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Midwife Ann Kelly wins Supreme Court victory against Nursing Board

By Marie O'Connor

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Dublin home birth midwife, Ann Kelly, has won her four-year legal battle against the Irish Nursing Board. On 17 May last, the Supreme Court ruled in her favour in two separate appeals. The midwife won her appeal quashing the Nursing Board's right to hold an inquiry into three outstanding complaints against her. At the same time, the Board had its appeal against the lifting of the injunction against her in 1999 dismissed.

One of the five Supreme Court judges, Mr Justice Hardiman, referred to the existence of a debate in Ireland on the merits of "domiciliary childbirth", saying that the existence of such a debate underlined the need for "proper and fair procedures". Kelly had previously been acquitted of misconduct on 10 March after a lengthy inquiry into a complaint against her made by a prominent Dublin obstetrician. He has just been served by Kelly with a writ for defamation.

In September '96, the former Master of the National Maternity Hospital at Holles Street, Dr Peter Boylan, complained to the Nursing Board that Kelly had 'left' a woman in labour at home for three days, before transferring her to his hospital. Mother and baby were in perfect health, and the parents opposed the complaint. A 19-day hearing into this case, held intermittently over a three- year period by the Irish Nursing Board's Fitness to Practice Committee, concluded that Kelly was not guilty of professional misconduct.

Dr Boylan, who is the co-author, with Dr Kieran O'Driscoll, and his father- in-law, Dr Declan Meagher, of the third edition of "Active Management of Labour", made a second complaint against Ann Kelly. This case, however, belonged to another midwife. No attempt was made by the Nursing Board to investigate this latter complaint, before moving to suspend Kelly from practice. The Board's failure to do so was heavily criticised by the Supreme Court.

Two further complaints against Kelly came from another major Dublin maternity hospital, the Rotunda. These complaints were similar to the first one, in that neither the mothers nor their babies suffered any ill-health. Both mothers strenuously opposed these complaints, and told the High Court that if they become pregnant again, they would employ Ann Kelly as their midwife. Since then, one of them has actually had another baby at home under Kelly's care.

Again, no inquiries were made by the Board to establish the facts in these cases before applying, successfully, for an injunction against the midwife. In July 1997, the Board went to the High Court to have Kelly's name removed from the register, alleging that she represented a "danger" to the community. Later, in his evidence to the High Court in May '99, the Chief Executive Officer of the Nursing Board, Mr Eugene Donoghue, maintained that the Board was not obliged to make any inquiries before seeking an injunction against a nurse or a midwife suspending them from practice. This argument, however, was decisively rejected by the Supreme Court.

As many as 60 pregnant women then applied to the High Court for permission to book Kelly as their home birth midwife. The High Court was told by counsel for Kelly that this case was a "turf war" between two competing professions, obstetrics, and midwifery. Home birth services in Ireland provided by independent midwives are low-tech, drug-free, and midwife-led; the allegations came from large maternity hospitals where birth is high-tech, drug- based, and midwives apply "active management" protocols under obstetric direction.

Kelly's clients were succesful in their High Court applications, and 47 "injunction babies", as they were later to be legally baptised, were born, safely and well, from 1997 to 1999. (The injunction had been lifted by the time the other 13 women came to give birth.)

In May '99, the President of the High Court lifted the injunction against Ann Kelly. It had been in place for nearly two years. The Nursing Board, however, refused to accept the judgement of Mr Justice Frederick Morris, and appealed his verdict to the Supreme Court. The Board duly lost its appeal on 17 May.

On that date, the Supreme Court found that the Nursing Board had acted unfairly in that it had failed to notify the midwife of the existence of the three complaints made against her by hospital management prior to applying to the High Court on 31 July '97 to seek an injunction depriving her of her right to work. "Fair procedures", Mr Justice Barron, one of the five judges, observed, "would require some form of inquiry".

He was harshly critical of the Board's administrators. Opposing the lifting of the injunction in May '99, the Board's Chief Executive Officer, Mr Eugene Donoghue, told the High Court that the incoming Board, appointed in September '97, two months after Kelly's suspension, had never reviewed the complaints despite all the evidence filed in the High Court contradicting them. He explained to the President of the High Court that the Board was a board 'in perpetuity', therefore it did not need to discuss the matter, and since the Board had applied to the High Court, it was up to the Court to decide what to do, not the Board.

The Supreme Court rejected these arguments. Mr Justice Barron said he regarded it as "totally unacceptable" that the Chief Executive Officer should have thought it "unnecessary" to notify the Board as to how the case was proceeding.

On 10 March '00, the Board's Fitness to Practice Committee acquitted Kelly of misconduct in relation to the first complaint. Notwithstanding this verdict, the Committee recommended that the midwife's name

be retained on the Board's register on condition that she be subjected to public health nursing supervision, involving six-monthly reports on her midwifery practice for a period of two years. The Committee, which consisted of a majority of nurses, cited no evidence in their one-and-a-half-page report, and gave no reasons for their conclusions. The Fitness to Practice Committee consisted only of Nursing Board members: the jury in the trial, therefore, was also the prosecutor in the case. The case was heard in camera. Kelly lost a High Court application to have it heard in public. Ann Kelly successfully applied for leave in the High Court to bring a judicial review challenging these recommendations, and this action will be heard later this year.

The Kelly Case is thought to have wide implications for self-regulating professions, including midwives, nurses, doctors, solicitors, barristers, and accountants, everywhere. The legal view is that these professions may have to sharpen up their disciplinary machinery to make it fairer, so that complaints can be dealt with at an early stage. To quote Mr Justice Barron, fairness of procedure is simply fair play in action.

By December '99, the Nursing Board had spent £540,000 on the Kelly Case. Although Kelly was acquitted by the Board's Fitness to Practice Committee, the Board is not obliged to pay the costs of her legal representation. Human rights legislation has not been introduced in Ireland, and there is no obligation to pay for the legal defense of a person accused of wrongdoing (as has been mooted in Britain in the case of financial tribunals) even where that person is found innocent.

Kelly's insurance did not cover her in the case of a vexatious complaint, where no damage was done to "the patient". The Irish Nurses' Organisation had originally offered Kelly £1,500 towards her legal costs. It later withdrew this offer, then finally gave her the money. On 19 May, the Dublin-based firm of MacGeehin and Toale, who act for Kelly, and who took the case on a pro bono or "no foal no fee" basis, were awarded the bulk of their High Court and all of their Supreme Court costs against the Nursing Board. The only casualties, as far as costs were concerned, were the mothers who had originally applied to the High Court for leave to vary the injunction so that they could have their babies at home under Kelly's care. Their legal team, who also took these cases on a pro bono basis, were refused their costs by the Supreme Court.

Ann Kelly's costs against the Nursing Board have been estimated to be at least £1m. Midwives and nurses expect to be asked to pick up the tab.

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