Case No: HQ09X03020

Neutral Citation Number: [2012] EWHC 3279 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

MXB	**Claimant**
- and -	
EAST SUSSEX HOSPITALS NHS TRUST	**Defendant**

- -
- -

Ms E A Gumbel QC (instructed by **Christian Khan**) for the **Claimant**
Mr M Jackson (instructed by **Capsticks**) for the **Defendant**

Hearing dates: 13 November 2012

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Judgment

Mr Justice Tugendhat :

1. In this case Ms Gumbel QC invites me to make an order prohibiting a report of these proceedings which are in terms wider than the form of order which may be granted under the Children and Young Person's Act 1933 ("the 1933 Act") s.39. The claimant is a child. The Defendant does not ask for any reporting restriction for itself, and does not oppose the making of an order relating to the Claimant.

2. In *A Child v Cambridge University Hospitals NHS Foundation Trust* [2011] EWHC 454 (QB); [2011] EMLR 18, [2011] Med LR 247, 120 BMLR 59 I considered the circumstances in which, when approving a settlement of a claim by a minor, the court should restrain publication of the name, or of other information concerning the claimant.

3. The 1933 Act s.39 (as amended) provides:

> "**Power to prohibit publication of certain matter in newspapers.**
>
> (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 not exceeding level 5 on the standard scale."

4. The scope of s.39 was extended by the Children and Young Persons Act 1963, s.57(4) so that that section (and others) now "apply in relation to sound and television broadcasts as they apply in relation to newspapers". But there has been no extension of s.39 to apply to any other form of report, such as one made in the social media or the internet.

5. In the *Cambridge* case the order I made followed the terms of the 1933 Act. It provided that:

> "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".

6. I made that order, rather than an anonymity order, because (as I stated in para 14 of the judgment):

> "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".

7. The first draft of the order that Ms Gumbel asked to make in this case followed the form of the order that I made in the *Cambridge* case, save that after the word "newspaper" there were inserted the words "or other media", in both places where the word "newspaper" occurs. In a revised draft Ms Gumbel put forward the following:

> "AND IT IS FURTHER ORDERED that pursuant to section 39 Children and Young Persons Act 1933 and CPR 5.4C(4) and CPR 39.2(4):
>
> i) the identity of the Claimant must not be disclosed
>
> ii) a non-party may not obtain a copy of a statement of case under CPR 5.4C(1)
>
> as the Court is satisfied that such an order is necessary to protect the interests of the Claimant and his family and there is no countervailing public interest in disclosure."

8. In *LK v Sandwell & West Birmingham Hospitals NHS Trust* [2010] EWHC 1928 (QB) I had made an anonymity order, that is an order under CPR Part 39.2(4) ("The court may order that the identity of any party … must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party …"). 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, too, I made an anonymity order. In cases involving adults an order under the 1933 Act is, of course, not available.

9. In another recent case I was asked by counsel to make an anonymity order in the case of a child. It was submitted to me then, as it is submitted to me in this case by Ms Gumbel, that an order under s.39 of the 1933 Act relates only to a "newspaper report of the proceedings", and not to any other report. Those responsible for the welfare of

the claimant in both cases were concerned that an order under the 1933 Act would not provide sufficient protection.

10. I have since heard a number of approval applications, and in the course of them I have received similar submissions. The first and second such cases were one immediately following this case, *RC v TB*, and a case the next day, *XX v YY,* in each of which Mr Maskrey QC appeared for the claimants. He made applications for anonymity orders under CPR r.39.2(4), and for an order under CPR r5.4C(4) restricting access to the court file.

11. Whereas in 1933, and until recently, the only form in which a report of proceedings was likely to reach the public was by newspaper or broadcasting, today reports of proceedings can be made by any individual posting a report on the internet. And whereas reports in newspapers and broadcasts were ephemeral and difficult to find even a day or two after they had first been published, reports on the internet are easy to find with a search engine, and very difficult to remove.

12. Accordingly, it is submitted, the limitation of s.39 of the 1933 Act to newspaper reports may not only be insufficient, it is also anomalous, in failing to provide for forms of reports to the public that have become technically possible, and now common, in addition to newspapers and broadcasts.

13. It is not necessary in this application for me to decide what is the scope of the 1933 Act, and I do not do so. It is sufficient that I should decide, as I do, that there is force in the argument that s.39 of the 1933 Act may not give the court jurisdiction to prohibit the making of a report otherwise than in a newspaper or a sound or television broadcast. And if that is right, then there would be the risk to the Claimant which gives rise to the concern.

14. Certainly, when I gave the judgment in the *Cambridge* case, I did not have in mind that an order under s.39 might not prohibit reports otherwise than in a newspaper or a sound or television broadcast. Although I referred to the internet at para [15], I did so only in relation to a newspaper archived on the internet.

15. I repeat, as I did in the *Cambridge* judgement that the guidance recently given by the Court of Appeal on anonymity orders applies to orders made on applications under CPR Part 21 for the approval of a settlement. 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."

16. The present case is one where, in spite of the injuries the Claimant has suffered, it is expected that the Claimant will have capacity at the age of 21 years. There is evidence before the court which in my judgment demonstrates that it is necessary that there should be no reporting of the Claimant's name, or other means of identification of the Claimant, in order to prevent the risk of the Claimant becoming the victim of those who would attempt to misuse the funds which the Claimant has been awarded as compensation for injuries. It is not necessary to set out this evidence in this open judgment. 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 the rights of the Claimant and the family 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.

17. The form of order sought by Mr Maskrey differed from that sought by Ms Gumbel, although they were each seeking to achieve a similar result. Mr Maskrey's draft read:

> "AND PURSUANT to s11 Contempt of Court Act 1981, s.6 of the Human Rights Act 1998 and CPR Rule 5.4A to 5.4D and CPR Rule 39.2
>
> IT IS ORDERED that
>
> 1. There be substituted for all purposes of this case, in place of references to the Claimant by name, and whether orally or in writing, references to the letters XX. Likewise, the Litigation Friend shall be referred to as EM and the Defendant YY.
>
> 2. A non-party may not inspect or obtain a copy of any document from the court file without the permission of a

Master. Any application for such permission must be made on notice to the Claimant.

3. A non-party may not obtain any copy statement of case or document from the court file unless it has been anonymised in accordance with this direction and there has been redacted any information which might identify the Claimant, the Defendant or the Litigation Friend.

4. There shall be no publication or other disclosure of any name, address or information tending to identify the Claimant.

5. Permission to apply."

18. In my judgment, if s.39 is not the basis of the jurisdiction for making an order, it is better not to use the wording derived from s.39, as Ms Gumbel's first draft did, and there is no occasion to refer to s.39 at all. It is preferable to follow the words of the applicable provision of the CPR, namely CPR r39.2(4).

19. Accordingly I made the order in the form of Ms Gumbel's revised draft in the present case (but omitting the reference to the 1933 Act), and in the form requested by Mr Maskrey in his case.

POSTSCRIPT

20. By way of comparison, I note that in passing the Contempt of Court Act 1981 and the Defamation Act 1996 Parliament recognised that reports of proceedings otherwise than in a newspaper required recognition. In the Contempt of Court Act 1981 s.4 it is provided that:

> "a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously…"

21. In the Defamation Act 1952 s.7 qualified privilege had been afforded to:

> "the publication in a newspaper of any such report … as is mentioned in the Schedule…"

22. In the Defamation Act 1996, the corresponding section giving qualified privilege is s.15(1). That provides:

> "The publication of any report or other statement mentioned in Schedule 1 …is privileged…"

23. The Contempt of Court Act 1981 and the Defamation Act 1996 simply refer to a report. Neither Act limits the reports to which it relates to reports in any specified medium.

24. The submission made to me in this case is of obvious relevance to the criminal courts in which orders under s.39 of the 1933 Act are commonly made, and I have drawn

this judgment to the attention of those who may be concerned as to the implications of an argument that an order under s.39 may not achieve the effect which those making it intend.