Reporting the courts

CHILDREN, EXPERTS AND OPEN JUSTICE IN THE FAMILY DIVISION

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The media are rarely made to feel welcome in the Family Division. The corridors of the Queen's Building, where most High Court family cases are heard, are littered with signs prohibiting entry to courtrooms. Journalists seeking comments from those waiting outside courtrooms are rebuffed not just by anxious litigants but also by lawyers so entrenched in the culture of secrecy that they will not even volunteer their own names.

But change is in the air. In two notable recent cases – that of baby Charlotte Wyatt and the battle between David Blunkett and his former lover Kimberley Quinn [1] over access to their child – judges have permitted extensive reporting where this would previously have been unimaginable. Senior Family Division judges told a Constitutional Affairs Select Committee in March 2005 that they thought there should be further openness in the Division. The Committee itself said in its report that a 'greater degree of transparency is required in the family courts'. A government consultation paper in the spring will outline a range of options for reform.

Resistance to this clamour for openness has come particularly from child protection professionals. Many of them fear that moves to permit greater reporting will deter doctors and others, whose evidence is crucial in such cases, from participating. Their concerns have been treated very seriously by judges who have recognised that there is already a dwindling supply of professionals prepared to do such work.

In three recent cases – *Portsmouth Hospitals Trust v Darren Wyatt and Others, Re B* and *BBC v Rochdale MBC* – the courts sought to balance these competing interests. The cases show the increasing awareness of judges to the sensitivities on both sides of the debate.

Portsmouth Hospitals Trust v Darren Wyatt and Others (the Baby Charlotte case)

Charlotte Wyatt was born three months prematurely and, at the time of the hearing, was 10 months old. She had very serious heart and lung problems. Doctors at St Mary's Hospital Portsmouth considered that, given the likely level of her suffering and her poor prospects of recovery, they should not attempt to resuscitate her in the likely event that she were to stop breathing. Her parents, Darren and Debbie Wyatt, disagreed and wanted her kept alive. The Trust went to court to seek a ruling under the inherent jurisdiction allowing it to refuse to resuscitate the child.

Before the Trust issued proceedings, the parents gave an interview to their local newspaper, the Portsmouth News, outlining their horror at the prospect of the Trust doctors allowing Charlotte to die. The following day the story appeared across the national press. The Trust put forward a spokeswoman who gave a brief response to the criticisms. By the time the matter came to court, much information about the child, the parents and the case was therefore already in the public domain, including the identities of those involved.

The parents wanted the trial to be heard in open court. The Trust also wanted the trial in open court, so that they could publicly justify their stance, but were anxious that the identity of the doctors and staff treating Charlotte be kept secret. The expert witnesses, all consultants from a different trust, had no objection to the trial being held in open court but wanted their identities kept secret. However CAFCASS, representing the interests of Charlotte, argued that the child's welfare would be best served by having the matter heard in private.

The approach taken by the judge

Hedley J gave an ex tempore judgment in which he made clear that he was not going to attempt an exhaustive analysis of the legal principles applicable when considering holding Family Division hearings in public. In particular he did not specifically rule whether or not in determining the question the paramount consideration for the court was the welfare of the child. CAFCASS, which advanced this proposition, maintained that the court was on this application determining a question with regard to the child's upbringing, thus engaging the custodial jurisdiction of the court **[2]**. The media applicants contended that at most the court was exercising its protective jurisdiction in which the child's welfare was not paramount. Hedley J said he was inclined to accept CAFCASS's argument, but that the question was in any event academic since he did not consider that an open hearing would compromise the child's welfare.

Hedley J ruled that the proceedings were family proceedings **[3]** and noted that the usual practice of holding such proceedings in private, especially where issues of children's welfare were involved, had been held to be compatible with Article 6 by the Court of Appeal in *Re PB* **[4]**. However, he considered this case to be unusual not just because of the amount of information that was already in the public domain, but also because both the parents and the Trust were content for the trial to be conducted in public.

The judge raised two further matters which he noted were of increasing concern to judges in the Family Division. First, the family courts have faced mounting criticism in the media in part on account of the secrecy surrounding their proceedings. Hedley J referred to the fact that the Court of Appeal had in *Clibbery v Allen* **[5]** endorsed the need to scrutinise more closely than has happened in the past whether a hearing in private can be justified. In *Pelling v Bruce Williams* **[6]** the Court of Appeal had ruled that judges should be prepared to actively consider lifting reporting restrictions in the Family Division, notwithstanding the strong inherited convention of privacy.

Second, the judge echoed the concerns recently expressed by judges and ministers as to the apparently dwindling supply of medical experts prepared to give evidence in cases involving children. He said that within the last few years experts had worked within an increasingly hostile environment and had in some cases been subjected to campaigns of harassment. In this case the medical experts had indicated that they had no objection to giving evidence in open court, but only on condition that an order was put in place to preserve their anonymity. The judge considered that it was appropriate in these circumstances to impose a reporting restriction preventing their identification, as well as the identification of the Trust for which they worked **[7]**.

Hedley J concluded that, having balanced the Article 6 and 8 rights of the child, the Article 8 and 10 rights of the parents and the Article 10 rights of the media the case should be heard in open court. He commented during the hearing that he believed such an order was unprecedented in cases involving children, but was anxious to emphasise the unique set of circumstances that led him to depart from the usual practice. He concluded his judgment by saying that, notwithstanding his ruling, his personal inclination was to preserve the culture of the family courts, by which he presumably meant the culture of privacy (or secrecy) which has become the subject of growing controversy.

Re B[8]

B was a child who was made the subject of a care order after doctors had concluded that she had been abused by her mother. The mother, who was appealing the care order, wished to discuss the case publicly and applied for an order relaxing the restrictions on publication automatically imposed by s.12 of the Administration of Justice Act. No application was made for any proceedings to be in open

court, but issues arose for consideration which were very similar to those in *Wyatt*. Munby J relaxed the restrictions to the extent of allowing her to publish a limited amount of evidence and information, without allowing identification of the parties.

In his judgment Munby J stated that 'open and public debate in the media is essential' to restore public confidence in the family court system and endorsed the administrative directions recently issued by the President of the Family Division encouraging judges to make their judgments in public to meet 'increasing complaints of secrecy' about the courts. He went on **[9]**:

> 'Those who without justification attack the family court system can all too easily do so by feeding the media tendentious accounts of proceedings whilst hypocritically sheltering behind the very privacy of the proceedings which, although they affect to condemn, they in fact turn to their own advantage. It is all too easy to attack the system when the system itself prevents anyone correcting the misrepresentations being fed to the media.'

In *Re B*, as in Wyatt, the experts giving evidence in the case were anxious to ensure their continued anonymity. The BBC, and the mother, wanted the court to allow identification of the expert witness who had concluded that the mother had abused her child. Munby J agreed that there was a

> 'powerful public interest, particularly at a time when public concerns are as great as they are at present, in knowing who the experts are whose theories and evidence underpin judicial decisions which are increasingly coming under critical and sceptical scrutiny.' **[10]**

However he considered that there was also an important public interest in ensuring that the courts address the 'present crisis in child-protection work' which evidence had suggested was caused by 'media attacks on paediatricians'. Having performed what he described as an 'acutely difficult balancing exercise' he concluded that, for the time being at least, the experts in this case should not be identified.

BBC v Rochdale Metropolitan Borough Council**[11]**

The BBC intended to identify social workers involved in a case of alleged child abuse in Rochdale in 1991. In the 1991 wardship case the Judge held that the two social workers carried out interviews with the children at the centre of the case incompetently but did not name them. Several of the children, as adults, waived their privacy and gave interviews to the BBC for a documentary and wanted to name the social workers in question and show footage of the interviews. The council applied for an injunction to restrain the BBC from identifying the social workers on the basis that they and their families would be harmed personally and professionally and they had a reasonable expectation of privacy arising out of their anonymisation in 1991. They also argued that problems of recruitment of social workers in child protection cases would be exacerbated by the naming of experts in such cases.

Ryder J dismissed the application for an injunction, and held that there was nothing inherently confidential or constituting an abnormal physical threat to the social workers that justified interference with the Article 10 rights of the former wards and the BBC. Interference with the social workers' Article 8 rights was legitimate and proportionate, given the public interest in the proceedings and in openness in family proceedings generally. There was no longer any interest of a particular child or children generally in retaining the anonymity of the social workers.

In relation to the assertion that publishing the names of the social workers would exacerbate problems of recruitment, the judge acknowledged that there was a continuing shortage of social work professionals, particularly in child protection, and that there is a public interest in encouraging social workers and others to participate in this work. These factors did not however outweigh the article 8 and 10 rights of the BBC and the former wards in permitting publication.

There were two main factors which differentiated *Rochdale* from *Re B* and led the judge to conclude that, unlike in *Re B*, the experts should be identified. First, the only reason why the judge in 1991 had anonymised the experts in his judgment was to protect the identity of the wards. The wards, now 18 and consenting to identification, no longer needed protection. Second, the focus of the application was

on the damage that publication would cause to the two experts rather than on wider questions of the effect identification may have on recruitment; yet the evidence of likely damage to the experts from publication was far from compelling.

Conclusion
The three cases highlight the tension between two growing but conflicting pressures on family judges: the need to respond to criticisms of secrecy by allowing further openness, and the need to address the concerns of medical professionals increasingly unwilling to perform the work on which the family courts depend. The government is now actively reviewing what further legislative steps need to be taken to respond to pressures for change. Its consultation paper on reform will make interesting reading.

Notes
[1] Blunkett v Quinn [2004] EWHC 2816 (Fam), where Ryder J stated: "I have come to the clear conclusion that having regard to the quantity of material that is in the public domain some of it even in the most responsible commentaries wholly inaccurate, it is right to give this Judgment in public. The ability to correct false impressions and misconceived facts will go further to help secure the Article 6 and 8 rights of all involved than would the court's silence which in this case will only promote further speculation and adverse comment that will damage both the interests of those involved and the family justice system itself"

[2] Kelly v BBC [2001] 1 FLR 197 per Munby J at p.225 G

[3] See s.32 Matrimonial and Family Proceedings Act 1984. The proceedings were not brought under the Children Act 1997 so the automatic restrictions imposed by s.97 of that Act, which prevent identification of any child as being involved in proceedings in which any power under the Children Act may be exercised, did not apply

[4] Pelling v Bruce Williams (Children Cases: Hearings in Public) [2004] EWCA Civ 845

[5] [2002] 2 WLR 1511, per Keene LJ at [119]

[6] Pelling v Bruce Williams (Children Cases: Hearings in Public) [2004] EWCA Civ 845

[7] He also ordered that the child's carers at St Mary's Hospital should not be identified

[8] [2004] Fam 411

[9] at [133]

[10] at paragraph [129]

[11] [2005] EWHC 2862 (Fam)

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