference but if it failed to do so the matter would be referred further on to the Oireachtas Committee. It is in that sense and that sense only, as was clearly indicated by Senior Counsel to the members of the group at the meeting, that a statutory inquiry of any description would be held. That is the position that was adopted prior to the meeting by the Respondents. The "representation" was as indicated here already in this judgment.

41. In my judgment, even on the assumed facts, such fall far short of establishing what is required of a "transaction definitely entered into" in this case. The Plaintiff puts the case in its submissions that "on the basis of the assurance provided to her, the Applicant participated in the work of the Post-Mortem inquiry and made submissions to the said inquiry in or around December 29th 2000." The assurances therein referred to are the meeting of 3rd May 2000 and in particular the letter of September 27th 2000. That letter makes it perfectly clear that the second of the tiers of inquiry would only occur if necessary.

42. In regard to the third element identified by Fennelly J. it is, in my submission, fatal to the Applicants' case because the obstacle to the Plaintiffs' legitimate expectation claim is that the establishment of an inquiry of the nature sought by the Plaintiff is, simply not, within the power of the Defendants. For an inquiry to be conferred with statutory powers set up either under the Tribunals of Inquiry (Evidence) Acts, or the Commission of Inquiry Act requires a decision of that effect of the Houses of the Oireachtas. That is a matter for judgment for that institution and not for the Court.

43. In my judgment the public interest remains the overriding consideration. While Fennelly J. referred to the principle that freedom to exercise properly a statutory power is to be respected, it is clear that the same principle applies to the exercise of non statutory powers by the Executive. The Court must be careful not to fetter unduly the Executive's freedom of decision.

44. Undoubtedly the Plaintiff was given to understand that an effective and expeditious inquiry would take place. The Minister is in no position to dictate, once the matter had been placed into the hands of the chairperson, the effectiveness or expedition of the inquiry itself. Regretfully the first phase of the inquiry was not as either expeditious or effective (from some person's point of view) as had been hoped. Indeed such was the length of the inquiry that the Respondents, five and a half years later, brought the matter to an end. The Madden Report clearly records that the purpose of the inquiry was to be a fact finding exercise "not a method of apportioning guilt or blame for what happened in the past." It does not address disputes or conflicts arising in individual cases (p. 22). In the course of her report Dr. Madden records as follows: -

> "3.2. All submissions from parents of children within the Terms of Reference were read carefully and analysed to ascertain the principal concerns and grievances of parents. All relevant transcripts of evidence given to the Dunne Inquiry were also taken into account in this regard. Individual cases have not been selected or identified in this report so as to protect the privacy of the families who made submissions. Their experiences are set out, using their own words, in chapter 4.
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> 3.3. All submissions from hospitals and health boards (as they then were) within the Terms of Reference were read carefully and analysed to ascertain the principal facts of Post Mortem practice in Irish hospitals since 1970. The length and complexity of the submissions varied between hospitals, with some producing vast amounts of documents, minutes of meetings, clinical audit reports, and or correspondence over the time period covered by the inquiry. Other hospitals produced little documentary evidence and relied on detailed answers to a set of scheduled questions put to each hospital at an early stage of the Dunne Inquiry. Some hospitals were hampered by lack of Post-Mortem reports or log books, and in some cases relied on the memory of personnel working in the hospital over the relevant period. In the absence of an independent audit of the pathology department of each individual hospital, the absolute accuracy of the details of Post-Mortems carried out on organs retained submitted by the hospitals cannot be objectively verified.
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> 3.4. In the course of her work Dr. Madden read the report prepared by Ms. Dunne together with the appendices submitted with the report. She met with Parents for Justice, the Infant Still Birth and Neonatal Death Society (ISANDS), Heart Children Ireland, the Faculty of Pathology, perinatal, paediatric pathologists, and professors of pathology from the medical schools of Irish universities. She visited the pathology departments of Crumlin Hospital and St. James' Hospital. Dr. Madden travelled to Manchester, Belfast, Edinburgh and Glasgow to meet with members of inquiry teams in the UK, Northern Ireland and Scotland who had carried out similar works in those jurisdictions. She also attended two conferences at the Royal College of Pathology in London in relation to the implementation of the UK Human Tissue Act, 2004.
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> 3.5. It had originally been envisaged that some aspects of Dr. Madden's work might be carried out in public and initial attempts were made to organise a public meeting during July. However, having discussed the possibility of a public meeting with the various interested parties, Dr. Madden concluded that such a meeting would not be productive at the present time.
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> 3.6. Following the publication of the Terms of Reference on 14th July, Parents for Justice called on their members to boycott the work of the inquiry. Following this decision, no further meetings took place between Dr. Madden and Parents for Justice." (P. 21-22)

45. I am satisfied on the facts and as a matter of law that the thrust and purpose of the inquiry to which the Applicant, through the group, indicated participation was for the general purpose of the practice of Post-Mortems in Ireland over the period 1970-2000. No express representation was made to the Plaintiff and/or to the group in absolute terms such as is contended for 16:47by the Applicant in the instant case. The effectiveness of the inquiry was rendered at least to some extent nugatory by the decision not to participate in the public hearings Dr. Madden clearly wished to undertake. The Dunne Report (as yet unpublished) and the Madden Report are to go to the Oireachtas Committee on Health and Children. It remains to be seen how the Committee will decide to proceed on the information they have to hand. The Committee will have to carry out its functions having due regard to the decision in *Maguire -v- Ardagh.* However, that decision will not necessarily have any impact on the Committee's it. To the extent that it does, then clearly that represents a change of circumstance since 1999/2000.

46. The critical aspect of the right of the Executive through the Committee of the Houses of the Oireachtas is its freedom of decision in its capacity to respond to material change and circumstances.

47. There have been a number of court decisions which have helped to clarify the legal position relating to the removal and retention of organs both in this jurisdiction (*Devlin -v- National Maternity Hospital* (unreported the High Court, O'Donovan J.), *O'Connor -v- Lenihan* (unreported the High Court, Peart J. 9th June2005) and *Tierney-Quirke -v- Southern Health Board*(unreported, the High Court Lavan J. 21st December 2005) and elsewhere, most notably the decision in *AB and others -v- Leeds Teaching Hospital NH Trust* [2004]EWHC 644 - per Gage J. in the Queen's Bench division). These changes, in my judgment, militate against the enforcement of a purported legitimate expectation of the Plaintiff at this stage.

48. In my judgment the question of the second tier of the inquiry is envisaged by the persons at the meeting on 3rd May 2000 has to be considered in the light of the expression if necessary of the letter of 27th September2000. Such an inquiry can only be established by a decision of the Houses of the Oireachtas. Clearly the Minister does not consider it appropriate to seek the establishment of such an inquiry for reasons which are identified in the submissions of the Defendant, which are legitimate reasons. It is a matter for the judgment the Minister in the first instance and ultimately a matter for decision by the Government and decision of the Houses of the Oireachtas whether such an inquiry, as wished for by the Plaintiff, should be established.

49. Effectively what is suggested by the Applicant is that for reasons or on grounds which are not clear, the Minister has a duty of care not to avoid injury to the Plaintiff but a duty of care importing an obligation to establish an inquiry of the character contended for by the Plaintiff. In my judgment there is no warrant on the evidence or the agreed evidence before the Court or on the authorities to suggest there could be such a duty of care owed by the Minister. In my judgment the case does not satisfy any element identified in the authorities as giving rise to a legitimate expectation. It is, in effect, under the guise of a declaratory relief a claim that is made for substantive benefit, which the authorities are of one view in this context cannot be obtained by way of legitimate expectation. Abrahamson's case itself does not suggest that there could be a legitimate expectation of the kind contended for the Plaintiff in this instance and in fact identifies the very reasons why there could not be. The Houses of the Oireachtas and the Committee set up thereunder cannot be dictated to by an order of the Court as to how it is to exercise powers entrusted to it or them.

50. In my judgment it is not open to the Court to give some form of advisory declaration or some form of conditional declaration unless I am satisfied that there is an obligation underlying the existing legal obligation. In my judgment there is not an existing legal obligation such as to justify an order in declaratory terms which is effectively of a mandatory injunctive character. I am of the view that there is no justiciable issue as between the parties and I rule accordingly.