

IRISH HAEMOPHILIA SOCIETY

TRIBUNAL NEWSLETTER

ISSUE 31

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TRIBUNAL OF INQUIRY

**(Into the Infection with HIV and Hepatitis C of Persons
with Haemophilia and Related Matters)**

PROCEEDINGS: Tuesday 8th May 2001 - Day 126

Mr. Martin Giblin made an application on behalf of the Irish Haemophilia Society, challenging a claim to legal professional privilege claimed by the BTSB over certain documents contained in its second supplemental affidavit of discovery. Mr. Giblin set out the background to the application, which arose by virtue of the Chairperson's ruling of the 1st February 2001, wherein she ordered the BTSB to provide a supplemental affidavit of Discovery in keeping with the law as described in the Bula case.

Mr. Giblin said it was the Society's contention that the BTSB had failed to comply with the Chairperson's direction in that its affidavit did not adequately enumerate the content of each document over which privilege was raised. In failing to adequately identify the contents of each document, it was impossible for a reader of the affidavit to determine if the particular document contained legal advice which is privileged, or legal assistance which is not.

Mr. Giblin pointed out that it was established in law that legal advice is privileged, but legal assistance is not. The documents described by the BTSB's Affidavit did not offer the reader of the affidavit an adequate opportunity to determine if they contained either legal advice or legal assistance. In these circumstances, said Mr. Giblin, it would fall to the Tribunal Chairperson to determine if the documents enjoyed legal professional privilege or otherwise.

It is further established in law that where a claim of privilege is challenged, the onus is placed on the person invoking that privilege to justify it. He also argued that the correct formulation of legal professional privilege lies where it is established that a communication was made between a person and his lawyer acting for him as lawyer, for the purpose of obtaining from such lawyer legal advice.

Mr. Frank Clarke responded to Mr. Giblin's application on behalf of the BTSB. Mr. Clarke said he did not disagree with the principles as set out by Mr. Giblin concerning the difference between legal advice and legal assistance. However, he said he did not accept that the general contents of the documents over which privilege had been claimed, should be set out. To do so would be to render void the principle of legal professional privilege. Mr. Clarke said that the legal professional privilege asserted over the documents in the affidavit of Dr. Lawlor for the BTSB was properly established by virtue of the averment in the affidavit that such documents did in fact contain legal advice. Mr. Clarke said for the Irish Haemophilia Society to successfully challenge the claim of legal professional privilege contained in the affidavit, it would have to produce cogent evidence that such documents over which legal professional privilege had been claimed did not in fact contain legal advice.

Mr Clarke said no proper case had been made out to the Tribunal that it should examine the documents. However, he agreed with Mr. Giblin that if the Tribunal decided that there was merit

in the application, that this should be the course that the Tribunal should adopt, ie. it should examine the documents rather than order a further supplemental affidavit.

Replying Mr. Clarke's submissions, Mr. Giblin said that other affidavits furnished to the Tribunal following its ruling of 1st February, gave an indication of what was contained in the documents. In this way, it could be determined if they were likely to contain either legal advice or legal assistance. This was not the case with the B'TSB's affidavit, he said. Mr. Giblin also pointed out that it may be necessary to cross examine Dr. Lawlor on the affidavit. He reiterated that the onus was on the person claiming privilege to establish privilege once a challenge had been raised. He questioned the practicality of adducing cogent evidence challenging a claim for legal professional privilege for documents which were described in a manner that left it impossible to determine whether they contained either advice or assistance.

Mr. Giblin said that, with the forthcoming phase of the Tribunal where the role of the Department of Health would be under investigation, it was important that the issue be determined as the documents could be relevant to the Department of Health phase of the Tribunal's investigations.

PROCEEDINGS: Wednesday 9th May 2001 - Day 127

Judge Lindsay gave her ruling on the Irish Haemophilia Society's application, challenging the right of the BTSB to claim legal professional privilege over documents contained in the supplemental affidavit of Dr. Lawlor of 15th March 2001.

The Chairperson set out the averment in the affidavit of Dr. Lawlor, wherein she claims legal professional privilege over 611 documents contained in the schedule to the Affidavit. The Chairperson said that she was satisfied that this was a careful exercise by her [Dr. Lawlor], and that she was aided by legal advice in the selection of the documents, and that she selected documents coming within her understanding of what is legal advice.

The Chairperson said if she were to refute this she would need evidence, and cogent evidence, to the effect that such legal privilege was wrongly asserted. Instead, said the Chairperson, what she had received was a cogent argument put forward by the Irish Haemophilia Society that such enumeration did not allow the Chairperson to distinguish between what is legal advice and legal assistance. However, no *prima facie* case was put forward that a document, or documents, contained in the schedule were not such as should have legal privilege attached to them.

The Chairperson said she was directed in her judgement by the judgement of Mr. Justice Kelly in *Duncan – v - The Governor of Portlaois Prison*, in which he said that if a challenge was to be made against the claim of legal professional privilege, it would be contained in a very rare case and that cogent evidence would have to be adduced on behalf of the person challenging that such legal privilege was wrongfully asserted.

The Chairperson said that she appreciated that the case put forward by the Society could be that rare case, but she said cogent evidence had not been adduced before her to substantiate that any document or documents over which legal professional privilege had been asserted by Dr. Lawlor, was in fact incorrectly asserted. She said she accepted that the affidavit, as a sworn document, grounded the claim for legal professional privilege. The Chairperson said that if cogent evidence had been adduced before her, and if there was a doubt in her mind with regards to the assertion of legal privilege over certain documents, she would have no hesitation in calling for a further affidavit or to inspect the documents herself, but she said she was not satisfied that this was the case.

The Chairperson said she thought there would be very little point in giving the protection of legal professional privilege if one had to state the nature of the advice one was seeking or giving. She said in her view that would defeat the very purpose for which legal professional privilege was accorded in the first instance. The Chairperson said she was satisfied that the BTSB had complied with the direction contained in her ruling of 1st February, and had prepared and sworn an affidavit which covers the stipulations outlined by her at that time. The Chairperson reiterated her view that cogent evidence must be adduced and a *prima facie* case must be made that legal professional privilege was wrongfully asserted before she would set it aside. She said there must be a doubt, and she did not have that doubt. The Chairperson refused the application.

**APPLICATION BY THE IRISH HAEMOPHILIA SOCIETY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

The High Court

Friday 11th May 2001

Mr. Martin Giblin S.C. moved an application for leave to apply for Judicial Review before Mr. Justice Kelly in the High Court on 11th May 2001. Mr. Giblin, appearing for the I.H.S., told the Court that the respondent in the matter was the Chairperson of the Tribunal, and the notice party was the Blood Transfusion Service Board, now known as the Irish Blood Transfusion Service. Mr. Giblin told the Court that his position was that the I.H.S. challenged legal professional privilege claimed in the supplemental Affidavit of Discovery of Dr. Emer Lawlor. Mr. Giblin said that the nature of the Affidavit and the description of the documents contained therein, over which legal professional privilege had been claimed, put the applicant in an impossible position and the applicant was unable to identify if the documents contained legal advice which was privileged or legal assistance which was not. Mr. Giblin pointed out that the respondent had shifted the onus of justifying a challenge to privilege, onto the applicant. Mr. Giblin said he was not seeking a comprehensive description of the documents, but said it was possible to describe the documents short of compromising legal professional privileged information contained therein.

Mr. Giblin said he was seeking Orders of Certorari quashing various rulings of the Tribunal Chairperson declarations that the Tribunal Chairperson erred in Law, and an Order of Mandamus directing the respondent to order the B.T.S.B. to furnish further Supplemental Affidavit of Discovery, wherein documents over which it asserts legal professional privilege are described, such that of the Affidavit would be able to determine if such documents contained legal advice or legal assistance. Mr. Giblin said that in the Supplemental Affidavit of Discovery as sworn by Dr. Lawlor, legal professional privilege is claimed but no evidence is offered that Dr. Lawlor is in a position to define the difference between legal advice or legal assistance.

With respect to whether or not Judge Kelly could determine issues of fact, Mr. Giblin said the Court was not, in an application for Judicial Review, the arbiter of fact. Judge Kelly said the Court was concerned with the issue of law and would decide issues of law. Mr. Giblin said the matter of law arising in his application was that of fair procedures. Mr. Giblin said it was impossible for the applicants to offer cogent evidence on the contents of the supplemental Affidavit without some indication as to the nature of the documents, the applicant had therefore not reached the stage where a challenge to the documents could be sustained. The applicant had failed to reach this stage because the documents inadequately identified the nature of the contents of the documents.

Mr. Giblin opened his statement of grounds and the Affidavit of Mr. Pat Long. He put the transcript of the proceedings before the Court. Mr. Giblin told the Court the applicant did not disagree that legal professional privilege attached to documents containing legal advice. He did not say the contents of the documents should be revealed, such that the nature of the advice was

open. But he did say he was entitled to have some indication as to what the documents contained, so as to determine whether or not the legal advice, as a matter of probability, attached to the documents. Mr. Giblin said the applicant was not seeking to destroy privilege. By way of comparison Mr. Giblin said the Affidavit of the IMB contained enough detail for a reader of the Affidavit to be able to determine whether or not a document contained legal advice or legal assistance, and this being the case, no difficulty arose with the IMB supplemental Affidavit.

Judge Kelly asked Mr. Giblin, was it his case that privilege had not been properly asserted, and was it also the case that the applicant did not reach the stage of being able to offer a challenge to that privilege because of the deficiency in the Affidavit. Mr. Giblin agreed that this was the case. Mr. Giblin said that, while the Chairperson felt that the schedule for the Supplemental Affidavit was satisfactory and the issue of fair procedure arose, a further issue of fair procedures arose on the right to cross examine on the Affidavit. Mr. Giblin said that the requirement to produce cogent evidence without the weapon of cross examination presented an insurmountable hurdle to the applicant. Mr. Giblin said that, since the deponent had declined to adopt the usual formula whereby she would state that she had been advised legal professional privilege pertained arising from advice she herself had received from her lawyers, she was therefore expressing her own opinion. Given that she was expressing such an opinion, Mr. Giblin said that the applicant should now be allowed to explore her state of knowledge by way of cross examination.

Judge Kelly asked Mr. Giblin, was the applicant applying for a stay on the proceedings of the Tribunal. Mr. Giblin said that this was not the case, and asked for short service should the Court grant leave. Such short service to facilitate an early hearing of the Judicial Review. Mr. Giblin said at this stage the applicant was not looking for a stay as such. However, the Tribunal would be consulted and, assuming leave was granted, serve papers on the Tribunal.

Judge Kelly asked Mr. Giblin, had the applicant filed an Affidavit raising objection to the Supplemental Affidavit of Dr. Lawlor, objecting to the fact that she was not aided by legal advice in putting together her Affidavit. He said no such Affidavit had been submitted by the applicant to the Tribunal. Mr. Giblin said the matters before the Court should ideally be resolved before the next phase of the Tribunal commences. Mr. Giblin said he submitted that the Tribunal Chairperson exceeded her jurisdiction ruling that the schedule containing a proper distinction between legal assistance and legal advice. The requirement that the applicant produce cogent evidence challenging the contents of the Affidavit, in the absence of any detail concerning the document in the Affidavit, prejudiced the applicant and further prejudice was imposed on the applicant by refusing to allow cross examination on the Affidavit. Mr. Giblin said the applicant should have been allowed to explore Dr. Lawlor's knowledge as to whether or not she could distinguish between legal advice and legal assistance. Mr. Giblin further submitted that the respondent was wrong in law in placing the onus of justifying a challenge to legal professional privilege on the applicant, rather than on the notice party. The notice party having in fact claimed privilege in the first place. The onus of defending a claim of privileged property lay with the person raising that claim, said Mr. Giblin.

On ruling the application of the Irish Haemophilia Society, Judge Kelly said that the Irish Haemophilia Society came to Court seeking leave to apply for Judicial Review of an Order of the Tribunal Chairperson concerning the Affidavit of Discovery of the notice party.

Judge Kelly said the notice party, the B.T.S.B., had been directed by the Chairperson to submit a second Affidavit following a successful challenge by the I.H.S. to its first Affidavit of Discovery. Judge Kelly said the second Affidavit set out 611 documents over which legal professional privilege is asserted. At paragraph four of the Affidavit, the deponent, Dr. Emer Lawlor, claimed legal professional privilege over the documents. Judge Kelly noted that the applicant society was dissatisfied with the descriptions of the documents in the second Supplemental Affidavit, and argued its case before Judge Lindsay, Sole Member of the Tribunal.

Judge Kelly said it was quite clear that extensive legal argument had been offered by both sides before Judge Lindsay, who ruled on 9th May 2001 that the notice party's claim to legal professional privilege was properly asserted. Judge Kelly noted that the applicant had sought permission to cross examine Dr. Lawlor on her Affidavit, and this application had been refused. Judge Kelly said that he had had the benefit of reading the transcripts of the proceedings before Judge Lindsay, and her ruling was set forth therein. Judge Kelly noted that the applicant had brought its application in complete conformity with the rules of Court. He noted that the Tribunal was about to proceed on another phase of its Inquiry, where the response of the Department of Health into matters under investigation would be examined. Judge Kelly said he noted at this point, the applicant was not seeking a stay of the proceedings, but if it was to proceed unimpeded, this was a matter for consideration. It had been indicated that such an application may be made if the Court granted leave.

Judge Kelly said he read the transcript and the Affidavit of Discovery, and while the application was brought within the rules of Court, he noted the Court was vested with the discretion to direct that an application for leave be heard by way of notice of motion to the parties, rather than on an ex parte basis. Judge Kelly granted the applicant liberty to serve notice of motion for leave to apply by way of an application for Judicial Review by way of notice of motion to the respondent and the notice party. Such application would be heard at 2.00pm on Monday 14th May 2001, when the issue of a stay on the proceedings could also be addressed.

Judge Kelly said he would therefore refuse the application ex parte, but would hear it on Monday on notice at 2.00pm. The issue of a stay would then be addressed, he said.

**APPLICATION BY THE IRISH HAEMOPHILIA SOCIETY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

The High Court

Monday 14th May 2001

Mr. Martin Giblin S.C. moved the I.H.S. application for leave to apply for Judicial Review before Mr. Justice Kelly. The application was opposed by the Tribunal, represented by Mr. John Finlay, and the BTSB, represented by Mr. Frank Clarke S.C.

Mr. Giblin put his case, which was resisted by the Tribunal and the BTSB.

Judge Kelly delivered judgement on the 16th May 2001, and refused to grant leave to the Irish Haemophilia Society to issue Judicial Review proceedings against the ruling of the Chairperson.