

Commentary on *The Report of the Tribunal of Inquiry into 'The Kerry Babies Case'*

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Introduction

Most judgments examined in this book come from appellate cases. There has been a long-acknowledged imbalance in attention devoted to questions of law in appellate courts and disputed questions of fact in courts of first instance.¹ In the specific context of feminist judging, the conduct or management of the first instance trial or hearing process has also gained little attention.² The 'judgment' delivered by Vicky Conway here is unique within the Northern/Irish Feminist Judgments Project as it reviews a report from a Tribunal of Inquiry. A Tribunal of Inquiry is a unique legal process, which is first instance in the sense that it hears directly from witnesses, but it is not the same as a trial. A Tribunal is an inquisitorial, as opposed to adversarial, process aimed at making findings of fact, not law, and no criminal consequences attach to any findings made. Nonetheless it is a powerful tool, which produces an official 'truth', and individual reputations can be significantly impacted by its findings.

The Tribunal under examination here was established to inquire into the facts and circumstances leading to the preferment of criminal charges against Joanne Hayes and her family members in connection with the death of an unnamed male infant and the subsequent withdrawal of those charges; related allegations surrounding garda questioning of Joanne Hayes and her family and the taking of statements from them; and any matters connected therewith.³ However, in the course of the Tribunal its Chairman, High Court judge Mr Justice Kevin Lynch, suggested that the process could be seen as analogous to a claim for damages by Joanne Hayes and her family against An Garda Síochána.⁴ This conflicts with the exceptional nature of a Tribunal of Inquiry, equating it with a traditional adversarial contest between two parties. This binary combative conception of the process was clear in the manner in which witnesses before the Tribunal, specifically Joanne and her family, were allowed to be questioned by lawyers. This impacted on the eventual outcome of the process wherein, basically, the gardaí were exonerated and the Hayes' family were found to be liars. Given the approach adopted by the Chairman, it could not be otherwise: if the gardaí were to be exonerated, then Joanne and her family had to be liars.

Within this commentary I first set out briefly the social and factual context of the case. I then consider the feminist features of Conway J's 'judgment' (hereinafter 'the

¹ See Jerome Frank, *Law and the Modern Mind* (New York, Brentano's, Inc, c1930); 'Why not a Clinical-Lawyer School?' (1933) 81(8) *University of Pennsylvania Law Review* 907-23; *Fate and Freedom* (New York, Simon and Schuster, 1945). See also William Twining, 'Taking Facts Seriously' in *Rethinking Evidence: Exploratory Essays* (Cambridge, Cambridge University Press, 2006, 2nd Edn).

² See Rosemary Hunter, 'Can feminist judges make a difference?' (2008) 15(1-2) *International Journal of the Legal Profession* 7-36, 17. See, however, Marie Fox's feminist judgment in this collection, ch29. Fox rewrote a Northern Ireland County Court judgment rather than the appellate level judgment. One of her motivations was to conduct a re-evaluation of the expert evidence.

³ See Appendix A to the Tribunal Report, available at: <http://opac.oireachtas.ie/AWData/Library3/Library2/DL035878.pdf> (last accessed 2 February 2016).

⁴ Tribunal Transcript, 15/2.

review') before going on to examine Joanne's experience at the Tribunal, linking this to issues of female credibility in courtroom proceedings. I conclude by highlighting the public outpouring of support for Joanne Hayes and her family, which is interesting from both a socio-legal and a feminist perspective.

Social Context

In his exploration of the Kerry Babies story, Inglis provides the social context of the times, highlighting matters such as the economic recession of the 1980s, attitudes towards sexual morality, the death of Ann Lovett and her baby, the rising number of single mothers in the state, and claims of moving statues, amongst other things.⁵ He points to the collision between Catholic Ireland and the rise of individualism:

On the one side was traditional, conservative, Catholic teaching emphasising purity, chastity and self-denial. On the other was modern, liberal, individualism emphasising self-expression, eroticism and sexual experience.⁶

While there was a move towards an 'à la carte Catholicism' in Irish life at the time,⁷ the Catholic Church still had a strong hold over society.⁸

In October 1983, Joanne Hayes discovered that she was pregnant by a married man, Jeremiah Locke. She already had one child, Yvonne, as a result of their long-term affair and, like a growing number of single mothers in Ireland at the time, had kept and was raising her child.⁹ This second pregnancy was a worry to her, however,¹⁰ and it was about to give rise to police interrogation, murder charges and the Tribunal of Inquiry under examination here.

The Facts

The facts are more fully detailed in Conway J's review, but in extremely truncated form, they are as follows: Joanne Hayes was charged with the murder of a baby boy found dead on a beach at Cahirciveen, Co. Kerry and members of her family were charged with concealment of birth.¹¹ Joanne, as noted above, had been pregnant as a result of her long-term affair with a married man and she had given birth around the time that the baby was discovered on the beach. Joanne and her family were questioned by gardaí, including three senior members of the 'murder squad' (known in other circles as 'the heavy gang'¹²), and gave confession

⁵ Tom Inglis, *Truth, Power and Lies: Irish Society and the Case of the Kerry Babies* (Dublin, University College Dublin Press, 2003) ch 8 'The Context' and ch 9 'Long-term processes of change'.

⁶ *ibid.*, 124.

⁷ *ibid.*, 129.

⁸ *ibid.*, 126.

⁹ Inglis, above n 5, notes a study from June 1984 which suggested that the number of single mothers who were keeping their babies had increased; he states that this was part of a sea change (referencing *The Irish Times*, June 12 1984).

¹⁰ Joanne Hayes, *My Story* (London, Brandon/Mount Eagle Publications, 1985), 34: "...I felt I could not expect my family to accept a second child by this married man of whom they did not approve".

¹¹ It remains unclear why a charge of murder was preferred against Joanne rather than the more appropriate charge of infanticide. Even if Joanne had been the mother of the Cahirciveen baby and had stabbed that baby to death, the offence of infanticide specifically exists to be applied in such circumstances: see s 1(3) of the Infanticide Act 1949 (since amended in part by the Criminal Law (Insanity) Act 2006).

¹² Inglis, above n 5 at 192.

statements detailing the stabbing of the ‘Cahirciveen baby’ and his disposal over the cliffs near Slea Head. However, the body of the baby to whom Joanne gave birth (the ‘Tralee baby’) was found on her family farm and all charges against her and her family were eventually dropped when it was found that her blood type was different to that of the Cahirciveen baby. A Tribunal of Inquiry was set up in the wake of media and public concern as to how the clearly false confessions could have come about.

The Feminist ‘Judgment’

Much of Conway J’s review of the Tribunal and its ultimate Report relates to the manner in which witnesses were examined, the weight placed on certain evidence and the conclusions reached as a result. She seeks to assert Joanne’s voice within the review and is critical of the Tribunal for allowing irrelevant personal questions to be asked of Joanne, who, during five days of aggressive cross-examination, was understandably emotional and upset. Conway J notes the lack of sympathy shown to Joanne by the Chairman and ultimately issues an apology to Joanne on behalf of the judiciary for the ordeal that she experienced before the Tribunal.¹³ This is a very bold step to take, and one which seeks to redress the hurt caused to Joanne by the extremely personal questions that she was asked, the insensitive attitude towards her display of raw emotion, and the fact that counsel acting on behalf of individual members of An Garda Síochána were allowed to question her as aggressively as an accused in a criminal trial, if not more so. Joanne felt this very strongly. In her book she states that one of the things that struck her most about her experience under cross-examination was:

...that there seemed to be no humanity in the relentless way in which I was pursued by my legal interrogators. The process of the law allowed for me to be torn asunder and every part of me examined in such a way as to denigrate and degrade me.¹⁴

Conway J also concludes that the evidence before the Tribunal does not substantiate a number of the findings of fact, including the finding that Joanne killed the baby born to her. This conclusion by Conway J is extremely important. Joanne was very hurt by the original findings of the Tribunal in this regard,¹⁵ which ignored the expert testimonies of forensic pathologist Dr John Harbison and forensic scientist Dr Louise McKenna in favour of the testimony of Joanne’s aunt, Bridie Fuller, and her brother Mike, both of whom ought to have been regarded as unreliable witnesses. Dr Harbison’s evidence was that he had failed to establish that the baby had achieved an existence separate from Joanne, and Dr McKenna found no evidence of a birth in Joanne’s bedroom (in contrast to the testimony of Bridie and Mike) but did find vegetation on Joanne’s clothes, which substantiated Joanne’s account of giving birth in a field on the farm:

To me this attitude of the judge to two state witnesses is the most hurtful of all, because it leads him to the conclusion that I killed my baby and that I beat it with a bath brush. This really shattered me. Everything I suffered during the course of the

¹³ The importance of official apology from a feminist perspective is examined in Reg Graycar, ‘A Feminist Adjudication Process: Is there such a Thing?’ in Ulrike Schultz and Gisela Shaw (eds) *Gender and Judging* (Oxford, Hart, Oñati International Series in Law and Society, 2003) 435-457.

¹⁴ Hayes, above n 10 at 166.

¹⁵ *ibid*, 171- 2.

Tribunal, everything else said about me in the report, pales into insignificance beside that.¹⁶

As explained in her review, Conway J comes to the conclusion that no new inquiry into the matter ought to be established, given what Joanne and her family suffered during the Tribunal, the passage of time since the events, and Joanne's refusal to discuss the case in the intervening years. She accords priority to the interests of Joanne and the Hayes' family, whom she deems the 'victims of this whole saga'.

Conway J's review of the Tribunal process and its ultimate Report is informed by a feminist approach and seeks to illustrate how the Tribunal failed Joanne as a woman. In her Foreword to *Feminist Judgments: From Theory to Practice*, UK Supreme Court Judge, Lady Brenda Hale, observed the importance of how a story is told in a judgment:

Feminist judges will take different facts from the mass of detail to tell the story in a different way, to bring out features which others discard, and to explain the features which others find difficult to understand.¹⁷

This is certainly true of the review of this Tribunal. I hesitate to refer to the Tribunal by the title bequeathed upon it in the official report, i.e. the 'Report of the Tribunal of Inquiry into "The Kerry Babies Case"' because it was not an inquiry into the 'Kerry Babies': the terms of reference related to the garda conduct of the investigation and prosecution, rather than to the facts surrounding the actual deaths of either the Cahirciveen baby or Joanne's baby. Indeed, Joanne and her family preferred to refer to it as 'The Kerry Garda case'.¹⁸ This indeed seems a more accurate reflection of the terms of reference, though not of Joanne or her family's experiences before the Tribunal.

The Tribunal of Inquiry

Mr Justice Kevin Lynch was among 43 male officials in the Tribunal who engaged in a 'public probe of the private life of Joanne Hayes'¹⁹: all of the lawyers were men, all of the gardaí were men, all but one of the medical/scientific experts were men.²⁰ And indeed, the Tribunal involved itself in the very public questioning of the very private details of Joanne's life. Rather than focusing on how the gardaí elicited false confessions from members of the Hayes' family, the focus seemed to be on Joanne herself; her sexual life, her menstrual cycle, her contraceptive use, and the events on the night she gave birth to the 'Tralee baby'.

¹⁶ *ibid*, 172.

¹⁷ Brenda Hale, *Foreword* in Rosemary Hunter, Clare McGlynn, and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart, 2010) v.

¹⁸ Hayes, above n 10 at 172.

¹⁹ Nell McCafferty, *A Woman to Blame: The Kerry Babies Case* (Cork, Attic Press, 1985) Prologue, xv. McCafferty's book provides a fascinating feminist analysis of the entire affair, drawing on her contemporaneous coverage of the Tribunal in the *Irish Press*. For other accounts of the case see, amongst others: Gene Kerrigan, 'The Kerry Babies Case' (1985) *Magill* 16-51; Moira J Maguire, 'The changing face of Catholic Ireland: Conservatism and liberalism in the Ann Lovett and Kerry Babies scandals' (2001) 27(2) *Feminist Studies* 335-58; Tom Inglis, 'Sexual transgression and scapegoats: a case study from modern Ireland' (2002) 5(1) *Sexualities* 5-24.

²⁰ In the mid-1980s the sole female member of the Irish superior courts was Ms Justice Mella Carroll. Although it is not required by law that Tribunals of Inquiry should be chaired by a Judge, the convention in this jurisdiction is to that effect. Given the significant imbalance of gender on the judicial benches the majority of Tribunals established to date have, unsurprisingly, been chaired by a male judge.

Joanne felt this deeply and was very aware of the gendered nature of the Tribunal proceedings: "...I felt I was some kind of prey pursued by hunters, who were men and who invaded the privacy of my body and my emotions in their dragging out of all the details about me."²¹

Smart has noted that women:

go to law as mothers, wives, sexual objects, pregnant women, deserted mothers, single mothers and so on...In going to law women carry with them cultural meanings about pregnancy, heterosexuality, sexual bodies...[L]aws that deal with the private sphere operate on fully gendered subjects.²²

Not only does the law view women in this categorised manner, the media seizes upon this branding of women too, with certain headline-grabbing classifications being more commercially lucrative.²³ Joanne Hayes was an unmarried mother of an 'illegitimate' child and a woman who had conducted a long-term affair with a married man. She was suspected of killing her own child. The media was certain to make the most of this story,²⁴ and it seems clear from the conduct of the Tribunal and its final report, that the legal system viewed her in a certain light also.

Joanne expressed clearly in her book her feelings of insecurity within the legal processes and her realisation of the power imbalance therein:

In approaching the Tribunal I knew almost nothing about the way in which courts, let alone tribunals, operated, and I was utterly unprepared for what happened.

As the Tribunal began to settle into its probing concentration on my personal and sexual life I felt bewildered and horrified. What had been announced as an inquiry into the behaviour of the gardaí had already become, even before I gave evidence, an inquisition into my life and character.

...I had never really considered questions of power and how it is structured; I had never considered the law as such and how it operated within society. But as I looked at many of the lawyers and heard their accents and tones of voice, I felt as if they were some kind of alien force – alien, that is, to the society in which I had lived. In their manners and in the ways they spoke they seemed to be expressing some kind of code which I had never encountered before and as the Tribunal progressed I grew to hate that code.²⁵

This sense of power imbalance is not unique to Joanne's experience and, as discussed below, the alienating effect of the law and legal discourse can disadvantage female witnesses, plaintiffs and complainants more than their male counterparts.

²¹ Hayes, above n 10 at 167-168.

²² Carol Smart, 'Law's Truth/Women's Experience' in Reg Graycar (ed) *Dissenting Opinions: Feminist Explorations in Law and Society* (Sydney, Allen and Unwin, 1990) 7-9.

²³ On the media portrayal of female criminal offenders, Jewkes argues that they are constructed around a narrow range of stereotypes relating to sexuality, physical attractiveness, maternity, monsterisation and victimhood: Yvonne Jewkes, *Media and Crime* (London, Sage, 2011, 2nd Edn).

²⁴ See Inglis, above n 5, ch 13 'The Media'.

²⁵ Hayes, above n 10 at 165.

Female Credibility in Courtroom Proceedings

Beginning his analysis of the complaints raised by Joanne and the Hayes' family against the gardaí, which included allegations of physical assault, Mr Justice Lynch said:

[i]f the Gardaí were prosecuted before a Jury for the matters alleged against them by the Hayes family, the Jury would have no hesitation in throwing out all such charges because of the broad unreliability so far as truthfulness is concerned of the Hayes family.²⁶

On the other hand, when discussing the creditworthiness of the gardaí, the Tribunal Report refers to a tendency 'to elevate honest beliefs or suspicions into positive truth'²⁷ or a 'gilding of the lily'.²⁸ While this, again, illustrates the Chairman's traditional adversarial approach to what was supposed to be a fact-finding Tribunal of Inquiry, it also raises questions around the performance, as such, of Joanne and her family in testifying before the Tribunal as compared with the performance of experienced gardaí in delivering their version of events. The latter spoke a language the Chairman understood; the language of the law, the language of those experienced in giving testimony before a court, the language of middle-aged men. Joanne and her family did not speak this language.

Graycar and others have noted the difficulties for women and other 'outsiders' in having their stories believed or taken seriously in the courtroom:

there are enormous obstacles to women's stories and outsiders' stories occupying the same space and doing so with the same authority as the stock stories that underpin the common sense of deeply gendered and racialised legal discourses.²⁹

Joanne Hayes was not only a woman, but an outsider too. She was an outsider because she had had an affair with a married man and had a child with him. It seems inevitable that Joanne's story would not be believed, while the Garda story would find favour.

Hunter has observed that:

[t]he fact that a witness is a woman does appear to trigger a set of moral judgments for determining credibility that is not applied to men. In other words, fact finders tie the worth of a woman's testimony to her moral worth. Women judged to be 'bad,' and therefore unreliable, include prostitutes, lesbians, women who leave their children or whose children are in foster care, women who abuse alcohol or drugs, and women perceived to be angry.³⁰

²⁶ Tribunal Report p 63.

²⁷ *ibid*, 60.

²⁸ *ibid*, 61.

²⁹ Reg Graycar, 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32(1) *University of British Columbia Law Review* 1-21, 19. See also Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87(8) *Michigan Law Review* 2411-41.

³⁰ Rosemary Hunter, 'Gender in Evidence: Masculine Norms v Feminist Reforms' (1996) 19(1) *Harvard Women's Law Journal* 127-167, 165, referencing Helena Kennedy, 'Eve Was Framed: Women And British Justice' (London, Vintage, 1992) 124-27 and Morrison Torrey, 'When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions' (1990-1991) 24(4) *University of California Davis Law Review* 1013-46. See also Rosemary Hunter, 'Evidentiary Harassment' in Mary Childs and Louise Ellison (eds) *Feminist Perspectives on Evidence* (London, Cavendish, 2000), ch 6.

Examining research on cases involving sexual violence, Hunter has also observed the informal mechanisms by which women's credibility is undermined or devalued in court proceedings. She has noted a consistent finding in (US) research on gender bias in the courts to the effect that:

women litigants and witnesses are frequently subjected to inappropriate and demeaning conduct that affects their credibility. This conduct includes informal modes of address, the use of endearments, comments on a woman's appearance, sexual innuendo, sexist remarks or jokes, patronizing behavior, physical and verbal bullying, intimidation, and badgering. The studies identify instances of judges and opposing counsel making an issue of a woman's title, name, or marital status and of counsel questioning female witnesses in a snide, condescending tone or deliberately asking embarrassing questions.³¹

Interestingly, in this context, beyond the obvious questioning of Joanne on extremely private matters in the extremely public setting of the Tribunal, Joanne asked her own lawyers, during the course of the Tribunal, to request that the lawyer representing three of the Superintendents refer to her by her correct name – Joanne – rather than Joanna/Johanna as he had been doing, whether by design or otherwise.³²

Community Support

One of the most striking aspects of the 'Kerry Babies' case, from a socio-legal and feminist perspective, is the level and nature of public support which Joanne and the Hayes' family received. Even those who believed that Joanne may have had a hand in the death of her own son were sympathetic to her plight before the Tribunal, where she was questioned intensely on intimate private details before a Chairman who seemed to become frustrated with her increasing upset on the stand. At this thirty-year remove it is extraordinarily moving to read about the way in which different groups came together and organised various ways of showing support to Joanne and her family.³³ Without the modern advantages of social media or mobile phones, persons and groups took it upon themselves to reach out to the Hayes' family, to travel to Tralee (where the Tribunal was hearing evidence), to send letters, cards, and a succession of hundreds of single yellow roses. 142 mass cards were also sent. The triumph of individual empathy over the constraints of 1980s Catholic Ireland which this evokes is powerful. Women, and men, had specifically arranged for masses to be said on behalf of Joanne Hayes, the unmarried mother who had been having a long-term affair with a married man, because of the ordeal she was suffering before the Tribunal. Maguire suggests that Joanne's indiscretions, as such, were viewed as 'irrelevant in the face of what many people regarded as a gross abuse of power on the part of the state'.³⁴

Support for Joanne and the Hayes' family came from many quarters, and was expressed at parliamentary level too, with the Oireachtas Committee on Women's Rights

³¹ Hunter, above n 30 at 162, referencing the Report Of The Florida Supreme Court Gender Bias Study Commission 122 (1990); Report Of The Illinois Task Force On Gender Bias In The Courts 113 (1990); Final Report Of The Michigan Supreme Court Task Force On Gender Issues In The Courts 37-38 (1989); Final Report Of The Washington State Task Force On Gender And Justice In The Courts 41 (1989).

³² Hayes, above n 10 at 88.

³³ McCafferty provides a profound account of these matters: McCafferty, above n 19 at 107-127.

³⁴ Maguire, above n 19 at 348.

characterising the questioning of Joanne as ‘insensitive’, ‘frightening’, ‘harrowing and quite horrific’, and ‘mental torture’.³⁵

Almost the entire village of Abbeydorney, the nearest place to the Hayes’ family farm, arranged to come to Tralee on one of the days the Tribunal was sitting. The men and women of this small Irish village held placards declaring ‘Abbeydorney supports Joanne’ and they walked silently up and down outside the council building which housed the Tribunal for two hours. On the following day, the villagers’ silent protest was replaced by a demonstration co-ordinated by a number of feminist groups, including the Tralee Women’s Action Group. This brought hundreds of people, mainly women but men also, from all around the country to Tralee. This was certainly a livelier protest than that of the previous day, and this led the Tribunal Chairman to describe the feminist protestors as ‘raucous, ignorant, urban dwellers’ and to threaten them with contempt of court and imprisonment for any insult to or obstruction of the Tribunal.³⁶ There seems to have been an implicit suggestion that those who had come from Dublin, Cork, Belfast, and perhaps even those from the urban town of Tralee itself, had no right to be interested in or to take up the cause of a single mother from a farm in rural Ireland. What did the feminists of urban Ireland know about what goes on in small-town Ireland?³⁷

Conclusion

The ‘Cahirciveen baby’ was laid to rest in a grave with a simple wooden cross inscribed ‘I am the Kerry Baby...named John, and I forgive’.³⁸ Whether or not Joanne Hayes has forgiven the legal system for its brutal treatment of her at her lowest ebb is not known.

³⁵ Renagh Holohan, ‘Deputies demand action by Noonan on Kerry tribunal’ *Irish Times*, 23 January 1985.

³⁶ McCafferty, above n 19 at 128. Protests also occurred outside the Department of Justice in Dublin with representatives of Sinn Féin, the Women’s Community Press, the Union of Students of Ireland, the Socialist Workers’ Movement, and the Dublin Lesbian/Gay Collective. A group of women also protested outside the Irish Embassy in London. See Hayes, above n 10 at 103.

³⁷ On urban-rural feminism generally see Janice McCabe, ‘What’s in a Label? The Relationship between Feminist Self-Identification and “Feminist” Attitudes among U.S. Women and Men’ (2005) 19(4) *Gender and Society* 480-505; Marvin L Anderson, ‘Reluctant Feminists: Rural Women and the Myth of the Modern Family’ in Anne E Carr, Mary Stewart Van Leeuwen, (eds) *Religion, Feminism and the Family* (Kentucky, Westminster/John Knox Press, 1996), ch 12; and Elizabeth Kenworthy Teather, ‘The Double Bind: Being Female and Being Rural: A Comparative Study of Australia, New Zealand and Canada’ (1998) 8(3) *Rural Society* 209-21.

³⁸ The wooden cross was replaced in February 2004 by a marble headstone which was vandalised, apparently with a sledgehammer, in July of the same year: ‘Slab on grave of the ‘Kerry Baby’ is smashed’, *Irish Times*, 9 July 2004.

