Neutral Citation Number: [2010] IEHC 169

**THE HIGH COURT**

**2008 565 P**

**BETWEEN**

**LUKE MIGGIN (A MINOR, SUING BY HIS MOTHER AND**

**NEXT FRIEND EMILY MIGGIN)**

**PLAINTIFF**

**AND**

**HEALTH SERVICE EXECUTIVE AND MICHAEL GANNON**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Hanna, delivered on Friday 26th March, 2010**

The plaintiff in this case brings proceedings by his mother and next friend. He alleges he suffered serious brain injuries during the course of his delivery at the maternity unit at Mullingar General Hospital on the 28th day of February, 2006. The plaintiff says that, at all material times, he was under the care both of the first defendant's midwifery and nursing staff and the second defendant, a consultant obstetrician and gynaecologist.

This case comes before me as an appeal from a decision of the Master of the High Court refusing discovery of a transcript of the proceedings before the Fitness to Practice Committee of the Medical Council ("the Committee") conducted in April, 2008, and concerning a complaint made against the second named defendant as to the conduct and management of the plaintiff's birth. We are not presently concerned with the detail of what transpired before that committee. I should note, however, that the complaint against the second defendant was not upheld and this carries with it possible implications with regard to the release or otherwise of this transcript to the plaintiff as a consequence of an order of discovery and/or inspection.

Counsel for the plaintiff said that the discovery of the transcript of the said proceedings was essential for the conduct of the plaintiff's case and to create an "equality of arms" between the parties. Counsel for the defendants argued that an order of discovery should not be made against the second defendant Firstly, the transcript of the proceedings was impressed with a statutory privilege. Secondly, although undoubtedly relevant, discovery of the said documentation was not necessary.

The enquiry before the Committee was conducted pursuant to the provisions of the Medical Practitioners Act 1978, (the "Act of 1978") and in particular, s. 45 thereof. Section 45(1) of the said act provides, *inter alia*:-

> "45(1) The Council or any person may apply to the Fitness to Practise Committee for an inquiry into the conduct of a registered medical practitioner on the grounds of:-
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> (a) his alleged professional misconduct, or,
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> (b) his fitness to engage in the practice of medicine by reason of physical or mental disability,
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> and the application shall, subject to the provisions of this Act, be considered by the Fitness to Practise Committee."

Subsections (4) and (5) of the said act provide as follows:-

> "(4) When it is proposed to hold an inquiry under subsection (3) of this section the person who is the subject of the inquiry shall be given notice in writing by the Registrar sent by pre-paid post to the address of that person as stated in the register of the nature of the evidence proposed to be considered at the inquiry and that person and any person representing him shall be given the opportunity of being present at the hearing.
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> (5) The findings of the Fitness to Practise Committee on any matter referred to it and the decision of the Council on any report made to it by the Fitness to Practise Committee shall not be made public without the consent of the person who has been the subject of the inquiry before the Fitness to Practise Committee unless such person has been found, as a result of such inquiry, to be -
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> (a) guilty of professional misconduct . . . ."

The latter subsection gives a veto to the person about whom complaint has been made and who has successfully cleared himself or herself of an allegation of professional misconduct as to publication of the findings of the committee, a veto which the second defendant, quite properly and within his rights, has sought to employ. It is the defendant's case that subsection (5), cited above, extends to the transcript of the proceedings before the Committee.

A significant feature of the proceedings before the Fitness to Practice Committee was that the said committee, as it was entitled to do under s. 45(6) of the said act directed the plaintiff's mother to produce the following:-

> "All documentation in your power or possession in relation to your attendance at the Midland Regional Hospital at Mullingar on 28th February, 2006, including but not limited to any notes prepared by you in relation to the treatment afforded to

you by hospital staff and in particular Dr. Gannon."

Accordingly, the plaintiff's mother had to make, in effect, discovery of all material documents in her possession or power of procurement including notes that she appears to have made during the course of the labour. The second named defendant's lawyers now have possession of those notes and, no doubt, should the opportunity arise, will utilise them in their client's interest.

The plaintiff's mother attended the hearing before the said committee accompanied by her solicitor. Having completed her evidence, she and her solicitor were requested by the Committee to leave the hearing. An application by her solicitor to remain on, by way of holding a watching brief, was refused. Therefore, the plaintiff's mother and her solicitor are in a state of complete unawareness as to what transpired before the committee, a position which contrasts sharply with that of the second defendant. He has full access to the transcript, the mother's notes, the evidence which was given by the plaintiff's mother and documents, such as reports (if any) which may have been offered to the committee in defence of the second defendant.

A number of authorities were opened to me. The defendants placed significant reliance upon the decisions of both Costello P. in the High Court and Barrington J. in the Supreme Court in the case of *Barry v. the Medical Council and Anor* [1998] 3 I.R. 368. In both courts there was clear recognition of the discretion vested in the Committee by the Act of 1978, to decide whether or not proceedings before it were conducted in public or in private. In that particular case, the plaintiff, a medical practitioner against whom complaints had been made to the Medical Council, wished that the proceedings be conducted in public, given what he perceived to be the ruination of his professional reputation hitherto. The Committee determined that it would press on with matters in private and this decision was determined to be *intra vires*. Among the reasons given by Costello P. were that, given the nature of the complaints against the plaintiff, and the risk that the proceedings might not take place if the hearing were held in public, the interests of justice might be prejudiced and dealing with the matter in private would not offend, *inter alia*, the provisions of the European Convention on Human Rights.

At pp. 380 to 381 Costello P. says:-

> "The applicant's second submission is that the Committee's decision was *ultra vires* the Act of 1978. It is said that (a) the Committee misconstrued the Act of 1978 by holding that it had a discretion to hold the inquiry in private or public, (b) that the only discretion that the Committee had was to hold such part of the inquiry that might relate to confidential patient-doctor relationship *in camera* and (c) its decision was accordingly, *ultra vires*.
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> The statute is silent as to whether or not the hearing should be in private or in public but it seems to me that the Committee properly construed the statute by holding that it had a discretion in the matter. Section 45(1) of the Act of 1978 provides that the findings of the Committee and the decision of the Council on any report made to it by the Committee 'shall not be made public' without the consent of the doctor, unless the doctor has been found guilty of professional misconduct or unfitness to engage in the practice of medicine. This implies that the proceedings before the Committee and the Council may be held in private. The statute does not prohibit a public hearing and if requested by the doctor it may comply with such a request. Accordingly, a discretion exists. I have already held that there is no obligation imposed by the Constitution on the Committee to hold its sittings in public and accordingly there is no consideration based on the Constitution which would require a construction of the Act otherwise than is to be ascertained by the provisions of the statute itself."

In the Supreme Court, Barrington J. again identified and approved the discretion vested in the committee in the conduct of proceedings before it. At pp. 391 to 392 he says:-

> "The first question to decide is whether under the statute itself, leaving aside for the moment all questions of constitutional interpretation, the Fitness to Practise Committee has a discretion or power to conduct its proceedings in private. To this it appears to me that there can be only one answer and, indeed, I did not understand counsel on behalf of the applicant to argue the contrary. Earlier in this judgment I have quoted s. 45(5) of the Act of 1978 which provides that the findings of the Fitness to Practise Committee and the decision of the Council on any report made to it by the Committee should not be made public without the consent of the doctor who has been the subject of the inquiry unless such doctor has been found guilty of professional misconduct or unfit to engage in the practice of medicine. Clearly the purpose of this provision is to protect the reputation of practitioners who have not been found guilty of professional misconduct or unfit to engage in the practice of medicine. But such a provision would be pointless if the proceedings before the Fitness to Practise Committee had been held in public. It therefore appears to me that s. 45(5) contemplates, but does not necessarily require, that the proceedings before the Fitness to Practise Committee will have been held in private. It is not therefore surprising to hear that the practice of the Committee has been to hold its proceedings in private.
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> The present case is unusual in that the applicant, the practitioner against whom the complaints have been made, has demanded that the proceedings be held in public. He has done this, he says, because the case has received so much damaging advance publicity that his reputation as a doctor has been ruined and he would therefore welcome the opportunity to vindicate his character in public.
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> In these circumstances the only question is not whether the Committee has the right to conduct its proceedings in private but whether it has a discretion to conduct them in public. While the Act contemplates that proceedings before the Fitness to Practise Committee shall be in private it does not require it. I can see no reason why the Committee should not hold its proceedings in public if all parties were agreed and if the Committee itself thought it was the proper thing to do. While therefore the normal procedure before the Committee is to hold its proceedings in private I see no reason why it should not hold its proceedings in public in a proper case. In other words I think the Committee has a discretion in this matter."

Two important points emerge here. First, the Act of 1978, does not provide for an explicit discretion as to whether or not proceedings are conducted in public or in private. The discretion is implied, but is, nonetheless, very real. The Act of 1978 does impose an explicit embargo on publication of the findings of the Committee where a positive finding has been made regarding the medical practitioner under scrutiny where he or she does not give consent. This consent extends, I repeat, to the finding. The act is silent with regard to such matters as the transcript of the proceedings which, after all, in ordinary circumstances might or might not reveal the findings of the Committee. On the other hand, unregulated release of transcripts of the proceedings may have the effect of thwarting the discretion vested in the committee, as counsel for the defendant put it, "by the back door" thereby undermining the discretion.

Secondly, it is of interest to note, and I think the parties were in agreement on this, that were the provisions of the Medical

Practitioners Act 2007, in force and governing these proceedings, we would not be here, as provision is made therein for the publication of the transcript of the proceedings if the Medical Council ("the Council") is of opinion that publication is in the public interest. Whereas I would not presume to guess what the Council might do in such purely hypothetical circumstances, I can, however, state that it would be confronted with a persuasive argument to exercise its discretion in favour of the plaintiff.

Here we must deal with the provisions of the Act of 1978 and this case must be decided according to these provisions.

**DECISION**

1. In so far as any conflict lies between the public interest in the production of documents or in the maintenance of their confidentiality, under the provisions of the Constitution such conflict falls to be resolved by the courts. Where the courts seek to resolve this conflict in favour of the party seeking discovery and/or inspection of the documents by way of discovery, such a party is prohibited from employing the documents other than in the context of the action in question. The courts have an inherent jurisdiction to regulate in this area. (See *Ambiorix and Others v. The Minister for the Environment and Others* [1992] 1 I.R. 277. See also *O'Brien v. Ireland* [1995] 1 I.R. 568).

2. In the present case, there is no challenge to the right of the Committee to exercise its discretion to hear the complaint against the second defendant otherwise than in public. Furthermore, a legal challenge has not been made to the decision of the Committee to exclude the plaintiff's mother and her solicitor from the proceedings after she had concluded giving evidence. Of course, the plaintiff does complain about possible tactical and forensic shortfall resulting from this forced absence, and I am invited to weigh this actuality in assessing where the balance of justice lies in this case.

3. I expressly adopt the rationale of Barr J. in *Eastern Health Board v. The Fitness to Practice Committee of the Medical Council and Others* [1998] 3 I.R. 399 at p. 428. Under the heading "CONCLUSIONS" he says, beginning at para. 3:-

> "3. A statutory imperative that proceedings of a particular nature be held in private (as provided, for example, by s. 5 of the Punishment of Incest Act, 1908) does not imply that there is an absolute embargo on disclosure of evidence in all circumstances. Such an embargo requires specific statutory authority to displace judicial discretion at common law to permit disclosure in appropriate circumstances. If an absolute embargo on the publication of evidence adduced in the course of *in camera* proceedings in all circumstances were implied from a mandatory requirement that such proceedings be held in private, then grievous harm could be done to public and private interests and to the pursuit of justice. For example, if in the course of proceedings *in camera*, it was established that a witness was guilty of perjury or some other crime, the trial judge would be unable to refer the matter to the Director of Public Prosecutions with a view to having a criminal prosecution brought against the wrongdoer. Likewise, if it emerged in evidence protected by the rule that a professional witness, or a lawyer acting in the case, was guilty of professional misconduct, the trial judge would be inhibited in referring the matter to the offender's professional body for investigation. It would also follow if there was an absolute embargo that a child concerned in such proceedings would be spancelled in pursuing claims which he or she might have for damages arising out of evidence protected by the *in camera* rule, notwithstanding that the primary purpose of the rule in such cases is to protect the minor. A major far-reaching change in the law, which sets aside established practice, could not arise merely by implication derived from a mandatory statutory requirement that certain proceedings shall be held in private but, in my view, would require specific statutory authority.
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> 4. I have been unable to discover any specific statutory provision in Irish law which provides that there is an absolute embargo in all circumstances on the publication of information deriving from proceedings held *in camera*.
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> 5. There is an established practice at common law recognised in England and in this jurisdiction (see *P.S.S. v. Independent Newspapers (Ireland) Ltd*. (Unreported, High Court, Budd J., 22nd May, 1995), that the court in proceedings held *in camera* has a discretion to permit others on such terms as the judge thinks proper to disseminate (and in appropriate cases to disseminate himself/herself) information derived from such proceedings where the judge believes that it is in the interest of justice so to do, due and proper consideration having been given to the interest of the person or persons intended to be protected by the conduct of the proceedings *in camera*. In given circumstances the judge may find that a crucial public interest, such as the prosecution of crime or the protection of vulnerable children, takes precedence over the interest of the protected person in non-disclosure of the information in question.
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> 6. In considering a conflict between the public interest or the interest of a person seeking disclosure on the one hand, and the interest of an individual in retaining the full benefit of the *in camera* rule on the other hand, the court is bound by the concept that the paramount consideration is to do justice – see *In re R. Ltd*. [1989] I.R. 126."

4. In so far as any claim of privilege is advanced by the defendants, it has been held that transcripts of proceedings before the Committee do not bear such privilege and are amenable to an order for discovery. (See *Buckley v. Bough* (Unreported, High Court, Morris J., 2nd July, 2001)).

5. The guiding consideration in evaluating the necessity for discovery is the overriding interest in the administration of justice. Discovery must, of course, be relevant and necessary. Necessary does not connote absolute necessity. The party seeking discovery should show, for example, that he is at a disadvantage in litigating the case by not having sight of documents in possession of the other side. (See Kelly J. in *Ryanair plc v. Aer Rianta c.p.t*. [2003] 4 I.R. 264). In this case, it is beyond question but that the defendants and, specifically, the second defendant have in their possession documents which could be of considerable forensic assistance to the plaintiff. The transcript of the disciplinary proceedings could reveal matters of great assistance to the plaintiff, for example, in cross examination. The second defendant must gain an advantage by knowing everything that transpired at the said hearing. At the same time, that defendant has in his possession the plaintiff's mother's own notes of what transpired during that period of time which, no doubt, will be submitted to intense scrutiny at the substantive hearing of this case. The foregoing circumstances can only confer a litigious advantage on the defendants. In *Flynn v. R.T.E. and Others* [2000] 3 I.R. 344, Kelly J. cites Bingham M.R. in *Taylor v. Anderton* [1995] 1 W.L.R. 447 at P 462 as follows:-

> "… The crucial consideration is, in my judgment, the meaning of the expression 'disposing fairly of the cause or matter'. Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment

> is the test."

In *Science Research Council v. Nasse* case [1979] 3 All E.R. 673 at 684 Lord Salmon in his speech said:-

> 'Since confidential documents are not privileged from inspection and public interest immunity fails, the tribunal, which for this purpose is in the same position as the High Court and the County Court, may order discovery (which includes inspection) of any such documents as it thinks fit, with this proviso: 'discovery shall not be ordered if and so far as the court [or tribunal] is of opinion that it is not necessary either for disposing fairly of the proceedings or for saving costs.'
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> If the tribunal is satisfied that it is necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then, in my opinion the law requires that such an order should be made; and the fact that the documents are confidential is irrelevant.'"

6. The defendants argue that there is an equality of arms between the parties. After all, the plaintiff is being advised by lawyers of renowned expertise in the conduct of medical negligence litigation. He has available to him medical experts of great eminence, no doubt, who have all the information they need to be gleaned from the plaintiff's mother and, *inter alia*, the hospital notes and records. The plaintiff simply does not need this transcript certainly to the extent that it would necessitate dispensing with such privilege or confidentiality or both which might otherwise shield the transcript from discovery. I cannot accept this argument. The transcript is not the "Rolls-Royce" referred to by Geoghegan J. in *Carroll and Co. Ltd. and Others v. Minister for Health and Children and Others* [2006] 3 I.R. 431. On the contrary, and as I have already noted, there is the potential that this could constitute a formidable weapon in either supporting the plaintiff's case or undermining the case of the second named defendant. It may provide powerful material. It may not. The plaintiff, of course, possesses some strong cards. The fact, however, that the second defendant possesses the full pack, in all the circumstances of this case, creates, in my opinion, an inequality of arms.

7. I must apply a test of proportionality (see *Independent Newspapers v. Joseph Murphy Junior* [2006] 3 I.R. 566, Clarke J.). In my view, the discovery of the transcript in question in circumstances where it can only be used in the context of a trial where serious allegations of negligence are going to be levelled against the second defendant in any event, is not disproportionate to the second defendant's right to confidentiality. It does not, in my opinion, abrogate in any way the right of the Committee to conduct its proceedings according to its legally and constitutionally informed discretion. Balancing justice in the specific circumstances of this case, I am of the view that the discovery of the transcript of the proceedings is warranted, limited in use as I've indicated above, and in circumstances where the court can exercise its inherent jurisdiction to police such discovery. I allow the appeal and direct that the Order of the Master of the High Court be amended accordingly.