THE COURT OF APPEAL

UNAPPROVED

Court of Appeal Record Number: 2019/474

Neutral Citation: [2022] IECA 174

Whelan J.

Faherty J.

Binchy J.

BETWEEN/

PETER MCEVOY AND LINDA MCEVOY

APPLICANTS/

APPELLANTS

- AND –

THE PRELIMINARY PROCEEDINGS COMMITTEE AND THE MEDICAL COUNCIL

RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 29th day of July 2022

1. This is an appeal from an Order of the High Court (O'Regan J.) of 30th October 2019 whereby she refused the appellants leave to apply for judicial review, of a decision made by the Preliminary Proceedings Committee ("the PPC") of the Medical Council made on 17th January 2019 and endorsed by second named respondent, the Medical Council, on 6th February 2019. The decision of the PPC related to a complaint (the "Complaint") made by the appellants to the Medical Council in connection with treatment administered to Mrs.

Eileen McEvoy, wife of the first named appellant, and mother of the second named appellant, following the onset of a stroke on 9th May 2012. The Complaint was advanced against two named doctors, Dr. A of hospital A, and Dr. B of hospital B and is set out in considerable detail in the Complaint form submitted by the appellants to the Medical Council on 6th June 2017.

2. At the conclusion of the relevant part of this form, the appellants advanced the following complaints against Dr. A:

1) Dr. A made no attempt to administer what is known as clot busting medication or make any attempt at blood thinning in accordance with national/guidelines, even though Mrs. McEvoy presented at hospital A within sufficient time to do so;
2) Dr. A referred and transferred Mrs. McEvoy to hospital B in order to undergo a thrombectomy, which is described as an experimental and unauthorised surgical procedure without disclosing in advance to Mrs. McEvoy or her next of kin (being the appellants, who were present at all times at hospital A) the name of the procedure, the experimental nature of it, or the risks known to be associated with the procedure. Nor, the appellants claimed, did Dr. A inform the appellants of the name of the surgeon who would undertake the procedure and his professional research interest in the procedure;
3) Accordingly, Dr. A made no attempt to obtain informed consent from either Mrs. McEvoy or her next of kin prior to transferring her from hospital A to hospital B for the purpose of such surgery;
4) Dr. A offered no explanation, after the procedure, as to why it was unsuccessful, nor to explain the adverse consequences of the procedure for Mrs. McEvoy;
5) There is no record in hospital A of Dr. A's first examination of Mrs. McEvoy in the emergency department;

6) There is no record in hospital A of the times and the content of discussions between Dr. A and Dr. B regarding Mrs. McEvoy.

3. The appellants advance the following complaints against Dr. B:

1) That on Wednesday 9th May 2012, he performed an experimental and unauthorised surgical procedure on Mrs. McEvoy without disclosing the experimental nature of that procedure, its risks and his professional research interest in the same. As such, Dr. B made no attempt to obtain informed consent from any party (i.e. neither from Mrs. McEvoy nor her next of kin) prior to carrying out the procedure;

2) Upon conclusion of the procedure, in the knowledge that it was not successful and that the condition of Mrs. McEvoy was deteriorating, he "ejected" Mrs. McEvoy from hospital B;

3) He failed to offer any explanation as to why the procedure did not work, and its consequences for Mrs. McEvoy;

4) There are no records in hospital B of the discussion between Drs. A and B concerning Mrs. McEvoy.

4. The appellants then proceed to make some allegations concerning hospital records regarding the transfer of Mrs. McEvoy to and from hospital B, and other records prepared by named parties other than Drs. A and B. The Complaint form concludes with a statement that the appellants have in their possession a medico-legal report prepared by an eminent UK based neurologist which states:

1) Clot busting drugs should have been administered to Mrs. McEvoy;

2) There was no excuse not to obtain informed consent to the surgical procedure in circumstances where the next of kin of Mrs. McEvoy were available;

3) The transfer of Mrs. McAvoy to hospital B was delayed;

4) The commencement of the thrombectomy operation was delayed.

The appellants did not provide a copy of this report to the respondents either with the Complaint or at any time thereafter.

5. As already mentioned, the narrative contained in the Complaint is very detailed. At the end of the Complaint, it is signed by both appellants, and Mr. McEvoy describes himself as a retired senior producer and director in RTÉ, and Ms. Linda McEvoy describes herself as a solicitor. It appears that Ms. McEvoy has at all times had responsibility for the conduct of these proceedings on behalf of both appellants, and she represented herself and her father at the hearing of this appeal.

6. The narrative of the Complaint runs to some 19 pages. Annexed to the Complaint is a suite of documents which includes, *inter alia*, hospital records relating to Mrs. McEvoy, articles about stroke, academic commentaries on the procedure of thrombectomy, information relating to medical devices used in connection with the procedure and documentation obtained by the appellants under FOI concerning research projects at hospital B. In total, the Complaint and documentation submitted with it ran to some 251 pages.

7. The Complaint was acknowledged by letter dated 21st June 2017, sent by a Ms. Carol Fitzgerald, Case Officer of the PPC. In this letter, Ms. Fitzgerald sets out briefly the investigative procedure and, importantly as regards one of the appellants' complaints in these proceedings, Ms. Fitzgerald states:

> "In order for the PPC to fully consider your complaint, it is important if you have any documentation such as contemporaneous notes, reports, diary entries, medical records, photographs etc. that these are furnished to me as soon as possible."

8. On 31st July 2017, Ms. Fitzgerald again wrote to the appellants, explaining that the PPC had met on 25th July 2017, and had formally assigned the Complaint to Ms. Fitzgerald

as Case Officer. Ms. Fitzgerald explained that the PPC had directed her to carry out the following investigations in relation to the Complaint:

1) To write to both doctors inviting their response(s) to the Complaint, pursuant to s.59(6) of the Medical Practitioners Act, 2007;
2) To send a copy of the responses to the appellants for their comments and,
3) To request an independent expert report for the purpose of assisting the committee in its consideration of the matter.

9. In due course, responses were received from Dr. A and Dr. B. Dr. B submitted his response to the PPC on 21st August 2017, and it was sent, on the same day, by Ms. Fitzgerald to the appellants for their observations. Dr. A submitted a response dated 18th September 2017, which was sent by Ms. Fitzgerald to the appellants for their observations on 29th September 2017.

10. The appellants submitted a response to the report of Dr. B on 26th September 2017. This is a very detailed response running to 53 pages. The appellants submitted a response to the response of Dr. A on 17th October 2017. This is also a very detailed response. The narrative runs to 35 pages, and there are an additional 57 pages of exhibits.

11. The PPC then sought a report from an independent expert. Initially, they suggested that the report should be provided by a Dr. H, but the appellants objected owing to their concerns as to a possible conflict of interest. The PPC accepted this objection and arranged instead to obtain an independent report from a Dr. Nick Losseff, a Consultant Neurologist at the National Hospital for Neurology and Neurosurgery, University College London and the Wellington Hospital, London. Dr. Losseff provided the PPC with a report dated 20th September 2018.

12. At the beginning of his report, Dr. Losseff provides details of his credentials and then proceeds to identify the materials relied upon in the preparation of his report. The materials

included the Complaint of the appellants, and the attachments to the Complaint, correspondence from Ms. Linda McEvoy, the responses of Drs. A and B, the responses of the appellants to the responses of Drs. A and B and the medical records of Mrs. McEvoy.

13. Dr. Losseff proceeds to summarise the background facts to the Complaint. He then proceeds to consider, in general terms, treatments for stroke, one involving the use of drugs, that is I.V. thrombolysis and another involving surgical intervention. In each case the objective is to clear a clot caused by the stroke. He stated that both "have a complicated and evolved evidence base and it is important when considering this matter to be fully aware that current evidence differs from that in 2012."

14. In relation to the procedure performed by Dr. B on Mrs. McEvoy, i.e. thrombectomy, he states that "everything changed" (by which I infer him to mean attitudes in the medical profession to thrombectomy) on publication, in rapid succession of nine landmark randomised controlled trials between December 2010 and February 2015. He then identifies a series of papers published in connection with these trials, which date from 2015 to 2017. He noted that the evolving evidence has "clearly shown improved outcomes when thrombectomy is performed up to 7.3 hours" after the onset of stroke. He further observes that it has been acceptable practice across most European non-UK centres where hyperacute stroke management is considerably more advanced, to offer thrombectomy in appropriately selected patients. These include patients selected "post 6 hours" (by which I understand Dr. Losseff to mean more than six hours after the onset of the stroke) and indeed in some cases up to 24 hours. As regards the UK, he said that the policy was conservative and "only endorsed the use of thrombectomy following publication of a large evidence base". It is somewhat unclear whether or not that requirement was satisfied by the studies and trials conducted between 2015 and 2017, referred to above.

15. Dr. Losseff then concludes with his opinion on the Complaint. He opines as follows:

1) Re: The non-prescription/administration of blood thinning medication. Dr. Losseff says that given that Mrs. McEvoy was going for thrombectomy, decisions about appropriate antiplatelet treatment would usually be made at the end of the procedure. It was therefore appropriate to delay any decision on this prescription.
2) Re: The decision not to administrate I.V. thrombolysis to Mrs. McEvoy. He states that such medication cannot be administered safely more than 4.5 hours after onset of the stroke. While he notes that there is a dispute between the family and the treating doctor/hospital staff as regards the timing of the onset of the stroke, this was not an issue that he could resolve.
3) Re: The performance of the thrombectomy. Dr. Losseff states:

> "it certainly would be the practice of some institutions not to offer such treatments outside of a clearly established evidence base (as is common in the UK) and you will see from the narrative above that this evidence base was not clearly established until some years later. However, I reiterate it was not unreasonable practice to offer this procedure in this situation. There is likely to be a range of opinion on this statement, some practitioners would not have offered this treatment in these circumstances."

In his conclusions, he states that while Mrs. McEvoy deteriorated post-procedure, it is more likely than not that this happened as a result of the natural history of the stroke, i.e. it would have happened in any case, regardless as to whether or not the thrombectomy was performed. He clearly states that the deterioration of Mrs. McEvoy cannot be considered a consequence of the thrombectomy.

4) Re: The appellant's complaint about the transfer time of Mrs. McEvoy from hospital A to hospital B. Dr. Losseff opines that owing to the complexities of the arrangements, by the time Mrs. McEvoy was transferred, the arterial puncture

could not commence before 20.00hrs. He says that this is understandable given the year this occurred and the evolution of stroke services at the time. In his opinion this was not either an individual or systematic failure.

5) Finally, Dr. Losseff addresses the Complaint of the appellants as regards the failure of Drs. A and B to obtain the consent of either Mrs. McEvoy or next of kin to the procedure of thrombectomy. Insofar as this complaint relates to the consent of Mrs. McEvoy, it does not appear to be controversial between the parties that, almost certainly, Mrs. McEvoy would not have been sufficiently conscious or alert to have had a meaningful discussion of this kind. However, as regards next of kin, Dr. Losseff says:

> "There is some concern regarding documentation of establishing best interests. Specifically, no discussion is documented between the family and the attendant doctors as to the nature of the proposed treatments, the risks and benefits and whether it would be in her best interests. As the family were present, it would be good practice to have these discussions and ascertain the best interests of the patient. In this particular situation I regard this as a minor system failure and in my opinion, it is mostly a reflection of the complexity of the thrombectomy pathway, rather than an individual clinician failure. This is particularly so when the procedure and operator are in a different hospital to the referring clinician. Though consent/establishment of best interest is technically the responsibility of the interventionalist [by which I understand him to refer to Dr. B in this case] in such pathways this is impracticable. In any case whether thrombectomy had or had not been attempted it is more likely than not that the outcome for Mrs. McEvoy would have been the same."

16. The PPC sent the report of Dr. Losseff to the appellants for their observations by letter dated 21st November 2018, and requested any comments that the appellants might wish to make by 7th December 2018. The appellants submitted a comprehensive and detailed response to the report of Dr. Losseff by letter dated 6th December 2018. The narrative of their response runs to 51 pages (in contrast to the report of Dr. Losseff runs to just a little over 8 pages). There are then some 34 pages of attachments to the response.

17. The appellants reject the conclusions of Dr. Losseff, in trenchant terms. As with the responses of the appellants to the responses of Drs. A and B to the Complaint, the approach taken is forensic in nature, comparing any assertions or statements of fact with hospital records. The following is a summary of some of the salient points, as they appear to me, but this is by no means intended to be exhaustive:

1) Both Dr. A and Dr. B are criticised and accused of poor professional performance and professional misconduct in failing to keep proper records while Mrs. McEvoy was in their care. This is not a generalised complaint; relevant records are specified. The appellants claim that Dr. Losseff fails to address these deficiencies in his report.
2) Dr. Losseff mis-quotes from important hospital records (the relevant records are identified);
3) Dr. Losseff relates certain aspects of the Complaint inaccurately;
4) Dr. Losseff relates certain aspects of the report of Dr. B inaccurately;
5) The publications relied upon by Dr. Losseff as positively changing the perception of the effectiveness of thrombectomy were published two years and more after the performance of the thrombectomy on Mrs. McEvoy in May 2012.
6) The procedure of thrombectomy had not been approved at hospital B in 2012, and there was no randomised control trial in place at hospital B for that procedure at

the time it was performed on Mrs. McEvoy, contrary to European stroke organisation guidelines 2008 and Royal College of Physicians guidelines, 2012.

7) In the case of Dr. A, the appellants claim that he failed to administer either I.V. thrombolysis or I.A. thrombolysis to Mrs. McEvoy, within a period when it was possible to do so, even assuming the earliest onset time of the stroke, as was assumed by Dr. A and Dr. Losseff. Further, Dr. A failed to administer aspirin in accordance with stroke pathway guidelines.

8) Dr. A contacted Dr. B with a view to Dr. B deploying either a MERCI Retriever Device or a Stryker Trevo Stentretriever Device (in performing the thrombectomy) in the knowledge that no randomised controlled trial was in being for the same at hospital B.

9) Dr. A failed to inform the appellants of the procedure for which he was arranging to have Mrs. McEvoy transferred to hospital B, did not identify the clinician with whom he had been in contact and did not identify the risks of the procedure.

10) Dr. A directed the appellants not to attend hospital B in circumstances where they were available and willing to do so.

11) Dr. A witnessed Dr. B recording what the appellants describe as a fraudulent consent of Mrs. McEvoy to the procedure.

12) Dr. A witnessed Dr. B deploying a Stryker Trevo Stentretriever on Mrs. McEvoy and took no steps to prevent the same.

13) Dr. B carried out a thrombectomy on Mrs. McEvoy in the knowledge that no randomised controlled trial was in being for the same at hospital B and that there was no clearance from the hospital B Ethics Research Office in direct contravention of prevailing European and Irish Guidelines.

14) Dr. B failed to ensure that Mrs. McEvoy was administered aspirin upon her arrival at hospital B, in accordance with stroke pathway guidelines.

15) Dr. B made no attempt to contact the appellants to discuss the procedure, despite them being available to do so.

16) Dr. B "fraudulently" recorded Mrs. McEvoy's consent to the procedure.

17) Dr. B caused Mrs. McEvoy to be removed from hospital B after the procedure in the knowledge that it was a clinical failure.

Opinion of the PPC

18. On 21st January 2019, the PPC issued its opinion on the Complaint, which is very brief and I therefore quote from it in full:

"Dear Mr McEvoy and Ms McEvoy,

I refer to previous correspondence in relation to the above referenced complaint.

The Preliminary Proceedings Committee ("the PPC") considered your complaint at its meeting on 17 January 2019.

The Committee carefully considered all the material in relation to this matter including but not limited to:- the complaint form from Ms Linda McEvoy and Mr Peter McEvoy dated 8 June 2017; letter of response from Dr [A] dated 18 September 2017, letter of response from Dr [B] dated 21 August 2017; and expert report from Professor Nick Losseff dated 20 September 2018.

The Committee formed the opinion, pursuant to section 61(1)(a) of the Medical Practitioners Act, 2007, that there was not sufficient evidence to warrant further action being taken in relation to the complaint, as there was no prima facie evidence of professional misconduct or poor professional performance on the part of Dr [B] and Dr [A].

The Committee was satisfied that Dr. Lessoff did not identify any serious failing in relation to Dr. [B] and Dr. [A]'s clinical management of Mrs McEvoy's presenting symptoms.

The Committee noted Dr. Losseff's conclusion that Mrs McEvoy's deterioration cannot be considered a consequence of Dr. [B] and Dr. [A]'s actions and more likely this happened as a result of the natural history of the stroke syndrome.

The PPC will inform the Council of this opinion at the Council's next meeting on 6/7 February 2019.

Pursuant to Section 61(2) of the Medical Practitioners, Act 2007, the Council may, after considering an opinion referred to it by the PPC do one of the following:

(a) decide that no further action is to be taken in relation to the complaint,

(b) direct the Preliminary Proceedings Committee to refer the complaint to another body or authority,

(c) refer the complaint to a professional competence scheme,

(d) refer the complaint for resolution by mediation or other informal means, or

(e) if it considers it necessary to do so, direct the PPC to refer the complaint to the Fitness to Practise Committee for an inquiry.

I will write to you following the Council meeting to inform you of the Council's decision.

Yours Sincerely,

Anne Marie Keaveny

Case Officer

Professional Standards".

19. The appellants replied to this letter, by letter dated 30th January 2019. At the outset, they stated that the opinion of the PPC that there was no *prima facie* evidence of professional misconduct or poor professional performance on the part of Drs. A and B is irrational and counterfactual. They claimed that it bore no relationship to the evidence, and they asserted that there must be some undisclosed reason for the presentation of such an irrational opinion. Accordingly, they said, they had carried out further investigations.

20. As a result of these investigations, the appellants continued, they had discovered that the chairperson of the PPC had previously served as director of nursing and head of corporate affairs at hospital A from 1998 to 2008, and on 9th May 2012 that same person, a Mrs. Carrigy, was still a council member of the hospital A foundation. This, the appellants claimed, was a conflict of interest.

21. Secondly, and as the appellants describe it, "most pointedly" they discovered that a sitting member of the Medical Council was a Mr. John Gleeson, solicitor, who was the solicitor acting on behalf of Dr. A in medical negligence proceedings initiated by Mrs. McEvoy in connection with the procedures the subject of the Complaint. Furthermore, Mr. Gleeson and his firm were on 9th May 2012 the solicitors for the hospital A foundation. The appellants go on to refer to correspondence from Mrs. McEvoy's solicitors to Mr. Gleeson (in the legal proceedings issued by Mrs. McEvoy), and assert that Mr. Gleeson had not replied to correspondence, and specifically had not replied to a series of questions raised on behalf of Mrs. McEvoy by her solicitors some five years previously. The appellants submit that the presence of Mr. Gleeson on the Medical Council hampered the proper conduct of the PPC inquiry, and as a result no fair and transparent adjudication of the Complaint was afforded to the appellants.

22. Finally, the appellants state that, as previously referred to in the original complaint, they were in receipt of an independent expert report from an eminent UK based neuro

radiologist, and that they had since received what they describe as an "updated and complementary expert report" from a second eminent UK based neurologist dated 7th January 2019. They claim that the qualifications and expertise of both of their independent experts exceed that of Dr. Losseff, whose report, they claim, is evidentially discredited, as described in their response to the report of Dr. Losseff of 6th December 2018.

Decision of the Medical Council

23. On 7th February 2019, immediately following the meeting of the Medical Council, a Ms. Keaveny, on behalf of the Medical Council sent the appellants a letter setting out the decision of the Medical Council on the Complaint. This letter states that at its meeting on 6th/7th February 2019, the Medical Council had considered the PPC's opinion and decided that no further action should be taken. The letter states that that is the Medical Council's final decision. Nothing more at all is said in respect of the Complaint or the submissions made by any of the parties.

24. On 6th March 2019, Ms. Keaveny again wrote to the appellants, this time on behalf of the PPC, in response to the appellants' letter of 30th January 2019. This letter stated that the Committee, had, at a meeting of 26th February 2019, considered the additional correspondence, i.e. the letter of 30th January 2019, and having done so, the Council concluded that the letter did not contain any new information or evidence that would warrant reconsideration of its decision.

25. In relation to Mrs. Carrigy and Mr. Gleeson, the letter stated that the PPC "wished to clarify that neither Committee Member was present when the PPC formed their opinion on 17 January 2019, Mr Gleeson having withdrawn from the meeting for consideration of the matter and Ms Carrigy's term of membership of the PPC having ended in May 2018."

The proceedings

26. On 30th May 2019, the appellants issued these proceedings by way of Notice of Motion whereby they seek leave to apply for judicial review of the opinion formed by the PPC at its meeting of 17th January 2019, as ratified by the Medical Council at its meeting of 6th/7th February 2019. This motion is grounded on the affidavit of the appellants whereby they depose as to the accuracy of the statement of grounds.

27. By their statement of grounds, the appellants seek the following the reliefs:

1) An order of certiorari quashing the decision of the Medical Council of 6th/7th February 2019 that no further action should be taken in respect of the Complaint, on the basis of the opinion formed by the PPC at its meeting of 17th January 2019.
2) The appellants also seek orders of mandamus requiring the respondents, *inter alia*, to disclose their full sitting composition and chairperson on 17th January 2019, and any perceived or actual conflicts of interests of any member with Drs. A and B and hospitals A and B. They also seek a full reconsideration of the Complaint having regard to all of their various submissions (which they itemise) and the two independent expert reports which they had referred to in their correspondence to the respondents, but which they had not actually sent to the respondents.

28. At para. (e) of the statement of grounds, the appellants set out the grounds upon which relief is sought. These may be summarised as follows:

1) Failure of PPC and Medical Council to consider all relevant evidence

The appellants contend that it is apparent from the letter of Ms. Keaveny on behalf of the PPC of 21st January 2019, that the PPC did not consider all documentation submitted by the appellants, and specifically did not consider their responses of 26th September 2017, 17th October 2017 and 6th December 2018. The appellants claim that the absence of any reference to their responses implies that the PPC

relied, to the exclusion of those responses, upon the responses of Drs. A and B to the Complaint, and the independent report of Dr. Losseff.

The appellants further claim that the respondents ignored the independent expert reports of the appellants, to which the appellants had drawn attention in the Complaint and in their letter of 30th January 2019. The appellants claim that the respondents failed to request sight of these reports.

2) Unreasonableness and irrationality

The appellants contend that "no competently functioning and coherent Preliminary Proceedings Committee would rest any final opinion or decision on [a report such as that] of Dr. Losseff dated 20th September 2018." They claim that by their response dated 6th December 2018, they highlighted fatal evidential flaws in the report of Dr. Losseff to which no reference was made in the letter of 21st January 2019, as having been considered by the PPC. The appellants claim that their response of 6th December 2018 demonstrates the unreasonableness and irrationality of the opinion formed by the PPC on 17th January 2019 and of the decision taken by the Medical Council at its meeting of 6th/7th February 2019 in relying on the report of Dr. Losseff to justify their respective decisions.

The appellants refer to and rely upon the test for unreasonableness referred to by Henchy J. in *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642 and they cite and rely on the following passage from the judgment of Henchy J:

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for

the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

3) Bias

The appellants contend that the website of the Medical Council disclosed that on Friday 25th January 2019, Mrs. Anne Carrigy was chair of the PPC and that the said Mrs. Carrigy had also served as Director of Nursing and Head of Corporate Affairs at hospital A from 1998 to 2008, and that on 9th May 2012 (the day of Mrs. McEvoy's admission to hospital A) Mrs. Carrigy was a council member of its foundation (being its fundraising arm). This, the appellants contend is a conflict of interest and any reasonable person would perceive bias arising out of the involvement of Mrs. Carrigy on the PPC in its determination of the Complaint.

The appellants also contend that the membership of Mr. Gleeson on the Medical Council since July 2018 also represented a conflict of interest such as to give rise to a reasonable apprehension of bias, not least because Mr. Gleeson had actually had an involvement in the defence of proceedings issued by Mrs. McEvoy arising out of her treatment.

It is further claimed that the response on behalf of the respondents to this element of the Complaint revealed that Mr. Gleeson was not just a member of the Medical Council but was also a member of the PPC at all relevant times during the consideration of the Complaint. Even if, therefore, he abstained from the meeting of 17th January 2019, he was privy to the Complaint, and the discussion of the Complaint at PPC meetings up to that point, without having disclosed to the Appellants his presence on the PPC, and all of this give rise to a reasonable

suspicion or apprehension of bias on the part of the PPC. Reliance is place upon the following passage from the decision of Kenny J. in *O'Donoghue v. Veterinary Council*, [1975] IR 398:

> "The test to be applied in determining whether a tribunal (be it judge or jury or disciplinary committee) is impartial is that a member is not impartial if his own interest might be affected by the verdict, or he is so connected with the complainant that a reasonable man would think that he would come to the case with prior knowledge of the facts or that he might not be impartial."

It is claimed that by reason of his involvement as solicitor for Dr. A and hospital A in the clinical negligence proceedings issued by Mrs. McEvoy, Mr. Gleeson has a material interest in the outcome of the Complaint.

4) Flawed and bad faith

It is claimed that between 25th January 2019, when the appellants searched the website of the Medical Council to identify the membership of the PPC and the Medical Council, and 30th January 2019, when they sent a letter to the PPC in response to its decision of 21st January 2019, the identity of the members of the PPC had been entirely removed from the website. This, it is claimed, was to conceal membership of Mrs. Carrigy and Mr. Gleeson of the PPC and constitutes clear evidence of fraud and bad faith on the part of the respondents. In advancing this claim, the appellants state that they made this discovery prior to sending their letter of 30th January 2019, when they rechecked the website for verification purposes prior to sending the letter.

5) The decision is contrary to public policy

The appellants claim that the procedure carried out upon Mrs. McEvoy was at the time in the nature of an experimental procedure, that it was conducted outside of

a clinical trial, with no approval of the Ethics Board of hospitals A or B and without the informed consent of the patient or her legal representative. It is claimed that in rejecting the Complaint, the PPC and the Medical Council establish a precedent that such conduct will not only not result in any regulatory sanction, but it will not even warrant referral to the Fitness to Practice Committee of the Council for investigation.

This, the appellants submit, must be contrary to public policy, having regard to:

(1) The unenumerated right to bodily integrity pursuant to Article 40.3 of the Constitution of Ireland;

(2) Articles 3, 4 and 7 of the Charter of Fundamental Rights of the European Union and in particular Article 3(2) thereof which states: "In the fields of medicine and biology, the following must be respected in particular: the free and informed consent of the person concerned according to the procedures laid down by law" and,

(3) The offences of assault, assault causing harm and endangerment as set out in ss. (3), (4) and (13) of the Non-Fatal Offences Against the Person Act, 1997.

It is claimed that apart from the injustice caused to Mrs. McEvoy personally, the decisions of the respondents are contrary to public policy, public safety and the public interest.

Application on notice

29. In the usual way, the appellants first moved their application, *ex parte*. That application came before the High Court (O'Regan J.) on 24th May 2019, and O'Regan J. directed that the application should be brought on notice to the respondents.

30. Consequent on such notice, the respondents filed replying affidavits before the matter resumed at hearing before O'Regan J. on 18th July 2019.

Affidavit of Rita Doyle

31. An affidavit was sworn on behalf of the Medical Council by Dr. Rita Doyle on 4th July 2019. Dr. Doyle deposes that she had been president of the Medical Council since 11th July 2018. Dr. Doyle refers to an affidavit sworn by the chair of the PPC, Thomas Crotty, in connection with this application and the exhibits thereto (as it happens, on the date that Dr. Doyle swore her affidavit, Dr. Crotty had not sworn his affidavit, but by a supplemental affidavit of 16th July 2019, Dr. Doyle avers that she had had sight of a draft of Dr. Crotty's affidavit prior to swearing her own affidavit, and she averred that she had also reviewed the affidavit as sworn by Dr. Crotty and the exhibits thereto).

32. Dr. Doyle avers that all of the documents referred to by Dr. Crotty in his affidavit as being before the meeting of the PPC on 17th January 2019, were also before the meeting of the Medical Council at its meetings of 6th/7th February 2019. As will become apparent from the affidavit of Dr. Crotty, this includes all of the submissions made by the appellants to the PPC and the Medical Council, and all documentation annexed to those submissions and responses.

33. Dr. Doyle notes that grounds (1) and (2) in the statement of grounds of the appellants are matters for the PPC. She then proceeds to address ground (3), being the allegation of bias on the part of the respondents. So far as the involvement of Mr. Gleeson on the Medical Council is concerned, Dr. Doyle observes:

> "While Mr. Gleeson has been a member of the Council since July 2018, all members of the PPC who were present at the meetings of 6/7 February 2019 absented themselves when the Council considered the opinion of the PPC. I say that Mr Gleeson was not present for such consideration and took no part in the Council's decision in respect of the Complaint. In the premises, I believe and am advised that the allegations of bias made against the Council are unsustainable."

34. Accordingly, Dr. Doyle continues, the decision of the Medical Council, that no further action should be taken in respect of the Complaint, was taken without any involvement of any members of the PPC who were also members of the Medical Council.

35. Dr. Doyle also addresses grounds (4) and (5) of the appellants' statement of grounds and rejects the claims of the appellants therein. She avers that Dr. Crotty would address issues relating to the website of the Medical Council in his affidavit. She also avers that the matters involved in the proceedings are limited to consideration of the appellants' Complaint, and accordingly do not raise issues of public policy, public safety or the public interest.

Affidavit of Thomas Crotty

36. Dr. Crotty is a Consultant Histopathologist and deposes that he has been the chair of the PPC since 9th August 2018. Before addressing the grounds upon which judicial review is sought, he summarises the processing of the Complaint before the PPC. At para. 27 of his affidavit, having referred in the previous paragraph to the meeting of the PPC of 17th January 2019, he avers that at that meeting the PPC carefully considered all the material in relation to the Complaint. It is clear from all that preceded it in his affidavit that the reference to "all the material" includes all of the material gathered in the course of the processing and consideration of the Complaint, including not just the Complaint, but the responses to the Complaint from Drs. A and B, and the responses of the appellants to those of Drs. A and B, as well as the response of the appellants to the report of Dr. Losseff. He avers:

> "[T]hat the PPC formed the opinion pursuant to section 61(1)(a) of the Act that there was not sufficient evidence to warrant further action being taken in relation to the complaint, as there was no *prima facie* evidence of professional misconduct or poor professional performance on the part of the doctors. The PPC was satisfied that Dr Losseff did not identify any serious failings in relation to Dr B or Dr A's clinical

management of Mrs McEvoy's presenting symptoms. The PPC noted Dr Losseff's conclusion that Mrs McEvoy's deterioration could not be considered a consequence of Dr B and Dr A's actions and more likely this happened as a result of the natural history of the stroke syndrome. This is recorded in the minutes of the said meeting as is the fact that Mr Gleeson rejoined the meeting when the PPC had concluded its consideration of the matter."

Dr. Crotty exhibits the minutes of that meeting.

37. Dr. Crotty then goes on the address the correspondence received from the appellants subsequent to notification by the PPC to the appellants of its opinion, on 21st January 2019. He avers that at a meeting of the PPC on 26th February 2019 the committee considered the additional correspondence received from the appellants, and he then cites an extract from the minutes of that meeting (which minutes he also exhibits) as follows:

"The Committee considered the additional correspondence from Mr Peter McEvoy and Ms Linda McEvoy dated 30 January 2019 regarding the Committee's decision that this complaint did not warrant further action.

The Committee was satisfied that this complaint had been considered in full and having carefully reviewed the additional correspondence from Mr and Mrs McEvoy, agreed that it did not contain any new information or evidence which would warrant reconsideration of its decision.

The Committee noted reference to individual Committee members in the complainant's correspondence. The Committee wished to clarify that neither Committee member was present when the PPC formed their opinion on 17 January 2019, Mr Gleeson having withdrawn from the meeting for consideration of the matter and Ms Carrigy's term of membership of the PPC having ended in May 2018."

38. Dr. Crotty then refers to the letter of the PPC to the appellants of 6th March 2019, advising them as to the discussion and conclusions of the PPC at its meeting of 26th February 2019, and further advising them that neither Mr. Gleeson nor Mrs. Carrigy were present when the PPC formed its opinion on the Complaint on 17th January 2019.

39. In relation to the grounds upon which leave is sought, Dr. Crotty had the following to say. Firstly, in relation to the claim that the PPC did not consider all documentation submitted by the appellants, Dr. Crotty avers that all documentation, including all documentation provided by the appellants in the course of the processing of the Complaint was before the meeting of the PPC of 17th January 2019 and was considered by the Committee. He avers that there were two booklets of documentation before the PPC on that date, comprising in total 1,343 pages. He then makes specific reference to the submissions of the responses (and the enclosures thereto) of 26th September 2017, 17th October 2017 and 6th December 2018. He avers that the letter of 21st January 2019 explicitly states that the "Committee carefully considered all the material in relation to this matter including but not limited to …". Accordingly, it is the contention of Dr. Crotty that the appellants are simply wrong to assert that, just because their submissions on the reports of Drs. A and B and Dr. Losseff were not specifically itemised, that they were not considered.

40. As regards the reference to their own expert reports by the appellants, and the contention of the appellants that the PPC should have sought these reports from the appellants, Dr. Crotty says that the appellants were advised, by letter of 21st June 2017 that it was important for them to submit any documentation, such as contemporaneous notes, reports, diary entries, medical records, photographs etc. in connection with the Complaint, and he avers that the medical reports which the appellants claim they have in their possession were not considered in circumstances where they were not furnished to the PPC. He avers

that it would be unreasonable to impose an obligation on the PPC to request the appellants to provide copies of the reports that they had in their possession.

41. In relation to ground (2) – that the opinion of the PPC was unreasonable and irrational, Dr. Crotty avers that the opinion was based upon the report of Dr. Losseff. He avers that while there is a difference of opinion between the appellants and Dr. Losseff, an independent expert, that that does not constitute a ground for challenging the opinion of the PPC which was reasonable, factually sustainable and not irrational.

42. In relation to the complaint of bias (ground (3)), Dr. Crotty avers that there were elections in March 2018, following which the composition of both the PPC and the Medical Council changed. Following those elections, Mrs. Carrigy was no longer a member of the Council or the PPC and was not therefore present at the meetings at which the Complaint was considered by the PPC later in 2018, and January 2019.

43. In relation to Mr. Gleeson, Dr. Crotty avers that he withdrew from the PPC during consideration of the Complaint by the PPC at its meeting of January 2019, and accordingly he was not involved at all in the formation of the PPC's opinion. Likewise, he withdrew from the earlier meeting of the PPC, on 16th November 2018, when the Complaint was also before the PPC. He avers that Mr. Gleeson did not take any part in consideration of the Complaint, and he exhibits minutes from the relevant meetings.

44. Dr. Crotty also avers that Mr. Gleeson was appointed to the PPC in June 2018, having retired from private practice with the firm of Mason Hayes and Curran.

45. Finally, in relation to ground (4) whereby the appellants allege fraud and bad faith on the part of the respondents on the basis of inaccuracies regarding the composition of those bodies as disclosed on the website of the Medical Council, and subsequent changes to the content of the website, Dr. Crotty avers that these inaccuracies occurred through inadvertence and administrative oversight and were corrected when they were discovered.

Judgment of the High Court

46. At the outset of her judgment, the trial judge made the observation that by their statement of grounds, the appellants are seeking an order of certiorari quashing the decision of the Medical Council made at its meeting of 6th/7th February 2019, but that it appears from a reading of the reliefs sought in the statement of grounds that they are also seeking an order of mandamus directing the PPC to reconvene for the purposes of reconsideration of the appellants' complaints. The trial judge observed that "[t]o the extent therefore that such relief would necessarily involve an order quashing the opinion formed by the PPC on the 17th of January, 2019" such relief was not specifically sought. It appeared therefore to the trial judge that the application for that relief was brought outside the time limits provided for by O.84, r.21(1) of the Rules of the Superior Courts. The trial judge noted that the appellants contended that no extension of time was required in respect of the PPC opinion of 17th January 2019, and stated that she did not agree with that view. She held that "accordingly it appears that the challenge to the PPC opinion is out of time without explanation as contemplated by Order 84."

47. Nonetheless, the trial judge went on to consider the merits of the application. In relation to the claims of the appellants that the respondents had not considered all of the submissions of the appellants, the trial judge noted that the letter sent by the PPC to the appellants on 21st January 2019 stated that the PPC had carefully considered all material including but not limited to documentation expressly identified. She held that having regard to the volume of documents before the PPC, it would have been impossible to recite all documents that were before the PPC in the letter of 21st January 2019. In the view of the trial judge, the fact that the letter did not specifically identify all documentation considered did not constitute an arguable ground for judicial review.

48. As to the claim of the appellants that the PPC should have sought copies of the expert reports obtained by the appellants, the trial judge held that it was unsustainable to argue that the respondents failed to have regard to all relevant evidence by not requesting the reports in circumstances where the appellants, for their own reasons, had decided not to furnish the same.

49. The trial judge then addressed the argument that it was unreasonable and irrational of the PPC to rely on the report of Dr. Losseff, particularly in view of the detailed response of the appellants to that report in their letter of 6th December 2018. However, the trial judge considered that this letter could not be considered a peer review of Dr. Losseff's report. She also observed that the existence of negligence is not dispositive of poor professional performance or professional misconduct, and referred to the decision of *Corbally v. The Medical Council* [2015] IR 304.

50. The trial judge considered that Dr. Losseff was an independent expert, and while his views differed substantially from those of the appellants, this was not a basis upon which to grant leave. This, she considered, would be outside the scope of unreasonableness and irrationality as defined in *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642. The trial judge referred to the passage from the decision of Henchy J. cited by the appellants in their statement of grounds (see para. 28(2) above).

51. In the view of the trial judge, the opinion of the PPC under challenge was *bona fide*, reasonable and factually sustainable notwithstanding that the views of Dr. Losseff (upon which the decision of the PPC was based) differs from those of the appellants. The trial judge held that the decision of the PPC could not be said to be plainly and unambiguously flying in the face of fundamental reason and common sense.

52. As to the claim of bias and bad faith by reason of the alleged involvement of Mrs. Carrigy and Mr. Gleeson in the decisions of the respondent, the trial judge was satisfied that

Mrs. Carrigy could not have been involved at all by reason of her retirement from the Medical Council in mid-2018, and that Mr. Gleeson had absented himself from the meetings during which the relevant decisions were made. Insofar as the appellants relied upon the presence of Mr. Gleeson at a meeting on 26th February 2019, which gave rise to the issue of a letter by the Medical Council to the appellants of 6th March 2019, that letter was sent following the final conclusions of each of the respondents and it was (the trial judge held) therefore irrelevant.

53. In relation to those complaints of the appellants concerning the content of the website of the Medical Council, and the taking down of content in January 2019, the trial judge was satisfied with the explanation of Dr. Crotty as provided in his affidavit of 5th July 2019. She stated that the scepticism of the appellants alone was insufficient to contradict the sworn evidence of Dr. Crotty addressing this issue.

54. For these reasons, the trial judge was satisfied that none of the foregoing matters provided any basis for the claims of the appellants that the decisions of either or both of the PPC or the Medical Council were biased, fraudulent or motivated by bad faith.

55. Finally, the trial judge addressed the claim of the appellants that the decision(s) of the respondents were contrary to public policy. She noted that the appellants themselves acknowledged in their statement of grounds that the jurisdiction of the court in a judicial review is limited to a consideration of the issues between the parties, which in this case was concerned with the management of the Complaint. The trial judge dealt with these issues very briefly at para. 34 of her judgment as follows:

> "34. In my view the alleged breach of statute Constitutional and EU Law are directed at the alleged matters which occurred on the 9th of May, 2012 rather than the manner in which the respondents conducted their various statutory obligations on foot of the 2007 Act therefore the limited detail under the heading of a decision contrary to public

policy should be considered entirely unsustainable for the purposes of grounding either an order of certiorari or mandamus, in particular having regard to the generalised reference to the quoted legislation."

56. For all of the foregoing reasons, the trial judge concluded that the appellants could not maintain an arguable case that they were entitled to the reliefs claimed, and she further stated that the "totality of the facts do not support stateable grounds for the reliefs sought". She therefore refused the relief sought. The trial judge also ordered that the appellants should discharge the costs incurred by the respondents in connection with the application.

Notice of appeal

57. In their notice of appeal of 17th January 2020, the appellants identify 25 grounds of appeal. They may be summarised as follows:

(1) The trial judge erred in holding that the application for judicial review was brought out of time.

(2) The trial judge erred in failing to understand the background to the Complaint and made her decision based on an incorrect understanding of the background.

(3) The trial judge erred in holding that, by reason of the volume of documents, it was not possible for the PPC to recite all documents its opinion, because that was not the ground relied upon by the appellants.

(4) The trial judge erred in holding that because communications from the appellants were not mentioned in a "particular letter" from the PPC to the appellants, that does not give rise to an inference that they were not considered.

(5) The trial judge erred in failing to consider the representations made by the appellants in their letters of 26th September 2017 and 17th October 2017 to the respondents.

(6) The trial judge erred in holding that the appellants' letter to the respondents of 6th December 2018 did not constitute a peer review of the report of Dr. Losseff.

(7) The trial judge erred in fact and/or in law by misapplying the test set forth by the Supreme Court in *Corbally v. The Medical Council.*

(8) The trial judge erred in fact and/or in law by holding that the decision of the PPC was *bona fide*, reasonable and factually sustainable, and the trial judge misapplied the test in *The State (Keegan) v. Stardust Victims Compensation Tribunal.*

(9) The trial judge erred in fact and/or law in misstating the involvement of Mr. Gleeson in the decision-making process of both respondents and in misapplying the test of reasonable apprehension of bias arising by reason of such involvement.

(10) The trial judge erred in fact and/or in law in failing to address the role of Mrs. Carrigy as chairperson of the PPC until 2018 and in misapplying the test of reasonable apprehension of bias by reason of her position as chairperson.

(11) The trial judge erred in fact and/or in law in accepting the averments of Dr. Crotty as regards the circumstances giving rise to the removal of content from the website of the Medical Council and the replacement thereof, and in concluding that it is not arguable that the respondents acted fraudulently or were motivated by bad faith in connection with the content of the website and the involvement of Mr. Gleeson and Mrs. Carrigy.

(12) The trial judge erred in fact and/or in law in holding that the appellants' claim for relief on the grounds that the decisions of the respondents were contrary to public policy is unsustainable.

(13) The trial judge erred in fact and/or in law in holding that the standard of proof at this stage of the proceedings is that of beyond a reasonable doubt, on the basis of *O'Laoire v. The Medical Council* [Unreported, Supreme Court, 25th July 1997].

(14) The trial judge erred in fact and /or in law in making an adverse costs order against the appellants in circumstances their application was moved *ex parte,* and it was the trial judge directed that the respondents be put on notice of the application.

Respondents' notices

58. The respondents delivered two separate respondent's notices, each of which constitutes a full traverse of the notice of appeal of the appellants. There is no cross appeal in either case, and the respondents in each case seek orders dismissing the appeal of the appellants together with an order for costs of each of the respondents in connection with the appeal.

Submissions of the appellants

59. The appellants helpfully group their grounds of appeal under six headings. The first two of these headings are (1) Time limits and (2) Background. The subsequent four headings of appeal reflect the grounds set out in paras. E 1-3 and E 5 of the statement of grounds, being: failure to consider all relevant documentation, unreasonableness/irrationality, bias and public policy

Time Limits

60. The appellants make comprehensive submissions in support of their argument as to why the application was brought within the time limits prescribed by O.84, r.21(1) of the Rules of the Superior Courts. However, it is unnecessary to address these arguments because at the hearing of this appeal the respondents confirmed to the Court that they were not

contending that the application was brought out of time, and for the purpose of this appeal they relied only on the conclusions of the trial judge on the merits of the application.

Background

61. The appellant submits that in her decision the trial judge presents an inaccurate account of the background to the Complaint at paras. 9 to 18 of her decision, and also erroneously relies on information provided by Drs. A and B, without making any reference to the rebuttal to that information provided by the appellants in their responses of 26th September 2017 and 17th October 2017. Specifically, the appellants submit that at para. 16 of her judgment, the trial judge erred in accepting a statement in the response of Dr. A to the Complaint that "Data available in 2012 indicated that the intervention undertaken was potentially helpful" while failing to refer to the response/rebuttal of the appellants to the response of Dr. A. Similarly, it is submitted the trial judge erred at para. 17 of her judgment in accepting a statement of Dr. B in his report, that "the procedure adopted was not experimental but an available and approved procedure" without making any reference to the response/rebuttal delivered by the appellants.

62. In failing to make any reference to the rebuttal of these opinions by the appellants, it is submitted that the trial judge fell into error and that the conclusions reached by the trial judge were, as a result, grounded on an erroneous interpretation of the evidence presented to the court.

Failure to consider all relevant evidence

63. In their submission under this heading, the appellants argue that the trial judge has mischaracterised their argument. They refer to para. 23 of the judgment of the trial judge in which she stated that "given the volume of documents before the PPC it would be impossible to recite all documents as were before the PPC in such letter. The content of such letter does not appear to this Court to demonstrate any arguable grounds that because the

communications from the applicants were not mentioned specifically in the letter same were not considered."

64. This paragraph is of course referring to the letter to the appellants from the PPC dated 21st January 2019, notifying the appellants of the opinion of the PPC on the Complaint. The appellants submit that in their statement of grounds they referred to three specific items of correspondence, being their responses to the responses of Drs. A and B, and the report of Dr. Nick Losseff, which they argue should have been referred to specifically in the letter of the PPC of 21st January 2019. The appellants argue that the failure to mention any of these letters specifically is "irreconcilable with the fact that they were specifically solicited from the appellants by the respondents." By this of course the appellants are referring to the fact that in each case, the letters sent by the appellants were in response to letters received from the PPC inviting them to make any submissions they may wish to make in connection with the responses received from Drs. A and B, and the report of Dr. Losseff.

65. The appellants argue that the only logical inference to be drawn from the failure on the part of the PPC to refer to this correspondence is that the correspondence was not in fact considered by the PPC informing its opinion. Furthermore, the court itself repeated this error in failing to refer to the letters of the appellants dated 26th September 2017 and 17th October 2017 when setting out the background to the proceedings at paras. 14-17 of its judgment.

66. The appellants further argue that, they (the appellants) having drawn to the attention of the respondents that they had a medical report (at the time they advanced the Complaint), it was incumbent on the respondents to request the appellants to submit their report. They advance a similar argument in relation to the second report that they had obtained on behalf of Mrs. McEvoy after the decision of the PPC, but before the meeting of the Medical Council on 6th/7th February 2019.

67. The appellants' argument in relation to this is grounded on what they submit are analogous procedures in clinical negligence claims whereby the existence of expert evidence is first revealed by way of a schedule, and subsequently reports are exchanged. The appellants appear to argue, in their written submissions, that there should have been an exchange of sorts of the first report that they had obtained, with that of the report of Dr. Losseff, and that it was a matter for the respondents to arrange such exchange. Thereafter, and for much the same reason (save as to exchange) the appellants submit that the respondents should have asked for the second report of the appellants, once they were on notice of the same from the appellants.

Unreasonable and irrational decision

68. The appellants submit that the trial judge erred in holding that the respondents did not have to have regard to the submissions of the appellants dated 6th December 2018 relating to the report of Dr. Losseff, on the grounds that it was not a peer review of the review of Dr. Losseff. The respondents – who sought the views of the respondents on the report of Dr. Losseff – had a duty to consider those views as did the court in the context of this application for judicial review.

69. It is submitted that the trial judge misapplied the decision of the Supreme Court in *Corbally v. The Medical Council*, and should have taken into account the submissions of the appellants of 6th December 2018 when considering whether or not there was a *prima facie* case of "poor professional performance" or professional misconduct on the part of Drs. A and B. The court further erred in failing to take account of the appellants' submissions of 26th September 2017 and 18th October 2017. It is submitted that in performing an experimental surgery on a patient outside of a clinical trial, with no clearance from the Hospital Ethics Committee and no informed consent, the conduct of Drs. A and B meets the threshold of poor professional performance as identified in *Corbally*.

70. It is the appellants' contention that the acceptance by the respondents of the report of Dr. Losseff, having regard to the submissions of the appellants of 6th December 2018 is irrational and unreasonable, and as a result the conclusions of the respondents are factually unsustainable.

Bias and bad faith

71. The appellants submit that given the role of Mr. Gleeson as defence solicitor in the proceedings taken by Mrs. McEvoy, there is a reasonable apprehension as to bias arising out of his membership of the PPC at the time that the PPC made its decision on the Complaint on 17th January 2019, regardless as to whether or not he absented himself from the meeting and the decision-making process. The appellants rely on the decision of Kenny J. in *O'Donoghue v. Veterinary Council* [1975] IR 398 and refer to the same passage of that judgment also cited in their statement of grounds (see para. 28(3) above).

72. The appellants contend that, at the time, Mr. Gleeson had an interest in the outcome of the Complaint or alternatively any reasonable person would consider that Mr. Gleeson would not be impartial.

73. The appellants rely on the fact that they were not informed of Mr. Gleeson's membership of the PPC or the Medical Council when these bodies made their respective decisions, and the inaccurate information on the website of the Medical Council which made no reference to Mr. Gleeson until as late as July 2019, after the appellants moved their application for judicial review.

74. The appellants also point to the fact that Mr. Gleeson was present at the meeting of 26th February at which the letter of the appellants of 30th January, raising the issue of his membership of the Medical Council was discussed, and they claim that he was a party to the reply issued by the Medical Council on 6th March 2019.

75. The appellants submit that the explanation of the respondents as to the involvement of Mr. Gleeson in the entire process could not serve as a satisfactory discharge of a reasonable apprehension of bias in circumstances where the respondents had failed to disclose Mr. Gleeson's membership of both respondents, and the explanation offered was only after the appellants had raised the issue.

76. The appellants contend that not only is the test of a reasonable apprehension of bias fully met, but the facts support a finding of actual bias in the formation of the opinion of the PPC and the decision of the Medical Council.

77. As regards Mrs. Carrigy, the appellants contend that her name remained on the website of the respondents until at least 25th January 2019. Accordingly, while she may have ceased membership of the Medical Council and the PPC in May 2018, the appellants submit that it is reasonable to apprehend bias on the part of the PPC, having regard to the fact that there was no disclosure by the respondents at any stage as to Mrs. Carrigy's conflict of interest.

78. The appellants contend that the trial judge misapplied the test in *O'Donoghue.* They contend that the presumption of bias could only be discharged if the respondents had disclosed Mrs. Carrigy's conflict of interest voluntarily to the appellants upon the initial consideration by the PPC of the appellants' Complaint in June 2017, and not having done so there is a reasonable apprehension of bias in the ultimate decision of the PPC, particularly in circumstances where she continued to be named as chair of the PPC until at least 25th January 2019, on the website of the Medical Council.

79. The appellants further submit that the trial judge erred in fact/or in law in accepting the averments of Dr. Crotty that the content of the website, which the appellants drew to the attention of the respondents, was an administrative error. The appellants submit that this should be seen against the background of their Complaint and the timeline of events.

A decision contrary to public policy

80. The appellants refer to the function of the respondents as set out in s.6 of the Medical Practitioners, Act 2007, which states:

> "The object of the Council is to protect the public by promoting and better ensuring high standards of professional conduct and professional education, training and competence among registered medical practitioners."

81. The appellants submit that the public policy implications of the opinion of the PPC and the decision of the Medical Council on the Complaint is that "actions which concurrently attract liability in concurrent legislation, in particular the failure to obtain informed consent to experimental surgery, are not a material issue for the Respondents in the prosecution of clinical complaints within the remit of the 2007 Act." It is submitted that such a conclusion is incompatible with the safety of the public at large. That being the case, the trial judge erred in fact and/or in law in holding that it is unsustainable to argue that the opinion of the PPC and the decision of the Medical Council are contrary to public policy.

Threshold for review

82. The appellants submit that the trial judge applied an incorrect threshold of review. The trial judge held that since the threshold standard for a regulatory body or a court to be satisfied as to the occurrence of professional misconduct is one of beyond reasonable doubt (per *O'Laoire v. Medical Council*), the threshold standard of an arguable case for leave purposes in such cases is to a higher standard than in other cases.

83. The appellants submit that the role of the PPC is to give initial consideration only to complaints. The standard of proof of beyond a reasonable doubt is only relevant at a later stage in the process, being the Fitness to Practice Committee inquiry stage to which the PPC refers complaints if it considers that there is a *prima facie* case arising from a complaint that warrants an inquiry.

Costs

84. Firstly, the appellants submit that they made the Complaint only upon being prompted to do so by the Minister for Health, having first made a complaint to the Minister about the conduct of Drs. A and B. Having been so advised, the appellants made an *ex parte* application, but it was the court directed that the application should be put on notice to the respondents. This was outside the control of the appellants, who argue that they were entitled to have the application heard and determined on what they describe as the "usual" *ex parte* basis. They argue that the involvement of the respondents at the application stage was unnecessary, and the trial judge therefore erred in making and adverse costs order against the appellants.

85. The appellants also complain that during the course of the hearing the trial judge displayed pre-judgment and bias and in this regard they rely on the following remarks of the judge:

> "Straight up you are not abiding by my direction. I wish you would, Ms. McEvoy. I don't wish this to deteriorate any further between us, but I want to get through this. I was told two hours."

The appellants submit that they had not engaged in any hostility or misconduct before the trial judge and that this comment by the trial judge indicated pre-judgment prior to the appellants concluding their application to the court.

Submissions of the respondents

Alleged failure to consider relevant evidence

86. The respondents submit that it is clear from the statement of grounds that relief was sought under this heading on the basis that the letter of the PPC dated 21st January 2019 to the respondents failed to refer specifically to certain correspondence submitted by the appellants to the respondents in the course of the processing of the Complaint. The respondents submit that it is clear from the affidavit of Dr. Crotty and the exhibits thereto

that the said documentation was before the PPC and was considered by it in arriving at its opinion. Furthermore, as the trial judge noted in her decision, the letter of 21st January 2019 expressly states that the "committee carefully considered all (my emphasis) material, including but not limited to the communications expressly referred to in the letter."

87. In relation to the second part of this argument, i.e. that the respondents had a duty to request the appellants to submit the medical reports procured by the appellants on behalf of Mrs. McEvoy, it is submitted that the PPC had no obligation to do so, and it was a matter for the respondents themselves to submit any documentation which they wished to rely on in advancing the Complaint. The respondents rely upon the letter of 21st June 2017 which expressly informed the respondents that they should submit all documentation relied upon by them for the purpose of the Complaint, including reports.

88. Furthermore, the respondents argue that for the PPC to seek further expert reports from the complainants might well be contrary to due process and would raise issues as to the fairness of the procedures accorded to Drs. A and B in the processing of the Complaint.

Unreasonable and irrational

89. In their submissions under this heading, the respondents firstly referred to the relevant statutory provisions as to the powers and duties of the PPC. Specifically, they refer to ss. 61 and 63 of the Act of 2007 which provide as follows, in material part:

> "61(1) Where the Preliminary Proceedings Committee is, in respect of a complaint, of the opinion that —
>
> (a) there is not sufficient cause to warrant further action being taken in relation to the complaint [...]
>
> it shall inform the Council of that opinion.
>
> […]
>
> 63. Where —

(a) the Preliminary Proceedings Committee is of the opinion that there is *a prima facie* case to warrant further action being taken in relation to a complaint, […]

the Preliminary Proceedings Committee shall refer the complaint to the Fitness to Practise Committee."

90. As regards what is sufficient cause to warrant further action, or what constitutes a *prima facie* case, the respondents rely on a number of authorities including the decision of Hogan J. in *Flynn v. Medical Council* [2012] 3 IR 236, the decision of the Supreme Court (Hardiman J.) in *Corbally v. The Medical Council* [2015] 2 IR 384 and the decision of the High Court (Meenan J.) in *BM v. Fitness to Practice Committee of the Medical Council* [2019] IEHC 106.

91. The respondents submit that these authorities establish that, in evaluating the evidence of whether a *prima facie* case has been established, the PPC is entitled to determine whether the application has any real prospect of being established at a subsequent enquiry. It is submitted that there is a "threshold of seriousness" to be met before a *prima facie* case for an enquiry before the Medical Council is made out.

92. As to the standard of proof at a subsequent enquiry, the respondents refer to the decision of Finnegan P. in *Law Society v. Walker* [2007] 3 IR 581 in which case Finnegan P. said that the standard at such enquiries is the criminal standard of proof, beyond a reasonable doubt. He further stated that this is a factor to which regard may be had in determining whether a *prima facie* case is disclosed.

93. In this case, the PPC had the benefit of the report of Dr. Losseff's and relied on that report in arriving at its conclusions. The respondents submit that while there is a difference of opinion between the appellants and the independent expert appointed by the respondents, that does not give rise to a ground for leave for judicial review. The opinion of the PPC,

based as it is on the report of an independent expert, is *bona fide*, reasonable and factually sustainable.

Bias and bad faith

94. The respondents submit that the appellants appear to be under the misunderstanding that Mrs. Carrigy and Mr. Gleeson participated in the PPC meeting on 17th January 2019. It is clear from the affidavit of Dr. Crotty that they did not do so.

95. It is also clear from the affidavit of Dr. Crotty that the Medical Council website contained outdated material, by reason of inadvertence. When the error was identified, the incorrect information was removed. It is submitted that incorrect information on a website is no basis upon which to impugn the opinion of the PPC, or the decision of the Medical Council. None of these matters are evidence of either bias or bad faith.

A decision contrary to public policy

96. The respondents submit that judicial reviews are concerned with the manner in which a decision is made, and this ground – the allegation that the decision of the Medical Council is contrary to public policy – is incapable of constituting a ground for the purposes of judicial review of either the opinion of the PPC or the decision of the Medical Council.

Costs

97. The respondents refer to the following passage from *De Blacam On Judicial Review*:

> "If leave is refused, no order is made, unless the application has been on notice in which case the court may award the costs of the application to the respondent. It has been decided in England that a respondent who chooses to attend at a leave application (not being an application required to be on notice) should not generally recover costs unless there are exceptional circumstances."

98. The respondents submit that in this case, the trial judge directed that the respondents be put on notice. Thereafter, the appellants were refused leave following a full hearing, and

in those circumstances, it is submitted that there is no basis to interfere with the court's award of costs.

Discussion and decision

99. In *Flynn v. Medical Council*, in a decision to which the trial judge referred, Hogan J., was required to consider the adequacy of reasons provided by the PPC for its opinion that the complaint made in that case did not warrant further action. At paras. 25 and 26, Hogan J. observed:

> "25. As we have already noted, the Preliminary Proceedings Committee is required to form an opinion for the purposes of s.63(a) of the Act of 2007 as to whether the facts disclose a '*prima facie* case to warrant further action being taken in relation to a complaint'. The statutory requirement that the committee must form an opinion is of some importance, because the use of this particular language is conventionally understood to import the triple requirements that any such decision must be *bona fide*, not unreasonable and factually sustainable: see, *e.g.*, *The State (Lynch) v. Cooney* [1982] I.R. 337, at p.361, *per* O'Higgins C.J., and *Kiberd v. Mr. Justice Hamilton* [1992] 2 I.R. 257 at p.265, *per* Blayney J. […]
>
> 26. This, then, brings us to a consideration of the committee's decision not to take any action against the two medical practitioners in question. In essence, the applicant's case is that the reasons given by the committee are inadequate and, moreover, that the decision is not a reasonable or factually sustainable. In some respects it is well nigh impossible to segregate the issue of the adequacy of the reasons from the questions of unreasonableness and factual sustainability so far as the present proceedings are concerned, because the answer to one question informs the disposition with regard to the other."

100. The letter of the PPC of 21st January 2019 informing the appellants of the opinion of the PPC that there was not sufficient evidence to warrant further action being taken in relation to the Complaint is, by any standards, brief and does not, in its own terms, address the substance of the Complaint at all. However, it is clear from the letter that the opinion of the PPC was formed entirely on the basis of the report of Dr. Losseff and, in effect, that the reasons for the rejection of the Complaint are to be found in the conclusions set forth in his report.

101. The difficulty with this is that the PPC, very correctly, afforded the appellants an opportunity to comment on the report of Dr. Losseff, and as already mentioned, the appellants provided a very detailed commentary on that report, running to 51 pages. However, while the opinion of the PPC as expressed in its letter of 21st January 2019 states that it "carefully considered all the material in relation to the matter" there is nothing at all to indicate the basis upon which it apparently rejected out of hand all of the submissions made by the appellants in their response of 6th December 2018, and instead accepted in full the conclusions of Dr. Losseff.

102. The affidavit of Dr. Crotty makes it clear that all of the material gathered in relation to the Complaint was before the PPC at its meeting on 17th January 2019, and even though the responses of the appellants to the reports of Drs. A and B and Dr. Losseff were not specifically itemised in the letter of the PPC to the appellants of 21st January 2019, I am satisfied, from the averments of Dr. Crotty, that all of those materials were before the PPC for consideration. While it would, in my view, have been preferable for the letter of 21st January 2019 to identify all of the key documentation before the committee on that day (in summary form, as Dr. Losseff did in his report), nonetheless the affidavit of Dr. Crotty fills this lacuna satisfactorily.

103. However, what the letter of 21st January 2019 does not do is to offer any explanation for the rejection of the submissions of the appellants of 6th December 2017. As regards this issue, the trial judge in effect held that the response of the appellants to the report of Dr. Losseff did not merit consideration simply because it was not a peer review of Dr. Losseff's report.

104. At one level this is understandable. The courts as well as other bodies responsible for adjudication of disputes – including regulatory bodies such as the Medical Council - rely heavily upon reports and opinions from independent experts. It undoubtedly makes the task of resolving disputes more difficult and more time consuming when persons without relevant qualifications make submissions outside their own areas of expertise and critique the opinions of those with the relevant expertise. However, that does not mean that a body tasked with such a function can avoid giving due consideration to a submission altogether simply on the basis that a person making observations or criticisms is a "lay" person.

105. While the opinion of an expert is very likely to be preferred to that of an unqualified person on the substance of an issue, the astute and well-informed unqualified person may well be able to point out inconsistencies in the report of a qualified person or expert, and may also be able to address and correct issues of fact upon which the expert opinion is based. Moreover, a lay person may identify relevant issues not addressed at all by an expert report.

106. It follows therefore that when a lay person, in response to a request for observations, as in this case, critiques the opinion of an expert that has been procured in a regulatory process, that critique cannot be rejected simply because its source is a lay person, and indeed I do not understand the respondents to contend that this is so. The critique requires consideration in its own right, and where it is being rejected, for the reasons stated by Hogan J. in *Flynn*, that rejection must be reasoned as it would be in the case of a critique provided by another expert. By this I do not mean that a line by line or paragraph by paragraph analysis

is required, but it must be apparent from a decision that a submission, such as that made to the PPC by the appellants on 6th December 2019, has been considered and addressed, and, where applicable, rejected, for stated reasons. It is not enough merely to say that it has been considered. As Hogan J. stated at para. 37 of *Flynn*:

> "None of this is to suggest that the respondent is required to give a discursive judgment (*cf.* the comments of Murphy J. in *O'Donoghue v An Bord Pleanála* [1991] I.L.R.M. 751, at p.757). But as Murray C.J. pointed out in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] I.R. 701, it does mean that the essential rationale of the decision should be evident – or, at least, be capable of 'being inferred from its terms and its context'. Given, moreover, as we have just seen that the respondent also owes a duty to protect, where appropriate, the good name of the medical practitioners against whom the complaint has been made, there is no reason why the reasons for summarily rejecting a complaint without the necessity for further action could not be pithily and succinctly expressed, quite often in two or three sentences".

107. In this case, while Dr. Crotty has said that all relevant material was considered, that bald assertion cannot carry any weight as regards consideration of the appellants' submission on the report of Dr. Losseff because there is nothing at all to indicate what consideration was given to that submission, or the reasons for its rejection. The report of Dr. Losseff addressed the Complaint and the responses of Drs. A and B to the Complaint, and the responses of the appellants thereto. So if the PPC formed its opinion at that point in time, it might well have been an adequate reason to reject the Complaint based on the report of Dr. Losseff, without saying much more. However, having requested and thereafter received the detailed response of the appellants to the report of Dr. Losseff, further reasons were required to reject that response. If, for example, the PPC considered that the appellants had not raised anything that had not already been considered by Dr. Losseff, then it should have said so in its opinion.

108. As the trial judge observed (at para. 19), in *G v. DPP* [1994] 1 I.R. 374, the Supreme Court held that an applicant applying for leave by way of judicial review must make out a *prima facie* case and satisfy the court, *inter alia*, that the facts averred to support a stateable ground for the reliefs sought and on those facts an arguable case can be made that the applicant is entitled to the relief sought.

109. For the reason discussed above, I am satisfied that the appellants have established a *prima facie* case for leave on one ground and one ground only (I address below the reasons for rejection of the other grounds advanced in support of the application). That ground is that that the opinion of the PPC, and consequent decision of the Medical Council, were, in the most literal sense, unreasonable, and irrational because there is nothing in the opinion of the PPC to indicate or from which it may be inferred what consideration was given to the response of the appellants of 6th December 2019 to the report of Dr. Losseff, or the reasons for the rejection of those submissions. While argument was advanced, based on the decision of the Supreme Court in *Corbally v. Medical Council*, and other authorities referred to above, that there is a higher threshold for leave on applications for judicial review involving professional misconduct, counsel for the respondents accepted that that was not so on this application, involving as it does an application for leave only to review a decision not to admit a complaint for further investigation, as distinct from an application to review a substantive decision on the Complaint.

110. I do not consider however that leave should be granted in respect of any of the remaining grounds relied upon the appellants, for the reasons that follow below. Before addressing those grounds however, in the interests of completeness I should address one other element of the appellants' claim that the respondents failed to consider all relevant documentation. This is that (the appellants claim) that the respondents had an obligation to request the appellants to produce the medical reports that they had obtained, having been put

on notice of the same. This ground is entirely without foundation and wholly unsustainable. If the appellants wished to rely on these reports in support of the Complaint, there was nothing preventing them from submitting them to the PPC; on the contrary the first letter sent to the appellants in response to the Complaint informed them that they should submit all documents and reports in their possession, as soon as possible. The appellants choose not to do so, for reasons of their own, which as I understand it were connected to the professional negligence proceedings issued by or on behalf of Mrs. McEvoy. In any case, the respondents had no obligation to request these reports just because the appellants informed the respondents they had them in their possession, and no authority was advanced for such a proposition.

111. Finally, before leaving the subject of consideration of relevant documents, I think it appropriate to comment on the prolixity of the documents submitted by the appellants to the PPC at every stage of the process. Complainants or litigants, whether legally represented or not, cannot be at large to make complaints or plead cases at whatever length they please. While it is understandable, and indeed proper, that complainants/litigants will always wish to make the best possible case, this will not be achieved by overloading tribunals or courts with information and documents. They must make reasonable efforts to identify their strongest points, and to present their claims succinctly. In this case Drs. A and B responded to the Complaint with commendable clarity and succinctness, only for the appellants to respond, in each case, with a forensic and lengthy analysis of those responses. In turn, Dr. Losseff addressed all documents in a report of just over nine pages, only for the appellants to respond with another forensic analysis of over 53 pages, not including appendices.

112. Of course, the appellants may say that none of the responses/reports of Drs. A, B, and Losseff adequately address the Complaint, but that would be to miss this point. That point being that overloading tribunals and/or courts with documents, not to mention the other

parties to disputes, is counterproductive and serves only to add to the expense incurred by the parties involved and the time taken to bring disputes to a conclusion. This is hardly in the best interests of anybody.

Bias

113. The appellants claim that the opinion of the PPC and decision of the Medical Council are tainted by bias by reason of the alleged involvement of Mrs. Carrigy and Mr. Gleeson in the formation of the PPC opinion. This argument must be rejected for the simple reason that neither party had any involvement in the deliberations or conclusions of the PPC.

114. So far as Mr. Gleeson is concerned, Dr. Crotty avers at para. 22 of his affidavit that Mr. Gleeson was appointed a member of the PPC on 9th August 2018, having retired as a partner in the firm of Mason Hayes and Curran. It was in that capacity that Mr. Gleeson had had an involvement in the defence of the medical negligence action initiated by Mrs. McEvoy against Dr. A. Clearly, however, he had no ongoing financial interest in the outcome of that litigation once he retired as a partner. Nonetheless, it would obviously have been inappropriate for him to have any involvement in the adjudication of the Complaint. The affidavit of Dr. Crotty makes it clear that, following his appointment to the PPC, Mr. Gleeson absented himself from meetings on 16th November 2018 (when the Complaint was on the agenda of the PPC) and again on 17th January 2019, when the PPC made a final determination of its opinion.

115. As to Mrs. Carrigy, Dr. Crotty avers that she was not a member of the PPC or the Medical Council following elections that took place in March in 2018. Accordingly, she could have had no involvement at all in the formation of the decision of the PPC or the decision of the Medical Council.

116. It follows that there is no prospect of the appellants succeeding with their challenge based on the ground of bias, and leave should not be granted on this ground.

Fraud and bad faith

117. The appellants allege fraud and bad faith on the part of the respondents arising out of changes to the website of the Medical Council during the course of January 2019. The appellants suggest that the motivation behind these changes was to conceal the membership of Mrs. Carrigy and Mr. Gleeson on the PPC and the Medical Council. In his affidavit, Dr. Crotty avers that the information on the website of the Medical Council was outdated, and this occurred through inadvertence. When this was identified, the inaccurate information was removed. There is no reason to disbelieve Dr. Crotty. On the contrary, there is every reason to believe the innocent explanation that he provides. It is clear from what has been said above in relation to Mrs. Carrigy that the continued reference to her as a member of the Medical Council in January 2019 was an error and had been since as far back as March 2018.

118. Similarly, there was no reason to conceal Mr. Gleeson's membership of the Medical Council, or the PPC, for the reasons given above, i.e. that he withdrew from any consideration of the Complaint by the PPC. Accordingly, this ground too is unarguable and must be rejected.

A decision contrary to public policy

119. The appellants advance a creative argument that the decision of the Medical Council that there was no *prima facie* case of misconduct warranting further investigation is contrary to public policy, because it serves to set a precedent that a medical practitioner may perform experimental surgery, without the informed consent of a patient or the patient's family, without regulatory sanction. The appellants contend that such a state of affairs is contrary to the unenumerated right to bodily integrity protected by Article 40.3 of the Constitution, Articles 3,4, and 7 of the Charter of Fundamental Rights of the European Union and such conduct constitutes offences under ss. 3,4 and 13 of the Non-Fatal Offences Against the Persons Act, 1997.

120. The appellants themselves acknowledge that the judicial review process is concerned with the determination of the manner in which an administrative decision is made. Even if it could be established that the provisions of the Constitution or the European Charter relied upon were in some way violated by the respondents, or that criminal offences had been committed by any of the medical personnel involved, these would be separate matters for adjudication in different proceedings. I agree with the observation of the trial judge that this ground appears to be more directed at the events of 9th May 2012 than it is to the opinion of the PPC and the decision of the Medical Council. If the appellants' argument under this heading is correct, then the mere fact that the respondents reject any serious complaint could be said to be contrary to public policy. This could hardly be so; the respondents are charged with statutory functions, and the mere fact that they exercise those functions one way or another, by accepting or rejecting a complaint, can hardly give rise to a complaint that their decision is contrary to public policy. While the issue was not argued in any great detail, it seems to me that the decision of the Medical Council (and the opinion of the PPC) were either properly and lawfully arrived at, or they were not; I do not consider that public policy has any role to play to in this assessment. This ground too must therefore be rejected.

Costs

121. Since the appellants have been successful in setting aside the order of the High Court to the extent that they have established arguable grounds for judicial review, my preliminary view on the issue of costs is that the order of the High Court should be set aside. The appellants are lay litigants and could not be entitled to any order for costs other than the outlay that they have occurred in initiating the proceedings and filing the within appeal. Since the application for relief by way of judicial review will now go forward to a determination, the appellants are not entitled to any outlay occurred in issuing the proceedings, unless and until they obtain an order for the reliefs sought upon the conclusion

of the proceedings. They are, however, entitled to any outlay incurred by them in prosecuting this appeal, and I propose making an order in these terms. If either party wishes to contend that a different order as to costs should be made, they may contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by the parties in relation to the appropriate order for costs. In light of the fact that this judgment is being delivered on the last day of the legal term the parties should make any such request no later than 16th September 2022. However, the parties should be aware and note that in the event that either of them request such a hearing and are unsuccessful in altering the provisional order for costs which I have indicated, the party requesting the hearing may be required to pay the costs of that additional hearing.

Conclusion

122. The appellants have been successful with one ground of appeal, but unsuccessful with all others. Leave to seek judicial review of the opinion of the PPC of 21st January 2019, and the consequent order of the Medical Council of 7th February 2019 shall be ordered on the ground that the opinion of the PPC and the decision of the Medical Council are unreasonable and/or irrational for failing to take account of relevant information, being the response of the appellants dated 6th December 2018 to the report of Dr. Losseff, and/or for failing to provide any reasons for rejecting the response of the appellants in its entirety. All other grounds upon which judicial review is sought are rejected.

123. As this judgment is being delivered electronically, Whelan and Faherty JJ. have authorised me to confirm their agreement with it.