Paper given to the President's Conference on 12 May 2009

The President has kindly asked me to speak today about the increasingly important issue of media access to the family courts.

My talk is divided into two parts. First I will discuss the new rules for access to family courts. The new rules have of course allowed journalists into family courts hearing most kinds of case. But the government have not changed the law on what can and cannot be reported, at least not yet.

So I am going to talk about some of the issues which emerge from this new regime. It gives rise to some anomalies which, I think, have not yet been widely appreciated.

I will then talk a little about the law on reporting cases involving children. This is a subject which has received some considerable judicial consideration over the last few years, but still perplexes those who come to me for advice.

In the second part of my talk, I will try to provide you with some thoughts on what the media want to be able to achieve through greater transparency. Parts of the media have been vociferous in campaigning to have the courts opened up to public scrutiny. Should you trust the media's intentions now that they have managed to secure a small but superficially significant advance in this direction?

In preparing the second part of my talk I spoke to a number of investigative journalists who have worked with cases involving the family courts. I shall share with you some of the concerns they have expressed about the future of journalism in this important but very challenging area.

But first, the new rules.

<u>The new rules</u>

Under the new rules accredited members of the media are allowed in to watch almost all family proceedings being heard in private. Certain hearings are excluded,

including hearings conducted for the purposes of judicially assisted conciliation or negotiation.

Under the rules media representatives may be excluded on specified grounds. They are that it is necessary:

> (a) in the interests of any child concerned in, or connected with, the proceedings
>
> (b) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or
>
> (c) for the orderly conduct of the proceedings; or
>
> or where the court is satisfied that justice will otherwise be impeded or prejudiced.[1]

There is no guidance in the rules as to how the courts are to apply these provisions. Plainly the onus will be on the person seeking to exclude the press to satisfy the court that the exclusion is *necessary* – not merely *desirable* – for one of the reasons cited.

The fact that one or even all the parties involved would *prefer* the media to be excluded, whilst a relevant factor, is plainly not determinative.

The position as regards excluding the media from proceedings involving children gives rise to different considerations than in proceedings involving other matters such as financial disputes.

When it comes to children, journalists who are present in court can report little of what they have seen whilst in court because of the provisions of Section 12 of the Administration of Justice Act, something to which I will turn shortly. Indeed, if journalists do communicate information from the case they have seen they may be in contempt of court.

Given the breadth of the restrictions on reporting what has taken place in Children Act proceedings, it is difficult to see in the ordinary case how the mere presence of a

[1] Rule 16A(3)

journalist in court will impede or prejudice the course of justice, let alone compromise the safety of a party or witness.

What about cases involving matters other than children, such as financial disputes? The rules don't on their face provide a basis for excluding journalists at all. There is nothing in the rules stating that journalists may be excluded because of the confidential or sensitive nature of the issues being litigated. Oddly, the CPR do by contrast contain such a provision in CPR Rule 39.2(3)(c).

However it is, I suggest, at least arguable that to make the rules compliant with the European Convention on Human Rights the '*protection of the parties*' must be construed to include the protection of the Article 8 rights of the parties – i.e. the protection of their privacy rights. If so, the court could exclude journalists if necessary for this purpose.

There is another important point of distinction between family cases which do involve children those which do not. Journalists can in general freely report what they have witnessed in cases not involving children. There are statutory restrictions on reporting some matters which arise in, for example, proceedings for dissolution of marriage. Some aspects of ancillary relief proceedings may be effectively unreportable because of the limited use which can be made of information disclosed in these cases under compulsion. But the general rule is that it is neither a breach of confidence nor a contempt of court to report what has happened in such cases – see *Hodgson v Imperial Tobacco*[2].

Can the court hearing a case not involving children permit journalists to attend the case but make a reporting restriction prohibiting them from reporting what they have seen?

It is **not** currently obvious that the court **can** do this.

[2] [1998] 1 WLR 1056, CA

There is currently no express provision under the FPR giving the court a power to impose an order preventing a journalist from reporting what he has seen in court. Neither, it is worth noting, does the CPR contain such a provision.

There is no power at common law for the court to make such an order, save in the unusual case where the administration of justice will be prejudiced in the absence of such an order. However, it may be that a court is able now to give effect to a party's Article 8 rights by making orders restraining the publication of reports of proceedings which would otherwise constitute an invasion of that party's privacy.

There is also an argument to the effect that section 11 of the Contempt of Court act 1981 empowers the court to make wider reporting restrictions in a case heard in private given the court is in one sense withholding the whole case from the public. However this approach might be thought to be inconsistent with the judgment in *Hodgson v Imperial Tobacco*.

If, however, the court has **no** power to make an order prohibiting the reporting of matters heard with journalists present, it will be suggested that there is all the more reason for excluding journalists from attending such cases – after all, if you want to stop something being reported, you stop the journalists from coming in.

If this is so, then paradoxically, perhaps, the argument for excluding journalists from hearings involving financial matters may be stronger than the argument for excluding journalists from cases involving children.

Section 12

I want next to say a few words about section 12 of the AJA 1960. This makes it potentially a contempt of court to communicate information about the substance of a case heard in private where (amongst other things) the proceedings are brought under the High Court's inherent jurisdiction with respect to minors or under the Children Act 1989.

In cases involving children, this is a crucial, but often misunderstood, provision.

First of all, what is meant by '*publication*'? The question came before Mr Justice Munby for consideration in the case of *Kent CC v B*[3] in 2004. The learned judge found that publication must be understood in the sense it is used in defamation proceedings, that is to say communication to any third party.

Obviously the term includes publication to the world at large in a newspaper. It also includes the communication of information to a journalist. Perhaps less widely appreciated is the fact that it includes the communication of information by a journalist to a third party, including an editor or legal advisor.

The new rules make provision for the communication of information to third parties in a number of specific situations. But no provision is made for communication of information to a journalist. Thus a party cannot, for example, tell a journalist about the evidence which other parties are planning to adduce in the case, or about the evidence adduced in previous hearings where the journalist was not present.

Rule 10.20 does permit the communication of information "*necessary to enable that party…by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings*". There may be cases where a litigant claims he is receiving support, advice or assistant from a journalist who has taken a close interest in his case. If a complaint were made about such a communication, the question for the court would be whether or not such a communication is properly to be regarded as 'necessary' for the litigant.

Even if it were necessary, however, the provisions do not entitle the journalist to communicate what he has heard to third parties.

Thus it may well be that journalists in court will seek permission from the court to discuss the case with his editor or legal advisors back in the office so as to decide whether or not to apply for further documents such as skeleton arguments or witness

[3] [2004] EWHC 411 (Fam)

statements. Without such permission, the journalist is severely restricted in what he can tell his editor about the case he has seen.

Unsurprisingly, this restriction on onward communication to editors by journalists has been met with bewilderment on Fleet Street.

What does section 12 cover?

Going back to the case of *Kent CC v B*[4], Munby J also set out in his judgment a comprehensive list of what is and is not restricted by section 12.

Publications which may be a contempt under s.12

* Accounts of what has gone on in front of the judge.

* Publication of documents such as affidavits, witness statements, reports, position statements, skeleton arguments, transcripts and notes of the judgments, or extracts or quotations from these documents.

Publications not a contempt under s.12

* Date, time and place of a past or future hearing

* Text or summary of the whole or part of any order made

* Anything seen or heard by a person conducting himself lawfully in the corridors or precincts outside the court

[4] *per* Munby J at [62] to [82];

* Identification of witnesses – including expert medical witnesses, and witnesses such as social workers.

* Identification of parties

* The "nature of the dispute"

A difficult question which has received only limited judicial consideration is what is properly to be considered 'the nature of the dispute', and therefore may be published without risk of attracting contempt proceedings.

In *X v Dempster*[5] Mr Justice Wilson found that the Daily Mail had gone too far when it published the following words about a case in the family courts:

"says a friend of the mother, "she has been portrayed as a bad mother who is unfit to look after her children. Nothing could be further from the truth. She is wonderful to them and they love her. She wants custody of them and we will see what happens in court."

Mr Justice Wilson said he was satisfied that the portrayal of the mother in the proceedings as a bad mother went far beyond a description of the nature of the dispute.

Kent CC v B concerned a mother who was alleged to have harmed her children, who were taken into care. She claimed that she was the victim of a miscarriage of justice. Munby J said that it would not be a breach of section 12 to identify the issues as being whether the mother suffered from Munchausen's syndrome by proxy, and whether she had killed or attempted to kill her children by, for instance, smothering or poisoning.

Mr Justice Munby found that first, to publish the fact that witness had given evidence for one side or another did not cross the line.

He went on to say that the newspaper report in that case which recounted the evidence of a paediatrician in the case that the mother may have deliberately injected her child

[5] [1999] 1 FLR 894

with the water from a flower bowl or lavatory may have been close to the line, but almost certainly on the wrong side of it. [80]

Section 97(2) of the Children Act 1989

This section makes it a criminal offence to identify to the world at large a child as being the subject of proceedings under which an order may be made under the Children Act 1989.

Following the case of *Clayton v Clayton*[6], it has been clear that the section ceases to apply once proceedings have concluded. Thus, if the court wants to make an order *contra mundum* preventing the identification of children who have been involved in such proceedings, it must make an order.

Before considering making such an order, however, there is an onus on the party seeking a restriction to inform the media of its intention to seek such an injunction. Lord Justice Wall's observation in *Clayton* that such orders were likely to be rare has, I understand, proved to be correct.

It is worth noting that the government did signal an intention to legislate to reverse the effect of Clayton, but the most recent signals from the Ministry of Justice are, I am informed, that this may not happen after all.

Coming back to s.97, the court has a discretion under s.97 (4) to dispense with the restriction "if…the welfare of the child requires it". This provision appears to have been included to allow for the situation where the police wish to publicise the disappearance of an identified child who is the subject of proceedings.

In *Norfolk County Council v Nicola Webster and Others*[7] Mr Justice Munby held that s.97(4) must be read as a non-exhaustive expression of the terms on which the

[6] [2006] EWHC Civ 878
[7] [2006] EWHC 2733 (Fam)

discretion can be exercised, so that the power is exercisable not merely if the welfare of the child requires it but wherever it is required to give effect to the rights of others.

Thus in *Webster* Mr Justice Munby permitted the identification of parents and a child in a case into which he allowed the press. There was no question of the welfare of the child requiring his identification. However, given the powerful public interests engaged, the very young age of the child and, significantly, the fact that much about the case including images of the parents had already entered the public domain, the judge held that the balance between the Article 8 rights of the child and the convention rights of others was correctly struck by permitting identification.

In fact, Webster was not the first case in which the court had sanctioned the identification of the parties, and thus of their children as being the subject of proceedings. This had been done in the *Blunkett v Quinn*[8] case involving the former Home Secretary; and in *Harris v Harris*[9] where the court made trenchant remarks about the activities of Mr Harris, a father who had subjected his family and others to a long and vicious campaign of harassment and abuse.

The issue of identification is one of particular importance for the broadcast media, for reasons which I will come to shortly. Whilst the media rarely feel it appropriate to seek to identify children involved in family cases, the courts will be met from time to time with applications by the media for permission to name those involved in family cases which it is said are of particular public interest.

Relevant factors in considering such issues will be first, the wishes of the parties. Plainly if one parent objects the case for identification will be much weaker than if both consent.

Second, what is already in the public domain? In the *Webster* case much was already in the public domain because the parents, whose first three children had already been adopted, went to the press to talk of their fears that their yet unborn child would be removed upon birth. When they did this there were not yet any proceedings in place.

[8] [2004] EWHC 2816 (Fam)
[9] [2001] 2 FLR 895

Third, what is the public interest in the story? Public law cases are likely to raise much more powerful public interest arguments than private law cases given the draconian powers which the courts are often being asked to exercise – a point underlined in the *Webster* case. And where the public interest argument is stronger, the case for permitting to tell the story in an engaging way may also be stronger.

Fourth, what is the impact upon the child of identification? There may be cases – *Webster* was one – where the likely impact upon the child of identification is relatively limited. If the child is very young, as in Webster, identification will have a less adverse impact. If there is evidence before the court of vulnerability, the impact upon the child of identification will be greater. Each case will raise different considerations. It cannot automatically be assumed that identification will cause such detriment to the child as to outweigh any public interest in publication.

Finally, what if a broadcaster says it is prepared to give an adult party a pseudonym? By picturing the adult, the child will be identified to those who know the parents, but identification to the wider world will be much more limited. It may be that for some the prospect of identification of the child to *any* section of the community seems an unacceptable price to pay, but, as I will explain shortly, there can a strong case for permitting identification where without it a story, which could be of real public significance, will simply never see the light of day.

Part 2: the media perspective

With that I come to the second part of my talk – the media perspective on attending and reporting the family courts.

As you have probably observed, the opening up of family courts has not resulted in an invasion of family courts by journalists. There are only very few journalists who roam the corridors of courts looking to sit in and observe. Given the complex restrictions on reporting, journalists by and large see little point in coming into family cases. Those that do often find the proceedings unintelligible, with references repeatedly being made to documents they cannot see.

Once the novelty of being able to come in has worn off, which it may have done already, you can expect to be troubled only rarely by reporters wishing to come and watch proceedings.

But there is a real difference between media access to courts, on the one hand, and media reporting of cases, whether or not journalists are present in court, on the other.

There undoubtedly exists a real appetite for reporting cases, or perhaps more accurately for telling the stories behind the cases, which come before the family courts.

These cases fall into three categories.

The first, of course, is the story with the celebrity element. Celebrities sell papers. There will inevitably be a clamour to attend and report the next big celebrity tussle over money or children. These cases, as I note above, raise difficult issues of confidentiality.

However, my focus for today is on the second and third categories, namely 'real life' documentaries on topics such as family breakdown, and 'miscarriage of justice' stories.

In discussing the issues raised by these types of story, I have spoken to some serious investigative journalists. These are not people interested in the easy celebrity headline. They feel there are important stories to be told which involve cases going through the family courts, but believe there are very real obstacles in telling them. Despite the reforms, they fear their job is becoming ever more difficult.

The 'real life' television documentary - my second category – is typically about family breakdown and other topics related to the profound social problems facing contemporary British society. This is a very different type of journalism from the celebrity scoop, and it is neither cheap nor easy.

It is generally a form of journalism undertaken by television not the print media. It involves broadcasters cultivating relationships with the subjects of their films over long periods. This can take many months.

The subjects of the films are often volatile, and will typically change their mind several times over the life of the film making process about whether they want to be involved.

Once there is trust between the film maker and the subject, film makers try to make sure that they are getting a balanced picture of life within the family. If, as is often the case, there are legal proceedings, the film maker will want to understand why.

In such a situation, permission will need to be sought from the court to ask participants about their cases and perhaps, to see relevant documents for support. But media organisations often baulk at the prospect of going to court. Applications to court are expensive. Hearings are frequently adjourned. The outcome of such applications can be hard to predict. There is a risk of an adverse costs order being made.

All this is very expensive. To make a film of this sort typically costs around £200,000 for just one hour of broadcast film. That is a huge amount when one considers that films of this sort are not made to cater for a mass audience, and given the increasing pressure on media budgets.

What's more, film makers working in this field tell me that more often than not they need to identify their subjects. There is now a strong trend towards observational rather than reconstructed television. Viewers are thought no longer to want editorial and commentary – they want to be able to make their own assessments about individuals who are the subject matter of such films.

Real lives, it is said, cannot effectively be depicted through silhouettes and pixellation.

An experienced programme maker said to me the other day that from an editorial perspective, if the subjects on screen had to be masked or represented through actors' voices, the programme would simply never get broadcast.

Last year Channel 4 commissioned a series of this sort. It was made, then never broadcast. The legal problems, I am told, became insuperable.

Filmmakers who want to make programmes about these topics therefore face an increasing struggle in getting commissions. The perception amongst commissioning editors is not merely that projects of this sort are very challenging, but that the convention of privacy in the family courts is so strong that it will prove hard if not impossible to secure the access to information that is required.

As a result, documentary making of this kind is an increasing rarity. With multi-channel broadcasting, audience figures for serious journalism is in decline. Yet these are topics which, one might think, more than ever need to be aired and properly discussed.

Another result of the problems faced in making serious programmes of this kind is that when a case can be reported, because it has been litigated in the criminal rather than the family courts, the media over react and sensationalise. The Baby P case is the most obvious recent example.

One wonders whether that case might have been subject to more balanced reporting if the media were able to report the true picture which emerges from the family courts on a daily basis, namely that children are the victims of abuse and neglect on a tragically large scale.

Another film maker made the point that at a time when family breakdown is leading to increasing use of the family justice system, there is a real need for the public to understand how that system works. She told me that she wants her audience to know that they can trust the family court system. Many of those she speaks to fear they will not get a just result, or have expectations which are entirely out of line with the reality

of the system. The job of explaining how the system works can, she says, only effectively be done by using real life examples.

My third –and probably most controversial - category of journalism connected with the family justice system is the 'miscarriage of justice' story'. Journalists involved in this area of work tell me that, more than any other topic, they are inundated with correspondence from aggrieved parents who feel they have been the victims of injustice.

The challenges confronting journalists in this area are particularly acute. In order to assess whether there is any basis for scrutinising the conclusions reached by the court, programme makers need to see the underlying evidence and materials. This they cannot do without the permission of the court. Obtaining such permission is, once again, perceived to be expensive and very difficult.

They also need to be able to speak to the alleged victim of injustice. There is a widely held view that it is wrong that people who feel – rightly or wrongly – that they have been let down by the system should be unable to express this view properly with journalists – journalists who may or may not ultimately choose to take up their cause.

Again, from the journalist's perspective there is a real premium on being able to interview, and if at all possible to identify the individual concerned. Programme makers want viewers to be able to make their own assessments of the aggrieved parent.

Conclusion

Where does all this leave the media in the family courts?

I have listed, in no particular order, some of the species of applications likely to be heard involving the media. I do not, of course, take into account here applications made *against* the media by local authorities seeking orders for the protection of children.

First, there are the applications brought by those attending proceedings. There will be applications concerning attendance of journalists, and applications permitting journalists to discuss cases with their editors and legal advisors.

There will be applications by journalists to see documents which will help them understand cases. Skeleton arguments are of particular use. Applications for these might give rise to difficult questions of disclosure of sensitive information, but the case may make little or no sense to an onlooker without them.

Next, and I suggest of greater importance for the kind of investigative journalism I describe above, are applications by journalists for permission to discuss cases with participants, and applications to see the underlying documents. These raise sometimes difficult issues of confidentiality.

One such category document is of course the judgments in the case. Publication of anonymised judgments is becoming more commonplace, and is of course of considerable use to those interested in reporting the family courts.

Next is the issue of publication to the world at large of information from proceedings. There are various ways of doing this. One, used in the *Medway*[10] case, is for the court to sanction the publication of an approved summary produced by the parties. This is not a solution which the media will often like, since it involves circumscribing what can be reported, but it may in some cases be an effective way of balancing disclosure with the privacy interests of those involved.

Finally, and most problematically perhaps, is the issue of identification. This will rarely be attempted because journalists are acutely aware that by identifying children they may be compromising their welfare. But where such attempts *are* made, and I know I have made them more than once before some of those present here, there often lies behind such applications an urgent sense that courts need to allow these kinds of stories be brought to life, otherwise they will never get told at all.

[10] *Medway v G and Others* [1998] EWHC 1691 (Fam)

In conclusion, if this type of serious journalism is to survive and flourish, the courts will need to learn to trust the media to use information they receive about family cases in a responsible and sensitive way.

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