



Neutral Citation Number: [2005] EWHC 1144 (Fam)

Case No: FD05P00944

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 June 2005

Before :

MR JUSTICE MUNBY

Between :

E (by her litigation friend the Official Solicitor)

Claimant

- and -

(1) CHANNEL FOUR

(2) NEWS INTERNATIONAL LIMITED

Defendants

- and -

ST HELENS BOROUGH COUNCIL

**Interested
Party**

Ms Fenella Morris (instructed by Hogans) for the Official Solicitor
Mr Andrew Nicol QC and Ms Aswini Weeraratne (instructed by Simons Muirhead & Burton) for Channel Four
Mr Andrew Nicol QC and Ms Aswini Weeraratne (instructed by Alastair Brett, Legal Manager, Times Newspapers Limited) for News International Limited
Ms Jenni Richards (instructed by Peter Blackburn, Assistant Chief Executive (Legal and Administrative Services)) for the local authority

Hearing dates: 25-26 May 2005

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE MUNBY

This judgment was handed down in private on 1 June 2005 and is now (8 June 2005) handed down in open court.

Mr Justice Munby :

1. In these proceedings the Official Solicitor, joined by St Helens Borough Council, seeks an interim injunction to restrain the broadcasting by Channel Four Television Corporation of a film and the publication by the Sunday Times of an article about Pamela. She is a woman of 32, who they assert lacks the capacity to consent to what Channel Four and the Sunday Times are proposing. They invoke the inherent jurisdiction of the court.

Pamela

2. Pamela was born in 1972. From a very early age she suffered from neglect and emotional abuse. She was taken into care by the local authority. Whilst in care she met Judy, who at that time was employed as a play therapist at a children's hospital which Pamela attended. From 1984 to 1989 Pamela was placed at a Rudolph Steiner school. In 1987, following the breakdown of her previous foster placement, Pamela was placed with Judy and her then husband as foster carers. From 1989 until 1999 Pamela was placed by the local authority in a residential establishment. In 1999 she was removed by Judy who took her to live in her own home. She remained there until her current package of care was set up, following extensive negotiations with the local authority, initially by Judy and subsequently from February 2002 by the Official Solicitor. Pamela now lives in her own house, supported by a large round-the-clock care support team. I have not been told exactly how the team is funded and managed, but as I understand it the funding comes from the local social services and health authorities under the community care legislation – the National Assistance Act 1948, the Chronically Sick and Disabled Persons Act 1970 and the National Health Service and Community Care Act 1990. Although she does not live in Pamela's house, Judy continues to play what is on any view a central role in Pamela's life.
3. Pamela has a learning disability (mental impairment within the meaning of the Mental Health Act 1983) and has additionally been diagnosed as suffering from DID – dissociative identity disorder. DID, in the view of the Official Solicitor's expert, Dr Milne, is an extremely controversial diagnosis which is probably best considered to be a disorder of personality rather than a mental illness.
4. Someone suffering from DID manifests on occasions as different "personalities". In Pamela's case there are four personalities in addition to Pamela herself: "Sandra", "Andrew", "Margaret" and "Susan". As can be seen on the Channel Four film, when Pamela is in a dissociative state she switches between herself and her other "personalities", each apparently interacting with the other(s). Thus, for example, the film shows "Andrew" trying to kiss Judy and "Sandra" trying to stop "Andrew" behaving in this way by slapping him – each of these roles being simultaneously played out, often with different facial expressions and in different tones of voice, by Pamela herself.
5. I should refer at this stage to three professionals who play, or have played, an important part in Pamela's life:
 - i) Dr Roger Banks is a Consultant Psychiatrist in Learning Disability employed by Conwy & Denbighshire NHS Trust Adult Learning Disability Service. In October 1999 he produced a psychiatric report on Pamela and thereafter

provided periodic support for Pamela, Judy and the care team for the next two years. The last time he made a formal clinical assessment of Pamela and her mental state was in May 2002, but he has since kept in touch with her care team informally.

- ii) Dr Valerie Sinason (she is a Doctor of Philosophy, not a medical doctor) is a Consultant Psychotherapist and Psychoanalyst. As a Consultant Psychotherapist at the Tavistock Clinic she convened the Learning Disability Workshop for twenty years. She is Consultant Psychotherapist in Learning Disability at St Georges Hospital Medical School Psychiatry of Disability Department and Director of the Clinic for Dissociative Studies. Since September 2000 she has been treating Pamela for intensive weekly psychotherapy.
- iii) Graeme Farquharson is a social worker and group-analytic psychotherapist. At one time he was Director of Peper Harow, the well-known residential therapeutic community. Since January 2001 he has attended what he calls the 'Project' (the carefully designed therapeutic environment which facilitates day-to-day life for Pamela) one day a week as a consultant, the focus of his work being with the team rather than with Pamela directly.

The filming

- 6. In July 2002 Judy, together with some of the other people involved in Pamela's care, approached Steve Boulton, a film producer, apparently wanting to publicise what they believed was mismanagement and maltreatment of Pamela by the local authority's social services department. In November 2002 Mr Boulton contacted a professional colleague, David Modell, an independent filmmaker and photographer whose principal occupation for the last four years has been making documentary films for Channel Four. Mr Modell had a number of telephone conversations with Judy during November and December 2002 and met Pamela and her care team on 19 December 2002. He met Pamela and her care team, including Mr Farquharson, on two further occasions between then and early March 2003.
- 7. Mr Modell's understanding, based on those meetings and discussions, was that Pamela was not, as he puts it, under a care order, and was therefore free to make her own decisions about important aspects of her life, and that there was an ongoing dispute with the local authority about her care package in which the Official Solicitor, having replaced Judy in that role, was acting as Pamela's litigation friend. In his witness statement dated 18 May 2005 he says:

“The involvement of the Official Solicitor did not strike me as being significant, because I was reassured that their role in Pamela's life was limited solely to matters associated with the care dispute. I was not surprised that Pamela had a litigation friend, as she clearly needed assistance in dealing with complicated legal matters.”
- 8. Mr Modell went to see Dr Sinason to seek her views about making a documentary about Pamela. He was, he says, interested to know if it would be helpful to Pamela

and if she could give meaningful consent to a programme being made. He understood Dr Sinason's view to be that:

“if carried out responsibly the kind of film I was proposing could be extremely helpful for Pamela and for others. She told me that Pamela had the intellectual ability to give informed consent.”

9. In his witness statement Mr Modell describes his thinking at that time and his approach to the project:

“By March 2003 I was satisfied that there was potentially an important and powerful film to be made about Pamela which could be both helpful to her and contribute to public understanding of the condition from which she suffers and issues around mental health generally. Pamela struck me as an extremely impressive woman, who was carrying with her a legacy of abuse and failings in the care system.

I believed that by telling her story in an honest and sensitive way, the public would see a person who, although damaged by awful experiences in childhood, was determinedly attempting to come to terms with her past and move forward in her life in an inspiring way. I also felt that by communicating to the viewer that her condition and the extreme behaviour which accompanies it, is linked to past experiences I could make it understandable and help enlighten the public about those within our society who might frequently be seen as simply ‘mad’.

I was well aware by this stage that Judy was in constant dispute with the local authority and held strident views about their perceived inadequacies. It was clear that she hoped the intended programme would reflect her views. I explained that it would not be my intention to focus on this in the proposed programme, and that she must understand that I had to have editorial independence to determine the direction and content of the documentary.”

10. Mr Modell carried out some trial filming of Pamela over three days from 20-22 March 2003. With Pamela's approval a compilation of the material he had shot was shown by Mr Modell in April 2003 to Kevin Sutcliffe, commissioning editor at Channel Four. Mr Sutcliffe indicated that he would support the project and take the first steps toward commissioning the documentary. At subsequent meetings between Mr Modell, Mr Sutcliffe and Jan Tomalin, head of legal and compliance at Channel Four, it was agreed to draw up a production protocol for what they recognised was “clearly going to be a very sensitive film” and also to engage a psychiatric consultant to offer advice during the filming and editing process. In due course Dr Judith Trowell, a Consultant Child & Adolescent Psychotherapist at the Tavistock Clinic, was appointed as psychiatric consultant for the production. As it happens she was aware of Pamela, having assessed her as a teenager in the late 1980s.

11. Filming of Pamela resumed over two days in May, five days in June and three days in July 2003. The programme was commissioned in early July 2003.
12. On 14 August 2003 Judy, with the support of the production company, wrote to the solicitors acting for the Official Solicitor in the ongoing dispute about the care package. They responded on 11 September 2003, enquiring when the documentary was likely to be shown and if it was going to deal with issues relating to the dispute with the local authority.
13. In the meantime, in late August 2003 Mr Modell had joined Pamela on her holiday in Greece, filming her at the beginning and end of her time there. He filmed her again on her birthday, 11 September 2003.
14. In early September 2003 Mr Modell met Dr Trowell. He showed her some of the film. He describes her as being “supportive in a number of ways”, adding:

“She reassured me that the film, as described, would not, as far as she could tell, be harmful or exploitative of Pamela. She said that, as far as she could tell from material she had watched, the process of filming was not harmful to Pamela. She also helped me to understand Pamela’s condition and the nature of her relationship with Judy.”
15. According to Mr Modell, he kept both Mr Farquharson and Dr Sinason informed of the progress of the production. He understood that they continued to be supportive of the film. Dr Sinason, he says, “was explicit that Pamela was enjoying the filming process and benefiting from it.”
16. On 25 September 2003 Mr Modell wrote to the solicitors acting for the Official Solicitor. The next day (26 September 2003) they wrote to Dr Elizabeth Milne. She is a Consultant Psychiatrist in Learning Disabilities at Rampton Hospital who is very experienced in this kind of case. As recently as 11 September 2003 she had assessed Pamela as part of the preparation for the ongoing community care case. Dr Milne responded on 30 September 2003. On 3 October 2003 Mr Modell wrote to the local authority. On 13 October 2003 the Official Solicitor’s solicitors, responding to the letter from Mr Modell, wrote to Steve Boulton Productions. Referring to the advice they had received from Dr Milne, they expressed the Official Solicitor’s view that Pamela’s participation in the documentary was not in her best interests and that filming should therefore immediately cease. They sought confirmation within 24 hours that filming would cease, failing which they would have no option but to consider legal action.
17. Ms Tomalin, head of legal and compliance at Channel Four, responded on 14 October 2003. In the course of her letter she wrote:

“Pamela’s carers and advisers have been fully involved in and consulted on the filming process and have been supportive of the making of a documentary about Pamela. We are referring to Valerie Sinason the Psychiatrist specialising in multiple personality disorders who has treated Pamela, I understand, at a weekly double session for around 4 years and Judy ... , an

occupational therapist who has been involved in Pamela's care for 20 years, having fostered her in 1988, Pamela's primary carer since 1999. They are both of the opinion that Pamela is able to give informed consent to the filming and broadcast of the programme and that the filming and broadcast of such a documentary would be in her best interests. In addition, Graeme Farquharson, a Psychodynamic Psychotherapist, who regularly advises on issues relating to Pamela's care, is also fully aware of the filming. He has expressed no concern either about Pamela's capacity to consent or her welfare."

Stating that there were in fact no immediate plans to resume filming with Pamela in the next few days, Ms Tomalin said that she was prepared to provide an undertaking not to commence such filming without giving five days written notice, providing that, in return, there was an undertaking not to make any application to the court for an order to prevent filming or broadcasting without the same prior written notice. Those mutual undertakings were confirmed on 17 October 2003.

18. In the event the break in the filming continued, with the exception of one day's filming in December 2003, until July 2004. According to Mr Modell the suspension of filming upset Pamela, who was very angry and talked about having her "freedoms taken away" but agreed to assist the process of getting the filming restarted by allowing both side's experts to assess her.
19. On 13 November 2003 the Official Solicitor's solicitors wrote to Ms Tomalin informing her that arrangements were being made for a more detailed assessment of Pamela's capacity to be carried out by Dr Milne and seeking an undertaking that there would be no filming of Pamela until Dr Milne had been able to complete her assessment. Ms Tomalin replied with the necessary assurance on 17 November 2003, asking to be supplied with a copy of Dr Milne's final report as soon as it was completed.
20. On 11 December 2003 a formal letter of instruction was sent to Dr Milne by the Official Solicitor's solicitors. She saw Pamela again on 15 December 2003 and again on 16 February 2004. She produced her first formal report on 26 April 2004. In the meantime, and in accordance with arrangements which had been agreed in correspondence between the Official Solicitor's solicitors and the solicitors who by now were acting for Channel Four, Mr Modell had carried out some further filming of Pamela on New Year's Eve 2003.
21. On 24 May 2004 Professor Anthony Holland, holder of The Health Foundation Chair in Learning Disabilities in the Department of Psychiatry at the University of Cambridge, produced a report on Pamela. It had been commissioned by Channel Four.
22. On 4 June 2004 the Official Solicitor's solicitors wrote to Channel Four's solicitors indicating that filming could resume if the Official Solicitor had editorial control of the film. On 16 June 2004 Channel Four's solicitors replied, pointing out that to cede editorial control to the Official Solicitor would place Channel Four in breach of the Broadcasting Act 1996 and its licence from Ofcom. They indicated, nonetheless, that Channel Four and Steve Boulton Productions remained willing to enter into a

dialogue about the film and, “given the unusual circumstances”, were prepared to show the Official Solicitor the edited film before it was transmitted and to consider, in good faith, any reasonable concerns about harm to Pamela expressed at that stage.

23. Following further correspondence, in the course of which Channel Four sent the Official Solicitor’s solicitors a copy of Professor Holland’s report of 24 May 2004, Channel Four’s solicitors wrote to the Official Solicitor’s solicitors on 6 July 2004 giving notice, in accordance with the undertaking of 14 October 2003, of their intention to recommence filming on 12 July 2004. On 14 July 2004 Channel Four’s solicitors sent the Official Solicitor’s solicitors a copy of the production protocol. In the event, and following further correspondence, the date for recommencing filming was extended until 19 July 2004. On 19 July 2004 Channel Four’s solicitors wrote to the Official Solicitor’s solicitors with Channel Four’s undertaking that it would not broadcast the final programme within 14 days of the date that the Official Solicitor and Dr Milne viewed the film.
24. The Official Solicitor took no steps to prevent further filming in the meantime. Between July and October 2004 Mr Modell carried out another six days filming, starting to edit the programme in November 2004 and producing a rough cut at the end of January 2005. During the course of the editing Mr Modell decided to make no mention of the ongoing dispute between the local authority and Pamela’s care team, though he was conscious that this was bound to cause conflict with Judy who was, he says, desperate that her views about social services should be broadcast. He also showed a rough version to Dr Trowell who again reassured him, saying that, as far as she could see, the film was sensitively made, correct and not harmful to Pamela.
25. According to Mr Modell it had always been agreed that he would show Pamela, Judy and Dr Sinason a rough cut of the finished programme and respond to any comments they might make either about factual accuracy or in relation to Pamela’s welfare. He therefore undertook a detailed consultation process before a final cut of the film was shown to Channel Four.
26. On 30 January 2005 the rough cut was shown to Pamela, Judy and Dr Sinason. Mr Farquharson and some of Pamela’s other carers were also present, as was Dr Banks. After seeing it, Pamela said that she liked it and would like it to be on TV. Dr Sinason said that she was entirely satisfied that Pamela had benefited from the process of making the film and that it was in her best interest. She said that in her view Pamela clearly consented to it having been made and to the intended broadcast. According to Mr Modell the general response by the group to the viewing was very positive. A number of mainly minor points were raised, one being the unhappiness of Judy and some other members of the group that no reference was being made to the dispute with the local authority. The only substantive issue related to a scene towards the end of the film showing Judy and Pamela which both of them wanted changing. There were no other parts of the film that Pamela said she did not like or asked to be changed.
27. Following that showing, Mr Modell made several changes in the film in the light of the various points that had been made, though he did not add anything about the dispute with the local authority. Pamela, Judy, Dr Sinason and two members of the care team viewed the amended version of the film on 25 February 2005. Judy asked that some of one of the final scenes in the film should be cut and was supported in this

by Pamela. Mr Modell agreed to make further cuts in this part of the film. On 2 March 2005 Pamela, Judy, Dr Sinason, Mr Farquharson and two other members of the care team viewed the last three scenes in the film to see that the agreed changes had been made. Ms Ann Whitla Syz was also present. She is a Child Psychotherapist who assists in the supervision of Judy's clinical work as a Trainee Child Psychotherapist. She has no professional responsibility for Pamela and was present to ensure that Judy's work as a trainee Child Psychotherapist would not be compromised by the contents of the film.

28. According to Mr Modell, everyone was satisfied that the remaining alterations had been properly made. There was, he says, a very positive atmosphere following the viewing. Dr Sinason said that she thought the film was "just right." The following week Pamela, Judy, Ms Syz and two members of the care team viewed the complete film.
29. On 8 March 2005 the Official Solicitor's solicitors, having discovered that the Sunday Times was intending to publish an article on Pamela, wrote to the editor drawing his attention to her alleged lack of capacity, asserting that "prior to the publication of any article about [her], approval must first be obtained from the Official Solicitor on her behalf" and seeking confirmation "that you will be consulting the Official Solicitor for approval prior to publication." On 21 March 2005, after some further correspondence, the Sunday Times wrote indicating that they would not publish without giving the Official Solicitor notice.
30. In the meantime, on 9 March 2005 Dr Milne and Professor Holland viewed the film. On 11 March 2005 it was viewed by the Official Solicitor's solicitors and counsel and a member of the Official Solicitor's office.
31. On 15 March 2005 the Official Solicitor's solicitors wrote to Channel Four's solicitors seeking either an undertaking not to broadcast the film until the negotiations for Pamela's community care package had been concluded or, if that was not acceptable, until 14 days after Dr Milne had had an opportunity to re-examine Pamela. On 16 March 2005 Channel Four's solicitors wrote (the letters apparently crossing in the post) confirming that they would give two weeks notice of the broadcast date. They repeated that in a letter dated 24 March 2005 in which they made clear that Channel Four was not prepared to give either of the undertakings that had been sought in the letter dated 15 March 2005.
32. During the post production period Mr Modell has made a number of further very minor changes in the film, including for example some small commentary changes and obscuring the faces of children and other people who appear in photographs.

The proceedings

33. On 15 April 2005 Channel Four's solicitors wrote to the Official Solicitor's solicitors confirming the transmission date of the programme as 8 June 2005 at 9 pm and indicating that "information about the programme will be sent to the press (including listings magazines) by Channel Four two weeks in advance of this date." They added that there would be a feature in the Sunday Times magazine the previous Sunday, 5 June 2005, authored by Mr Modell.

34. On 13 May 2005 the Official Solicitor gave the national media notice of his intended application to the court via the Press Association's CopyDirect service in accordance with the *President's Practice Direction (Applications for Reporting Restriction Orders)* [2005] 2 FLR 120 and the *Practice Note (Official Solicitor: Deputy Director of Legal Services: Cafcass: Applications for Reporting Restriction Orders)* [2005] 2 FLR 111. The same day he attempted to issue the proceedings, a CPR Part 8 claim form seeking injunctive relief against both Channel Four and News International Limited (the parent company of Times Newspapers Limited, publishers of the Sunday Times) and an application notice seeking interim relief. The injunction sought, which was intended to have effect during Pamela's lifetime, was in wide terms and would have prevented both the broadcast of the film and the publication of the story. Unhappily, and because, as the Official Solicitor tells me, the court misplaced the papers, the proceedings were not in fact issued until 19 May 2005, the very day when the interim application came on before Kirkwood J. That application had been fixed on the basis of a belief that the feature article in the Sunday Times magazine due to be published on 5 June 2005 would have to go to press by around 20 May 2005. Kirkwood J was unable to hear the matter – and in any event some of the urgency had gone because it appeared that the Sunday Times was not going to press with the story that week. The matter came on for hearing before me on 25 May 2005. Ms Fenella Morris appeared for the Official Solicitor and Ms Jenni Richards for the local authority. Channel Four and the Sunday Times were both represented by Mr Andrew Nicol QC and Ms Aswini Weeraratne.
35. As requested by the parties I had previously watched the film – in what is, as I understand it, for all practical purposes the form in which it is intended to be broadcast. The hearing commenced at about 12 noon and continued until 1 pm. It resumed at 1.30 pm and continued without a break until about 6.45 pm. It was essential to finish the hearing that day because I was told that, if the film was *not* to be enjoined, Channel Four would need to put the arrangements in place for the planned broadcast on 8 June 2005 no later than 12 noon the following day, 26 May 2005. It will be noticed that the hearing lasted somewhat over 6 hours. Even allowing for interruptions from the bench this was significantly longer than the half day for which the hearing had been listed and longer than the agreed estimate of 3-4 hours shown on the application notice.
36. On the following morning, at 10.30 am I announced my decision, though without at that stage giving my reasons. I said that I was not prepared to grant an injunction restraining the broadcasting of the film in the form in which I had seen it. I indicated that I would be prepared to consider granting an injunction in narrower form (for example, to prevent 'door-stepping' or the publication of identifying or other information additional to that contained in the film) if requested to do so by the Official Solicitor. Later the same day Ms Morris appeared in front of me and said that the Official Solicitor was not making any such application. As I understood it, this was because he had been unable to obtain funding for such an application from the Legal Services Commission. I refused the Official Solicitor permission to appeal.
37. I now (1 June 2005) hand down judgment. I have in the meantime again watched the film.

The legal framework

38. Ms Morris seeks to restrain the broadcast of the film and the publication of the article essentially on the grounds that they will involve the public dissemination of intimate personal, private, domestic and more particularly medical information about Pamela in a manner which will cause her harm. Referring in particular to *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, Ms Morris asserts that this material is protected both by the domestic law of confidence and by that part of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which guarantees respect for private life. She points to Lord Nicholls of Birkenhead's observation at para [12] that

“A proper degree of privacy is essential for the well-being and development of an individual.”

She points to the recognition by Dame Elizabeth Butler-Sloss P in *X (A Woman Formerly known as Mary Bell) v O'Brien* [2003] EWHC 1101 (QB), [2003] 2 FCR 686, at paras [21]-[22], relying on the decisions of the Strasbourg court in *Botta v Italy* (1998) 26 EHRR 241 and *Bensaid v United Kingdom* (2001) 33 EHRR 10, that private life includes the psychological integrity and mental health of the individual.

39. In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, it was common ground (see para [23]) that the information published by the newspaper fell into five categories: (1) the fact of Miss Campbell's drug addiction; (2) the fact that she was receiving treatment; (3) the fact that she was receiving treatment at Narcotics Anonymous; (4) the details of the treatment – how long she had been attending meetings, how often she went, how she was treated within the sessions themselves, the extent of her commitment, and the nature of her entrance on the specific occasion; and (5) the visual portrayal of her leaving a specific meeting with other addicts. It was also common ground (see para [24]) that in the ordinary course the information in all five categories would attract the protection of Article 8. But it was accepted by Miss Campbell that her own conduct precluded her from claiming protection for categories (1) and (2). By a majority the House of Lords held that she was nonetheless entitled to protection in relation to categories (3), (4) and (5). Ms Morris, understandably, relies upon the ruling in relation to categories (4) and (5).
40. Ms Morris points to the decisions of the Strasbourg court in *Z v Finland* (1997) 25 EHRR 371 and of the House of Lords in *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033, as demonstrating the very substantial individual and public interests in maintaining the privacy of medical records. And in this connection she prays in aid what Baroness Hale of Richmond said in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at para [146]:

“The Court of Appeal in this case held that the information revealed here was not in the same category as clinical medical records. That may be so, in the sense that it was not the notes made by a doctor when consulted by a patient. But the information was of exactly the same kind as that which would be recorded by a doctor on those notes: the presenting problem was addiction to illegal drugs, the diagnosis was no doubt the same, and the prescription was therapy, including the self-help

group therapy offered by regular attendance at Narcotics Anonymous.”

She submits that the same principles apply to an individual’s social services records and to their social care and treatment, particularly where the two are closely connected in a community setting.

41. Ms Morris refers to what Lord Hope of Craighead said in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at para [98]:

“Where the person is suffering from a condition that is in need of treatment one has to try, in order to assess whether the disclosure would be objectionable, to put oneself into the shoes of a reasonable person who is in need of that treatment. Otherwise the exercise is divorced from its context ... The context was that of a drug addict who was receiving treatment. It is her sensibilities that needed to be taken into account. Critical to this exercise was an assessment of whether disclosure of the details would be liable to disrupt her treatment.”

In similar vein she points to Lord Steyn’s observation in *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591, at para [25], that “it is necessary to measure the nature of the impact” on the claimant.

42. Ms Morris submits, referring to *Keenan v United Kingdom* (2001) 33 EHRR 913 and *Z v United Kingdom* (2002) 34 EHRR 97, that public bodies – including of course the court – owe heightened obligations to those who by reason of mental disorder are vulnerable and least able to assert their own interests. As an illustration of this approach she points to the decision of Dame Elizabeth Butler-Sloss P in *In re A Local Authority (Inquiry: Restraint on Publication)* [2004] EWHC 2746 (Fam), [2004] Fam 96, at paras [98]-[99] holding that the balance came down in favour of protecting vulnerable adults by preventing publication of a local authority report:

“[98] ... They have had considerable and distressing disruption of their lives and are, as set out in the report, vulnerable. A period of peace, stability and a chance to settle down again after the very real upset of their lives is threatened by the likely intense media cover if this report is published. They are all under some disability but not such, as far as I know, as to prevent possibly all of them, but certainly at least 4 of them, from understanding the impact of press and other media intrusion. That intrusion would affect their daily lives and would be very likely to be disruptive, distressing and contrary to the need for them to settle back in the home. They clearly have rights under article 8 which are engaged and would be breached if the report is published. I am satisfied that publication of the report would be deeply damaging and detrimental to their welfare.

[99] The factors supporting the rights of the vulnerable adults under article 8 have to be balanced against the right of the local authority to publish under article 10. I have found that it would be lawful on their behalf to interfere with the article 10 right of freedom of expression. I have considered very carefully whether to exercise the court's discretion in favour of the vulnerable adults would be a disproportionate response to the contents of the report, having regard to the importance attached to article 10 by section 12 of the Human Rights Act 1998. I am also fully aware of the factors in favour of not restraining publication of volume 1. I am satisfied, however, that the balancing exercise comes down in favour of recognising the importance of the protection of the vulnerable adults by the granting of a declaration to that effect."

43. She also, and importantly in the context of the present case (for significant parts of the film are of Pamela in public places), submits that whilst an individual who appears in public may be taken to have consented to have others see him in public, this does not mean that he has impliedly consented to the broadcasting of pictures of himself in public. She points to what Lord Hoffmann said in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at paras [73]-[75]:

"[73] ... The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent ...

[74] But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large. In the recent case of *Peck v United Kingdom* (2003) 36 EHRR 719 Mr Peck was filmed on a public street in an embarrassing moment by a CCTV camera. Subsequently, the film was broadcast several times on the television. The Strasbourg court said, at p 739, that this was an invasion of his privacy contrary to article 8: "the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995."

[75] In my opinion, therefore, the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information."

Lord Hope of Craighead said much the same at paras [122]-[123].

44. Turning to Article 10, Ms Morris submits that the public interest in freedom of expression should not permit unwarranted interference in the lives of the incapable or

vulnerable. She refers to what Sir Stephen Brown P said in *Nottingham City Council v October Films Ltd* [1999] 2 FLR 347 at p 357:

“whilst preserving the principle of the freedom of the Press in a democratic society, it is nevertheless in the public interest that there should be discouragement and prevention of interference with, and exploitation of, vulnerable children by the media and that there should be support for the vital role of caring professionals working in the difficult field of delinquent children who are ‘at risk’.”

45. Pointing to what Baroness Hale of Richmond said in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at para [149], she asks rhetorically, How are the political and social life of the community, or the intellectual, artistic development of individuals assisted by the broadcast and publication proposed in the present case?
46. Now this is all very well, says Mr Nicol. Indeed he does not really take issue with any of Ms Morris’s submissions so far as they go. Nor do I. But, he says, and I agree, that the present case is more complex than the cases to which Ms Morris has referred.
47. In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, the claimant was a competent adult who wished to restrain publication. The case accordingly turned on a simple balancing of the claimant’s claim under Article 8 to the protection of her private life, against the media’s rights under Article 10 to receive and impart information. In *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591, the claim was brought on behalf of an eight year old child in care by his guardian, who wished to restrain publication in order to protect the child. Again, the case turned on a simple balancing of the claimant’s claim under Article 8 to the protection of his private life, against the media’s rights under Article 10. The same can be said of *In re a Local Authority (Inquiry: Restraint on Publication)* [2004] EWHC 2746 (Fam), [2004] Fam 96, where the Official Solicitor brought the claim on behalf of vulnerable adults to restrain publication of a local authority report. Again, the case turned on a simple balancing of the claimants’ claims under Article 8 to the protection of their private life, against the local authority’s rights under Article 10. Neither in *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591, nor in *In re a Local Authority (Inquiry: Restraint on Publication)* [2004] EWHC 2746 (Fam), [2004] Fam 96, was there any divergence between the claimant and those bringing the claim on the claimant’s behalf. In neither of those cases did the claimant himself seek or want publication.
48. The present case is quite different, for Pamela wishes the film to be broadcast. There is a stark conflict between the claimant and the litigation friend. The case is, therefore, more analogous to cases such as *Re W (Wardship: Discharge: Publicity)* [1995] 2 FLR 466, *Kelly v British Broadcasting Corpn* [2001] Fam 59 and *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949,¹ where teenage children wanted to tell their stories to the media in circumstances

¹ I agree with Mr Nicol that those parts of my decision in *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949 relevant here are not affected by the subsequent decisions of the House of Lords in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, and *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591. Nor did Ms Morris suggest otherwise.

frowned upon by their adult carers. In these circumstances, as I pointed out in the latter case, the child, whatever the adults around her are saying, may be seeking not merely to rely upon her own right under Article 10 to impart information to the media but also upon a rather different aspect of the private life guaranteed by Article 8.

49. In this connection Mr Nicol draws attention to what I said at paras [35]-[36]:

“[35] Article 8 thus protects two very different kinds of private life: both the private life lived privately and kept hidden from the outside world and also the private life lived in company with other human beings and shared with the outside world. For, as the Strasbourg jurisprudence recognises, the ability to lead one’s own personal life as one chooses, the ability to develop one’s personality, indeed one’s very psychological and moral integrity, are dependent upon being able to interact and develop relationships with other human beings and with the world at large. And central to one’s psychological and moral integrity, to one’s feelings of self-worth, is the knowledge of one’s childhood, development and history. So amongst the rights protected by Art 8, as it seems to me, is the right, as a human being, to share with others – and, if one so chooses, with the world at large – one’s own story, the story of one’s childhood, development and history ...

[36] The personal autonomy protected by Art 8 embraces the right to decide who is to be within the ‘inner circle’, the right to decide whether that which is private should remain private or whether it should be shared with others. Art 8 thus embraces both the right to maintain one’s privacy and, if this is what one prefers, not merely the right to waive that privacy but also the right to share what would otherwise be private with others or, indeed, with the world at large. So the right to communicate one’s story to one’s fellow beings is protected not merely by Art 10 but also by Art 8.”

50. I went on at para [37] to observe that:

“there may well be cases where a child wishes to go to the media – wishes, in other words, to avail himself of what he asserts are his Art 10 and Art 8 rights to make public that which would otherwise be private – whilst his parents, or the court, may think that his interests are better served by asserting his right under Art 8 to keep such matters private.”

It was for this reason that at para [38] I distinguished between (a) Angela’s rights under Articles 8 and 10, as she wished to assert them, to tell her story to the world through the medium of The Mail on Sunday, (b) Angela’s rights under Article 8, as Angela’s parents or the court might wish to assert them on her behalf, to keep her private life private and to preserve and protect the family life she enjoyed with her parents and other members of her family and (c) the newspaper’s rights under Article

10 to obtain the story that Angela wished to tell them and to publish her story in The Mail on Sunday.

51. How is such a difference of view to be adjusted? In *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949, at para [37] I said this:

“A child is, of course, as much entitled to the protection of the European Convention – and specifically of Arts 8 and 10 – as anyone else. But ... the personal autonomy guaranteed by Art 8 (and, I would add, by Art 10) is necessarily somewhat qualified in the case of a child. For, depending on the circumstances, decision-making power may rest not with the child but with the child’s parents or even with the court.”

The same approach, it seems to me, is in principle appropriate in the case of a vulnerable adult who, although lacking capacity, nevertheless has wishes and feelings which she is anxious to articulate.

52. In *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949, I found that Angela had ‘Gillick capacity’ and that her views were therefore determinative notwithstanding that in law she was still a child. As I said at paras [56], [59]:

“Angela, in my judgment, is of an age, and has sufficient understanding and maturity, to decide for herself whether that which is private, personal and intimate should remain private or whether it should be shared with the whole world ... The decision ... is for Angela: it is not for her parents, the local authority or the court.”

53. Now that was an easy case because I found that Angela *did* have capacity. How is the court to resolve matters if a child or an adult who lacks capacity nonetheless has strong wishes and feelings which conflict with what her carers believe to be in her best interests? The answer can only be by having recourse to the court’s inherent jurisdiction: in the case of a child, the court’s inherent *parens patriae* or wardship jurisdiction, and, in the case of an adult who is or may be incompetent, the court’s inherent jurisdiction in relation to mentally incapacitated adults.
54. This accords with the approach of Dame Elizabeth Butler-Sloss P in *In re a Local Authority (Inquiry: Restraint on Publication)* [2004] EWHC 2746 (Fam), [2004] Fam 96. The President reviewed a number of the previous cases on the inherent jurisdiction, including *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, *In re S (Hospital Patient: Court’s Jurisdiction)* [1996] Fam 1, *Re A (Male Sterilisation)* [2000] 1 FLR 549, *In re S (Adult Patient: Sterilisation)* [2001] Fam 15 and *In re F (Adult: Court’s Jurisdiction)* [2001] Fam 38, before concluding at para [97]:

“I am satisfied, therefore, despite the absence of any previously decided cases, that I can properly exercise the inherent jurisdiction of the High Court in order to consider whether I should restrain publication of volume 1 of the report. In the

previous cases about adults under a disability, the issues have been the lawfulness of the proposed course of action and considerations as to their best interests. That cannot be the correct approach in the present case. The application of the inherent jurisdiction would seem more appropriately to be treated as the exercise of a “protective jurisdiction” rather than a “custodial jurisdiction”. In considering whether the publication of the report would be contrary to the welfare of the vulnerable adults, I propose to approach the issue by balancing their rights under article 8 against the rights given under article 10 and the emphasis given by section 12 of the Human Rights Act 1998. In my judgment I have to balance those competing rights in the same way as I did with regard to the children.”

55. I respectfully agree with the President’s analysis. The simple fact is that we have come a long way since the decision in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1. The courts have created and now exercise what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established *parens patriae* or wardship jurisdiction in relation to children. Indeed, the President’s reference in the passage I have just quoted to the “protective” and “custodial” jurisdictions is a straight borrowing from wardship: see *S v McC, W v W* [1972] AC 24 and *In re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1.

56. I should, however, add a number of observations. The first relates to the circumstances in which the inherent jurisdiction can be exercised. As I said in *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] 2 WLR 953, at para [100]:

“An adult either has capacity [in relation to a particular matter] or he does not. If he does, then, at least in relation to that issue, the Family Division cannot exercise its inherent declaratory jurisdiction, because it is fundamental that this jurisdiction can be exercised only in relation to those who lack the relevant capacity.”

If Pamela has capacity then, just as in the case of a ‘*Gillick* competent’ child, her wishes are determinative. The court cannot exercise the inherent jurisdiction and, unless Pamela herself wishes to apply for an injunction (and she does not), it follows that the court equally cannot grant any injunction. As Mr Nicol correctly submits, the court in a case such as this only has jurisdiction to make an order if it has first decided that Pamela lacks capacity to take a definitive decision on her own behalf. So Ms Morris has, in principle, to establish that Pamela lacks the relevant capacity.

57. But the fact, if fact it be, that Pamela lacks the relevant capacity does not mean that her wishes and feelings simply fall out of account. As Mr Nicol correctly says, even if the court concludes that Pamela lacks capacity it must nonetheless pay close regard to her undoubted wish for the broadcast to proceed. If it is elementary that the inherent jurisdiction is exercised by reference to the incompetent adult’s best interests, it is equally elementary that in determining where such an adult’s best interests truly lie it is necessary, just as in the case of a child, to have regard to his wishes and feelings

insofar as he is able to express them: consider section 1(3) of the Children Act 1989 and section 4(6)(a) of the Mental Capacity Act 2005. (The Mental Capacity Act 2005 is not yet in force but, as the Mental Capacity Bill: Draft Code of Practice correctly recognises, many of the provisions in the Act are based upon existing common law principles.) So the task of the court, assuming Pamela lacks capacity, is to form a view as to whether her best interests require, as she would wish, that an injunction is *not* granted or whether, as the Official Solicitor would have it, her best interests require that an injunction *is* granted. The court is required to decide where her best interests lie, not, I emphasise, because that is the ultimately determinative question – as the President said in *In re a Local Authority (Inquiry: Restraint on Publication)* [2004] EWHC 2746 (Fam), [2004] Fam 96, at para [97], it is not – but because that is the test by which the court, exercising the inherent jurisdiction, decides whether it is in Pamela’s interests that the film should or should not be broadcast, whether, as it were, it is in her interests to maintain her privacy or in her interests to waive that privacy and share with the world what would otherwise be private.

58. If the court concludes that Pamela’s best interests do not require the grant of an injunction, then that is the end of the matter. There is no conflict between her wish to tell her story, her best interests and the media’s wish to broadcast and publish. It is only if there is a conflict between Pamela’s best interests and the plans of the media that one moves on to the third and final stage of the inquiry. But at this stage Pamela’s best interests are not determinative. There is a balancing exercise. The court is no longer exercising its inherent jurisdiction in relation to Pamela but rather its ordinary jurisdiction under the Convention as between claimant and defendant. Accordingly it has to balance the competing interests: Pamela’s interest under Article 8 (as ascertained by the court), and therefore her right under Article 8 to keep her private life private, and the defendants’ rights under Article 10.
59. I agree therefore with Ms Morris that in a case such as this there are in principle three questions which have to be considered:
- i) Does Pamela lack capacity? If yes, then
 - ii) Is it in Pamela’s best interests that the film not be broadcast? If yes, then
 - iii) Do Pamela’s interests under Article 8, and the public interest in the protection of the privacy of the vulnerable and incapable, outweigh the private and public interests in freedom of expression under Article 10.

As Ms Morris puts it, the court, if satisfied that Pamela lacks capacity, must first ask what is in her best interests. If the court is satisfied that the broadcast is not in her best interests then it should identify the extent to which her Article 8 rights are engaged and/or breached by the broadcast and then go on to balance those considerations against those invoked under Article 10 by the defendants.

60. There is no difference between Ms Morris and Mr Nicol as to the proper approach to each of these three questions.
61. As an adult, Pamela is presumed to have capacity unless the contrary is established. It is for the Official Solicitor to prove that she does not have capacity, not for Channel Four to prove that she does: *Sheffield City Council v E* [2004] EWHC 2808 (Fam),

[2005] 2 WLR 953, at para [18] (compare section 1(2) of the Mental Capacity Act 2005). The question of capacity is always issue specific: *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] 2 WLR 953. The test of capacity is that laid down in *Re MB (Medical Treatment)* [1997] 2 FLR 426 (compare section 3 of the Mental Capacity Act 2005).

62. The assessment of an incapable patient's best interests involves taking into account not just medical but a wide range of ethical, social, moral, emotional and welfare considerations: *In re S (Adult Patient: Sterilisation)* [2001] Fam 15. It is facilitated by the adoption of the 'balance sheet' referred to by Thorpe LJ in *Re A (Male Sterilisation)* [2000] 1 FLR 549.
63. The proper approach to the Convention balancing exercise is that identified by Lord Steyn in *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591, at para [17]:

"The interplay between Articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457. For present purposes the decision of the House on the facts of *Campbell v MGN Ltd* and the differences between the majority and the minority are not material. 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."

64. It is no longer necessary to go through all the old case-law. As Lord Steyn said at para [23]:

"The House unanimously takes the view that since the Human Rights Act 1998 came into force in October 2000, the earlier case-law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the European Convention. This is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt. This is not to say that the case-law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the European Convention provisions."

65. I have said that these are in principle the issues which have to be addressed. But in the present case what is being sought is an interim injunction pending the full hearing of a matter which, if it is to be finally resolved, will, as Mr Nicol contends, require the cross-examination of a number of witnesses. In this context section 12 of the Human Rights Act 1998 is therefore important, for section 12(3) provides that in the circumstances with which I am presented I must not grant relief:

“so as to restrain publication before trial unless ... satisfied that the applicant is likely to establish that publication should not be allowed.”

66. The meaning of the crucial word “likely” was explained by Lord Nicholls of Birkenhead in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, at paras [20], [22]:

“[20] ... “likely” in section 12(3) cannot have been intended to mean “more likely than not” in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that “likely” should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of “real prospect” but permits the court to dispense with this higher standard where particular circumstances make this necessary.

[22] ... Section 12(3) makes the likelihood of success at the trial an essential element in the court’s consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant’s prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success “sufficiently favourable”, the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably (“more likely than not”) succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be

so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.”

67. So my approach to the three questions which I identified in paragraph [59] above is not that Ms Morris has to establish her case. She merely has to satisfy me that it is “likely” that she will do so at trial.

The evidence

68. It is a striking – and I have to say a surprising – fact that, with the exception of Dr Milne’s expert reports the Official Solicitor has filed *no* evidence of any kind in support of his application. He has filed no factual evidence as to various matters which, as we shall see, Dr Milne has taken into account in her evaluation of Pamela’s best interests – for example in relation to the suggestion that the broadcast of the film may imperil the care package or the continuing discussions between the Official Solicitor and the local authority. He tells me that since the information he obtained was very similar to that obtained by Dr Milne he did not consider it appropriate to file further evidence. I do not find this explanation particularly compelling. If there was factual evidence underpinning Dr Milne’s concerns about the impact of the film on the future of the care package it would have been of great assistance to the court to hear it from the Official Solicitor, as the person acting as Pamela’s litigation friend not merely in the present proceedings but also in relation to her community care needs (see further my observations in paragraph [109] below). The Official Solicitor has not even interviewed Pamela since the film was completed with a view to ascertaining and reporting to the court on her wishes and feelings. He tells me that a visit to see Pamela had been arranged for 19 May 2005 (but did not take place because of the hearing before Kirkwood J) and that further efforts to arrange to arrange a visit have met with resistance. I accept all that, but the fact remains that the present proceedings were launched without the Official Solicitor having himself first ascertained Pamela’s wishes and feelings in relation to the completed film and in circumstances where, in the event, I have not had the benefit of material which is usually of great assistance. Nor has the Official Solicitor formulated for the assistance of the court his own evaluation of where Pamela’s best interests lie.
69. The local authority has filed evidence in the form of a statement by the Director of Adult Social Care and Health. Some of this, and more particularly much of the documentation attached as an exhibit to the statement, deals with the vulnerable adult abuse investigation which is currently investigating certain aspects of Judy’s behaviour to Pamela. I do not propose to discuss this material and it is probably better that I do not. It does not impinge significantly on anything I have to decide. Moreover, the investigation has yet to be concluded and both its findings and the material it has uncovered may feature in the proceedings under the inherent jurisdiction which Ms Richards told me the local authority is shortly to commence with a view, as it would see it, to better regulating Pamela’s care and making what it calls “firm and stable plans for Pamela’s future.” For present purposes the most important concerns identified by the local authority if the film is broadcast are as follows:

- i) Fear as to how Pamela will react to the broadcast.
- ii) Fear that there will be adverse reaction from the public to Pamela and/or Judy, which may impact adversely on Pamela and on her ability to live as “normal” a life as possible.
- iii) Concern that the broadcast may have a detrimental effect on the ability to recruit staff to work as part of Pamela’s care team: “Potential staff may have a legitimate concern over working with Pamela if they feel they are going to be subject to media and public scrutiny.”
- iv) Concern that it may have a detrimental impact on the ongoing vulnerable adult abuse investigation: “the effect the programme or article may have on staff and their willingness to engage in the investigation process.”

I should mention that the local authority has not in fact seen the film.

70. In addition to a number of expert reports the defendants have filed evidence in the form of witness statements from Mr Modell and Mr Sutcliffe. Mr Sutcliffe’s evidence describes Channel Four and its statutory remit and explains the relevant regulatory framework. It also deals with a number of other matters which there is no need for me to refer to. The more important evidence is from Mr Modell.

71. I have already made extensive reference to Mr Modell’s evidence. There are two other parts of it which I think I ought to refer to. Describing his documentary technique he says:

“The filming approach I use is largely observational. I work entirely on my own with a small camera, in a way that does not seek to influence events. The intention is to develop a relationship with the subject and become a part of their environment and to ‘tell the story’ of the subject through watching how they interact with the world, and where appropriate, some interview. For this kind of approach to be successful, filming has to take place over some considerable time and record important events in the subject’s life. It could be said that the intention is to develop, through the filmmaking process, a relationship between the viewer and the subject.”

72. I think I should also quote what he calls his conclusion:

“I am entirely satisfied that we have made a powerful and important film. One which achieves the objectives of being helpful to Pamela and contributing to society’s understanding of issues around mental health generally, and specifically the much misunderstood condition from which Pamela suffers.

I am aware that Pamela’s views often reflect those of Judy and that she is influenced by Judy. With this in mind I have consistently sought to verify with Valerie that it is truly Pamela’s wish to have the film made and broadcast. Valerie has

assured me this is the case and Pamela is consistently clear about it. I have been further reassured in this because during the later stages of filming and particularly the editing and viewing stages our relationship with Judy became very fraught. Over the months between November 2004 to March 2005 Judy regularly threatened to withdraw from the film, concerned about how she might be portrayed. This intention was never mirrored by Pamela, who throughout this period, and, indeed, from the start of the production was forthright and unambiguous in her desire for the film to be made and broadcast.

The film has been made over an exceptionally long period of time, because there has been such extensive thought given to issues relating to Pamela's welfare. The consultation process, which followed, was utterly unprecedented in my experience, and is testament to our desire to produce a programme which Pamela and those around her feel respects her dignity and does justice to her and her story.

I simply would not have embarked on this project if I felt that it would be harmful to Pamela, and I have, at all times, sought to maintain her best interests – relying on advice from independent experts and from the professionals involved in her care.

I believe Pamela is proud of the programme, which she refers to as 'my film'."

The expert evidence

73. I have reports and letters from various experts: Dr Milne (report dated 26 April 2004, letters dated 11 March 2005, 21 March 2005 and 13 May 2005), Professor Holland (reports dated 24 May 2004, undated (but following his viewing of the film on 9 March 2005) and 18 May 2005 and statement dated 23 May 2005), Dr Sinason (letter dated 18 May 2005), Mr Farquharson (letter dated 15 November 2003 and statement dated 18 May 2005), Dr Trowell (statement dated 18 May 2005), Ms Syz (statement dated 18 May 2005) and Dr Banks (letter dated 24 May 2005).
74. It is convenient to consider first the expert evidence in relation to capacity and then the evidence in relation to best interests.

The expert evidence – capacity

75. Dr Milne's formal letter of instructions, as I have said, was dated 11 December 2003. It invited both an assessment of Pamela's capacity, by reference to the test in *Re MB (Medical Treatment)* [1997] 2 FLR 426, and an assessment of her best interests, by reference to what had been said by Thorpe LJ in *Re A (Male Sterilisation)* [2000] 1 FLR 549 and in *In re S (Adult Patient: Sterilisation)* [2001] Fam 15. Dr Milne saw Pamela on 11 September 2003, 15 December 2003 and 16 February 2004. She has not seen her since. She viewed the film on 9 March 2005.

76. Understandably, perhaps, the focus of Dr Milne's assessment in her first report was as to whether Pamela had the capacity not merely to consent to the process of filming but more particularly to understand the nature of the editorial process and the full implications of the fact that she would not have editorial control over what was broadcast. That is no longer relevant to the issue of capacity. The question of capacity, as I have said, is always issue specific. The process of filming has now concluded, as has the editing of the film. The only question today is whether Pamela has capacity to consent to the broadcast of the film in the form in which she saw it in March 2005. That was not a question addressed by Dr Milne in her first report. Importantly, however, she did make clear that Pamela's capacity in relation to filming was not consistent and had improved when she saw her in February 2004.
77. Dr Milne has not seen Pamela since February 2004. Basing herself on how Pamela had presented then, and on the two previous occasions when she saw her, Dr Milne's view, as expressed in her letter dated 21 March 2005, is that "on neither occasion did she fully understand the likely negative consequences of her personal details and the details of her treatment becoming known to the public." Asked specifically by the Official Solicitor's solicitor in a letter dated 12 May 2005 whether Pamela has capacity to consent to the film being broadcast, Dr Milne replied in her letter dated 13 May 2005, referring to how Pamela had presented in 2004, that "she did not appear to understand the possible negative consequences of broadcast, both in terms of how she may be viewed by others but also the possible effect that the broadcast may have on the extremely protracted negotiations about her care package."
78. Professor Holland has seen Pamela once, in the spring of 2004. In his first report dated 24 May 2004 he expressed the opinion that the extent of Pamela's intellectual impairment and learning disabilities is mild and likely to be largely consequent upon her life experiences, that her intellectual functioning and any learning difficulties are not of such severity that by themselves they would result in significant incapacity with respect to decision-making, and that in many aspects of her life Pamela has the capacity to make decisions for herself. He questioned whether Pamela fully understood the implications of not having editorial control. More relevantly to the issue as it has now crystallised, he said:
- "I am not satisfied that she fully appreciates ... that it is possible that, when shown, she could be perceived by those who watch it in a negative light. I am not fully satisfied that she appreciates that she will have only limited influence about exactly when and how often the documentary is shown or who will watch it ... I concluded that on the balance of probabilities on the occasion I saw her, whilst she did have capacity to decide about whether the filming should continue, it was less certain she had the capacity to decide about the larger issue – that of the resultant documentary."
79. Professor Holland saw no reason to change his views after seeing the film in March 2005. He said that having seen Pamela in the film she appeared fully to understand that she was being filmed and he formed the impression that she would have been able to express her view if there were any parts that she did not wish to be shown.

80. Dr Sinason has seen Pamela very frequently and at regular intervals since September 2000. She liaised with Mr Modell during the filming process (see paragraphs [8] and [15] above). She has watched the film together with Pamela on three occasions (see paragraphs [26]-[28] above). She has not provided a formal assessment of Pamela's capacity but in her letter dated 18 May 2005 said this:

“However, complex analytic tools were not needed to gauge her final reaction, as she was so openly and deeply moved and integrated. She was profoundly pleased at being accurately perceived and shown. All her personalities also felt acknowledged.

She was able to think about what the public response might be as well as her own response. She said if people did not like the programme they could turn it off and if they spoke to her in the street and did not like her she could walk away with her team. She knows perfectly well the way she is perceived in public whenever she goes out and for her the television programme is not breaking a secret. Indeed, it is opening her life up in a way she considers helpful.”

81. Mr Farquharson has been familiar with Pamela's circumstances and regularly involved with her care since January 2001. He too liaised with Mr Modell during the filming process (see paragraphs [6] and [15] above). He watched the rough cut of the film with Pamela in January 2005 and part of the film again with her in March 2005. He first expressed his views about Pamela's capacity in his letter dated 15 November 2003. I think I should quote the relevant passage in full:

“This is clearly not straightforward (both in regard to P and generally to those with learning disabilities). I am not a specialist in this field, but I understand that modern practice considers capacity on a “decision-specific” basis. It would be true to say that P does not have unfailingly evident capacity to consent, but it is equally true that it is not evident that that capacity is entirely absent. It is the working style of the project to be as open as possible with P to ensure that she is fully appraised regarding matters which concern her, including the politics surrounding the project. In a context of safety and trust, this is done sensitively, offering (in “bite-size chunks”) as much complexity as can be managed, and in regularly re-visiting key matters at moments of stability and engagement. This approach derives from three sources – 1) a belief that it is right and proper that P be apprised of everything which affects her life; 2) the knowledge that historically the approach of institutional care has often been one of benign paternalism, making decisions on behalf of individuals without involving them or seeking their view, frequently with disastrous results; and 3) by this means, facilitating the emergence of personal agency and encouraging it where it exists. It is in this spirit of openness that the subject of a film has been approached with P

and it is my view that, with regard to this decision, she had (and has) sufficient understanding for it to be meaningful.”

82. In his statement dated 18 May 2005 Mr Farquharson added this:

“As someone with a Dissociative Identity Disorder in the context of a Learning Disability, Pamela’s self-presentation can be disconcerting to some (at least initially) – now lucid, now dissociated, now ‘distracted’, now lucid ... To those who know Pamela well, this kind of rhythm is familiar and it is entirely possible to get far beyond a surface impression of incompetence: her capacity for reflection and judgment is far greater than imagined or perceived by many professionals who pass through Pamela’s life, usually with one or two brief meetings. Such workers, usually concerned with assessment/ review/ comment – and there have been very many of these over the years – will usually encounter a Pamela who is quite reasonably guarded. Given circumstances where she feels safe (psychologically and physically), with people whom she trusts, and where complex ideas can be approached at a manageable pace in appropriate language, Pamela can be relied upon to express her thoughts clearly on what is best for her. With regard to the filming, she was enthusiastic from the earliest explorations of the idea. She quickly established a good rapport with the film-maker. (This is significant. In her early life, Pamela had much experience of neglectful and abusive adults and she has well developed antennae for discerning those who might ‘do her harm’.) Thus she engaged with the process, asked questions about it, received answers and explanations and was well able to ‘tell off’ the director if she felt something or other was not right. Thus, haste was made extremely slowly, in an openly collaborative style. It was clear that if there was disquiet about the film-making, any sense of exploitation or misrepresentation, then she would withdraw from it.”

83. Dr Trowell has not had face-to-face contact with Pamela since the late 1980s, her role having been to act as psychiatric consultant for the production. She has expressed no views about her capacity.
84. Ms Syz has no professional involvement with Pamela, her involvement, as I have said, being with Judy. She watched the film twice while Pamela was present. In her statement dated 18 May 2005 she says that Pamela struck her as able to pass some very perceptive comments about the film and about her portrayal in the film. She reacted with some pride and pleasure to the film and in the view of Ms Syz “appeared to be able to consent to the film being shown because she appeared to be capable of understanding what was going on in the film.”
85. Dr Banks, as I have said, watched the film with Pamela on 30 January 2005. In his letter dated 24 May 2005 he is appropriately cautious about expressing any detailed assessment of Pamela’s capacity, since he has not made a specific direct examination and assessment of her. However, he commented that at the screening “Pamela

appeared to be content for the programme to be shown, was excited at the prospect and gave it her full attention throughout.” He continued:

“At no point did she appear distressed or disturbed by the programme and from her comments spoken aloud appeared to comprehend both the images and the narrative as being a realistic portrayal of herself and her relationship with her carers.”

The expert evidence – best interests

86. Dr Milne readily accepts that Pamela is a person who would readily be identifiable within her community as a person with learning disabilities in addition to a degree of emotional difficulties. As she rightly says (and this was borne out by my viewing of the film) this would be very evident if for no other reason than the fact that members of her care team accompany her for all her activities. Accordingly, says Dr Milne, “I have no difficulty in her being identified to a potentially wider audience as such.” Dr Milne also accepts that not to allow the film to be broadcast would “undoubtedly” cause Pamela distress.
87. Dr Milne nevertheless is of the view that the broadcast of the film would not be in Pamela’s best interests. Her reasons, as set out in her first report, can be summarised as follows:
- i) Pamela will be identified as a person suffering from DID. This is a controversial diagnosis and is likely to lead to comment on the veracity of her symptoms which is in turn likely to distress her, particularly if it results in criticism of those to whom she is attached such as Judy and Dr Sinason.
 - ii) Pamela is likely to be identified as “mad” or mentally ill.
 - iii) Judy also is likely to be identified as “mad”. If so, this is likely to be distressing to Pamela because of the nature of their relationship.
 - iv) What Dr Milne calls the breach of Pamela’s confidentiality concerning her condition, her history of abuse and her present care and treatment:
 - a) may cause Pamela to be distressed in future at realising that information about her history of abuse is in the public domain;
 - b) may cause Pamela to be adversely affected by any negative reaction of those identified as her abusers (for example her mother); and
 - c) will make it more difficult for those arranging her care to recruit staff and manage her care in the future;
 - v) Publication of details of the very extensive and expensive package of community care provided for Pamela is likely to bring negative pressure to bear on the local health and social services authorities to reduce the package and expenditure.

- vi) Broadcast of a film about Pamela's relationship with Judy will hamper or compromise the vulnerable adult abuse investigation which, as I have said, is currently investigating certain aspects of Judy's behaviour to Pamela. It is said that one complainant has already indicated that he is unwilling to give further evidence in this context.
88. Those were Dr Milne's concerns in April 2004 and before she had viewed the film in March 2005. Her current concerns seem to be somewhat more limited. As I read her letters dated 11 March 2005, 21 March 2005 and 13 May 2005, her concerns now focus more on issues (ii), (iv)(c), (v) and (vi). In particular Dr Milne is concerned that the current negotiations will be "considerably hampered if not irreparably damaged" if the details of how Pamela lives and is cared for come into the public domain and that the vulnerable adult abuse investigation may be compromised.
89. Professor Holland in his initial report, whilst recognising the possible negative outcomes if the film was to be broadcast, was of the view that it was in Pamela's best interests to show it, giving what he called "particular emphasis" to her own wish that it should be. He added this important point:
- "Given my view that such a course of action is unlikely to be harmful and is in her best interests, there is also the broader issue relating to how the public can be helped to understand more about the consequences of childhood abuse and the complexity of mental health problems. The recent Government White Paper on Learning Disabilities (Valuing People) made specific reference to the inclusion of people with learning disabilities in wider society."
90. Having seen the film in March 2005, Professor Holland in his undated second report said that "there is nothing that I've seen in the video that in my view is likely to do harm to [Pamela]."
91. Having seen the letters from Dr Milne dated 11 March 2005, 21 March 2005 and 13 May 2005, Professor Holland was asked to comment on her views. He did so in a further report dated 18 May 2005. He differed from Dr Milne's assessment of the possible impact of the film on the ongoing negotiations for the care package and on the ongoing vulnerable adult abuse investigation. He described the film as "a fair representation of brief moments in [Pamela's] life" and said that as such, whilst it might lead the local authority to question the nature of the care being provided by Judy, that was likely to be of benefit rather than harm to Pamela, for "if there was concern about the strategies shown on the film, then it can only be to [Pamela's] benefit that these are examined by people with the skills to do so" and the film "could be of benefit to her in the sense that it could inform, in a positive way, this assessment." In relation to possible adverse comments, whether about Pamela or Judy, or possible criticisms from members of her family, Professor Holland's view was that they were "unlikely to be of a nature or severity that could cause harm. I believe that [Pamela] is aware of the possibility of such criticisms and this issue, by itself, does not in my view argue against showing the film." He was unable to see how the film would harm the vulnerable adult abuse investigation: "if anything, it might help inform the investigation." Overall, as I understand what he is saying, Professor Holland remains of the view that transmission of the film is unlikely to cause Pamela

harm and that, given her wishes in the matter, it is in her best interests that it be shown.

92. Dr Sinason in her letter of 18 May 2005 made the following comments:

“The film not being shown would have a major detrimental impact on her as she sees it as part of her human rights to have her story told – even though the programme does not detail the institutional abuse she alleges which she would have liked in it. Today was her usual Wednesday session and she made the following comment, which I asked her permission to send to you.

“If the Judge does not understand the film is important the people won’t have a chance to understand about Pamela’s life and DID and then I will be sad and it will be awful and they won’t understand my human rights and I will blink my tears”.

Pamela’s whole life has been a struggle to be heard and have her feelings and needs acknowledged. For her, this film has paid non-exploitative attention to her and has been a very healing part of her last year in contrast to her fearfulness and lack of trust of social services and the official solicitor’s office. Sadly, any injunction against this film will not just hurt her for the wiping away of her wishes, but also for the feeling that she can not gain justice either for the past, or for the present and maybe, most damagingly of all, for the future.”

93. Mr Farquharson, in his letter dated 15 November 2003, made a number of important points about the possible consequences for Pamela. Responding to Dr Milne’s views, he wrote:

“1) one might infer from this that P does not actively live *in* the world, where she might already have to manage difficult people and difficult responses to her. Of course in reality she does. She is out and about in her local community – in parks, in shops, in cafes and in bars. She travels to London every week negotiating a flight and her way through two major airports. This year alone she has travelled to Italy and to Greece. All of these outings are carefully considered and managed – from a risk perspective – and that includes managing awkward or hostile responses

2) the film will bear witness to her daily struggle to overcome earlier adversity; and this idea of “bearing witness” is of fundamental importance to people who have endured trauma, usually in private away from the protection of public gaze. (I might add that a consequence of her experience of abuse and trauma is that P has nothing to learn about ridicule and hostility. It has been her life’s experience. Being seen to

function in a variety of settings, amidst people whom she trusts, affords at least the possibility of asserting personal dignity and pride.)

3) related to the above, a sensitive portrayal of P and her ‘otherness’, locating her in the context of her history and her life experience, could be an important explanatory and educational document, bringing a marginal individual to life in a humane and respectful manner.”

94. Having watched the film with Pamela in January 2005 and again, in part, in March 2005, Mr Farquharson elaborated these views in his statement dated 18 May 2005:

“On both occasions, she was relaxed, attentive and wholly engaged with the portrayal of herself and her life. At no time was she distressed by what she was watching. Rather, she took a certain (appropriate) pride in this representation of her. (Remember that in recent months there have been TV films about women with DID – one dramatisation, one documentary – so there was/is a wider context for her television appearance. It is not freakish, abusive or disabling.) Moreover, there was a quality of her having a chance to ‘put her side of (her) story’. Very often, when people have endured severe abuse or trauma, they speak of their lives having been stolen and much of their later efforts is to re-claim their lives. One of the functions of the film is to sweep away the cloak of secrecy which has surrounded Pamela’s life. She is already ‘out in the world’ in very significant ways and she knows the range of responses she can expect to encounter there – a television film has nothing new to put to her in that regard. These responses simply need to be managed (and are managed) as part of her external reality.

For the above reasons, if the film were not to be shown, it would have an acutely distressing effect on Pamela. It would underline that she is to be a passive recipient of what others deem to be ‘good’ for her. It would serve to tell her that, whatever she might think, she has to be protected from herself. It would tell her that her story is unfit for portrayal; and it would lock her forever into this secretive ‘bubble’ where she can never bear witness to what has happened to her. All of these would be significant contributors to constraining and undermining the very real psychological, emotional and social development which she has achieved in recent years.”

95. Dr Trowell has watched the final film with Mr Modell and Mr Boulton. Her view, as set out in her statement dated 18 May 2005, is that the film seemed to be a reasonable and balanced documentary and did not appear to be doing anything damaging or detrimental to Pamela.
96. Ms Syz, having watched the film with Pamela, says that if it were not shown it would confirm Pamela’s view that she is not worth anything and not worth taking the trouble

over. “I think it would be harmful to her if the film were not shown because she has invested a great deal of trust and time with it and clearly likes and trusts the people at Channel 4 who have made the film.”

97. Dr Banks, having watched the film with Pamela, commented as follows in his letter dated 24 May 2005:

“I believe it is important for Pamela’s ongoing development and working her way through past traumas that she can have the opportunity to make her personal story heard by others and not for it to be hidden and suppressed and thus invalidated.

At present I do not believe that the showing of this documentary would be in itself harmful to Pamela or against her best interests. The potential support and understanding that it may bring from a public that has a curiosity for such public telling of personal stories of tragedy or suffering may be to her benefit. I believe it is unlikely that Pamela would be subjected to any greater public disapproval or adverse interaction than she is likely to receive at present when she is taking part in everyday activities and sometimes displaying emotional and behavioural difficulties in the same.”

The film

98. I have watched the film twice. I do not propose to describe its contents in any great detail: it has to be watched. It runs for a little under 50 minutes. It contains scenes both in Pamela’s home and in public (for example in a supermarket and at airports) both in this country and in Greece. It shows a number of scenes of Pamela in a dissociative state, switching between herself and her other “personalities”. To a layman who has never seen this before it is disturbing. The film shows Pamela taking medication. It also contains scenes where Pamela’s sister, K, describes in distressing detail the starvation, and the physical, sexual and emotional abuse, which she says they and their other siblings suffered at home during their early years. There are scenes featuring Judy, some showing her in what some viewers might think of as an ‘odd’ light. Although this is not the real theme of the film there is implied criticism of the local authority’s handling of the case many years ago when the children were much younger. There is no criticism of what the local authority is currently doing – as we have seen, Mr Modell was not prepared on this topic to go along with Judy’s agenda – although there is, albeit in passing, reference to the fact that the care team consists of about 20 people and that the annual cost to the local social services and health authorities of the care package is of the order of £500,000.
99. The film is about Pamela. It is not a film about the local authority, let alone an attack on the local authority. It is, in my view, a serious attempt to explore Pamela’s predicament and to explain it to the public in an educative and informative way. The ‘tone’ of the film is neither prurient nor exploitative. It takes Pamela seriously as a human being in her own right, showing her in a dignified and thinking light. Although much of what it shows is, on any view, unusual and, as I have said, is in some respects disturbing, the film does not put Pamela on show, nor does it, as it were, invite the audience to mock or ridicule or laugh at her or treat her as a freak. On the contrary it

seeks to inform the viewer and invites the viewer to understand her, sympathise with her and empathise with her. It is, if one chooses to use such terminology, a responsible piece of serious documentary film, not a cheap piece of sensational journalism. The purpose of the film is education, not entertainment. It raises issues of public importance. It is, on the face of it, a valuable contribution to an important public debate on issues which too often are swept under the carpet in fear or embarrassment.

Discussion – capacity

100. The question, as I have said, is whether the Official Solicitor has satisfied me that it is “likely” he will establish at trial that Pamela does not have the capacity to consent to the broadcast of the film. In my judgment he has failed to meet that test.
101. I have not, of course, had the opportunity of seeing any of the experts cross-examined. I have to make do as best I can by evaluating the differing views expressed in their various reports and letters. One thing I think is clear. Even taking Dr Milne’s report at its highest it is far from obvious that Pamela lacks the relevant capacity. Taking all the evidence in the round the question of whether she lacks capacity is certainly debateable.
102. The Official Solicitor can point to Dr Milne’s views and also, to a certain extent, to what Professor Holland says. And they, as Ms Morris correctly pointed out, are not merely eminent psychiatrists; they are the only experts who have formally assessed Pamela with a view to coming to a conclusion on the question. As against that, neither of them has seen her for some time, neither had the opportunity of observing her reaction to viewing the film, and their knowledge of Pamela is based on much more limited exposure to her than in the case, for example, of Mr Farquharson and Dr Sinason.
103. As against that there is a sizable body of evidence – including some of what Professor Holland says – suggesting that Pamela does indeed have capacity to decide whether the film should be broadcast or, putting it at its lowest, casting real doubt on the Official Solicitor’s assertion that she lacks capacity. (I put it this way because, as Mr Nicol was at pains to point out, it is for the Official Solicitor to establish lack of capacity, not for the defendants to prove capacity.) I have in mind, in particular, though not of course ignoring the evidence of Ms Syz and Dr Banks, the evidence of Mr Farquharson and Dr Sinason. They, of all the experts, are the people who have known Pamela most intensively and over the longest continuous periods. And Dr Sinason, Mr Farquharson, Ms Syz and Dr Banks all had the advantage of being able to observe Pamela’s reaction to viewing the film. Mr Farquharson’s views in particular are compelling, based on a sensitive ability to ‘read’ Pamela built up over a long time.
104. Doing my best to evaluate all the evidence, and in particular the specific passages which I have set out in paragraphs [76]-[85] above, I have concluded that, whilst the Official Solicitor may succeed at trial in establishing that Pamela lacks capacity to consent to the broadcast of the film, he has failed to satisfy me that it is “likely” – more likely than not – that he will do so. I put it this way because I agree with Mr Nicol that this is the appropriate test to apply in this particular case. As he correctly submitted, there are no particular circumstances in this case – indeed Ms Morris was

not able to identify any circumstances – to justify departing from the general approach indicated by Lord Nicholls of Birkenhead in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, or requiring me to accept a lesser degree of likelihood as sufficient.

Discussion – best interests

105. That alone is sufficient to dispose of the application. But there is a second, and quite independent reason, why this application fails and why it must be dismissed. Even if the Official Solicitor had managed to satisfy me on the issue of capacity I would still and in any event have concluded that he fails in relation to best interests.
106. The question here is whether the Official Solicitor has satisfied me that it is “likely” he will establish at trial that it is in Pamela’s best interests that the film not be broadcast. In my judgment he has wholly failed to meet that test. And he has failed, I should emphasise, by a margin such that on this point I would have found against him whether the test of likelihood is “more likely than not” or even a lesser degree of likelihood.
107. It is obvious from the expert and other evidence summarised in paragraphs [69] and [86]-[97] above that there is an unusually wide range of factors that have to be taken into account in this case in seeking to evaluate where Pamela’s best interests lie. Some point in one direction, some in the other. Some are weighty, others less so. I have taken them all into account. I have also taken into account my own impressions having not merely watched the film but also considered Pamela’s behaviour as I was able to observe it on screen.
108. Putting matters rather generally, the arguments in favour of the view that it is in Pamela’s best interests that the film *not* be broadcast are those marshalled by Dr Milne and by the local authority. The arguments in favour of the contrary view are those marshalled by Ms Syz, Dr Trowell and, more particularly and compellingly, by Professor Holland, Dr Banks, Dr Sinason and Mr Farquharson. I need not rehearse them all again. They are set out in the passages in their evidence I have quoted above.
109. Both Dr Milne and the local authority attach considerable weight to their concerns about the possible consequences of a broadcast (and attendant media publicity) on the future of Pamela’s care package and on the ongoing vulnerable adult abuse investigation. I have to say, not least having myself watched the film twice, that I cannot attach the same weight as they do to either of these considerations. The factual basis for their concerns is limited. As I have already observed, the Official Solicitor has filed no evidence on these matters – indeed no evidence at all – and, as Mr Nicol fairly observed, both the local authority’s evidence and Dr Milne’s report are short on detailed factual evidence to support the rather general case being made. Moreover, I think I am entitled to assume that public authorities will do their duty and will not allow themselves to be deflected by adverse media comment or other pressures. Nor is there anything I have read or seen to suggest that there is a real possibility that the broadcast of the film and any attendant media attention is going to exacerbate the already considerable difficulties in recruiting staff to care for Pamela.
110. This goes some way to weakening the case being put forward by the Official Solicitor. But the simple fact, as it seems to me, is that even taking what Dr Milne and

the local authority are saying at face value, the defendants are able to mount a formidable case for saying not merely that the Official Solicitor has failed to show that the broadcast is likely to be contrary to Pamela's best interests but, on the contrary, that there are the most compelling arguments in favour of the view that the broadcast of the film will actually serve and promote her best interests. I have in mind in particular the emphasis that Professor Holland appropriately places on Pamela's own wishes and feelings, the distress which Dr Milne, Dr Sinason and Mr Farquharson all agree Pamela will suffer if the film is not shown, and what in my judgment are the other very important and compelling points made by Dr Sinason, Mr Farquharson and Dr Banks. I also bear in mind that Pamela already has much experience of coping – seemingly fairly successfully despite all her difficulties – with the way in which the outside world treats her.

111. In my judgment the balance appears to come down fairly heavily in favour of the defendants. I put it this way because these are all matters which may appear rather differently at the end of a trial after full cross-examination of the witnesses. But the simple fact, as it seems to me, is that the Official Solicitor has a much more compelling case to meet than Ms Morris would have me accept. He may succeed at trial, but I have to say I think it pretty unlikely. More specifically, he has wholly failed to persuade me that it is “likely” – in any relevant sense of the word – that he will succeed on this issue at trial.

Discussion – the balancing exercise

112. In these circumstances the balancing exercise does not arise. I merely observe that were it necessary to embark upon the balancing exercise there would have to be put in the scales on the one side the many important factors correctly identified by Ms Morris: not merely Pamela's best interests in general but also, and importantly, her interests in maintaining her privacy and the confidentiality of her medical and social services records and the details of her condition and its treatment. But on the other side one would have to put, not merely Pamela's (albeit on this hypothesis incompetent) wishes and feelings and the distress she will undoubtedly suffer if the film is not shown, but also the various public interest arguments identified, for example, by Mr Modell and Professor Holland. It would also be necessary to consider the purpose and character of the film itself, as I have sought to do in paragraphs [98]-[99] above. It is not at all obvious that the balance would necessarily come down in favour of granting the Official Solicitor the interim relief he is seeking.

Conclusion

113. For these reasons I concluded that Ms Morris had failed to make out her case for an interim injunction to restrain the broadcast of the film. She has failed to satisfy me that she is “likely” to succeed at trial.

Other matters

114. That suffices to dispose of this application. But there are three other matters I think I should deal with briefly.
115. The first relates to the way in which Channel Four went about the filming, something about which both the local authority, and more particularly the Official Solicitor,

make strong complaint. Ms Morris complains that neither the film makers nor Judy consulted with the local authority responsible, as she puts it, for Pamela's care, nor with the Official Solicitor whom Judy knew was representing Pamela in relation to her community care needs. The film makers, she says, continued to proceed as though the Official Solicitor was not involved, and as if there was no local authority responsible for Pamela, even after they had made their responsibilities clear. They showed the film to Pamela several times without, as Ms Morris puts it, any consultation with those responsible for her as to the effect the film might have on her. Ms Morris asserts that "there is a public interest in film-makers not going about making films as they did in this case". She submits that "there is a positive obligation on the court under Article 8 not to establish a precedent which allows film-makers or other media to benefit from commencing filming children or incapable adults without notice to or consultation with those concerned with their care".

116. Ms Morris refers in this connection to what Sir Stephen Brown P said in *Nottingham City Council v October Films Ltd* [1999] 2 FLR 347 at p 357:

"In this case it is apparent from the correspondence, in particular the solicitors' letters, that the film company and Channel 4 are at pains to assert their democratic right to interview and film children provided that they obtain their individual consent. There appears to be a complete lack of understanding on their part of the position of the director of social services who has a responsible statutory duty to protect young people in his area. It appears to me that the problems in this case have principally arisen from the fact that the film company took the deliberate decision not to alert or to inform the social services of their proposed operations. They approached these children without parental consent or knowledge and indeed without the knowledge of anybody whose duty it was to seek to afford a degree of supervisory assistance to the children. Undoubtedly misunderstandings occurred as a result."

117. It is worth pointing out that of the five children involved in the filming in that case, two were in the care of the local authority under the Children Act 1989, two were being "accommodated" by the local authority, also under the Children Act 1989, and that only one, at the time she was first approached, was not in fact, as the President put it at p 350, under formal supervision by the local authority – though she was in fact later accommodated by the local authority.
118. As a matter of history many of Ms Morris's complaints are simply not borne out as a matter of fact. It is to be noted that, even now, the local authority has still not commenced any proceedings under the inherent jurisdiction with a view to regulating Pamela's care. The local authority's formal role in the matter is, essentially, as a provider of community care services to Pamela under the community care legislation (though in saying this I do not overlook its responsibilities to Pamela under the Department of Health's *No Secrets*). Prior to the commencement of the present proceedings the Official Solicitor's only formal role was as litigation friend in relation to Pamela's community care needs. Judy's role may be self-appointed but she is not a mere busybody. And as I pointed out during the course of argument, the doctrine of

necessity as explained in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 clothes Judy, unless and until she is replaced, with authority to act in Pamela's best interests insofar as she lacks the capacity to take her own decisions: see the analysis in *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, at paras [20]-[22].

119. Mr Modell consulted throughout with Judy, which is not to say that he was not also appropriately sensitive to the fact that her 'agenda' might not always be consistent with Pamela's welfare. He consulted throughout with members of Pamela's care team, critically with both Mr Farquharson and Dr Sinason, and reacted, appropriately as it seems to me, to any concerns they expressed. He was careful to employ Dr Trowell as psychiatric consultant to the programme. Although reserving formal editorial control he deferred in reality to Pamela's wishes and to the expert opinions of the professional members of her care team, whilst at the same time not being prepared to go along with Judy's separate agenda when it conflicted with what Pamela and the other members of her care team wanted. Mr Nicol submits on his behalf that there has throughout been proper compliance with the relevant regulatory code – the ITC Programme Code – and Ms Morris was unable to gainsay him. Nor did her attempt to demonstrate that Part IV of the *Guidelines for Treatment* published by The International Society for the Study of Dissociation had been breached fare any better, for both Pamela's therapeutic carers, and indeed Dr Trowell, are, as Mr Nicol points out, of the view that broadcasting the film will not in the circumstances be detrimental to Pamela.
120. I do not differ from what Sir Stephen Brown P said in *Nottingham City Council v October Films Ltd* [1999] 2 FLR 347. And a very similar approach might well be called for in a situation where a local authority had assumed some kind of formal responsibility for an incapable adult, for example by taking proceedings under the inherent jurisdiction as in *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292 (and as the local authority is now planning to do here) or under the Mental Health Act 1983 or, when it comes into force, under the Mental Capacity Act 2005. But I do not agree with Ms Morris that one can, as it were, extrapolate from that to the more sweeping proposition for which she seems to be contending, that the media, whether the print media or the broadcast media, must first consult with the relevant local authority or with the Official Solicitor before seeking to interview or film a vulnerable adult, or even an adult who is in receipt of care and support under the community care legislation.
121. The second matter relates to the way in which the present application was brought before the court. As I have already related, by the time this matter came on for hearing before me on 25 May 2005 it was extremely urgent; a decision was needed by the following morning. This court is very familiar with and, irrespective of the adverse impact it may have on the personal convenience of the judges, willingly shoulders the burdens, however great, of dealing with urgent cases. But the urgency in this case was avoidable. The Official Solicitor has been involved since August 2003. The film was seen by his solicitors and counsel and a member of his staff on 11 March 2005. He was told on 15 April 2005 that the film was to be broadcast on 8 June 2005. Yet it was not until 13 May 2005 that he launched the proceedings. This delay was unacceptable. In another Division it might have led to the summary dismissal of his application on that ground alone.

122. As I understand it a number of factors contributed to this delay. The first is that on 11 March 2005 the Official Solicitor was suddenly and unexpectedly faced with the need to change solicitors, and it took until 23 March 2005 for all the papers to be received from the previous solicitors. Secondly, there was delay in obtaining funding from the Legal Services Commission. (The Official Solicitor is no longer able to fund cases such as this – practice in the ‘medical’ cases is different – out of his own budget but seeks public funding from the Commission.) The Commission was apparently not prepared to grant authority to bring proceedings against the defendants without a comprehensive report from the Official Solicitor’s solicitors and counsel’s advice. Finally, it is said that the local authority did not respond immediately to certain requests for information from the Official Solicitor. The consequence, as I understand it, is that it was not until 5 May 2005 that the papers required by the Commission were sent to it and not until 9 May 2005 that authority was given by the Commission. Whilst I can sympathise with the difficulties in which the Official Solicitor found himself, the events as I have described them can be of no comfort either to the defendants or to the court; indeed it can only be a matter of great concern to the court that the interests of vulnerable people for whom the Official Solicitor acts are potentially being prejudiced by funding difficulties.
123. The consequence was that I had to announce my decision on the morning of 26 May 2005 in circumstances where it was quite impossible for me to formulate any but the most exiguous reasons in the short time which was all I had been allowed since 6.45 pm the previous evening; a difficulty only compounded by the fact that, even after the hearing had finished the night before, I still needed time to reflect before coming to a decision. That, and the state of the lists on 26 and 27 May 2005, meant in turn that, if the Official Solicitor was to have any sensible chance of getting to the Court of Appeal before the film was broadcast on 8 June 2005, I would have to spend a Bank Holiday weekend, as I have done, preparing this judgment. That, I emphasise, is a task I will always willingly undertake if the circumstances require it. But in the present case the circumstances that required it were, as I have said, avoidable. They could – and should – have been avoided.
124. The final matter is this. The task of preparing this judgment has been made more time consuming by the absence of any chronology. I have accordingly had to piece together myself the narrative in paragraphs [2]-[34] above. In *CF v Secretary of State for the Home Department* [2004] EWHC 111 (Fam), [2004] 2 FLR 517, at paras [214]-[215], I expressed certain views as to the procedure to be adopted in this Division in cases brought under CPR Part 8. I indicated that there should at the very least be lodged with the court the documents referred to in para 3.1 of the *Practice Direction (Family Proceedings: Court Bundles)* (10 March 2000) [2000] 1 WLR 737, [2000] 1 FLR 536, that is: a summary of the background to the hearing; a statement of the issue or issues to be determined; a summary of the order or directions sought by each party; a chronology; and skeleton arguments. Given that that was itself a case in which the Official Solicitor was involved it is all the more depressing to have to complain, as I do, about the failure to lodge a chronology. Urgency can be no excuse: if no sooner, there was plenty of time to prepare a proper chronology between the hearings on 19 and 25 May 2005.