THE SUPREME COURT

[S.C. No. 376 of 2008]

Murray CJ.
Denham J.
Geoghegan J.
Fennelly J.
Kearns J.

BETWEEN

HAZEL LAWLOR

APPLICANT/APPELLANT

AND

THE MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS

RESPONDENTS

JUDGMENT of the Court delivered by the Chief Justice, the Hon. Mr. Justice John L. Murray on the 1st day of July, 2009

This is an appeal brought from the judgment and order of the High Court (Murphy J.) delivered on 31st July, 2008 whereby the plaintiff was denied certain reliefs which she had sought in relation to the procedures adopted by the respondents. The plaintiff had sought a declaration that the respondents could not make findings of serious misconduct against her late husband, Mr. Liam Lawlor, unless supported by evidence establishing them beyond any reasonable doubt. She had also sought an

order directing the respondents to make all necessary financial arrangements to enable her to engage effective legal representation in the course of proceedings before the respondents.

The respondents are the members of the Tribunal of Inquiry into Certain Planning Matters and Payments. As is now well known the Tribunal was appointed by instrument of the Minister for the Environment & Local Government dated 4th November, 1997, as amended by further instruments dated 15th July, 1998, 24th October, 2002, 7th July, 2003, and 3rd December, 2004. These instruments were made in pursuance of resolutions passed by Dail Eireann on 7th October, 1997 and by Seanad Eireann on 8th October, 1997, and by further resolutions passed by Dail Eireann on 1st July, 1998 and by Seanad Eireann on 2nd July, 1998, by Dail and Seanad Eireann on 28th March, 2002, by Dail Eireann on 3rd July, 2003 and by Seanad Eireann on 4th July, 2003 and by Dail and Seanad Eireann on 17th November, 2004.

The Hon. Mr. Justice Feargus Flood was appointed sole member of the Tribunal on 4th November, 1997. On 24th October, 2004 the composition of the Tribunal was changed. Mr. Justice Flood was appointed chairperson and two judges of the Circuit Court, His Honour Judge Alan Mahon and Her Honour Judge Mary Faherty were appointed as ordinary members of the Tribunal. In addition, Judge Keyes was appointed a reserve member of the Tribunal. Mr. Justice Flood resigned

on 27th June, 2003 and Judge Mahon replaced him as chairperson on 7th July, 2003. Judge Keyes was appointed as a member of the Tribunal on the same date.

The terms of reference of the Tribunal require it:-

> *"(a) To enquire urgently into and report to the Clerk of the Dail and make such findings and recommendations as it sees fit, in relation to the following definite matters of urgent public importance."*

The terms of reference material to the present application are set out at paragraph A(5) of the resolutions passed on 7th October, 1997 and amended by resolutions passed by Dail Eireann on 1st July, 1998 and Seanad Eireann on 2nd July, 1998 and paragraph J(1) of the resolutions passed on 17th November, 2004 and are in the following terms:-

> *"A(5) In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process which may in its opinion amount to corruption, or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties, it shall report on such acts and should in particular make recommendations as to the*

effectiveness and improvement of existing legislation governing corruption in the light of its inquiries."

"J(1) The Tribunal shall, subject to the exercise of its discretion pursuant to J(6) hereunder, proceed as it sees fit to conclude its inquiries into the matters specified below (and identified in the Fourth Interim Report of this Tribunal) and to set out its findings on each of these matters in an interim report or reports or in a final report:-

(a) The Carrickmines I Module.

(b) The Fox & Mahony Module.

(c) The St. Gerard's Bray Module.

(d) The Carrickmines II Module and related issues.

(e) The Arlington/Quarryvale I Module.

(f) The Quarryvale II Module.

(g) Those modules that are interlinked with the modules set out at paragraphs (a) to (f), and that are referred to in paragraph 3.04 of the Fourth Interim Report of the Tribunal."

Since its establishment on 4th November, 1997, the Tribunal has published four interim reports, two of which, the second interim report (September, 2002) and the third interim report (September, 2002), have

dealt with allegations of corruption in the planning process. The second interim report was concerned with allegations against Mr. Raphael Burke, a former Minister, T.D. and member of Dublin County Council. In this report the Tribunal made findings on the balance of probabilities that Mr. Burke received corrupt payments. The third interim report was concerned with allegations against Mr. George Redmond, former Assistant City & County Manager for Dublin. In this report the Tribunal made findings of fact, based on the balance of probabilities standard, that Mr. Redmond had received corrupt payments.

Mr. Liam Lawlor first became involved with the Tribunal in 1998. He was involved in the following modules:-

- Carrickmines I
- Carrickmines II and related issues
- Arlington/Quarryvale I
- Quarryvale II

Mr. Lawlor's involvement in the Carrickmines I module stemmed from allegations made by Mr. Frank Dunlop that Mr. Lawlor assisted in the rezoning of land at Carrickmines Great, known as the Paisley Park/Jackson Way Lands and adjoining nearby lands in Carrickmines Valley. Mr. Lawlor's involvement in the Carrickmines II module stems from allegations made by Mr. Frank Dunlop that a Mr. Jim Kennedy told him that Mr. Lawlor had a share in the ownership of Jackson Way. Mr.

Lawlor's involvement with the Quarryvale I and II modules stems from allegations made by Mr. Frank Dunlop and Mr. Tom Gilmartin that Mr. Lawlor was a key strategist in the Arlington/Quarryvale projects and that he received significant payments from Mr. Dunlop, Mr. Gilmartin and others allegedly connected with the projects.

No findings have been made against Mr. Lawlor by the Tribunal to date. The applicant is the widow of the late Mr. Liam Lawlor who died tragically in a road traffic accident in Russia on 22nd October, 2005. Mr. Lawlor was a former member of Dail Eireann and Dublin County Council. As already noted, his involvement with the Tribunal commenced in 1998 and during the course of the Tribunal's proceedings a number of grave allegations of criminal nature have been levelled against him. Following his death, the applicant was granted limited legal representation by the Chairman of the Tribunal on 29th November, 2005. At the time of the High Court proceedings herein, the applicant was a witness before the respondents in relation to the Quarryvale module.

From the brief historical summary of the proceedings outlined above, it is clear that the Tribunal in its proceedings to date has adopted the civil standard of proof, that is to say, the balance of probability test, in making findings of fact in relation to allegations of corruption in its two interim reports to which reference has already been made.

In delivering judgment in the High Court herein, Murphy J. concluded as follows in relation to the applicant's case that the standard of proof should be proof beyond reasonable doubt:-

> *"It does seem to me having regard to the submissions made and the case law which the Court has examined that there is no necessary standard of proof laid down in relation to Tribunals of Inquiry. The Beef Tribunal did take, and Hederman J. acknowledged it was entitled to take, a higher standard of proof but that it wasn't necessary for it to do so. ... It does seem to me accordingly that the application for reliefs that the respondents may not make any findings of serious misconduct against the late husband of the applicant unless supported by evidence proven beyond reasonable doubt is not substantiated by the arguments and submissions made."*

In relation to the application directing the respondents to make all necessary financial arrangements to enable the plaintiff engage legal representation for herself in the course of proceedings before the respondents, the learned trial judge stated:-

> *"The Court is conscious that the Tribunal has been ongoing for over a decade and, indeed, the affidavits filed on behalf of the applicant describe in considerable detail the complaints which the late Mr. Lawlor had with the Tribunal. The Court notes the*

opening of Mr. McGonigal's application to the Court that the Tribunal had made no findings against the late Mr. Lawlor. There was no evidence as to the responsibility for the length of the Tribunal's deliberations.

The current claim in relation to standard of proof and the question of costs of legal representation are both matters which could have been raised in Judicial Review proceedings by Mr. Lawlor in his lifetime. The bringing of this application years after his unfortunate death are outside the time fixed by Order 84, Rule 21 of the Rules of the Courts, and this should be the basis of the Court's discretion in refusing the relief."

Murphy J. also noted that tribunals have no inherent power to provide for an applicant's costs and further noted that tribunals themselves have no funds or assets out of which such provision can be made. He further noted that the applicant had not sought to keep the State as a party in the proceedings for the purpose of seeking costs of representation. He noted also that the Tribunal was neither a criminal trial nor a civil trial and that there was no claim in the proceedings for a declaration that the legal provisions establishing tribunals of inquiry were incompatible with the European Convention. He further noted that no evidence had been adduced in relation to the applicant's financial means and for all of these reasons refused to direct the respondents to provide

legal representation, or rather the cost of same, in respect of the proceedings still remaining before the Tribunal.

STANDARD OF PROOF

Submissions on behalf of the applicant

Mr. Eoin McGonigal, senior counsel on behalf of the applicant, contended that the respondents, required as they were to make findings in relation to the matters identified in their terms of reference, were obliged to do so by the application of a rigorous and analytical process. In submitting that the criminal standard of proof beyond reasonable doubt was appropriate in this context and particularly so in the case of Mr. Lawlor, counsel relied on the following four grounds:-

(i) The nature of the possible findings that might be made against Mr. Lawlor.

(ii) The absence of any appeal from the findings of the Tribunal.

(iii) The fact that Mr. Lawlor is deceased.

(iv) The possibility of the Criminal Assets Bureau becoming involved.

The respondents had the power to make very grave findings against Mr. Lawlor, including findings which, if correct, would constitute breaches of the criminal law and would be severely damaging in terms of Mr. Lawlor's reputation. Mr. McGonigal noted that this Court in *Maguire*

v. Ardagh [2002] 1 I.R. 385 had considered the meaning of the word *"findings"* in the context of a challenge to the procedures adopted by the Oireachtas sub-committee established to inquire into the Abbeylara incident. The sub-committee had argued that because its findings were 'legally sterile' they should be regarded as nothing more than an expression of opinion. This argument was rejected in no uncertain terms by this Court in holding that a finding by such a body that there had been an unlawful killing would have an extremely adverse effect on the individual concerned notwithstanding that there was no conviction as a result or that the finding did not determine rights or liabilities in civil law.

The allegations made against Mr Lawlor were that he was engaged in corrupt practices while a public official. Bribery is an offence at common law and other criminal offences in this context have been created by the Prevention of Corruption Acts, 1889 – 2001.

While those facts alone warrant the application of a standard of proof beyond reasonable doubt, that requirement was reinforced by the fact that no appeal lies from the findings of a Tribunal. The Salmon Commission had considered the question of whether there should be an appeal from the findings of a tribunal of inquiry and had stated at para. 134 of its report:-

> *"The question has been canvassed before us as to whether or not there should be any appeal from the findings of a Tribunal*

of Inquiry. The great preponderance of evidence is against such appeals. These tribunals have no questions of law to decide. It is true that whether or not there is any evidence to support a finding is a question of law. Having regard, however, to the experience and high standing of the members appointed to these Tribunals and their natural reluctance to make any finding reflecting on any person unless it is established beyond doubt by the most cogent evidence, it seems to us highly unlikely that any such finding would ever be made without any evidence to support it. Any adverse finding which a Tribunal may make against any person will depend on what evidence the Tribunal believes. Accordingly it would be impossible to reverse such findings without setting up another tribunal to hear the evidence all over again. This would be as undesirable as it would be impracticable. In matters of the kind with which tribunals are concerned, it is of the utmost importance that finality should be reached and confidence restored with the publication of the report."

Mr. McGonigal submitted that the Salmon Commission, in not recommending the introduction of a system of appeal, was justifying that stance by setting a requirement for a standard of proof *"beyond doubt by the most cogent evidence"*.

The fact that Mr. Lawlor had died was another factor strongly suggesting that a standard of proof equivalent to criminal standards should apply. A deceased person has a right to reputation and a corresponding right to have his reputation protected. However, Mr. Lawlor's ability to defend and vindicate his constitutionally protected right to reputation had been severely hampered by his death. While the respondents granted to the applicant the right to represent Mr. Lawlor, the restrictions put on that right and confirmed in a decision of the High Court on the 27th April, 2007 by O'Neill J. [2007] I.E.H.C. 139 had made it clear that the applicant's representation of her late husband was prospective only and did not encompass Mr. Lawlor's past grievances. Significant prejudice had been caused to Mr. Lawlor by virtue of the Tribunal's delay in completing its task and this was yet another factor which warranted the *"beyond reasonable doubt"* standard of proof formulation.

The final part of counsel's submission under this heading was to the effect that adverse findings against Mr. Lawlor could have significant consequences under the Criminal Assets Bureau Act, 1996, as amended, which empowers the Criminal Assets Bureau to proceed against the assets of persons where those assets are suspected to derive from criminal activity. While the findings of the Tribunal would be inadmissible in a

court of law, the Bureau could use the report as a *"road map"* in attempting to build a case against the applicant.

The Court was referred to the approach adopted to the standard of proof in other tribunals both in this jurisdiction and in other jurisdictions. In the Tribunal of Inquiry into the Kerry Babies Case, Lynch J. had applied a *"sliding scale"* employing at different times the standard of proof beyond reasonable doubt, proof by way of *"substantial probability"* and proof *"on the balance of probabilities"* depending on the seriousness of the allegations. The Tribunal of Inquiry into the Beef Processing Industry set for itself the criminal standard of proof beyond reasonable doubt. The Tribunal of Inquiry into the Blood Transfusion Service Board, while not expressly adopting the standard of proof beyond reasonable doubt, employed terminology consistent with the more stringent criminal requirement. The Moriarty Tribunal had expressly stated that the standard of proof was not the criminal standard of proof beyond reasonable doubt, but rather a flexible civil standard, proportionate to the nature and gravity of the matters arising. The Abbeylara Inquiry had indicated a clear preference for the *"beyond doubt"* standard recommended by the Salmon report. On the other hand, the Tribunal of Inquiry into Certain Gardai in the Donegal Division stated expressly in successive reports in 2005 and 2006 that it was *"bound"* to adopt the standard of proof on the balance of probability in determining

facts. Similarly, the Commission to Inquire into Child Abuse in a ruling dated 18th October, 2002 adopted the standard of proof applicable in civil proceedings, that is to say, proof on the balance of probabilities.

In a ruling delivered on 11th October, 2004, the Bloody Sunday Inquiry adopted an approach whereby it did not apply the criminal standard of proof but opted instead to record the *"degree of confidence or certainty with which it reached its conclusions"*.

In considering whether there was corruption and collusion by members of the police force, the Stephen Lawrence Inquiry [February, 1999] addressed the standard of proof to be applied to such allegations at para. 8.5 of its report in the following manner:-

> *"Furthermore in this area of the Inquiry it is necessary to indicate that the standard of proof to be applied must be the criminal standard. That is to say we can only reach a conclusion adverse to the MPS or individual officers if we are satisfied beyond reasonable doubt that collusion or corruption is established. In other areas of the case we are entitled to reach conclusions upon a balance of probability; and we are entitled also to voice suspicions should they be found validly to exist. The standard of proof is not so rigid that we cannot make findings or indicate that a situation may exist otherwise than by applying the well known principles which govern litigation. But where such a serious allegation as*

collusion with criminals or corruption is made, it would be wholly unfair to reach any adverse conclusion without being sure that such a conclusion was justified as a matter of evidence and proper inference."

Finally, in Australia, the Final Report of the Royal Commission into the Building and Construction Industry [February, 2003] summarised the relevant law as follows in Volume 2, Chapter 5, paras. 9 and 10:-

"The law does not mandate any particular level of satisfaction that must be achieved before a finding of fact, which carries no legal consequence, may be made by a Royal Commission. Nevertheless, I have been conscious that a finding that a particular individual, organisation or company has engaged in unlawful contact may cause serious damage to the reputation of such an individual, organisation or company.

I have therefore acted in accordance with the general principle that the appropriate standard of proof varies with the seriousness of the matter in question."

In response, Mr. Michael Collins, senior counsel on behalf of the respondents, submitted that, save for very limited exceptions in relation to allegations of professional misconduct on the part of professional persons such as solicitors or doctors, the "*beyond reasonable doubt*" standard is confined to criminal cases. This was made particularly clear, he

submitted, by this Court in *Banco Ambrosiano SPA & Others v. Ansbacher & Co. Ltd. & Others* [1987] I.L.R.M. 669. In that case the allegation was that the plaintiff had been defrauded of a sum of US $30 million. The plaintiffs' case had failed in the High Court and Hamilton P. took the view that a higher standard of proof was required than the normal civil standard. This view, however, was rejected by the Supreme Court which held that to opt for some intermediate standard of probability between civil and criminal standards of proof would lead to confusion and uncertainty.

In the instant case, Mr. Collins reminded the Court that the learned High Court judge had attached importance to this decision in rejecting any suggestion that proof beyond a reasonable doubt should be adopted as the appropriate standard by a Tribunal of Inquiry.

Equally, in *Georgopoulus v. Beaumont Hospital Board* [1998] 3 I.R. 132, one of the grounds of appeal was that the Board in reaching its decision should have but did not apply the "*standard of proof*" required in a criminal charge, that is to say, beyond a reasonable doubt. This Court had made it very clear that the reasonable doubt standard was confined to criminal trials and had no applications to "*proceedings*" of a civil nature, Hamilton CJ. stating at pp. 149-150):-

> "*As already pointed out in this judgment, the proceedings before the defendant were in the nature of civil proceedings and*

did not involve any allegations of criminal offences. The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application in proceedings of a civil nature".

O'Laoire v. The Medical Council (Unreported, Supreme Court, 25th July, 1997) was another case in which O'Flaherty J. confirmed the accepted view that the standard of *"beyond a reasonable doubt"* should be confined to criminal cases, stating at p.5:-

> *"The standard of proof prescribed for criminal trials is peculiarly suited for the respective functions of judge and jury as well as for the presumptions and protections that attach to an accused in the course of a criminal trial, though I do not lose sight of the fact that the same standard of proof applies where cases are heard by a judge alone, such as in the District Court, or by a number of judges in the Special Criminal Court.*
>
> *It seems to me that it is better that we preserve the civil standard for all civil proceedings and leave the criminal standard to the arena to which it is best suited. As Barrington J. (speaking for the Court) said in Mooney v. An Post (judgment delivered 20th March, 1997):-*
>
> > *'To attempt to introduce the procedures of a criminal trial into an essentially civil proceeding serves only to create confusion.'*

> *It is clear that the Committee and the trial judge were concerned with an allegation which did not have any criminal constituent to it. However, the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated: see Banco Ambrosiano SPA v. Ansbacher [1987] IRLM 669; Re Ward of Court [1995] 2 ILRM 401 and Hanafin v. Minister of the Environment [1996] 2 ILRM 161. And if the fact finding body sets itself a higher standard than the normal civil standard of proof that will not affect the proceedings: see Goodman International v. Hamilton [1992] 2 I.R. 542."*

Mr. Collins stressed that tribunals of inquiry often examine serious allegations which are sometimes based on mere rumour and/or hearsay and that public hearings into those allegations has a real potential to damage reputations. The report of the Tribunal, however, is merely a report of the findings of the Tribunal. Any subsequent prosecution that might arise cannot rely on the report and/or any of the evidence opened in public by the Tribunal as provided for in s.5 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979.

Mr. Collins thus submitted that it was quite clear that the civil standard of proof applies in civil cases even where the allegations made in the case involve allegations of criminality. Given the inquisitorial nature of the task entrusted to the Tribunal it was questionable whether it

could even be regarded as a *"proceeding"*. However, whatever else it might be, a tribunal process is not a form of criminal proceeding, a fact confirmed by Denham J. in *Lawlor v. Flood* [1999] 3 I.R. 107 at p. 137: *"A tribunal hearing is not a criminal trial, nor is it even a civil trial"* and accordingly, Mr. Collins submitted that it was not necessary to apply a *"beyond reasonable doubt"* standard.

Finally, Mr. Collins submitted that in any event the applicant's claim should fail on grounds of delay, given that Mr. Lawlor could have raised these points himself. The point was only now being taken, many years later, and subsequent to the making of findings by the Tribunal on the balance of probabilities into earlier modules.

DECISION

Ever since the decision of this Court in *Goodman v. Hamilton* [1992] 2 I.R. 542 it has been accepted that a Tribunal of Inquiry is not involved in the administration of justice in the sense identified by Finlay CJ. when in the course of his judgment in that case he stated at p.588:-

> *"The essential ingredient of a trial of a criminal offence in our law, which is indivisible from any other ingredient, is that it is had before a court or judge which has got the power to punish in the event of a verdict of guilty. It is of the essence of a trial on a criminal charge or a trial on a criminal offence that the*

proceedings are accusatorial, involving a prosecutor and an accused, and that the sole purpose and object of the verdict, be it one of acquittal or of conviction, is to form the basis for either a discharge of the accused from the jeopardy in which he stood, in the case of an acquittal, or for his punishment for the crime which he has committed, in the case of a conviction.

The proceedings of the inquiry to be held by this Tribunal have none of those features. The Tribunal has no jurisdiction or authority of any description to impose a penalty or punishment on any person. Its finding, whether rejecting an allegation of criminal activity or accepting the proof of an allegation of criminal activity, can form no basis for either the conviction or acquittal of the party concerned on a criminal charge if one were subsequently brought, nor can it form any basis for the punishment by any other authority of that person. It is a simple fact-finding operation, reporting to the Legislature."

Tribunals of Inquiry perform a unique role in Irish public life. A tribunal is an inquisitorial body which derives its authority and existence and its terms of reference from resolutions passed by the Oireachtas. In this instance, the Oireachtas determined that this Tribunal should be constituted to inquire urgently into allegations that corrupt acts had occurred in relation to the process of granting planning permissions in the

Dublin area. The Tribunal was charged with the task of conducting that inquiry and reporting to the Clerk of the Dail having made such findings and recommendations as it saw fit. This exercise was required to be undertaken in the context that the Oireachtas considered that the subject matter of the investigation was one of *"urgent public importance"*. Given the nature and wide ambit of the terms of reference given to the Tribunal this could not be taken to imply that its inquiries would be of modest duration.

The various contentions advanced on behalf of the applicant must be seen against this backdrop. It is undeniable that reputational damage may attach to any individual against whom allegations are aired before a tribunal, notably in its public sittings, not least because of the length of time which may elapse before the person concerned can rebut such allegations. This is a feature of a public inquisitorial tribunal process which is difficult to avoid and can only be justified by reference to the critical requirement that matters of such public importance and concern be properly investigated when the Oireachtas so determines.

The legislation which provides for tribunals has survived constitutional scrutiny and the courts in this jurisdiction have repeatedly upheld the right of tribunals to purposively inquire into matters the subject of their terms of reference. Nonetheless, the courts have stressed repeatedly the obligation of tribunals to apply fair procedures and to

trench upon the rights of the individual as little as possible, consistent with the aims and objectives of the inquiry itself. In this regard the invocation by persons under investigation of the panoply of rights identified by this Court in *In Re Haughey* [1971] I.R. 217 is an entitlement repeatedly upheld and supported by the Courts. That said, the Courts have been quick to acknowledge that considerable adverse reputational consequences can flow both from allegations aired at tribunals and from supposedly 'legally sterile' tribunal findings. The term 'legally sterile' has been used as an allusion to the fact that the findings of a tribunal are the conclusions only of the Chairperson, and its members where there is more than one member, and in no sense, as pointed out above, has the status of a judicial finding, civil or criminal, nothwithstanding that in order to ensure the independence of a tribunal, its chairman and members are judges. Persons the subject of inquiry by such a tribunal are never charged with any offence nor are they on trial. A tribunal can never be seen as a substitute for or an alternative mode of criminal trial. That does not of course take away from the fact that the adverse findings of grave wrongdoing can have devastating consequences for the standing and reputation of a person in the community.

Where a tribunal of inquiry is investigating the reason why a bridge collapsed or a ship broke in two at its moorings, its processes do not usually involve allegations of criminal behaviour. The allegations may not be such as to give rise to reputational damage, such as that identified by this Court in *Maguire v. Ardagh* [2002] 1 I.R. 385, where an Oireachtas committee proposed to inquire into the lawfulness or otherwise of a killing. There was but one judicial review in the Whiddy Inquiry which was tasked with investigating the causes for the break up in 1979 of an oil tanker at the jetty in Bantry whereas the Court was informed that in excess of 20 judicial review applications have been brought during the course of this Planning Inquiry, some successful, some not, and some of which, intentionally or otherwise, have slowed and delayed the work of this Tribunal.

Counsel for the applicant has pointed out that all of the adverse reputational consequences outlined above are actually or potentially present in this case and are exacerbated because Mr. Lawlor has died. It is those particular features of his situation which essentially underpin the application in this case, namely, that a standard of proof beyond reasonable doubt, that is to say a criminal standard of proof, should apply to any adverse findings that might be made by the respondents in respect of the late Mr. Lawlor.

At the outset it must be said that such a standard has never been mandated in respect of any tribunal of inquiry by this Court. It was a contention specifically rejected by this Court in *Goodman v. Hamilton* [1992] 2 I.R. 542. That is not to say that a tribunal of inquiry is precluded from adopting that standard in circumstances it considers appropriate. In this regard, reference was made by both sides to certain *dicta* from the judgment of Hederman J. in that case where he stated, first, at p.600:-

> *"It may well not have been necessary for the Tribunal to set a standard of proof "beyond reasonable doubt" but that is a procedural requirement which it was well within the competence and entitlement of the Tribunal to lay down. It does not have the effect of transmuting what is an inquiry into a 'trial'"*

and to the following passage at 603 of his judgment:-

> *"In the course of this inquiry it may be necessary for the Tribunal to relax the rules of evidence in regard to some particular party - including the applicants. It would be very unwise for this Court to attempt to fetter the discretion which the Tribunal undoubtedly possesses to regulate its own procedure. Similarly, in regard to whether any evidence should be taken in private - that would be a matter for the Tribunal to rule on as the occasion requires."*

It would, nonetheless be wrong to infer from these comments that a tribunal of inquiry is at large in terms of the requirements of proof or that the standard of proof is simply a matter of procedure which it may regulate as it sees fit. Such an approach could lead to a situation where, for example, on the bare balance of probabilities, a finding of the utmost gravity could be made against a particular individual. In principle evidential requirements must vary depending upon the gravity of the particular allegation. This is not to adopt the *"sliding scale"* of proof advocated by counsel for the applicant, but rather to simply recognise, as an integral part of fair procedures, that a finding in respect of a serious matter which may involve reputational damage must be proportionate to the evidence upon which it is based. For example, a finding that a particular meeting occurred on one day rather than another may be of such little significance that a tribunal could make a finding in that respect on the bare balance of probabilities. A finding of criminal behaviour on the other hand would require a greater degree of authority and weight derived from the evidence itself.

The common law requirement to prove a criminal case beyond reasonable doubt dates back to the late 18th century (See Langbein's '*Origins of Adversary Criminal Trial'* (Oxford: Oxford University Press 2003), a time when punishments following conviction could range from the death penalty to transportation for life or a lengthy prison term. Many

of the rights enjoyed by persons facing criminal trial and criminal sanctions undoubtedly developed because of the severity of such sanctions. There is a self-evident requirement for the strictest levels of proof where draconian punishments may follow a particular finding by a court. However no punitive sanctions or consequences attend the findings of a tribunal of inquiry. It is this fundamental distinction which differentiates the criminal law from the law applicable to tribunals.

Thus in *Banco Ambrosiano SPA & Ors v. Ansbacher & Co. Ltd & Ors* [1987] I.L.R.M. 669 this Court was satisfied that an allegation of fraud did not require to be proved to the criminal standard where the proceedings take place other than in a criminal court. As Henchy J. stated at p. 700:-

> *"When fraud has to be proved in a criminal court as an element of an offence charge, it must of course be proved beyond a reasonable doubt, which is the prescribed degree of proof for every essential ingredient of a criminal charge. In the civil courts, while fraud is not recognised as a distinct tort or cause of action, it is well recognised as an element which, if proved in the appropriate manner, will vitiate the act or conduct which it induced or resulted in, so that the court will seek to undo the intended and actual effect of the fraud by awarding damages or making such order as it*

deems necessary for the purpose of doing justice in the circumstances."

Henchy J. was firmly of the view that it would be an error to introduce some intermediate standard of proof between that of civil liability and criminal liability, stating at p. 701:-

"If, as has been suggested, the degree of proof of fraud in civil cases is higher than the balance of probabilities but not as high as to be (as is required in criminal cases) beyond reasonable doubt, it is difficult to see how that higher degree of proof is to be gauged or expressed. To require some such intermediately high degree of probability would, in my opinion, introduce a vague and uncertain element, just as if, for example, negligence were required to be proved in certain cases to the level of gross negligence. Moreover, since in this jurisdiction many civil cases involving fraud are tried by juries it would be difficult for a trial judge to charge a jury as to this higher degree of proof without running the risk of confusing the jurors."

Quite apart from the practical difficulties which would arise from the creation of an intermediate standard of proof, Hamilton C.J. in *Georgopoulus v. Beaumont Hospital Board* [1998] 3 I.R. 132 offered a perhaps more important rationale for maintaining the distinction when he stated at pp. 149-150:-

"As already pointed out in this judgment, the proceedings before the defendant were in the nature of civil proceedings and did not involve any allegations of criminal offences. The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application in proceedings of a civil nature.

It is true that the complaints against the plaintiff involved charges of great seriousness and with serious implications for the plaintiff's reputation.

This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on "the balance of probabilities" bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."

To revert to the judgment of Henchy J. in *Banco Ambrosiano* (cited above) he concluded his judgment by stating:

"Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud. But that finding should not be shirked because it is not a

conclusion of absolute certainty. If the Court is satisfied, on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find."

The foregoing judicial statements aptly describe the requirements of due process, as regards the circumstances of the present case. The findings made must clearly be proportionate to the evidence available. Any such findings of grave wrongdoing should in principle be grounded upon cogent evidence.

In the foregoing circumstances the Court considers that this ground of appeal should fail.

COSTS OF LEGAL REPRESENTATION BEFORE THE TRIBUNAL

The applicant submits that the learned trial judge erred in law in not holding that the respondents are obliged to provide her in advance with the means to secure legal representation before the Tribunal. While counsel for the applicant accepted that the legislation contained no express provision enabling a tribunal to provide for costs in advance he submitted that, insofar as s.6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, as amended by s.3 of the Tribunals of Enquiry (Evidence) (Amendment) Act, 1997, failed to *preclude* the making of such an order, the statutory powers of the Tribunal should be interpreted

on the basis that a tribunal had an inherent power in that respect to so order. Counsel on behalf of the applicant also attached some significance to the fact that there had been at least two incidents where other tribunals had exercised what was described as an "*inherent power*" to discharge the costs of witnesses. The first instance cited arose during the Beef Tribunal when a significant allocation of funds was made to secure the attendance of a witness from a foreign jurisdiction. Similarly, in the Moriarty Tribunal, it was asserted that counsel for that Tribunal had undertaken to pay the personal and legal costs of a Mr. Christopher Vaughan, an individual that they wished to meet in London.

In response, counsel for the respondents argued that a tribunal can not be compelled to provide legal representation for the following reasons:-

- The Tribunal does not have an inherent power with regard to costs.
- There is no statutory provision to deal with costs as contended for by the applicant, the only statutory provision being Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 (as amended)
- Costs are a creature of statute.
- As a matter of law under the Constitution or the European Convention on Human Rights there is no entitlement to

State- funded legal representation in tribunal type proceedings

DECISION

The Tribunals of Inquiry (Evidence) Act 1921 as originally enacted did not deal with the issue of costs.

Section 6 (1) of the Tribunals of Inquiry (Evidence) Act, 1979 as amended by section 3 (1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 and section 2 of the Tribunals of Inquiry (Evidence) (Amendment) Act 2004 provides:-

"(1) Where a tribunal or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal, or the chairperson, as the case may be, may, either of the tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs –

(a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;

(b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order

(1A) The person who for the time being is the sole member of a tribunal or is the chairperson of a tribunal consisting of more than one member-

(a) may make an order under subsection (1) in relation to any costs referred to in that subsection that were incurred before his or her appointment as sole member or chairperson and that have not already been determined in accordance with that subsection, and (b) shall, for that purpose, have regard to any report of the tribunal relating to its proceedings in the period before his or her appointment.

1(B) Paragraph (b) of subsection (1A) shall not be taken to limit the matters to which regard is to be had under subsection (1)

(2) The amendment effected by subsection (1) of this section applies to –

(a) tribunals appointed, and

(b) costs incurred,

before or after the passing of this Act."

The Court does not believe it is necessary to conduct a wide-ranging discussion into this aspect of the case. It is plain that the only power a tribunal enjoys to make any order in relation to costs is that outlined above and it arises only where "*findings*" have actually been made by a tribunal. It is clear from the decision of Laffoy J. in *Goodman v. Minister for Finance* [1999] 3 I.R. 356 that a Tribunal of Inquiry has no power to make an order for costs other than in those circumstances. As was stated by Laffoy J. in that case at p. 367:-

> *"…save and insofar as the Act of 1979, empowers it to make an order for costs, a tribunal established under the Acts of 1921 and 1979, has no power to award costs or other monies to a party represented before it. Moreover, such a tribunal is only empowered to direct payment by the defendant, pursuant to an order made under s. 6, out of monies provided by the Oireachtas to the extent that is clearly so expressed in the Act of 1979."*

The decision of Laffoy J. in this respect was followed by Peart J. in *McBrearty v. Morris* (High Court, Unreported, 13th May, 2003) when at p.61 of his judgment, Peart J. stated:-

> *"I have already set out the terms of section 6 of the 1979 Act as substituted by section 3(1) of the 1997 Act. It is clear that the*

only power the Tribunal enjoys to make any order in relation to costs is contained in that section."

Having expressly followed the approach adopted by Laffoy J. in *Goodman v. Minister for Finance*, Peart J. then continued at p.62:-

"The Respondent and the Attorney General submit that there can be no question but that the Tribunal has been given no power to make an order for the costs to be paid or at least guaranteed by the Tribunal ahead of its making findings at the conclusion of the Inquiry. This submission is based on the wording of the section itself, which requires the Tribunal in its consideration of any application for costs to have regards to certain criteria, namely the findings of the Tribunal, the extent to which a party has failed to co-operate with the tribunal during the course of the hearings, and the extent to which a party may have given false or misleading information to the Tribunal. Clearly, they submit, the Oireachtas intended these matters to be taken into account before making any award of costs to a party, and that cannot be done until after the Tribunal has completed its work.

… I am completely satisfied that the Tribunal has no power under the section … to make provision for, or at least guarantee in advance, the costs of the applicant's legal representation, or those of his family or his extended family."

What the case law does establish, in the context of the criminal law, is the right to be provided with legal representation for accused persons in criminal cases or for persons whose liberty is otherwise at stake. (see *The State (Healy) v. Donoghue* [1976] I.R. 325). Otherwise It is well settled that even if fair procedures entitle a person to be legally represented there is no obligation on the deciding body to fund such representation (see *Corcoran v. Minister for Social Welfare* [1991] 2 I.R. 175; *K Securities Limited v. Ireland* (High Court, Unreported, Gannon J., 15th July, 1977) and *Condon v. C.I.E.* (High Court, Unreported, Barrington J., 16th November, 1984).

In the present case the proceedings sought to be impugned are not criminal proceedings nor are they proceedings which determine any rights of any parties. While particular reliance was placed by the applicant on the decision of the European Court of Human Rights in *Steel & Morris v. The United Kingdom* (E.C.H.R., Unreported, 15th February, 2005), the Court is satisfied that that case has no application here. The case was concerned with the right to a fair trial under Article 6.1 of the Convention and all the comments of the court must be understood in the context of that right. Thus, for example, in the opening paragraph of the court's assessment it is stated as follows:-

> *"The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial … It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court … and that he or she is able to enjoy equality of arms with the opposing side …"*

Principally because the Tribunal is neither a criminal or a civil trial, the decision of the European Court of Human Rights in the above cited case is not pertinent to the present circumstances. It is noted, as the learned trial judge also noted, that the applicant's claim herein does not include any claim for a declaration that those provisions of the Tribunals of Inquiry Acts which deal with costs are incompatible with the Convention.

In relation to the two specific instances where counsel argued that tribunals had made provision for costs or expenses in advance, it quickly emerged that any reliance thereon by the applicant was completely misplaced. In each instance, specific arrangements had been made with an appropriate Government department to discharge and defray the costs involved and no portion of the expenditure involved was provided or underwritten by the Tribunal itself.

The Court considers that there is no general principle that legal costs may be claimed in proceedings pending before a tribunal of inquiry with which this case is concerned. Furthermore, and this is not contested, the Tribunal itself has no funds and no power to make provision for persons appearing before it.

Moreover, although it is not essential to the Court's conclusion on this ground of appeal at no stage has the applicant put evidence before the Court to satisfy the Court that she is not in a position to defend her interests before the Tribunal without having her costs paid in advance. No evidence of the applicant's means was placed before the High Court, nor was any evidence tendered to the High Court as to the value of her late husband's estate.

This part of the case is virtually moot. The proceedings in so far as the late Mr. Lawlor is concerned are over. Two reports of the Inquiry have at this stage been completed and written up without challenge on the basis of a standard of balance of probabilities. This ground of appeal must also fail.

In relation to both grounds of appeal the Court finds that any right or entitlement to relief is in any event long since expired by virtue of the failure of the late Mr. Lawlor during his lifetime to seek a remedy in timely fashion. The appeal thus fails on grounds of delay also.