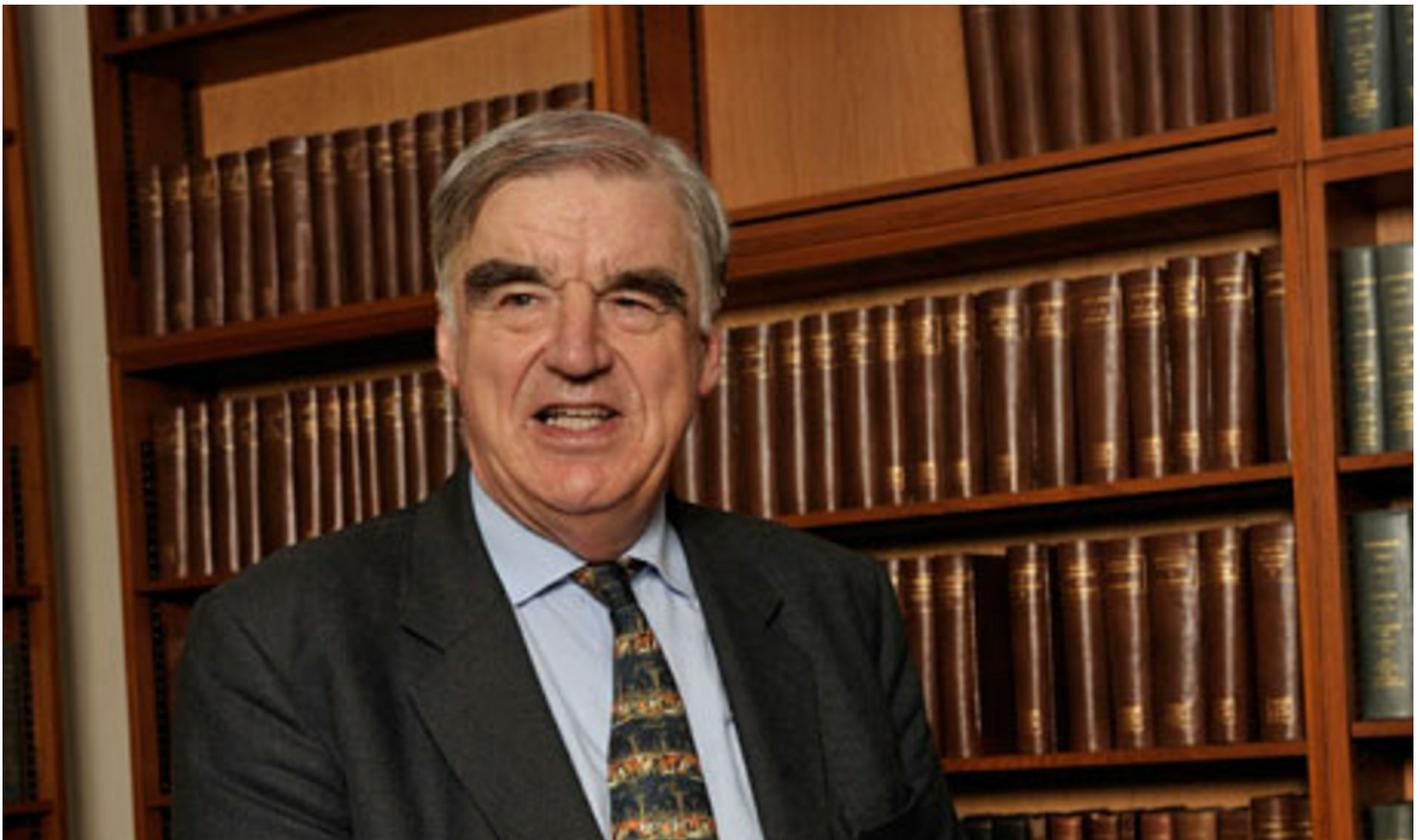


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# **Privacy and Publicity in Family Law - Their Eternal Tension Transcript**

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## **Privacy and Publicity in Family Law: Their Eternal Tension**

Sir Nicholas Wall

There appears to be general agreement among non-family lawyers (and also among some family lawyers) that Family Proceedings should be more transparent. The House of Commons Home Affairs Committee recently put it thus:

We recognise the need for transparency in the administration of family justice, and the equally important need to protect the interests of children and their privacy. However, our witnesses were united in opposing implementation of the scheme to increase media access to the family courts contained in Part 2 of the Children, Schools and Families Act 2010. While their reasons for doing so differed, and were sometimes contradictory, such universal condemnation compels us to recommend that the measures should not be implemented, and the Ministry of Justice begin afresh. We welcome the Government's acknowledgement that the way the legislation was passed was flawed, and urge Ministers to learn lessons from this outcome for the future.[\[1\]](#)

In its response to the Select Committee's Report, the Government stated:

The Government accepts the recommendation that Part 2 of the Children, Schools and Families Act 2010 should not be commenced at this time. Ministers advised Parliament in October 2010 that no decision would be taken on commencement of these provisions before the outcome of the Family Justice Review. However, in the light of the committee's findings, we have decided to bring forward that decision.

We are grateful for the work of the committee in gathering evidence that shows that whilst there are divergent views how to increase the transparency and accountability of the family courts, there is a general consensus that the status quo is unsatisfactory.[\[2\]](#)

And for good measure, the Family Justice Review, whose terms of reference asked it to have regard to transparency, but which did not take evidence on the issue, acknowledged that this was a "complex area requiring further consideration by government." Nonetheless, it too welcomed the Justice Select Committee's recommendation that Part 2 of the 2010 Act should not be implemented.[\[3\]](#) Indeed, I see that the Crime and Courts Bill 2012, which gives us the Unified Family Court, repeals Part 2.

So, the general view is that greater transparency is required. What is equally clear, however, it seems to me is that nobody knows quite how to achieve it. As we have seen, there is universal agreement that the last government's attempt at the problem in Part 2 of the Children Schools and Families Act 2010 should be abandoned, and that we should start again. But that is as far as it goes – at least at present.

The Select Committee summarised the position thus: -

There is a tension between allowing the media to publish even limited material about cases in the interests of increasing public confidence and a child's right to keep personal information about them and their experiences private. There is a danger that justice in secret could allow injustice to children, or a perception of injustice. We believe that the underpinning principle of the

family court system, that all decisions must be made in the best interests of the child, must apply equally to formation of government policy on media access to the family courts.<sup>[4]</sup>

Fine words, with which it is difficult to disagree. But what do they mean in practice? I make it clear at once – if I have not already done so - that Family Lawyers are divided on this issue. On the one side are those who take the view that any publicity involving the affairs of disadvantaged children and adults is unwarranted; that the media are unashamedly sensationalist (quite apart from being anti-judge) and that children and families are entitled to privacy when forced to litigate about the intimate detail of their lives.

At the other extreme are those weary of the constant refrain that the family court practices “secret” justice and the equally constant refrain that children can be removed from their parents at whim unless there is media scrutiny. The consequence of this “secret” justice, it is argued by those who use the phrase, is that social workers, judges and all engaged in the Family Justice System are both unprincipled and autocratic, as well as riding roughshod over parents’ ECHR article 8 rights.

So there we have what I have called in the title of this paper “the eternal tension”. The question which arises, of course, is whether the two positions can be reconciled and whether there is a workable solution to the problem. The purpose of this paper is to examine the arguments for and against publicity in proceedings relating to children and to see – if we can - which way the balance falls.

Of course, the simple answer would be to bring family justice into line with civil and criminal justice. There are occasions when anonymity is practised. But they are few and far between. The print media usually have free admission to such proceedings and are on the whole free to report as they wish. Proceedings are (usually) conducted in open court. There are few complaints from either side. One of the questions is, therefore, whether that system can be adapted to family justice.

Where does one start? I am going to try to get into the debate by reminding myself of two of the three propositions which are said to underlie the essential freedoms which we enjoy in this country, and with an examination of the tensions between them. They are, of course, (1) a judiciary independent of government and administering justice in public; and (2) a free press. No doubt other interest groups would add themselves to the list, and one can certainly add free and fair elections to it; but the two I have identified will do as a working basis for this paper.

What are the arguments against transparency? Yes, of course justice is and should be normally exercised in public. The reasons for this are self-evident. However, and in the same breath, we are constrained to recognise that there have always been exceptions to that general rule. I propose to start with the speech of the Lord Chancellor, Viscount Haldane in *Scott v. Scott*<sup>[5]</sup>. The language is dated, no doubt, but the ideas are modern and the sentiments are clear:

The case of wards of court and lunatics stands on a different footing. There the judge who is administering their affairs in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.

In order to make my meaning distinct, I will put the proposition in another form. Whilst the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the object of the courts of justice must be to secure that justice is done. In the two cases of wards and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incidental only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it, therefore, yields to the paramount duty, which is the care of the ward or the lunatic... As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield.

There are, of course, many other relevant passages in the speeches in this case, but this extract will serve for present purposes. The sentiments expressed in *Scott v Scott*, moreover, have found Parliamentary expression in several places, notably section 12 of the Administration of Justice Act 1960, section 97 of the Children Act 1989 and section 39 of the Children and Young Persons Act 1933. Thus the first of these reads:-

(1) The publication of information relating to any court sitting in private shall not of itself be contempt of court save in the following case, that is to say –

Where the proceedings –

Relate to the inherent jurisdiction of the High Court with respect to minors;  
Are brought under the Children Act 1989; or  
Otherwise relate wholly or mainly to the maintenance or upbringing of a minor.

(2) Without prejudice to the foregoing subsection, the publication of the text or summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication....

Sections 97(2) and (6) of the Children Act 1989 read as follows: -

No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify –

Any child as being involved in any proceedings before the High Court, a county court or a magistrates' court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child;

An address or school as being that of a child involved in any such proceedings.....

(6) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine.....[\[6\]](#)

Finally, section 39 of the 1933 Act (where material) reads:-

In relation to any proceedings in any court.... the court may direct that –

No newspaper report of the proceedings shall reveal the name, address, or school, or include

any particulars to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or against, or in respect of whom the proceedings are taken, or as being a witness therein;

No picture shall be published in any newspaper as being or including a picture of the child or young person so concerned in the proceedings as aforesaid.

Equally the argument that cases involving children should be heard in public has been taken to Strasbourg and has failed in the ECtHR.<sup>[7]</sup> It has also been litigated in our domestic courts and, perhaps unsurprisingly, failed there also.<sup>[8]</sup> The thinking of the ECtHR follows *Scott v Scott*. The following is an edited extract from the headnote to the first of the cases cited as reported in the Family Law Reports, and it demonstrates the ECtHR's thought processes: -

Whilst Article 6(1) of the Convention provided that, in the determination of civil rights and obligations 'everyone is entitled to a fair and public hearing', it was apparent from the text of the Article itself that the requirement to hold a public hearing was subject to exceptions. The present proceedings were prime examples of cases where the exclusion of the press and public might be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice. Moreover, it was not inconsistent with the general rule stated in Art 6(1) for a state to designate an entire class of case as an exception when considered necessary in the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of parties, although the need for such a measure must always be subjected to the court's control. The decision in each applicant's case to hold the hearing of his application for a residence order in chambers did not give rise to a violation of Art 6(1).<sup>[9]</sup>

The ECtHR did not consider Article 10 separately: it did not think it necessary to do so in the light of its findings on Article 6 and the limited extent to which the county courts' judgments were made available to the general public. I shall, of course, return to Article 10 later.

Thus there is ample material for the now universally exercised discretion to hear proceedings relating to children in chambers<sup>[10]</sup> (or, more accurately, in private) and for the reporting restrictions on such proceedings in the Court of Appeal, which, of course, sits in public. It is also worth pointing out, I think, that the burden of the Family Justice Review (henceforth the FJR), and the government's acceptance of its recommendations was the centrality of the role of the child.<sup>[11]</sup> There is, we learn, to be a "Young People's Board" as part of the Government's structure for the Family Justice system, and there is abundant evidence that, when asked, children do not wish the intimate affairs of themselves and their carers publicised.<sup>[12]</sup> The spectre of the playground is frequently alluded to, and the cruelty children show to those whose parents have transgressed.

And it is said, it is not simply a question of the wishes and feeling of children. Dr. Danya Glaser, a well known child and adolescent psychiatrist made the powerful point in *Family Law*, when opposing what was then the Children Schools and Families Bill that important information might be lost to the court if a child refused to co-operate with a clinician because there was a risk that what the clinician wrote would become known to third parties beyond the doors of the court.<sup>[13]</sup>

In addition, of course, the anti-transparency lobby argues that transparency not only involves the presence of the Press in court but trusting the Press with information, as well as trusting them to report family proceedings accurately and fairly. As a number of the revelations to the

enquiry being chaired by Leveson LJ demonstrate, the innate suspicion which lawyers (and particularly judges) have of journalists means that – for the anti-transparency lobby - this is not a good time to provide journalists with confidential information and to expect them not to exploit it.[\[14\]](#)

There is, of course, the additional problem of the identification of cases. Gone are the days when the Press could finance a reporter in every court. It is, in my view, unacceptable that the judge should be the arbiter of which case is reported and which not. So the Press will have to be told what cases are on, when and where in order to decide whether or not to send a reporter to cover the case.

Finally, on a purely human level, the story told by DJ(MC) Nicholas Crichton still resonates with some. He tells it much better than I will. A BBC interviewer spent a fortnight shadowing him. At the end, he asked her: “if you were one of the people whom you’ve been observing for the last two weeks, would you want to be identified? She answered immediately: “Of course not”.

I am sure that those who oppose media access to and reporting of the Family Courts would be able to add to these arguments, but it seems to me that this is enough to be going on with. There are powerful arguments in favour of privacy and against transparency. So what is the case on the other side? And why is there such a clamour for reform?

I am not necessarily going to take the points in order of merit, but the first point must, I think, be that the present situation is highly unsatisfactory – and particularly from the media’s viewpoint, They can attend, but there remains doubt about what they can report, and the rules about what can and what cannot be reported are far from clear.[\[15\]](#) The right to attend is of little value (even if the case is newsworthy) if there is no access to the court’s documentation, and doubt about what can or cannot be reported. Process is important. If the journalist is denied access to the process, and is only presented with the result, how can he or she adjudge the result to be fair, particularly when the person whose child has been removed, vociferously cries foul?

There is, I think, general and genuine acceptance of the proposition that the anonymity or privacy of children must be respected. There is also acceptance of the proposition that parents and other adults who bear the same surname may have to be anonymous. So far, there is no issue.

The media’s argument is very simple. One starts with the position that justice should be administered in public, and that the press represents the eyes and ears of the public. If the child can be protected by anonymity, why should not erring adults, social workers, experts and local authorities be identified? Moreover, not only is a great deal of public money spent on care proceedings in particular (and the public is entitled to know *how* its money is spent) but the fact that the court sits in private enables decisions to be taken without media scrutiny – thus social workers, local authorities and expert witnesses amongst others – indeed, anyone occupying public office, - are unaccountable to the media, and thus to the public. The argument that their decisions are subject to judicial scrutiny cuts no ice: the judge’s role is seen as at best passive, and at worst collusive. The judge also sits in private, and usually delivers judgment in private. With rare exceptions, even judgments made publicly available are heavily anonymised.

So, the argument runs, and subject to the safeguards I have mentioned why not, say the media open up the proceedings, and hear them in open court – or, at the very least and subject to the same safeguards, allow them to be fully reported? In short, ECHR Article 10 should prevail over

the rights of the parties under ECHR Article 8.

The Press can legitimately also make the point that in other areas of the law they are frequently in receipt of information which would enable them to name names, but they do not do so. They understand the process as well as the law of contempt better than most. Furthermore, the Press argues, that when the courts invoke their aid to track down a missing or a kidnapped child, the Press invariably cooperates.

### *Discussion*

Let us try to put these arguments in context and see where they take us. Two concerns of the Press in particular are, I think, warranted. The first is that journalists do not know what proceedings are on. Gone are the days when national newspapers could afford to have a reporter in every court. There may be some places in the country in which a local journalist sits in the local magistrates, or Crown Court and reports for his or her local newspaper. But such a system is unrealistic when it comes to family justice. So the media say – and there is force in this – that they need to have access to court lists, and such lists need to provide them with sufficient information to enable them to decide whether or not the case is worth coming to hear. Subject to appropriate safeguards about the publication of any information thus made available, it is difficult to see why this request could not be honoured by HMCTS.

Secondly, the Press argues that it does not, as of right, have access to the documents and journalists are thus unable to follow the proceedings. There can, I think, be a lively debate about precisely what documents the Press should see, and the safeguards which should surround their sight of the appropriate documents, but if the purpose of a sight of the documents is to enable the journalist (1) to follow the proceedings; (2) to understand that any tendentious version put by one side is or may be inaccurate; and (3) to further the process of accurate reporting - it is difficult to see – once again subject to safeguards – why the Press should not have access to at least some of the papers.

To the charge of sensationalism, the answers which can legitimately be given by the Press are at least twofold. I have already outlined both points. The Press is acutely aware of the law of contempt, and whilst frequently possessed of information in family proceedings does not publish it without the sanction of the court. Secondly, it points to the fact that whenever the court wishes to find a missing child, it calls on the media's services, with the child, of course, fully identified. And the media invariably co-operate.

Another criticism of the Press is its alleged preoccupation with names rather than issues. Here the Press can call the judiciary to its aid. A judicial member of the House of Lords has provided an eloquent answer to the question: what's in a name? because it illustrates the divide between judges and journalists. I can think of no better answer to this question than that given by Lord Rodger of Earlsferry in the case of *Re Guardian News and Media Limited*[\[16\]](#)

63. What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria*(2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v*

*MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *re British Broadcasting Corpn* [2009] 3 WLR 142, 152, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.

Lord Steyn put the point succinctly in *S*, when he stressed the importance of bearing in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.

Thus (and, as I say, these points are not taken in order of merit) the media's answer goes to the very fact that the courts sit in private [17] is unacceptable, and even if media access is not barred, then that which can be reported is strictly and inappropriately limited. The whole position, they say, is thoroughly unsatisfactory.

The charge of "secret justice" is easy to make. The fact that both the FJR and the Government have praised the dedication of those who work in the Family Justice System may have eased the problem, but has not solved it. If the public understanding of family justice is to be improved the argument has to be that the better informed the Press is about what we do, the greater will be the accuracy of what they report.

The fact of sitting in private undoubtedly leads to a number of evils from the judicial point of view. Because they often hear only one side, often passionately expressed by the litigant, journalists say they are unable to redress the balance. Unfortunately this often leads to judges being traduced in the press for that which they manifestly have not done, allied as it nearly always is to what I have in reported cases called illicit and tendentious leakage to the press by one side. [18]

The media's answer to this is equally simple. If one side (usually the parents) cries foul, and it cannot publish the other side because of its adherence to the confidentiality rule and its refusal to comment, what is it to do?

There are many examples of the phenomenon which I have described. One of the most recent is the case of *Re L (A Child: Media Reporting)* (18 April 2011) which, in anonymised form, is available on the Bailii website [19]. In that case, the issue was whether injuries to a non-ambulant child aged six weeks had an innocent, underlying organic and as yet undiagnosed medical cause or whether they were inflicted by one or both of his parents. At a fact finding hearing, and after listening to all the evidence, including five medical experts from four different specialities, the judge found (in a closely reasoned initial judgment running to some 193 paragraphs) that the injuries (and in particular the fractures suffered by the child) were non-accidental. The mother had given her version of events to a journalist, and it was published (anonymously). The journalist was not present in court at any time, and did not publish the judgment. Nonetheless, the judge was severely criticised by the journalist.

Equally, when Theis J delivered a detailed and careful 240 paragraph judgment (actually in open court) vindicating parents who were alleged to have killed one of their children<sup>[20]</sup>, the Family jurisdiction was taken to task by *the Times*, no less, in a leading article, for hearing the case at all. It was as if the concept of "child protection" and the difference between the criminal and the civil burden of proof simply did not exist.

In April 2009, the Rules were amended, and what is now FPR rule 27.11 was made. Rule 27.11(2) this permitted "duly accredited representatives of news gathering and reporting organisations" to be present at certain proceedings held in private. The accompanying Practice Direction, however, made it clear that this did not entitle the media "to receive or peruse court documents" without the permission of the judge and there was no clarification of what could be reported without the judge's consent. The result was, as I recall, initial confusion: latterly, as I understand it, the right to attend has not been exercised. I do not think that any criticism can properly be levelled at the media for the rule's desuetude. The situation, accordingly, remains unclear and confused. Hence, I think, the pressure to put things to rights.

The question must therefore be: can the bounds of the permissible be extended? I propose to start my discussion of the issues by adapting parts of the common ground between counsel as set out by Munby J. (as he then was) in paragraphs 12 and 13 of *BBC v CAFCASS Legal and Others*<sup>[21]</sup>, which, I think, fairly sets out the law as it currently stands: -

- (i) where proceedings in relation to children have come to an end, the restrictions imposed by section 97(2) of the Act 1989 no longer operate: *Clayton v Clayton* <sup>[22]</sup>;
- (ii) the only relevant statutory restrictions are those imposed by the Administration of Justice Act (AJA) 1960, section 12:
- (iii) AJA 1960, section 12, although it prevents the publication of a medical report and imposes restrictions upon discussion of the facts and evidence in the case, does *not* prevent publication of the names of the parties, the children or the witnesses: *Re B (A Child) (Disclosure)*<sup>[23]</sup>;
- (iv) accordingly, unless the court agrees to exercise what has become known as the "disclosure jurisdiction" (see *Re B* at para [84]) a medical report which relates to the proceedings cannot be published, but unless the court decides to exercise what has become known as the "restraint jurisdiction" there will be nothing to prevent the public identification of the author of the report;
- (v) both the "disclosure jurisdiction" and the "restraint jurisdiction" have to be exercised in accordance with the principles explained by Lord Steyn in *re S (A Child) (Identification: Restrictions on Publication)* <sup>[24]</sup> (*Re S*), and by Sir Mark Potter P in *A Local Authority v W*<sup>[25]</sup>, that is, by a 'parallel analysis' of those of the various rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which are engaged, leading to an 'ultimate balancing test' reflecting the Convention principle of proportionality: see *Re B* and *Brandon Webster, Norfolk County Council v Webster* <sup>[26]</sup>.

What Lord Steyn said in paragraph 17 of *Re S* was: -

What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.

It will be recalled that *Re S* involved the attempt, in care proceedings, to protect the subject child

from identification as the son of woman who was to be tried for the murder of a sibling. The judge dismissed an application for an injunction restraining the publication by newspapers of the mother's identity, and appeals on the child's behalf were dismissed. Although the right of the press under Article 10 to report a criminal trial featured strongly ("a public event": and "the glare of contemporaneous publicity ensures that trials are properly conducted") Lord Steyn's speech is plainly of wider importance, and he takes as a general position an extract from a speech by Lord Nicholls of Birkenhead in *Reynolds v Times Newspapers Limited* [27]:

It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

#### *The answer given by the Court of Protection*

It is, I think, instructive to look at a number of Court of Protection cases. In *A (By his Litigation Friend, the Official Solicitor) v Independent News and Media Limited and others* [28], the Court of Appeal (consisting of the Lord Chief Justice, the Master of the Rolls and my predecessor, Sir Mark Potter) dismissed an appeal against an order of Hedley J that the media should be granted access to the forthcoming hearings of an application by the relatives of a severely disabled patient that they should be jointly appointed his deputies to take decisions on his behalf. The effect of Hedley J's order was to enable designated representatives of the media to attend the hearing in the Court of Protection, and thereafter to apply to the judge for his authorisation to enable them to publish information disclosed in the proceedings.

The case, which had engendered a substantial amount of public interest, was about a blind and severely disabled pianist. The media's application was opposed by A's family and by the Official Solicitor on A's behalf.

The general rule in proceedings in the Court of Protection is that "a hearing is to be held in private" - see rule 90(1) of the Court of Protection Rules. However, everything is effectively left to the judge's discretion including the persons who may attend the hearing, and what may be published: see rule 91(2) and (3), which read: -

(2) The court may make an order authorising –

(a) the publication of such information relating to the proceedings as it may specify; or  
(b) the publication of the text or a summary of the whole or part of a judgment or order made by the court.

(3) Where the court makes an order under paragraph (2) it may do so on such terms as it thinks fit, and in particular may –

(a) impose restrictions on the publication of the identity of –

(i) any party;

(ii) P (whether or not a party);

(iii) any witness; or

(iv) any other person;

(b) prohibit the further publication of any information that may lead to any such person being identified;

(c) prohibit the further publication of any information relating to the proceedings from such date as the court may specify; or

(d) impose such other restrictions on the publication of information relating to the proceedings as the court may specify.

The court also has the power under rule 92 to order that a hearing be held in public, albeit with similar powers attendance and the publication of material emanating from it. However, any such order could be made “only where it appears to the court that there is good reason for making the order” – see rule 93(1) (a).

The Court of Appeal did not seek to re-interpret the words “good reason”. It simply said that “they mean what, taken together, they say”. It added, however, (paragraph 11)

In agreement with Hedley J, we would emphasise that, even when good reason appears, before the necessary authorisation can be granted better reasons may lead the court to refuse it. Accordingly the reality is that provided good reason appears, the court will then assess all the relevant considerations and make a balanced, fact specific judgment whether the specific authorisation should be granted. In other words, before the court makes an order under Rules 90 to 92, a two stage process is required; the first involves deciding whether there is "good reason" to make an order under Rule 90(2), 91(1) or 92; if there is, then the second stage is to decide whether the requisite balancing exercise justifies the making of the order.

Hedley J identified what he described as the "tension" between the essentially private nature of the subject matter of the proceedings and the legitimate public interest in the practice and exercise of the powers of the new Court. It arose in what he described as "the context of a person of whom much is already known by the public and whose story has an almost irresistible attraction to it".

In this case the media were seeking authorisation for the attendance of a limited number of media representatives at what would otherwise be a private hearing, who would then, having listened to the case, be able to make informed submissions about what, if any, matters they should seek to publish. Hedley J took the view that it was in the public interest that the issues raised by the application made by A's parents and sister should be heard by the media, and it was also in the public interest that the jurisdiction and powers of the Court of Protection, and how they were exercised, should be understood. He acknowledged that some of these considerations could be said to apply in almost any case, and stressed that it was the combination of these considerations in this particular, unusual, case that led him to his decision.. He took the view that once “good reason” was established, then the balancing exercise between ECHR Articles 8 and 10 fell to be undertaken.

The Court of Appeal, as I have already said, upheld Hedley J's decision. It rejected a submission that media access to the judgment would be sufficient: it said:

The problem with this submission is that it is just because A's remarkable situation, including (in particular through the medium of the published biography) details of his private life, is already in the public domain that the interests of the public and the media are legitimately engaged. There is nothing prurient about that interest: on the contrary, it tells us all something, perhaps indefinable, but for all that something inspiring about the triumph of the human spirit over adversity. The presence of selected representatives of the media, in limited numbers so that the hearing is not turned into a publicity circus, will ensure that matters of legitimate public interest may be drawn to the attention of the judge as possible matters for publication. However the litigation is about A's interests, and the involvement of his devoted family, and the judge must

concentrate on them and he will produce a judgment which reflects his decision about the matters in issue before him. He is not qualified to determine what is or may be of interest to the public: that is the function of the media, not the judiciary. In any event, it would be an inappropriate exercise of a judge's responsibility if he were to tailor the contents of his judgment to what he believed to be the needs or concerns of the media. Therefore, while the presence of a small number of media representatives would somewhat reduce the privacy of the proceedings, it would enable those representatives to be fully aware of the issues which may be of legitimate interest to the public and to make better informed submissions to the judge about the matters for which publication should be authorised.

We should add that it would be difficult to find a more appropriate hearing before the Court of Protection for media understanding of its processes. It is valuable for the public to be fully informed of precisely what happens in a court in which the overwhelming majority of hearings are, in accordance with the statutory structure governing its process, to be conducted in private. That is a particularly significant point at this time, in the light of the interest and concerns which have been expressed in some quarters about the new Court of Protection. That feature of the case, and Hedley J's reasoning, merits attention in the context of the high public interest element of this case.

The Court of Appeal disagreed with Hedley J on his assertion that the ECHR Article 10 rights of the media were not engaged until "good reason" had been established. It took the view that Article 10 was engaged at the time the media made its application. This did not, however, mean that the appeal fell to be allowed:

The fact that we take a different view from the judge .... cannot possibly mean that his decision was flawed. If he had concluded that article 10 was engaged at an earlier stage than he concluded, it would, at best, have reinforced his view that the media had shown "good reason" at the first stage of his two stage process (although, as explained above, we very much doubt that it would have affected his thought processes in any way.)

There is plainly a public interest, not only in how disabled adults are treated, but in the way the Court of Protection deals with its cases. Thus *In Re A (Reporting Restriction Order)*<sup>[29]</sup> Baker J was faced with the dilemma of a psychologically fragile mother who had been arrested on suspicion of murdering two of her three sons. There was, unsurprisingly, a great deal of press interest in the case. Everyone agreed that the third son, who was in foster care, should not be identified: the question was whether a similar protection should be afforded to the mother.

Baker J carried out a classic *re S* balancing exercise and came to the view that the Article 10 rights of the media prevailed over the Article 8 rights of the mother, and that it was in the public interest for the media to be allowed to report that a woman had been arrested on suspicion of killing her two children who, at the time, were known to social services. Furthermore, reports of the police investigation might lead to witnesses coming forward.

In *London Borough of Hillingdon v. Neary*<sup>[30]</sup> Peter Jackson J followed *A's* case, but went further. He directed that various newspapers were to be permitted to send designated representatives to attend the proceedings, that permission being granted subject to any different direction made at any subsequent hearing. He also directed that the media were to be permitted to identify the parties to the proceedings by their names, and to report any information already in the public domain when reporting the proceedings. However, any application by the media for permission to report information disclosed in the course of any private hearing in the

proceedings was to be determined by the court at the conclusion of the relevant hearing.

Peter Jackson J was undoubtedly influenced by the fact that there was a genuine public interest in the work of the Court of Protection being understood. He said so and added:

Not only is this healthy in itself – the presence of the media in appropriate cases has a bracing effect on all public servants, whether in the field of social services or the law – but it may also help to dispel misunderstandings. It is not in the interests of individual litigants, or of society at large, for a court that is by definition devoted to the *protection* of the welfare of disadvantaged people to be characterised (including in a report about this case, published as I write this judgment) as "secretive". It is part of our natural curiosity to want to know other people's secrets, and using pejorative descriptions of this kind may stimulate interest. The opportunity, in appropriate cases, to follow a process that has welfare, not secrecy, at its heart can only help the media to produce balanced reporting, and not fall back on clichés.

Peter Jackson J. recognized the reality that stories about particular individuals are much more attractive to readers than stories about unidentified people – see *In re Guardian News and Media Limited* [31]. Equally, however, once the parties' names were publicly attached to the proceedings, the court's ability to control that information was lost. He concluded: -

I do not foresee any possibility of the court preventing the media from reporting the parties' names at the end of the proceedings, even if everything else that takes place in court were to remain unreported. Given the extent of the information already publicly available, it is frankly unreal for the proceedings to continue under initials, as if that offered any meaningful protection.

Whilst each case turned on its particular facts, and Peter Jackson J was at pains to emphasise that he was applying the law as he understood it to be, one is left to reflect that *Neary* may represent a way forward.

In my judgment, there is, by direct analogy, a public interest in ensuring that the work of the Family Justice System is better understood. This is not simply a task for internal working or for legislators. The COP solution is, of course, very attractive from a judicial point of view. The media can be present, but what is reported is a matter for the judge. This, to my mind, raises the difficult but important question whether, in family justice, it is for the judge to be the arbiter of what is or is not in the public interest, and what should or should not be reported.

*Can the COP system be more generally applied?*

If the Press is allowed to publish what occurs in chambers in Family Proceedings, nobody, least of all the judiciary, can dictate to the Press what part of that material it should publish. Thus it is one thing to say that given material – for example, the identity of the child – shall *not* be published: it is quite a different thing to identify permissible material which *should* be published. Moreover, the Press is faced with a dilemma. It can either report as the case goes along or it can be faced with an anonymised judgment, the rubric of which forbids identification of whomsoever the judge chooses.

As an example, one of the many difficulties presented by Part 2 of the Children, School and Families Act 2010 was that under it, a journalist could attend on day 1 and report the opening of a case – an opening which might bear no resemblance to the subsequent judicial findings. Yet, of course, there was no obligation to report the ultimate findings. Thus the reporting, whilst no doubt accurate, would be unbalanced.

Absent legislation or agreement there is thus no obligation – and cannot be any obligation – to report, for example, the judge’s judgment, and the ultimate outcome of the case. This is a serious defect and undoubtedly in some cases leads to unbalanced and potentially unfair reporting.

I come back to *Re L*. In that case the judge’s judgment was careful and full. His reasoning was transparent. Yet his judgment, although publicly available, was not published by the newspaper which had printed the mother’s version of event and, nonetheless, held him up to ridicule. Furthermore, it was (inaccurately) reported that the judge had relied on an expert who had not reported in the proceedings at all.

There will always be journalists – in the same way as there will be always be some politicians, for whom the Family Justice System is corrupt and for whom the judge can do no right.<sup>[32]</sup> But am I alone in thinking they are, perhaps, a minority, and that a more open - dare I say, - trusting attitude would lead to the truth being published – namely as found by the FJR that the family justice system, for all its faults is, on the whole, peopled by decent individuals, doing their best for the children who are the subject of their involvement?

As I have said several times before<sup>[33]</sup>, it is, in my view, unacceptable that conscientious judges and magistrates up and down the country, doing their best, with limited resources and under heavy pressure of work to make difficult decisions in the best interests of children, should be accused of administering ‘secret’ justice, especially when what they are doing is following Parliament’s instructions. It was, after all, Parliament, not the courts, which imposed the restrictions contained in s 97 of the 1989 Act and s 12 of the 1960 Act. The judicial task is to interpret and apply those statutes.<sup>[34]</sup>

It is common ground between journalists and lawyers that some restrictions on publication are required. The rule that children should not be named is, as I have said, generally accepted. It follows, as I have already said, that if parents or other relatives with the same surname are named, the children are readily identifiable. Therefore in many cases. It may be necessary to afford the adults anonymity, in order to protect the children.

There will always be people “in the know” – that is people who know who the children are who are involved in a particular case. The question is whether those children can be protected if the media are allowed to publish.. *Haigh v Tune* <sup>[35]</sup> was not a case about the Press. In that case, the mother of the child concerned had published what I found to be untruths about the father on Email to his work colleagues and to the parents at the child’s school. She alleged, without – as I found – any justification – that the father was a paedophile. The hearings, at which the father had been vindicated, were in private. They resulted in a care order and the child living with her father under it.

The matter was complicated by the fact that the mother was living out of the jurisdiction in the Republic of Ireland, and that an Internet Provider, who published some of the details, was also out of the jurisdiction in Germany. It was in fact the local authority which applied for accurate information to be put in the public domain. I granted the application, whilst refusing to name the child.

### *Conclusion*

In a world of instantaneous communication, it seems to me that we are going to have to rethink many of our rules. If an expert can be publicly named, why should his or her report, suitably

redacted if need be, not be in the public domain and the subject of discussion?[36] In that case, it seemed to me inevitable that the expert witness's would have to go into the public domain: but if he was to be bound by the confidentiality rules and was unable to discuss its contents (which had been criticised by the judge) there would be no proper debate. I therefore ordered disclosure of his report (suitably redacted to preserve the anonymity of the children).

I agree with Judge Bellamy in *BBC v Coventry City Council and others*[37] when he said in that case that it was not a proportionate restriction on the ECHR Article 10 rights of the media to prevent them naming a local authority, whom he had ordered to pay a substantial contribution to the parents' costs in care proceedings which they had sought leave to withdraw. He held that the risk of breaching the children's ECHR Article 8 right was potential, whereas the breach of the media's ECHR Article 10 rights was real. The residents of Coventry had "the right to know" that their local authority was involved, and the media had the right to report that.

In my judgment, there is a powerful argument for public authorities, public servants and expert witnesses being named. My understanding is that AJA section 12 does not prevent it. So far as I am aware, AJAR section 12 has not been the subject of authoritative interpretation in the House of Lords or the Supreme Court. There are many technical arguments on its use. Perhaps the most significant is the proposition that the very presence of the Press in Family Proceedings means that they are no longer "in private". That view, if it is right, has huge implications.

If an issue is in the public interest, should it not be heard in public, or at the very least should the judgment not be publicly available? That is what the CoP has done, for example in the life support machine and other cases which I have identified. The relatives wish to switch off the machine. The judge perhaps agrees. The termination of life by judicial order is surely a matter of public interest, and should, in my view, be heard in public. The judge's judgment should be given in open court. Steps can be taken to protect the identities of the patient and the patient's family. The issue needs to be debated, and the only forum for such a debate is the public media.

I have a great respect for Dr. Glaser and her work, and I see the force of the argument which I set out earlier in this paper. But at the end of the day, I think the ECHR Article 10 argument would be likely to succeed in the example she gives. That, of course is a personal view. In any event, the type of case she is describing is, I think, very rare and could well be the subject of an order by the judge forbidding identification of the expert or his or her report.

It is, I think, significant, that when sentencing a person for contempt of court in a case heard in chambers, the judge is bound to go into open court to pass sentence.[38] People in this country are not sent to prison "in secret". A great deal of public money is spent on care proceedings. As the press argue, is the public not entitled to know *how* its money is spent?

What may be required is not legislation which, at best, can be both a blunt and not entirely clear instrument and is likely to give rise to argument leading in turn to litigation; but an agreement that in return for information about proceedings and access to them the Press would not publish the names of the parties without the consent of the latter and the court, and that under no circumstances would the names of children go into the public domain.

I acknowledge that the argument are finely balanced, and I note from a lecture which he gave on 8 October 2010 that whereas Judge Bellamy began the year as an enthusiast for greater openness and transparency in the family courts, he ended it with questions and doubts. The subtitle to his paper was: Can the Press be trusted? In his view, the jury was still out. His experience

in *Re L* cannot have helped.

The trouble with the COP approach, as I have indicated, is that it vests the discretion about what is to be published in the court. This, at first blush, is unlikely to be acceptable to the media in conventional family proceedings. They wish not merely to be present, but to report what goes on. Thus if a child is inappropriately made the subject of care proceedings, or if the case is mishandled by the judge or by any of the statutory agencies involved, the media, as the eyes and ears of the public, wish to make the facts known. Thus the media, for example, will draw a distinction between the issues surrounding the anonymous patient on the life support machine, and the child wrongly made the subject of proceedings.

But is it a valid distinction to draw? Nobody can force the media to publish the outcome of a life support machine case or what has gone on in court, even if the court gives permission for such reporting to take place. So why should the media in proceedings under the Children Act 1989 not be under the same degree of restriction?

And if we are to reach agreement with the press, are we not going to have to let them know what is going on? Gone, as I have said, are the days when the Press could afford a reporter in every court.

If this is the way forward, it requires substantial compromise on both sides. It also requires the Family Justice System not only to allow the journalist to be in court but to make available to him or her documents sufficient to enable them to understand the proceedings. By these means, the media are likely, of course, to learn the names of the parties and of the child. If the purpose of disclosure is the provision of “background information” there may well be a strong case for saying that as the price of that information being provided, it must not be published without good reason and without the court’s permission.

Is all this possible? I do not know. All I do know is that, on the whole, I would rather have an enforceable agreement between the media and judges than an imposed solution.. Such an agreement may not be possible. Terms proposed by the Family Justice System may be unacceptable to the media, and vice versa. I do not know the answer, but I do know that we will not know unless we try.

Thank you very much.

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[1]The Justice Committee’s Sixth Report of Session 2010-12:*Operation of the Family Courts*, Para 281

[2]The Government Response paras 73 and 74

[3].FJR Final report paragraphs 2.234 and 2.235

[4]The Justice Committee's Sixth Report of Session 2010-12:***Operation of the Family Courts***, Para 281

[5][1913] A.C. 417

[6]In *Clayton v Clayton* [2006] EWCA Civ 878, [[2006] Fam 83, the Court of Appeal held that the prohibition in section 97(2) was limited to the duration of the proceedings. The insertion of the phrase "to the public at large or any section of the public" was introduced to protect Members of Parliament who had discussed a constituent's case with him or her and wished to pass the information (usually in the form of a complaint) on to the relevant Minister or Government Department. The Family Proceedings Rules were also amended to clarify the point.

[7]*B v United Kingdom: P v United Kingdom*[2001] 2 FLR 261: 823

[8]See (inter alia)*Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs Intervening)* [2004] 2 FLR 823

[9][2001] 2 FLR 261. Although the terms are well known, it is perhaps worthwhile to record the provisos to ECHR articles 6 and 8. Although Article 6 refer to a "fair and public hearing", it goes on:" Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial.....where the interests of juveniles, or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". ECHR article 8.2 prohibits interference with the right "save in accordance with the law and necessary in a democratic society for (inter alia) "the protection of health or morals, or for the protection of the rights and freedoms of others. ECHR articles 6 and 8 are engaged in every case involving children."

[10]See Family Procedure Rules 2010, rule 27.10

[11]See its list of recommendations prefaced by the words "these recommendation aim to ensure that children's interests are truly central to the operation of the Family Justice System"

[12]See, for example Profess Julia Brophy: *The views of children and Young People Regarding Media Access to Family Courts* published by the Office of the Children's Commissioner for England, March 2010

[13][2009] Fam Law 211.

[14]See also the Report of the Select Committee of both Houses on Privacy and "Super" injunctions, which recommended that developments in the law should be left to the judiciary on a case by case basis.

[15] In the summer of last year, a guide was published under the joint signatures of myself and the Society of Editors. It is available on the website. It was written by two members of the bar, Adam Wolanski and Kate Wilson. I commend it to you.

[16][2010] UKSC 1 [2010]2 AC 697, para [63]

[17]There is a point – as yet only decided at first instance – that cases where the Press are

entitled to be present cease to be private – see

[18] See *Re H (Freeing Orders: Publicity)* [2005] EWCA Civ 1325, [2006] 1 FLR 815

[19] [2011] EWHC B8 (Fam)

[20] *London Borough of Lewisham v Al-Alas and Wray* [2012] EWHC 865 (Fam).

[21] [2007] 2 FLR 765

[22] [2006] EWCA Civ 878, [2006] Fam 83

[23] [2004] EWHC 411 (Fam), [2004] 2 FLR 142

[24] [2004] UKHL 47, [2005] 1 AC 593, at para [17]

[25] [2005] EWHC 1564 (Fam), [2006] 1 FLR 1, at para [53]

[26] [2006] EWHC 2733 (Fam)

[27] [2001] 2 AC 127 at 200G-H

[28] [2010] EWCA Civ 343

[29] [2011] EWHC 1764 (Fam), [2012] 1 FLR 239

[30] [2011] EWHC 413 (COP)

[31] [2010] 2 WLR 325 per Lord Rodger at [63]

[32] I forebear to name names. but give some references, which the industrious – or those in question – can pursue: - see *RP v Nottingham City Council and the Official Solicitor (Mental Capacity of Parent)* [2008] EWCA Civ 462, [2008] 1 FLR 1516;

[33] See, for example, Speech given by PFD at the Bond Solon Conference on 12 November 2010

[34] And what of the situation, admittedly rare, in which a parent by means of court proceedings is vindicated of abuse, and wishes to publicise the vindication? The question for the court in that case was whether the article setting the record straight fell foul of s 97 of the 1989 Act and s 12 of the 1960 Act. In the event, an agreement was reached, presumably approved by the judge (Coleridge J), that the article could be published subject to certain agreed restrictions.

[35] [2011] EWHC &&&(fam)

[36] See *Tr W, Y and Z (Expert Witness)* [2011] EWHC 1157 (Fam); [2011] 2 FLR 1437.

[37] [2011] 1 FLR 977

[38]