

Case No: HQ06X02828

Neutral Citation Number: [2011] EWHC 454 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 March 2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

A CHILD
(by his mother and litigation friend)

Claimant

- and -

CAMBRIDGE UNIVERSITY HOSPITALS NHS
FOUNDATION TRUST

Defendant

Margaret Bowron QC (instructed by **Attwaters**) for the **Claimant**
Sophie Mortimer (instructed by **Kennedys**) for the **Defendant**

Hearing date: 2 March 2011

Judgment

Mr Justice Tugendhat :

1. In the course of the hearing, in which I approved the settlement of a claim by the Claimant for personal injuries, I made an order under the Children and Young Person's Act 1933 section 39 (as amended) that:
 - (i) **no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification of the Claimant as being the person by whom the proceedings are taken and**
 - (ii) **that no picture shall be published in any newspaper as being or including a picture of the Claimant in the proceedings.**
2. I stated that I would give my reasons later and these are they.
3. This case raises again the question of what, if any, order the court should make to restrict publication of the name of a claimant in circumstances where the court is asked to approve a compromise by or on behalf of a claimant who is a protected party.
4. The Claimant is now aged seven. Sadly the birth was mishandled by the treating staff, the birth was delayed, the Claimant was starved of oxygen and as a result the Claimant is physically very incapacitated. But the Claimant is mentally entirely, or very substantially, intact. As a result of these tragic events a very large sum of money has been agreed in settlement of the claim for personal injuries suffered as a result of the Defendant's negligence.
5. Fortunately the Claimant enjoys the loving care of two dedicated parents in a family in which there are other children. The need for care is constant and touches every aspect of the Claimant's life. Anything significant which affects the Claimant is likely also to affect the other members of the family.
6. The Claimant is intelligent and sensitive and able to communicate, albeit with difficulty. The Claimant attends school. The expert evidence is that it is difficult to predict the Claimant's future educational progress. The Claimant's ability levels and parental background suggest that the Claimant could and should progress on to tertiary education, possibly to degree level. It is too soon to say whether the Claimant will have capacity within the meaning of the Mental Capacity Act 2005, but at present it looks as if the Claimant's preserved cognitive functioning is such that the Claimant will be able to make decisions and, subject to review, may therefore have legal capacity as an adult.
7. In *JXF (a child suing by his mother and litigation friend KMF) v York Hospitals NHS Foundation Trust* [2010] EWHC 2800 (QB) I set out the legal framework in which the court approves settlements and the provisions relevant for ensuring open justice. In that case I made an anonymity order. I was not asked to make an order under the 1933 Act.
8. In the present case the primary application made to me was for an order under the 1933 Act, and that is the order that I have made. That Act applies to civil

proceedings: see *Briffett v Crown Prosecution Service* [2002] EMLR 12. So far as material it provides as follows:

“39 (1) In relation to any proceedings in any court . . . , the court may direct that—

- (a) no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated 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:
- (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;

except in so far (if at all) as may be permitted by the direction of the court.

(2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine”

9. The editors of *Arlidge Eady & Smith on Contempt* 3rd edition (2005) discuss the 1933 Act in paragraphs 8-25 and following. As they observe in paragraph 8-62, there is no clear guidance as to the criteria judges should apply when invited to make an order under section 39. As they record in para 8-57, in *R v Leicester Crown Court ex p S (a minor)* [1992] 2 All ER 659 at 662 Tasker Watkins LJ in the Divisional Court had said:

“The mere fact that the person before the court is a child or young person will normally be a good reason for restricting reports of the proceedings in the ways permitted by section 39 and it will, in our opinion, only be in rare and exceptional cases that directions under section 39 will not be given or having been given will be discharged.”

10. However, as the editors point out in paragraph 8-58, it is necessary to approach this statement with some caution because in the later case of *R v Lee* [1993] 2 All ER 170 the Court of Appeal drew attention to the fact that nothing in the statutory wording justified the stricture that section 39 reporting restrictions were only to be withheld “in rare and exceptional cases”.
11. Moreover, the law has developed since then, in particular as a result of the passing of the Human Rights Act 1998, which, by section 12, requires the court to have regard to Article 10 (freedom of expression). The Act also requires the court to have regard to the requirements of open justice and respect for private life (Arts 6 and 8).

12. In *Briffett* at page 213 Newman J alluded to Art 10 by observing that the court would have to consider whether there was “a pressing social need” to make an order under section 39.
13. The guidance recently given by the Court of Appeal on anonymity orders applies equally to orders under s.39, as appears from sub-para (3) of the extract cited below. In *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, para 21 Lord Neuberger MR set out the following:
 - "(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.
 - (2) There is no general exception for cases where private matters are in issue.
 - (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
 - (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.
 - (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.
 - (6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less."
14. An order under section 39, such as I have made in this case, interferes less with the principle of open justice and freedom of expression, and is less restrictive, than an anonymity order coupled with an order restricting access to documents on the court file pursuant to CPR Part 5.4. It is therefore a more acceptable alternative to an anonymity order, if the case is one in which some protection is necessary for the child's welfare and private life, and if it is not necessary to make a more restrictive order.
15. In the present case I accept that an order is necessary in order to protect the rights of the Claimant and his immediate family. Although the Claimant is only seven now, time passes quickly, and in eleven years the child will be an adult. Any report of the

present proceedings which identifies the Claimant in a newspaper is, with modern Internet technology, very likely to be almost as readily accessible online in eleven or twelve years' time as it would be if it were published today.

16. One of the purposes of the proceedings for approval of settlements is to make sure that money recovered by or on behalf of the protected party is properly looked after and wisely applied. See CPR Part 21.10 and the notes in the White Book (2010) 20.10.1 as set out in my judgment in *JXF* at paragraph 5.
17. There is a risk that that objective will be defeated if the Claimant is named. When the Claimant becomes an adult the many physical disabilities suffered by the Claimant will result in vulnerability. If the sums of money at the Claimant's disposal as a result of this settlement are readily to be found out on the internet, there will be a risk of the Claimant losing that money to inappropriate friends, fortune hunters or even thieves. It is for that reason that I am satisfied that an order restricting publication of the Claimant's name is necessary in this case.
18. Each case depends on its own facts. Judgments explaining why orders derogating from open justice are made cannot, in the nature of things, set out in any great detail the particular facts which give rise to the need for the order. In some cases greater protection will be needed than in others. On the particular facts of this case I took the view that Counsel was right to put an application for an order under section 39 of the 1933 Act at the forefront of her arguments, and that an order under that section is necessary but also sufficient to meet the circumstances of the case.
19. There is in this case no sufficient general, public interest in publishing a report of the proceedings which identifies the Claimant to justify the resulting curtailment of his right and his family's right to respect for their private and family life, and the risk of defeating the purpose of the proceedings, which is to ensure that the Claimant receives and keeps the money necessary to compensate the Claimant for the personal injuries suffered.
20. It is therefore for these reasons that I made the order that I did.