APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/250

Noonan J.
Faherty J.
Allen J.

Neutral Citation Number [2023] IECA 78

BETWEEN

CLIONA O'KEEFFE AND ALAN DORAN

PLAINTIFFS/APPELLANTS

AND

THE GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE RELIEF OF THE POOR LYING-IN WOMEN, DUBLIN

DEFENDANT/RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 30th day of March, 2023

1. This is an appeal by the plaintiffs/appellants *("the parents")* against the judgment of the High Court (Twomey J.) delivered on 26th July, 2022 ([2022] IEHC 463) and consequential order made on 4th October, 2022 refusing the parents' application for discovery by the defendant/respondent *("the hospital")* of the statements made to an inquiry conducted by the hospital into the death of the parents' baby, Fiadh, at the hospital on 12th January, 2019.

2. In the High Court, and before this court on the appeal, there was extensive debate as to the circumstances in which public interest considerations associated with a risk management inquiry should weigh against the disclosure by a hospital of all documents and records relevant to litigation brought against a hospital, but as I will explain, there was no evidential basis for that debate. Absent evidence as to the circumstances in which and the purpose for which the contested documents came into existence, the debate, in my view, was moot.

3. Ms. O'Keeffe became pregnant in early 2018 and from 19th June, 2018 attended at the hospital from time to time for ante-natal care. Following a number of attendances in the meantime, Ms. O'Keeffe was admitted to the hospital on 9th January, 2019 for a planned induction of labour. The delivery was complicated. Baby Fiadh was born at 05:32 on the morning of 11th January but died on the following day.

4. On 21st December, 2020 a personal injuries summons was issued on behalf of the parents claiming damages for the wrongful death of Fiadh and damages for personal injuries and nervous shock to the parents. Mr. Maher S.C., opening the appeal, recalled the judgment of Hardiman J. in *Grant v. Roche Products (Ireland) Ltd.* [2008] 4 I.R. 679 and emphasised that the parents fundamental object in bringing their action is to secure a finding of wrongful death in vindication of the personal rights of Baby Fiadh. The indorsement of claim set out a detailed chronology of the labour and delivery, and the attempts to save Baby Fiadh. It made the parents' case that the hospital had been negligent, setting out thirty-two particulars of negligence.

5. On 12th January, 2021 an appearance was entered on behalf of the hospital and – following a motion for judgment in default of defence – the hospital's defence was delivered on 14th December, 2021. The affidavit of Ms. Laura Croke, an associate solicitor in the firm of Michael Boylan Litigation Law which acts for the parents' – to which I will come – shows

that the medical records had been provided by the parents' solicitors to the hospital's solicitors on 21st December, 2020.

6. The defence admitted Ms. O'Keefe's admission to the hospital, the birth, and the death but otherwise largely traversed. The parents were put on full proof of the factual narrative, matters and allegations pleaded in the particulars of the circumstances relating to the commission of the wrong; and the hospital denied the allegation of negligence and the particulars of negligence as if set out and traversed *seriatim.* Under the heading *"The grounds on which the defendants claims that it is not liable for the injuries alleged to have been suffered by the plaintiffs,"* the hospital justified the specific elements of the management of the labour and the delivery criticised in the summons and pleaded that the care provided was at an acceptable level.

7. The personal injuries summons was verified by an affidavit of Ms. O'Keeffe sworn on 12th January, 2021 and the personal injuries defence was verified by an affidavit of Prof. Fergal Malone, consultant obstetrician and gynaecologist.

8. Notice of trial was given on 13th January, 2022 and on the same day the action was set down for hearing. A notice to produce was served by the parents' solicitors on 13th January, 2022 and by the hospital's solicitors on 8th February, 2022.

9. On 11th January, 2022 the parents' solicitors wrote to the hospital's solicitors asking for confirmation within fourteen days that the hospital would make voluntary discovery of three categories of documents, broadly, (1) all documentation generated between 19th June, 2018 and 31st January, 2019 in respect of the care of Ms. O'Keeffe and Baby Fiadh, (2) the protocols and guidelines in place in that time for the management of identified complications in labour and delivery and (3):-

> *"Copies of all reports, memos and statements concerning [Ms. O'Keeffe's] labour and delivery and [Fiadh's] death in the possession, power or procurement of the*

[hospital], their servants or agents, medical consultants, midwives or third parties acting on the [hospital's] behalf as a consequence of the hospital's risk management enquiry into the incident event."

10. There appears to have been no reply to that letter, or to a reminder of 27th January, 2022 and by notice of motion dated 11th March, 2022 the parents applied to the High Court for an order for discovery in the terms previously sought.

11. That motion was grounded on an affidavit of Ms. Laura Croke sworn on 9th March, 2022, to which I have referred. Ms. Croke summarised the claim and the proceedings and set out that voluntary discovery of medical records had been made on 21st December, 2020. The averment was ambiguous but it was evident from an earlier affidavit of Ms. Croke, sworn in support of the motion for judgment, that the records had been provided by her to the hospital's solicitors. Ms. Croke referred to and exhibited her unanswered letters of 11th January, 2022 and 27th January, 2022 and said that:-

"I say that the documents sought to be discovered are within the possession, power or procurement of the defendants and are relevant to the issues in dispute between the parties. I say that the reasons for the plaintiffs seeking each particular category of documents is fully and clearly set out in the said request for voluntary discovery made by letter dated 11th January, 2022."

12. The relevance of the first two categories of discovery sought is clear from the summons and defence. The third category suggests – as the reasons given in the letter seeking voluntary discovery in support of the category asserted – that at some stage the hospital had conducted a risk management inquiry: but not when, or by whom, or for what particular purpose, or on what terms. Without reading too much into – or reading anything out of – Ms. Croke's averment, she did not specifically depose that the documents were necessary for the fair disposal of the action or for saving costs.

13. The parents' motion for discovery was returnable for 30th May, 2022 which – as usual – was a Monday, and came on before Twomey J. By then – and only shortly before the return date – there had been engagement between counsel as to the discovery sought and agreement had been reached in relation to the first two categories.

14. As to the third category – the statements made to the inquiry – counsel for the parents submitted that *"that the best available evidence in relation to those circumstances would be any statements that have been made in the immediate aftermath of the death of the baby in the course of that investigation."* Counsel for the hospital opposed the application for the third category on the grounds (1) that the parents had already been provided with the report of the risk management inquiry, (2) that the parents had been provided with draft depositions which had been prepared for a forthcoming inquest, (3) that the documents underlying the risk management inquiry were inadmissible and hearsay, (4) that the contemporaneous medical records rather than the statements – which, it was said, had not been made in the immediate aftermath of the incident – were the best evidence, (5) that the only reasonable purpose for which the statements might be sought was cross-examination, and (6) that there was an important point of policy that the risk management inquiry had been conducted by a clinician and/or administrative staff who had no power of compulsion but depended on the cooperation of the staff. Citing *Tobin v. Minister for Defence* [2020] 1 I.R. 211, and looking at relevance, proportionality and necessity, counsel submitted that the family had all they needed and *"there are strong policy arguments against ordering discovery of the category at paragraph C within the motion."*

15. Although it had not been spelled out by counsel in those terms, Twomey J. expressed the view that the case seemed to raise a significant issue in relation to policy, specifically, from the perspective of seeking to learn from the incident for the benefit of future patients in

the hospital and of ensuring that those engaging with the inquiry were as open and forthright as possible. The judge invited submissions:-

> *"... in relation to the position, in relation to inquiries, risk management and risk assessment inquiries that take place after incidents, and the extent to which the existing law applies somewhat different rules of disclosure than might otherwise apply for policy reasons in order that the participants in the process are as open and frank as they would be to a legal advisor, knowing that they have the benefit of legal professional privilege. But in this instance, in circumstances where the policy is that the more frank people are, the more likely the hospital is to learn how they might improve their practices."*

16. Just to pause there, it is easy to contemplate that in hospitals – as elsewhere – inquiries may be carried out or assessments made after incidents or near misses directed to identifying – and obviating or minimising – the risk of re-occurrence: but there was simply no evidence that the inquiry the subject of the discovery application was such an inquiry. There are – I think that I am entitled to say that I am aware – many models for such inquiries, one of the best known being the European Union Aviation Safety Agency model, which is underpinned by Regulation (EU) 376/2014: but there was simply no evidence that the hospital's inquiry was based on any particular model. I respectfully agree with the judge that the case might have given rise to an important policy issue and an important legal issue, but on the evidence, it did not.

17. On 28th June, 2022 the motion came back into the list before Twomey J. for further argument. The transcript shows that what had previously been described as a *"risk management inquiry"* was now described as a *"comprehensive systems analysis report."* Counsel for the hospital clarified that at the time of the previous hearing the parents had not been provided with the draft depositions for the inquest, but that they had since.

18. Counsel for the parents sought to hand in a copy of the *"Comprehensive systems analysis report"* but this was successfully opposed by counsel for the hospital on the basis that the sole purpose of the adjourned hearing was to allow legal submissions to be made. Having kept out the hospital's report, counsel for the hospital later managed to hand in a 149-page document called *"HSE Incident Management Framework"* – which, by the way, commences, in the foreword by saying that:-

> *"When an incident occurs, we have the opportunity to demonstrate the HSE's Values of Care, Compassion, Trust and Learning and this should be marked by openness and transparency. From the time of the incident and throughout the management process, the response of managers, clinicians and other frontline workers must be to seek to demonstrate these values so as not to damage the confidence and trust of any person affected by the incident."*

19. Counsel for the hospital focussed on a passage on page 29 where, under the heading *"Cross service reviews"* it was said that:-

> *"The terms of reference, review team and the service taking the lead should be jointly agreed. Systems should be put in place to ensure the seamless conduct of the review including agreement as to data protection, confidentiality, the sign-off of the final report and development of the implementation plan. The implementation and monitoring of recommendations particular to a service/location are the responsibility of that service/location regardless of which service led on the review."*

20. When I first read this passage, I had difficulty understanding how the HSE protocol on the conduct of cross service reviews might have been relevant to any inquiry by the hospital into an incident which occurred within the hospital – and at the hearing of the appeal counsel could not really explain how it was relevant – but the real point is that there was no

evidence as to how the HSE document was relevant to the inquiry which had been conducted by the hospital.

21. In any event, at the hearing in the High Court, counsel for the parents submitted that orders such as that sought – for discovery of statements made to inquiries – were relatively commonly made by the courts and were regularly consented to. This was contested by counsel for the hospital who submitted that:-

> *"It may be the case that they are sought on a regular basis but I would contest that they are at all consented to on behalf of the defendant. I would dispute that they are regularly ordered by the court. They may be ordered on occasion, but discovery is made or determined on a fact-specific basis, on a case-by-case basis, at the discretion of the court."* [Emphasis added.]

22. In support of his argument, counsel for the parents referred to *Miggin (a minor) v. Health Service Executive* [2010] 4 I.R. 338 in which discovery was ordered of the transcript of proceedings before the Fitness to Practice Committee of the Medical Council and *Gallagher v. Stanley* [1998] 2 I.R. 267, in which the Supreme Court held that legal professional privilege did not attach to statements prepared by nurses at the request of the matron of a hospital. Reference was also made to the *dictum* of Fennelly J. in *Ryanair p.l.c. v. Aer Rianta c.p.t.* [2003] 4 I.R. 264, to the effect that it does not lie in the mouth of a party which has denied almost all of the pleaded facts and put the opposing party to proof, to evade discovery by claiming that the facts can be easily proved.

23. Counsel for the hospital referred to the judgment of the Supreme Court in *Tobin* and, having identified what she referred to as the overarching principles of relevance, necessity, and proportionality, focussed on necessity and most especially proportionality. Counsel referred to two chapters from *Abrahamson on Discovery and Disclosure* (3rd. edition) which have not found their way into the book of authorities submitted to this court but where the

authors usefully and clearly explain the difference between privilege and confidentiality and examine the relevant cases. Having urged that *Miggin* was distinguishable on the ground that the doctor the subject of the Fitness to Practice Inquiry was a party to the action and having referred to *Leech v. Independent Newspapers* [2009] 3 I.R. 766 and *O'Neill v. An Taoiseach* [2009] IEHC 119, counsel for the hospital continued:-

> *"So there are a number of important points, judge, there where I've just paused. Firstly, the court in Leech said that the inquiry there in issue was carried out on an ad hoc basis. I compare that to the matters in issue in this case. The inquiry carried out by the risk management inquiry is essentially an ad hoc inquiry. It is clinician led, it does not have a legal process, it does not have lawyers involved. Confidentiality of the process and confidentiality is assured to the people who participate. That's an incredibly important point, judge. Part of the framework – there's a document which can be handed in to you. It's referred to as the HSE Incident Management Framework and I think it's dated from 2018. In carrying out these forms of reviews, it refers to the terms of reference which the review team and service taking the lead should agree. It says that: 'Systems are (sic.) put in place to ensure the seamless conduct of the review including agreement in relation to data protection and confidentiality, the signing-off of the report.' The important piece there, judge, is that it ensures agreement with regard to confidentiality. …*
> *The benefit of the outcome from that is twofold. Firstly it produces a report, which has been provided to the family and has been provided to the plaintiffs and their legal representatives. So they do have the full formal report itself, judge. The second benefit, of course, from the report is the learnings outcome from (recte. for) the hospital. This is the policy point that I was making on the last occasion to the court. It is essential in carrying out this type of systems review or a risk*

management inquiry report that the hospital will have the benefit of the co-operation of the staff, clinicians, midwives, nurses and that they will attend and give their account. They do that on the basis that they are assured confidentiality. There is no power of compulsion. Without that, judge, there is a detrimental risk to the process itself."

24. The insuperable difficulty with this eloquent argument is that there is no evidential basis for it. There is no evidence that the inquiry was clinician led. There is no evidence that it was based on a model contemplated by the HSE Incident Management Framework. There is no evidence of the purpose of the inquiry. There is no evidence that the terms of reference were agreed, or what the terms of reference were. And most of all, there is no evidence that those who may have engaged with the inquiry were given an assurance of confidentiality, whether – as suggested by counsel later in her submission – by letter sent to each participant, or otherwise. This asserted assurance of confidentiality, which was characterised by counsel in the modern usage as *"incredibly"* important, was the foundation of the judge's consideration of the legal arguments. But there was no evidential basis for it.

25. I add for completeness that counsel for the parents did not reply.

26. The High Court judge commenced his judgment by saying that it dealt with a situation where a hospital undertakes a risk management inquiry after an incident with the intention of learning from the incident, in order to improve patient care.

27. The parents' second ground of appeal – I do not immediately understand why it was not the first – is that High Court judge erred in his determination that a public interest existed without any evidential foundation or affidavit evidence in support of it. The hospital in its respondent's notice counters that there is no *de jure* or *de facto* need for a judge considering the application of confidentiality and public interest to have affidavit evidence. The grounds of opposition go on to assert that those who made statements to the inquiry were assured of

confidentiality; to assert the role of the inquiry as being to improve the future outcomes for patients; and to assert that assurances of confidentiality were essential to the discharge of the functions of the inquiry.

28. It is common case that confidentiality and public interest privilege are separate and distinct. It is common case that while a ground of privilege can generally be invoked as a right, confidentiality is not a right but is something that can be taken into consideration in deciding whether or not to order discovery.

29. In *Tobin* Clarke C.J. said, at para 44:-

> *"These measures exist, of course, against the backdrop that confidentiality (as opposed to privilege) does not provide a legitimate basis for refusing to require disclosure of documents should they prove necessary for the proper administration of justice. But they do provide a warrant for the court adopting appropriate measures to respect the importance of confidentiality by ensuring that it is only displaced when the production of confidential documentation proves truly necessary to the just resolution of proceedings."*

30. In *Ryan v. Dengrove DAC* [2022] IECA 155, Collins J., in a judgment with which Edwards and Noonan JJ. agreed, undertook a detailed review of the authorities dealing with discovery and confidentiality before, at para. 67, setting out a list of the principles to be derived from those authorities. Those principles which are particularly relevant in this case are that:-

> *"1. The starting point remains what is relevant in the Peruvian Guano sense. Absent relevance, a document will not be discoverable.*
>
> *2. While the 'default position' is that a document shown to be relevant should be considered to be one whose production is necessary, that position is not absolute*

and may be displaced. Establishing the relevance of a document gives rise to no more than a rebuttable presumption that discovery of that document is necessary.

3. Where the document at issue is confidential, its discovery should be directed only where it is 'clear' that the interests of justice in ensuring the fair disposal of the proceedings makes such an order necessary.

4. Impact on third parties is of particular significance. …

5. As is correctly emphasised by the authorities, confidentiality must ultimately yield to the interests of justice. …

6. In that context, a balance has to be struck between the likely materiality of any given document to the issues likely to arise in the proceedings and the degree of confidentiality attaching to it. …

7. It follows from the foregoing that a court may – and in an appropriate case ought to – refuse to direct the discovery of a relevant document (relevant in the Peruvian Guano sense) on the basis that the document is confidential and that in the particular circumstances the interests of protecting its confidentiality outweigh the interests favouring its disclosure. If that is not so, then it follows that relevance trumps confidentiality in every circumstances. That is not the law as I understand it. …"

31. It seems to me that not even the fact, still less the nature and extent, of confidentiality can be established by assertion. The likelihood of the existence of the first two categories of documents sought – the medical records and the protocols – was demonstrated by the pleadings. On one view, perhaps, the evidence is support of the fact of the inquiry and existence of the contested documents was thin enough but it is accepted that they do exist. While counsel in argument in the High Court indicated that she would focus on necessity and proportionality, it was, in truth, never in contest that the statements gathered by the inquiry

were relevant – in what Collins J. has described at the *Peruvian Guano* sense – to the issue of liability.

32. If, as it does, the establishing of the relevance of a document gives rise to a presumption that discovery of that document is necessary, the onus shifts to the requested party to rebut that presumption by establishing first the fact and then the nature and extent of the confidentiality. Whether a document is or is not confidential is a matter of fact, to be demonstrated by evidence.

33. The core proposition underlying the hospital's argument is that the statements were obtained in confidence, with an express assurance of confidentiality, and with a view to identifying and safeguarding against a recurrence of anything which might be shown to have gone awry in the incident under investigation. There is and was simply no evidence of any of that. I accept that in describing the material in respect of which a confidentiality claim is made, a requested party might need to be quite circumspect but it is trite that confidentiality by itself is no answer to a request for discovery and that in determining the legitimacy of and weight to be attached to a claim of confidentiality much will depend on the circumstances in which and the purpose for which the documents came into existence. If, in a particular case, the confidentiality claimed might be to some extent undermined by going too far into the detail of the contents of the documents or even – in the case, for example, of an inquiry – identifying the source of the information, the fact and the weight of the claim may be shown by a detailed explanation of the circumstances in which and the purpose for which the documents came into existence.

34. It will be recalled that at the first hearing of the motion before the High Court, it was asserted on behalf of the parents that the statements gathered by the inquiry were the best available evidence and that those statements had been taken in the immediate aftermath of the events. It seems to me that counsel for the hospital was entitled to have protested at the time

that there was no evidence as to when the documents had come into existence but not – as has been done in the written submissions on the appeal – to seek to supply that deficit by asserting that the terms of reference were signed on 8th April, 2019 and the review completed on 20th November, 2019.

35. The hospital in its submissions on the appeal, refers again to the HSE Incident and Management Framework – which counsel managed to get to the judge, and so into the books of appeal – if not into evidence. I have already set out the passage from page 29 of that document relied upon by the hospital. It says that systems *should* be put in place to ensure confidentiality, but does not go to show that they were. The assurance of confidentiality was, as the hospital now submits, a factor referred to by the judge in the course of his judgment. It was, as counsel submitted to the High Court an *"incredibly important"* point. It was the foundation of the claim for confidentiality. But there was no evidence of it. Nor was there any evidence of the objective of the inquiry. It seems to me that the nature of the inquiry might readily have been shown by the terms of reference, but these were not in evidence.

36. Mr. Foley S.C., on behalf of the hospital, sought to make much of the fact that counsel for the parents had not – at the hearing before the High Court – objected to the submissions made on behalf of the hospital, which are set out at para. 12 of the High Court judgment. When I read the transcript of the High Court hearing was, I must say, surprised that objection was not taken that there was no factual basis for the submission on behalf of the hospital. But I do not think that the hospital's submission can properly be founded on the absence of an objection. On the principles clearly established by *Tobin*, the parents having established the relevance – in the *Peruvian Guano* sense – of the contested documents, the onus shifted to the hospital to establish why discovery should not be ordered.

37. The hospital suggests the height of the parents' case is that there *may* be inconsistencies in factual statements it *wants* and the medical records it *has*, and that the High

Court was entitled to conclude that discovery was not required. This, I believe, is to misunderstand the parents' argument. Their first argument is that – having established the relevance of the contested documents – they are presumptively entitled in law to an order for discovery and the hospital has failed to lay the evidential ground for its confidentiality claim. I accept that submission. In my view the parents have shown that the High Court judge erred in principle in entertaining arguments for which there was no factual basis.

38. Towards the end of his oral presentation Mr. Foley – accurately reading the wind – submitted that if this court was disposed to deciding the case by reference to the evidence which was before the High Court, the motion might be remitted to allow the hospital to adduce evidence of the circumstances in which and the purpose for which the inquiry was convened. I am not persuaded that that would be a correct approach. It seems to me that if the High Court judge had – as he ought to have – discounted the hospital's opposition to the motion, the parents would have had their order.

39. In my view the parents' appeal should be allowed and an order made for discovery of the contested documents.

Judgement delivered by Mr. Justice Noonan

I agree with the judgement just delivered by Mr. Justice Allen that this appeal should be allowed and I would like to add a few brief observations of my own. As this is an appeal from an interlocutory discretionary order of the High Court, it is worth repeating what has often been said by this Court in recent times, namely that this Court will not normally interfere with such orders where they fall within the range of judgment calls reasonably open to the High Court, even if this Court might have made a different order.

That is, of course, subject to the overriding consideration that there is no error of principle or injustice arising from the making of the order by the High Court. I am satisfied here, however, that there is a clear error of principle and consequent injustice arising from the decision of the trial judge which unfortunately is based on assumed facts, of which there was absolutely no evidence. Rather, the trial judge appears to have accepted the submissions of counsel as though they were evidence.

We live in an era where it is virtually impossible to read the news without seeing headlines about the latest medical catastrophe, be it systemic or individual. Many of the dark episodes of the part have been characterised by a culture of cover-up, which has hopefully now been consigned to history. The clamour for a duty of candour or open disclosure over the years has led to the introduction of legislation and ethics policies designed to ensure that when things go wrong patients who are mostly, by definition, vulnerable when mishaps occur, have the fullest possible access to information from those entrusted with their care. The forthcoming patient safety legislation is but one example of this. Many hospitals, and indeed the HSE itself, as Mr. Justice Allen has pointed out, already operate voluntary disclosure regimes. Notably, the current Guide to Professional Conduct and Ethics of the Irish Medical Council has a specific section at paragraph 67 dealing with open disclosure and the duty of candour, and for illustration purposes I will refer to that briefly:

> *"Open disclosure is supported within a culture of candour. You have a duty to promote and support this culture and to support colleagues whose actions are investigated following an adverse event. If you are responsible for conducting such investigations, you should make sure they are carried out quickly, recognising that this is a stressful time for all concerned."*

In the next paragraph, the Guide says:

> *"Patients and their families, where appropriate, are entitled to honest, open and prompt communication about adverse events that may have caused them harm. When discussing events with patients and their families, you should acknowledge that the event happened; explain how it happened; apologise, if appropriate; and assure patients and their families that the cause of the event will be investigated and efforts made to reduce the chance of it happening again."*

While these are, of course, ethical rather than legal obligations, they are not, in my view, entirely without significance in the broad context of the public interest.

So one is instinctively somewhat surprised to see a hospital in a case such as present actively arguing that full and frank statements made by those who treated Baby Fiadh should not be made available to her parents on the basis that they were given in confidence and were it otherwise, it might discourage the making of such statements and thereby hamper the effective conduct of inquiries.

That seems to be to be a somewhat retrograde position to adopt. It proceeds on the assumption that healthcare professionals would be unwilling to comply with their own governing body's ethical policies and standards unless under guarantee of secrecy, a stance which seems to me surely inimical to the direction of travel of open medical disclosure, for now several decades.

The trial judge here placed primary reliance on the judgment of the Supreme Court in the well-known *Smurfit Paribas* case, which of course deals with legal professional privilege and there, the Chief Justice held that it was in the public interest to protect from disclosure communications between a party and their legal advisor, for the reasons he gave.

Here, the High Court appears to have reached a similar conclusion on the basis that the public interest favours protecting the confidentiality of statements made by doctors and nurses to private inquiries into medical accidents. Although it does not arise for consideration now in light of the judgment just given by Mr. Justice Allen, and I would reserve a full consideration of the issue to a case in which it arises directly, I have considerable misgivings about the Judge's conclusion on this issue. There can be no doubt that in the present case (and in fairness to the Defendant, it is not really in dispute) the documents in issue are relevant.

The hospital inquiry undertaken into Baby Fiadh's death and the statements made to that inquiry are, by definition, relevant. Accordingly, they are, on a *prima facie* basis at least, discoverable and that is, I think, evident from the judgment of the Supreme Court in *Tobin v. Minister for Defence* and the judgment of this Court in *Ryan v. Dengrove* and the onus of proving otherwise rests upon the defendant. Whether their disclosure is necessary is dependant on a range of factors and confidentiality is certainly one such factor, although the evidential basis for that is entirely lacking here.

However, were it established that these statements were given in confidence, that, without more, does not shield them from disclosure. The evidence would have to go very considerably further to rebut the presumption of discoverability. Were it to be established, for example, on the evidence that staff might not cooperate with an inquiry absent a guarantee of confidence, the Court might well have to consider whether such a stance was ethical, and if not whether the public interest or common good could support such an approach, or whether it could be regarded as consistent with the proper administration of justice. The Court would have to decide whether the fact that the statement was made in confidence outweighed the interests favouring disclosure having regard to the factors to which I have alluded.

As I have already explained, it is unnecessary to decide this issue today and, accordingly, these comments are clearly made on an *obiter* basis. However, were it necessary to do so, I would disagree with the trial judge's assessment of the public interest in this case in preserving the confidentiality of the statements in issue. For the reasons I have explained, I would allow this appeal.

Judgement delivered by Ms. Justice Faherty

I have listened with care to the judgment just delivered by Mr. Justice Allen and indeed to the further comments just delivered by Mr. Justice Noonan. I too, for the reasons Mr. Justice Allen sets out, would allow the appeal. As has been comprehensively set out by Judge Allen, there was here a manifest error in principle in the manner in which the High Court proceeded on the basis of an assumption of confidentiality having been established, where there was manifestly no evidence of any such confidentiality. I do not consider what is set out at paragraph 12 of the High Court judgment in any way remedied this fundamental frailty and I would just add that at its most fundamental level, the interests of justice, which underpins all discovery applications, mandated here that there would have been a clear factual basis to which the Judge could then apply the rationale he set out at paragraph 31 of his judgment. I have listened with care to the comments of Judge Noonan and I agree with those comments. It will fall to another day to consider whether the factors central to the Judge's rationale as set out in paragraph 41 are correct, but I would just say at this juncture that I would concur with the views, albeit maybe *obiter*, expressed by Judge Noonan in the latter parts of his comments.