Neutral Citation Number: [2007] EWCA Civ 101

Case No: A2/2006/0460

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
The Hon Mr Justice Tugendhat
[2006] EWHC 107 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2007

Before :

SIR ANTHONY CLARKE MR
LORD NEUBERGER OF ABBOTSBURY
and
LORD JUSTICE LEVESON

- -

Between :

MERSEY CARE NHS TRUST	**Claimant/ Appellant**
- and -	
ROBIN ACKROYD	**Defendant/ Respondent**

- -
- -

Mr Vincent Nelson QC and Mr Jonathan Bellamy (instructed by **Capsticks**) for the Claimant
Mr Gavin Millar QC and Mr Anthony Hudson (instructed by **Thompsons**) for the Defendant

Hearing dates: 23, 24 and 26 October 2006

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Judgment

Sir Anthony Clarke MR:

This is the judgment of the court to which each member has contributed.

Introduction

1. This is a most unusual case. Since 1 January 2002 the claimant has been the successor to the Ashworth Hospital Authority. In 1999 Ashworth Hospital was, as it is now, a special hospital provided by the Secretary of State for Health under the National Health Services Act 1977 for persons subject to detention under the Mental Health Act 1983 who require treatment under conditions of special security on account of their dangerous, violent or criminal propensities. Like the judge, we will refer to it as the hospital. Ian Brady, who is notorious as one of the 'Moors Murderers', was in 1999 and has since been detained at the hospital.

2. The defendant, whom we will call Mr Ackroyd, is a freelance investigative journalist. In November 1999 a source or sources at the hospital passed to Mr Ackroyd certain medical records pertaining to Mr Brady which were kept by the hospital. On 2 December 1999 some information from these records, including verbatim extracts, was published in the *Mirror* in an article attributed to Gary Jones. The hospital asked Mirror Group Newspapers Limited ("MGN") to disclose the name of the person or persons who had provided it with the records. It declined to do so. The hospital therefore sought an order for disclosure of the source from MGN.

3. The hospital obtained an order for disclosure after a trial before Rougier J in April 2000. MGN appealed to this court but its appeal failed. The judgment of the court was given on 17 December 2000 and is reported at [2002] 1 WLR 515. The principal judgment was given by Lord Phillips MR. Both May and Laws LJJ agreed with Lord Phillips, although Laws LJ added a short judgment of his own (see below). MGN appealed to the House of Lords but its appeal again failed. Judgment was given on 27 June 2002: see [2002] UKHL 29 and [2002] 1 WLR 2033. It appears that both the hospital and the courts were proceeding on the basis that compliance by MGN with the order would reveal the name of the source. However it did not. Compliance with the order revealed only the name of Mr Ackroyd.

4. The hospital then invited Mr Ackroyd to identify his source or sources. He declined. So the hospital issued these proceedings against him. The hospital sought and obtained summary judgment from Gray J on 18 October 2002. The hospital's case at that time was that the application was resolved in its favour by the decision in the *MGN* case. Mr Ackroyd appealed to this court. His appeal was allowed on 16 May 2003: see [2003] EWCA Civ 663. The leading judgment was given by May LJ. Carnwath and Ward LJJ gave concurring judgments, although Carnwath LJ did so on a somewhat narrower basis. The court identified potentially important differences between the issues in this action and those in the *MGN* case. The judgments ran to 88 paragraphs. The court held that the issues between the parties merited a trial. Mr Ackroyd's evidence is that he was provided with information by more than one source but it is convenient generally to refer to his source or sources as his source in the singular. It is also convenient to refer to the source in the masculine gender.

5. The trial came before Tugendhat J ("the judge"). It lasted six days between 17 and 25 January 2006 and the judge gave judgment for Mr Ackroyd on 17 February 2006. He

gave the hospital permission to appeal. This is that appeal. It is an appeal from a judgment which runs to 197 paragraphs. We will divide this judgment into a number of sections as follows: the principles of law, the correct approach to this appeal, the significance of the *MGN* case, the facts, conclusions and postscript.

Principles of law

6. The relevant principles are not in dispute. The jurisdiction of the court to order the disclosure of Mr Ackroyd's source is that stated in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. The judge quoted this statement from [26] of the speech of Lord Woolf, who gave the leading speech in the *MGN* case:

> "Under this jurisdiction, there is no requirement that the person against whom the proceedings have been brought should be an actual wrongdoer who has committed a tort or breached a contract or committed some other civil or criminal wrongful act. In *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 itself, the Customs and Excise Commissioners were an entirely innocent party. The commissioners had, however, because of their statutory responsibilities become involved or mixed up in the illicit importation of the chemicals manufactured abroad which Norwich Pharmacal alleged infringed their patent. The *Norwich Pharmacal* case clearly establishes that where a person, albeit innocently, and without incurring any personal liability, becomes involved in a wrongful act of another, that person thereby comes under a duty to assist the person injured by those acts by giving him any information which he is able to give by way of discovery that discloses the identity of the wrongdoer. While therefore the exercise of the jurisdiction does require that there should be wrongdoing, the wrongdoing which is required is the wrongdoing of the person whose identity the claimant is seeking to establish and not that of the person against whom the proceedings are brought."

7. The judge considered whether there was any relevant wrongdoing on the part of the source in some detail. He held that there was. He held at [138] that it was probable that the source was someone who was working at the hospital in the course of his or her employment, although he said that he could not decide on the evidence available to him whether he or she was employed by the hospital. He therefore said that he did not find that the source was an employee of the hospital. However, he concluded at [139] that for the purposes of deciding whether there was any wrongdoing it did not matter whether the source was employed by the hospital or not. He held that whoever the source was, if he was a person who had access to the records at Ashworth when permitted to be in the hospital for whatever reason, it is plain that he would have obtained the information subject to obligations owed by him, both to Ian Brady and to the hospital, not to use or disclose the information without authorisation or otherwise than for any purposes for which he was permitted to have access to it. The judge accordingly held at [140] that the source owed such a duty both to Ian Brady and to the hospital.

8. At [74] the judge noted Lord Woolf's conclusion at [36] that the need for involvement by the third party in the source's wrongdoing was a threshold requirement. In the *MGN* case the third party was MGN, whereas in this action it was Mr Ackroyd. When the *MGN* case was before Rougier J in April 2000, the question whether MGN should be ordered to disclose its source was governed by section 10 of the Contempt of Court Act 1981 ("the 1981 Act"), which reads as follows:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

9. By the time the *MGN* case reached the Court of Appeal in October 2000, the Human Rights Act 1998 ("the HRA") had come into force. An order that a journalist disclose a source affects the Convention right of freedom of expression. Accordingly, in the *MGN* case, as the judge put it at [75], the Court of Appeal and the House of Lords (Lord Phillips at [69-73] and Lord Woolf at [38]) re-affirmed previous English decisions referring to, and themselves had regard to, decisions of the European Court of Human Rights. The English cases had already established that section 10 of the 1981 Act and article 10 of the Convention have a common purpose in seeking to enhance the freedom of the press by protecting journalistic sources. The judge noted that in the *MGN* case the courts cited sections 2 and 3 of the HRA.

10. The judge also observed that Mr Millar relied upon section 12 of the HRA, which provides so far as relevant:

> "12(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> ….
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –
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> (a) the extent to which –
>
> (i) the material has, or is about to become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code.

> (5) In this section - … 'relief' includes any remedy or order (other than in criminal proceedings)".

At [78] to [80] the judge identified (and quoted from) the privacy code published by the Press Complaints Commission as an example of a relevant privacy code. It is not however necessary to refer further to that code for the purposes of resolving the issues in this appeal.

11. Article 10 of the Convention provides:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

12. It is now clear that the approach of the English courts to both section 10 of the 1981 Act and article 10 of the Convention should be the same. In the *MGN* case at [38] Lord Woolf identified the approach of the European Court of Human Rights to article 10 as being that set out at [39] of its decision in *Goodwin v United Kingdom* (1996) 22 EHRR 123 as follows:

> "The court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.
>
> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be

> compatible with article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

13. Lord Woolf explained at [39], by reference to the speech of Lord Bridge in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, that the approach to be adopted to section 10 of the 1981 Act involved very much the same balancing exercise as is involved in applying article 10 of the Convention. The key extract from the speech of Lord Bridge (with whom Lord Oliver and Lord Lowry agreed) in *Morgan-Grampian* at pages 43-44 was in these terms:

> "It is, in my opinion, 'in the interests of justice', in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Thus, to take a very obvious example, if an employer of a large staff is suffering grave damage from the activities of an unidentified disloyal servant, it is undoubtedly in the interests of justice that he should be able to identify him in order to terminate his contract of employment, notwithstanding that no legal proceedings may be necessary to achieve that end.
>
> Construing the phrase 'in the interests of justice' in this sense immediately emphasises the importance of the balancing exercise. It will not be sufficient, per se, for a party seeking disclosure of a source protected by section 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."

14. Lord Woolf said at [61] that he had no difficulty in following the approach of the European Court in *Goodwin* (at [40]) that

> "(i) "As a matter of general principle, the 'necessity' for any restriction of freedom of expression must be convincingly established" and (ii) "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court."

Lord Woolf added at [62] that he would adopt the contention that any restriction on the otherwise unqualified right to freedom of expression must meet two further requirements. First, the exercise of the jurisdiction because of article 10(2) should

meet a "pressing social need" and, secondly, the restriction should be proportionate to a legitimate aim which is being pursued.

15. In the *MGN* case in this court Laws LJ, while agreeing with Lord Phillips, put the general principle in this way at [101], after referring, first, to the court's duty under the HRA to take account of the Strasbourg jurisprudence (in section 2) and to act compatibly with Convention rights (in section 6) and, secondly, to the decision in *Goodwin v United Kingdom*:

> "It is in my judgment of the first importance to recognise that the potential vice -- the "chilling effect" -- of court orders requiring the disclosure of press sources is in no way lessened, and certainly not abrogated, simply because the case is one in which the information actually published is of no legitimate, objective public interest. Nor is it to the least degree lessened or abrogated by the fact (where it is so) that the source is a disloyal and greedy individual, prepared for money to betray his employer's confidences. The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. The suggestion (which at one stage was canvassed in the course of argument) that it may be no bad thing to impose a "chilling effect" in some circumstances is in my view a misreading of the principles which are engaged in cases of this kind. In my judgment, the true position is that it is always prima facie (I can do no better than the Latin) contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep press sources confidential should give way. That debate will arise under section 10 in the municipal legislation; it will arise more broadly by reference to article 10 of the Convention, and in the light of the Strasbourg jurisprudence on article 10."

In the House of Lords Lord Woolf said at [86] that no possible exception could be taken to those statements of general principle.

16. The judge directed himself in accordance with those statements of principle. To like effect, he referred at [84] to the rigorous approach to necessity which, as he put it, the Convention requires by quoting "the well known phrases" in the speech of Lord Bingham in *R v Shayler* [2003] 1 AC 247 at [23]:

> "'Necessary' has been strongly interpreted: it is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable': *Handyside v United Kingdom* (1976) 1 EHRR 737, 754, para 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are

> relevant and sufficient under article 10(2): *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, 277-278, para 62".

17. The question in each case to which section 10 of the 1981 Act or article 10 of the Convention applies is thus whether the claimant has shown that it is both necessary, in the sense of there being an overriding interest amounting to a pressing social need, and proportionate for the court to order the journalist to disclose the name of his source. As Lord Woolf put it at [61], the requirements of necessity and proportionality are separate but substantially cover the same area.

18. In answering that question the judge must balance the interests of the claimant on the one hand and the interests of the journalist on the other hand. This can be seen from the approach of the House of Lords in the *MGN* case: see the speech of Lord Woolf at [61] to [67], especially at [63], where he said of *Z v Finland* (1997) 25 EHRR 371 at [94] and [95], which are quoted at [24] below and which stressed the importance of medical information to a person's enjoyment of his or her right to respect for private and family life as guaranteed by article 8:

> "Those paragraphs of the judgment were of course addressing the question of whether medical data should be disclosed in a different context from the present *and it was not necessary for the court to balance the conflicting interests which are at play as is essential here.*" (Our emphasis.)

19. In this regard the judge discussed at [87] to [101] the interests of justice and the rights of others. At [87] he held, applying the decision of the House of Lords in the *MGN* case, that the intention of the hospital to dismiss the source engaged the interests of justice. Protecting patient records is a legitimate aim of the hospital, and in principle such a measure may fulfil a pressing social need and be both necessary and proportionate. The judge correctly held that whether it does so on the facts of this case depends upon a consideration of those facts.

20. The judge said at [88], again in our opinion correctly,:

> "Where disclosure is sought from a journalist, he safeguards freedom of expression by seeking to keep his source private. The other right in issue is also a right to privacy, namely the claimant's right which the claimant is ultimately seeking to enforce against the source, once he is discovered. The claimant's right to maintain the privacy of his information is always a right under domestic law, whether or not it is also a Convention right. In some cases, such as the present, even though the claimant is a corporation, there are also in issue the rights of third parties, namely the patients at the hospital."

21. The judge then considered in detail the rights of Mr Brady under article 8 of the Convention, to which we will further refer so far as necessary below. However, at [90] the judge noted Mr Millar's submission that, since the *MGN* proceedings, Mr Brady had altered his stance. In December 1999 Mr Brady's solicitors urged that

there was engaged his right under article 8 of the Convention to respect for his private life with regard to medical information. By contrast the effect of a letter dated 6 January 2006 was that, if he had retained any privacy rights, he was no longer concerned to protect them. At [95] the judge accepted Mr Millar's submission that Mr Brady has now given consent to his notes (known as PACIS notes) for October 1999 being disclosed to all the world. However the judge did not accept Mr Millar's submission that all that was left were the rights which the hospital had to keep private communications between members of its staff.

22. The judge expressly accepted (as he was bound to do) that in the *MGN* case this court held that the hospital has both an interest in protecting the information in patient records and standing to bring this claim. At [89] he quoted this extract from [52] and [53] of Lord Phillips' judgment:

> "52. … The extracts published consisted of observations of Brady by different members of the staff at Ashworth that were recorded as part of his medical records. Though they were personal to Brady, I consider that Ashworth had a clear independent interest in retaining their confidentiality. The Department of Health published, on 7th March 1996, Guidance on the Protection and Use of Patient Information. This includes the following guidance under the heading, `Who has a duty of confidence?':
>
> > "Everyone working for or with the NHS who records, handles, stores, or otherwise comes across information has a personal common law duty of confidence to patients and to his or her employer." (emphasis mine)
>
> 53. This guidance accurately states the position. Both Ashworth and its patients shared an interest in the confidentiality of patient records".

23. The judge considered the position of the hospital, as opposed to that of Mr Brady, at [95] to [101]. He quoted part of [57] of the decision of the European Court of Human Rights in *von Hannover v Germany* (2004) 16 BHRC 545 and held at [96] that the hospital was suing to safeguard the respect for the private lives of all its patients and that it would be unlawful for the court to act in a way which was incompatible with the rights of the patients at Ashworth: see section 6 of the HRA and the decision of Rose J in *X v Y* [1988] 2 All ER 648, where he explained the importance of confidentiality of medical records in terms similar to those used by Lord Woolf in the *MGN* case.

24. Having set out the terms of article 8, the judge said at [98] that medical records clearly come within the protection of article 8. As we said earlier, Lord Woolf referred to *Z v Finland*, which was concerned with Z's medical records in a case in which Z's husband had infected her with the HIV virus. Lord Woolf quoted [94] and [95] from *Z v Finland* as follows:

> "94. In determining whether the impugned measures were 'necessary in a democratic society', the court will consider

> whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued.
>
> 95. In this connection, the court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community. The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in article 8 of the Convention."

25. Lord Woolf said at [63] that, although spoken in a different context, those paragraphs provided a useful guide to the significance of the wrongdoing which the House of Lords, in agreement with this court, held had occurred on the facts of the *MGN* case. We will return to those facts and how the facts found by the judge relate to them below. However, it is plain from the decision in the *MGN* case that the courts have regarded the confidentiality of medical records as of very high importance.

26. This can be seen in particular from the concluding paragraphs in the judgment of Lord Phillips in this court and from the reasoning in the House of Lords. Thus Lord Phillips said at [98] and [99]:

> "98. … In *Goodwin v United Kingdom* 22 EHRR 123, 137 the Commission expressed the view that only in "exceptional circumstances where vital public or individual interests are at stake" can an order requiring journalists to disclose their sources be justified.
>
> 99. The disclosure of confidential medical records to the press is misconduct which is not merely of concern to the individual establishment in which it occurs. It is an attack on an area of confidentiality which should be safeguarded in any democratic society. The protection of patient information is of vital concern to the National Health Service and, I suspect, to health services throughout Europe. This is an exceptional case. If the order made by Rougier J discourages press sources from disclosing similar information in the future, this will be no bad thing. I would dismiss the appeal."

27. In the House of Lords that reasoning was challenged. The challenge failed. Lord Woolf put his conclusions in this way at [65] and [66]:

> "65. … Earlier in his judgment the Master of the Rolls had subjected the jurisprudence of the European Court to detailed analysis and clearly had in mind the importance of the protection of sources provided by both section 10 and article 10. What the Master of the Rolls regarded as being "no bad thing" was not the disclosure of the identity of sources but the discouragement of the wrongful disclosure of the contents of medical records by sources. This was conduct which exceptionally justified ordering the disclosure of documents which would reveal the identity of the source.
>
> 66. That Mr Browne has misunderstood the Master of the Rolls is apparent from the fact that notwithstanding Laws LJ repeated on two occasions that he agreed the appeal should be dismissed for the reasons given by the Master of the Rolls, he himself stated the situation with regard to the protection of sources of the press in terms to which no possible objection could be taken in paragraphs 101 and 102 of his judgment. The situation here is exceptional, as it was in *Financial Times Ltd v Interbrew SA* [2002] EWCA Civ 274 and as it has to be, if disclosure of sources is to be justified. The care of patients at Ashworth is fraught with difficulty and danger. The disclosure of the patients' records increases that difficulty and danger and to deter the same or similar wrongdoing in the future it was essential that the source should be identified and punished. This was what made the orders to disclose necessary and proportionate and justified. The fact that Ian Brady had himself disclosed his medical history did not detract from the need to prevent staff from revealing medical records of patients. Ian Brady's conduct did not damage the integrity of Ashworth's patients' records. The source's disclosure was wholly inconsistent with the security of the records and the disclosure was made worse because it was purchased by a cash payment."

28. The English courts have thus regarded the protection of medical records as of considerable importance in carrying out the balancing exercise required in a case of this kind. This approach is underlined by the judgment of Carnwath LJ in the earlier appeal to this court in this case: see for example at [75], where he said that, other than in exceptional cases, there is an overriding public interest in the protection of medical records from disclosure. There is, in our opinion, no doubt that the judge had these principles well in mind.

29. He also had in mind the correct approach to conflicting Convention rights. Thus he correctly directed himself by reference to this statement of principle in the speech of Lord Steyn in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (which was of course after the decision in the *MGN* case) at [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] 2 WLR 1232. For present purposes the decision of the House on the facts of *Campbell* 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."

30. Between [105] and [119] the judge considered what he described as the value of the freedom of expression which Mr Millar was relying upon on behalf of Mr Ackroyd. As Lord Steyn put it in *R v Home Secretary, ex p Simms* [2000] 2 AC 115 at 127:

> "The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value."

We agree with the judge at [106] that some speech attracts a high degree of protection and some little or none at all; it varies from case to case: see eg *von Hannover v Germany* (2004) 16 BHRC 545 at [59], *Douglas v Hello!* [2005] EWCA Civ 596, at [87] and *R v Home Secretary ex p Simms* [2002] AC 115 per Lord Steyn at 125. The judge emphasised the significant role played by investigative journalism by reference to *McCartan, Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, per Lord Bingham, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 per Lord Nicholls at 200 G-H and *R v Shayler* [2003] 1 AC 247 at [21].

31. In this regard the judge drew a distinction between the evidence before him and the evidence in the *MGN* case. As the judge said at [111], in the *MGN* case the courts proceeded on the basis that the source was motivated by financial gain, whereas in this case Mr Ackroyd denied that that was the case and the hospital did not contend to the contrary. As appears below, Professor Sines did not accept all Mr Brady's allegations as true. However, the judge was we think entitled to say (as he did at [117]) that any such falsity did not undermine the value of the freedom of expression being invoked by Mr Ackroyd. The judge expressed his conclusions in this regard at [118] and [119] as follows:

> "118. The value of freedom of expression in this context, and the role of the media, is demonstrated by the Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital, January 1999 Cm 4194-II ("the Fallon Report"). The membership of the Inquiry Panel consisted of: HHJ Fallon QC, Professor Robert Bluglass CBE, MD, FRCP, FRCPsych, DPM, Professor Brian Edwards CBE, FHSM, CBIM, Hon FRC Path, and Mr Granville Daniels RMH, RGM. The

> Report includes an account of the Defendant's role in the events leading to the setting up of that Inquiry, which is described below. In the introductory section headed 'The Problems of the Special Hospitals' the Report includes:
>
> > "1.19.1 All three Special Hospitals have been the subject of damning outside inquiries over the last 20 years. In 1980 Sir John Boynton chaired an Inquiry into Rampton, prompted by a critical television programme…"
>
> 119. The Report of Sir Louis Blom-Cooper and others into the hospital (Report of the Committee of Inquiry into Complaints about Ashworth Hospital (1992) Cm 2028-I) Ch 1 also records that it followed upon a documentary transmitted by Channel 4 TV which included a number of specific allegations of improper care and ill treatment at Ashworth. The chapter's sub-title are the words of Mr Justice Brandeis alluded to by Lord Bingham of Cornhill in *Shayler*: "Sunlight is the most powerful of disinfectants".

32. Given the history of problems at the hospital in the 1990s (to which we refer further below) and the importance of investigative journalism in bringing them to light, the judge was in our opinion entitled to regard the freedom of expression invoked by Mr Ackroyd as being of a high order when put in the scales against the important consideration that medical records should be kept confidential.

The correct approach to this appeal

33. The question for decision is whether the judge was wrong within the meaning of CPR 52.11.3(a). He correctly directed himself that the question was whether it was both necessary and proportionate to order the disclosure of the source. As stated earlier and, as Lord Woolf made clear at [63] in the *MGN* case, it was necessary for the court to balance the conflicting interests which are at play here. As we see it, that balance was essentially a matter for the judge. Although, as Sedley LJ (with whom Longmore and Ward LJJ agreed) observed at [55] in *Interbrew SA v Financial Times Ltd* [2002] EWCA Civ 274, [2002] 2 Lloyd's Rep 229, the judge was not exercising a discretion, and although it can in one sense be said, as Sedley LJ did at [58], that, once the facts are found, questions such as whether disclosure of a source is necessary admit of only one answer, the position is not quite as simple as that.

34. Sedley LJ himself made the position clear in the concluding part of [58] as follows:

> As Lord Griffiths said in *In re an Inquiry* [1988] AC 660 at p 704, "whether a particular measure is necessary, although described as a question of fact for the purpose of s 10 [of the 1981 Act] involves the exercise of a judgment upon the established facts". His next remark, that "[i]n the exercise of that judgment different people may come to different

> conclusions on the same facts", does not reduce the exercise to one of discretion. As Lord Bridge was later to explain in *X v Morgan-Grampian* (above, at p 44):
>
> > "Whether the necessity of disclosure in this sense is established is certainly a question of fact rather than an issue calling for the exercise of the judge's discretion, but, like many other questions of fact, such as the question whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgement. In estimating the weight to be attached to the importance of disclosure in the interests of justice on the one hand and that of protection from disclosure in pursuance of the policy which underlies section 10 on the other hand, many factors will be relevant on both sides of the scale."
>
> I have given earlier my reasons for thinking that the effect of ss 2 and 3 of the Human Rights Act 1998 has been to move the evaluation of necessity further towards the status of a question of law, albeit one which is still heavily fact-dependent and value-laden."

35. Thus the question the judge had to decide was one upon which different people could reasonably reach different conclusions and upon which many factors would be relevant on both sides of the scales. In short it involved a balancing of different factors and, although it can be said to involve a question of law, it was a question of law which was heavily fact-dependant and value-laden, and upon which many factors would be relevant on both sides of the scales. As we see it, it was an exercise not dissimilar to the exercise performed by a judge in balancing the various factors which were identified by Lord Nicholls in *Reynolds* as being relevant to the issue of what is now called *Reynolds* privilege. In *Galloway v Daily Telegraph* [2006] EWCA Civ 17 at [68], in giving the judgment of this court, I said this:

> > "The right to publish must however be balanced against the rights of the individual. That balance is a matter for the judge. It is not a matter for an appellate court. This court will not interfere with the judge's conclusion after weighing all the circumstances in the balance unless he has erred in principle or reached a conclusion which is plainly wrong."

36. In our opinion this court should adopt the same approach to an appeal in a case of this kind. The balancing of the considerations which are relevant to the question whether it was necessary and proportionate to order the disclosure of the journalist's source is essentially a matter for the judge and not for an appellate court. This court should respect his decision unless it is persuaded that he erred in principle or reached a conclusion that was plainly wrong; that is a conclusion which was outside the ambit of conclusions which a judge could reasonably reach.

The significance of the *MGN* case

37. An unusual feature of the present case is that, not surprisingly, many of the considerations which are relevant here were relevant to the decision of this court and the House of Lords in the *MGN* case. Mr Nelson submitted that there is no significant difference between the facts which were or ought to have been found by the judge and those which formed the basis of the decision in that case. If that is so, it must follow that the judge reached the wrong conclusion. However, if, as the judge held and (as Mr Millar submitted) correctly held, the facts were in significant respects different from those which were before the courts in the *MGN* case, the question whether it was necessary and proportionate to order disclosure of Mr Ackroyd's source was a matter for the judge after applying the relevant principles of law.

38. The judge was of course (like us) bound by the principles laid down in the *MGN* case. He recognised that that was the case. For the reasons already given, it is our view that he correctly identified those principles and endeavoured to apply them. As we see it, the question for decision is whether he erred in fact or, in the sense described above, in the application of the facts. In resolving the issues in this appeal, it is important to have in mind that, in addition to the evidence which was before the courts in the *MGN* case, the judge had available other evidence. It is also important to have in mind, as this court pointed out in allowing the appeal from the order giving summary judgment based upon the decision in the *MGN* case, that the question whether it was necessary and proportionate to order disclosure of the source fell to be determined by the judge in this action very much later than it fell to be determined by Rougier J, or even by this court or the House of Lords. As we see it, the question for the judge was whether it was necessary and proportionate to order the disclosure of Mr Ackroyd's source when he made his decision on 7 February 2006.

39. In this regard it struck us in the course of the argument that the most unsatisfactory procedural feature of this case has been that the issue whether the hospital was entitled to an order for disclosure of the underlying source which enabled the *Mirror* to publish extracts from Mr Brady's medical notes has taken so long to be finally resolved. As appears from [13] of Lord Woolf's speech, quoted below, it was assumed during the *MGN* case that an order made against MGN would yield the name of the underlying source. That has not proved to be the case but there is no suggestion that that assumption was the result of anything said or done by Mr Ackroyd and we do not think that the fact that the assumption proved false should be held against Mr Ackroyd. His position is entirely independent of that of MGN and is supported by the National Union of Journalists. We briefly return to this problem at the end of this judgment in the context of the future of cases of this kind but the correct approach to this appeal remains that to which we have referred. The question is whether the judge was wrong to hold that the hospital had failed to show that it was necessary and proportionate to order the disclosure of Mr Ackroyd's source when he made his decision on 7 February 2006.

The facts

40. It is convenient to begin with the facts found in the *MGN* case. The key facts were of course set out by both Rougier J and by Lord Phillips MR in this court. They were summarised as follows by Lord Woolf at [10] to [18]:

"*Background facts*

10. On 30 September 1999, Ian Brady was transferred to another ward. He took objection both to the transfer and to the manner in which it was effected. In addition to making complaints to the police and through the National Health Service complaints procedure he went on hunger strike. At the same time he began a media campaign, writing repeatedly to the BBC and others and issuing information through his solicitor complaining about the way that he had been treated, giving details of his hunger strike and the manner in which he was affected.

11. Because of the substantial media interest which Ian Brady generated, the director of communications of Ashworth found it necessary to make 12 press releases between 30 September 1999 and 11 January 2000 answering inquiries for information. The release of the 2 October 1999 began by stating: "Ian Brady, a patient at Ashworth Hospital, has exercised his right to refuse permission for the hospital to disclose any clinical details about him". On 29 October, it was announced that he had refused food for a total of 30 days and that a program of "refeeding" had been introduced, which involved force feeding by means of a nasogastric tube.

12. On 2 February 2000, Ian Brady obtained permission to apply for judicial review, in order to challenge the continuing decision to force feed him. The hearing was held in private but, due to the public interest in the case, Maurice Kay J delivered his judgment in open court: see *R (Brady) v Ashworth Hospital Authority* [2000] Lloyd's Med R 355; (2001) 58 BMLR 173. Maurice Kay J ruled that force feeding was lawful since it was reasonably administered as part of the medical treatment given for the mental disorder from which Ian Brady was suffering. By virtue of section 63 of the 1983 Act consent was not needed for such treatment. The judgment set out in detail particulars of Ian Brady's clinical history which related to his decision.

The source of the information sent to the Daily Mirror

13. It was Mr Jones's evidence that he did not know the identity of the initial source of the information, but that he assumed it to be an employee of Ashworth. However, he accepted that he did know the identity of the intermediary who supplied the material to him. It is also accepted that knowledge of the intermediary would in all probability lead to the identity of the original source. Mr Jones had previously dealt with the intermediary on the understanding that he would be paid for stories supplied. On this occasion he paid £1,500.

> 14. It was found by the Court of Appeal and was not disputed on this appeal that it was the overwhelming likelihood that the source provided the intermediary with a print out from Ashworth's computer database which is used to record data about patients ("PACIS"). This meant the source was probably an employee of the authority.
>
> 15. Rougier J found that the extracts of the information published in the article were no more than a watered down version of material which Ian Brady had placed already in the public domain in furtherance of his campaign.
>
> *The importance of confidentiality in relation to patients medical records*
>
> 16. The importance of confidentiality of medical records is emphasised when a new member of staff is engaged at Ashworth. The contract of employment contains a clause:
>
> > "*Disclosure of information*. You must not whilst you are employed or after your employment ends disclose to any unauthorised person information concerning the authority's business or the patients in its care nor must you make any copy, abstract, summary or précis of the whole or part of a document relating to the authority."
>
> 17. It is part of the agreed facts that leaks to the press have a detrimental effect on security; treatment of patients and staff morale, because they may inhibit proper recording of information about patients; may deter patients from providing information about themselves; may damage the patient-doctor relationship, which rests on trust; may lead to assaults by patients on a patient about whom information is disclosed; may create an atmosphere of distrust amongst staff, which is detrimental to efficient and co-operative work; and give rise to fear of future (and potentially more damaging) leaks.
>
> 18. In the case of patients at Ashworth, it is particularly important that accurate records are kept because otherwise warning signs indicating that a patient is in a condition in which he could be a danger to himself, his fellow patients or the staff could be overlooked so inhibiting preventative action being taken."

41. Lord Woolf applied the principles discussed above to those facts at [63] to [67]. We have already referred to some of those conclusions but it is important to note that at [63] Lord Woolf stressed the evidence of Dr James Collins, who was (and still is) the responsible medical officer for Ian Brady. He said this of Dr Collins' evidence:

> "He explains why it is essential for the care and safety of individual patients and the safety of other patients and staff that relevant information is entered in the patient's notes and why

> those entries having been made, their integrity and confidentiality should be preserved. He refers to the fact that psychiatry, more than any other branch of medicine, depends on a trusting relationship between therapists and patients. In addition he draws attention to the fact that the basis of virtually all assessment, diagnosis, treatment and analysis of risk is dependent on information provided by others. He explains that if the staff feel that if there is a possibility of what they report entering the public domain their reporting will be inhibited as they will think that this will place staff or patients at risk. In addition, Mr Brewster (information manager), in his statement, sets out the reasons why it is important that the authority should be able to identify the employee or employees who are responsible for the wrongful disclosure. These include preventing further disclosure and removing the cloud of suspicion that at present hangs generally over the authority's employees who have access to the records which were published. Medical records will always be confidential but this is particularly important in the case of the class of patients that the authority is responsible for caring for at Ashworth."

Lord Woolf then referred to the paragraphs of *Z v Finland* quoted above and expressed his agreement with Lord Phillips MR in this court for the reasons set out at [65] to [66] to which we have referred.

42. We turn to the facts found by the judge, who set them out in very great detail. Thus he described the events from 30 September to 28 October at [5] to [14]. They included a description of Mr Brady's forced move to Lawrence Ward, of his complaints (including letters to the BBC), of press notices issued by the hospital and of intense media activity. The press notices included a statement that the hospital was investigating Mr Brady's allegations, as were the police. The judge described the events from 29 October to 2 December at [15] to [29]. Those included the forced feeding of Mr Brady and his further complaints, which included complaints that he was ill-treated during the insertion of the tube and the administration of his first feed. They also included a complaint, which subsequently appeared in the article in the *Mirror,* that a staff member had mocked him during intubation. The judge referred to hospital statements explaining its decision to force feed Mr Brady. He also referred to the further media coverage at this time. On 9 November Mr Brady's solicitors complained to the hospital about alleged inaccuracies in its medical records for Mr Brady. The judge gave details of the inquiry carried out by Professor Sines and noted that it was extended to cover the force feeding complaints. Profesor Sines' first report was issued on 30 November. It was later revised and the second version runs to 56 pages.

43. It was on 2 December that the *Mirror* published the article which has led to these proceedings. They used information provided by Mr Ackroyd in printed form which had been derived from records which were kept electronically by the hospital and produced on a computer database known as PACIS. The judge described the article in some detail at [24] to [29] as follows:

"24. The article in the Mirror is spread over one column on page 4 and the whole of page 5. Half of page 5 is a photograph of Ian Brady next to the title "DEATH WISH DIARY - Hunger Strike Brady is determined to die". I have compared the article with the original PACIS (as printed out in March 2002). These were made available to this court with a request that they be kept private. They were not made available to any of the judges that have heard this case before the last hearing in the Court of Appeal in May 2003. The square brackets show where the quotation omits passages from the original, or misquotes it. The article includes the following:

> "Brady's desperation to die is revealed in a confidential 'diary' of his deteriorating condition kept by the authorities at Merseyside's Ashworth Hospital …
>
> It discloses how he told staff charged with keeping him alive 'One way or another I will get away from this place [This is a quotation from the notes for 29th October]… f***** screws [This is a quotation from the notes for 28th October], f*** all of you [This is not a quotation from the notes, but may be misquotation from the notes for 26th October]'.
>
> Asked for a blood sample, replied: 'They can take the lot'. [This is a quotation from the notes for 24th October] Once he told of his wish that he had killed himself when arrested more than 30 years ago [This is a paraphrase of the notes for 5th October].
>
> … The search took place on September 30. By tea time, he was observed by two members of staff around the clock and nurses were warned he could be a suicide risk.
>
> The diary starts the following day:
>
> October 1
>
> 'His only communication with nursing staff has been to philosophise on his current position and his perception that he is being mistreated. Stated: 'I have nothing so say that cannot be resolved by the courts. […] All dietary intake has been refused. […] Weighed at 13st 7lb…

25. The article continues in the same vein with extracts from the documents covering a few lines of the column for a selection of days: 4, 5, 6, 7, 18, 19, 20, 21, 24, 26, 27 and

28 October (those for 7th to 24th October are set out in the Court of Appeal judgment in the MGN case at para 10). The quotations are mainly of what members of staff, or Dr Collins, observed about Ian Brady's physical and psychological state, and what he was doing, but include occasional quotations of what he had said to them (the entries in the complete notes are not confined to those made by nurses and doctors). The longest extract from the so-called 'diary' (the PACIS notes) is for 28th October. It reads:

> "Dr Collins informed patient within next 24 hours he would be given four documents containing following information with [regard re-feeding] […] Dr Collins requests nursing staff to monitor and record accurately […] changes in physical, behavioural and psychological condition. […] Brady appeared to be more agitated and tense than earlier. […] Attempts to discuss any problems with staff met with ignorance [and] appeared angry/agitated. […] Began briskly pacing up and down day area for […] 15 minutes. Also […] heard muttering 'f***ing screws'. […] He reiterated he saw the hospital as having deteriorated and now being little, if at all, different to a prison. […] He point out the hospital had moved him to the most notorious ward'".

26. There then follows 35 lines of the newspaper column which are not derived from the PACIS notes. There is one passage which includes a reference to the tube not being inserted correctly at the first attempt, but then goes on to a point that does not correspond to anything else in the documents or evidence, and is inconsistent with Ian Brady's complaint that no anaesthetic gel was used. It reads:

> "Nurses struggled twice to insert the plastic tube in his nose, before a doctor was called and told them to use anaesthetic gel to make the process less painful".

27. There are also included in this passage two other complaints that Ian Brady did make:

> "The liquid came straight from a fridge, rather than being warmed to room temperature. And as the tube was being pushed down Brady's throat a manager mocked him by making gagging and gurgling noises, an independent inquiry into the treatment was told".

28. This indicates that one of the Defendant's sources had access to information about what Prof Sines was told, although not necessarily the source who disclosed the notes. There then follows a passage which is again a quotation from the 'diary' although that fact is not clear, because it refers to it as 'the report' (square brackets again indicate where comparison with the print out given to the court shows omissions in the article):

> "Brady claims he was mistreated and is determined to seek 'justice'. All that was said in the report was: 'The tube was inserted […] An X-ray confirmed that it was appropriately placed […] Mr Brady was clearly expecting at some level that something along those lines would take place and took it all in a resigned fashion. He was courteous throughout …"

29. The article then continues, and in this passage the word 'report' refers to Professor Sines' report:

> "The report into Brady's allegations, by Professor David Sines of South Bank University was delivered to the Health Department yesterday".

44. At [30] to [37] the judge discussed the contents of the PACIS notes and the Sines report. He noted that the PACIS notes covered in all about 21 pages in small print of which only about five per cent was used in the *Mirror* article. Professor Sines upheld Mr Brady's allegation that his first feed was not warmed, which was not in dispute, but rejected his complaint that he had been mocked by a member of staff. Professor Sines accepted that anaesthetic gel was not used and that the tube was not correctly inserted at the first attempt, although there was no dispute on either score. Professor Sines noted that Mr Brady himself said that he did not think that the nurse would intentionally inflict unnecessary pain on him. None of this was mentioned in the PACIS notes.

45. The judge said at [33] that the notes provided to the court for 30 September 1999 did not contain any description of the move from one ward to another. As shown in the above quote, the 'diary' began on 1 October. There is a reference to Mr Brady's wrist beginning after the words quoted in the article. As the judge put it at [34], the notes refer to Ian Brady complaining of a pain in his right wrist, and of his wrist being examined and x-rayed and looked at by an orthopaedic consultant. It is recorded that the consultant's view was that it was unlikely that the wrist was fractured (there are a number of subsequent entries on whether it was a fracture or not). The judge noted that it was immediately following this entry on 1 October that there appeared the entry which formed the subject of a press release by the hospital on 2 October, namely:

> "Mr Brady said that if the hospital were to be contacted and the issue of any injury raised then he would prefer that a 'no

> comment' was given to the press – he had no wish for the hospital to reveal details of this aspect of his case'".

46. It was not until a PACIS note dated 4 October that there was an entry by a nurse explaining Mr Brady's complaint about his wrist. That entry records his being interviewed by police in the presence of his solicitors and his saying:

> "Ian has made it known that he believes his apparent wrist injury was a direct result of the intervention of the C&R team…"

47. At [36] and [37] the judge described Dr Collins' evidence about the nature of the move, which he thought was heavy handed, and about what ought or ought not have been in the notes, some of which Dr Collins had made, although he was not involved in the move himself. Dr Collins agreed that the notes were inadequate in omitting a description of the move, which should have contained the essentials of what Professor Sines found to have occurred. Dr Collins did not ask at the time why the notes were incomplete, although with hindsight he accepted that he should have done. His priority at the time was how to make Ian Brady start eating again.

48. Dr Collins was also asked about the PACIS notes for the intubation on 29 October 1999. In his view the intubation passed in a proper way. He regarded the points about the anaesthetic and the cold first feed to be minor and did not think that there was anything wrong with the notes. He thought Ian Brady was by this time willing to use any lever which was to hand in his complaints about the hospital. At [37] the judge accepted Dr Collins' evidence as to the notes, and as to what should have been in them, and what did not need to be in them. However, he added that a person who claimed that Mr Brady's complaints about the intubation were all true, and that the two which were upheld were serious complaints, would also claim that the notes were incomplete for failing to record those matters on 29 October.

49. At [38] to [54] the judge included a detailed consideration of the hospital's responses to the leak. It is not necessary to repeat that account here. It is sufficient to note that, in response to the hospital's question whether the information in the article was released with the consent or approval of Mr Brady, his solicitors said in a letter dated 6 December 1999, that the answer was no. They expressly referred to Mr Brady's rights under article 8 and encouraged the hospital to bring proceedings for an injunction restraining publication of extracts from his "continuous medical records" without further delay. They wrote to much the same effect on 21 December 1999.

50. At [41] the judge recorded that on 10 December 1999 Mr Clarke, the Acting Chief Executive, wrote to Ian Brady's solicitors on behalf of the hospital enclosing a copy of the second version of the Sines Report on a confidential basis. The letter included four apologies in respect of aspects of the transfer between wards, including the strain to Ian Brady's wrist. The letter also included apologies for two of Ian Brady's complaints about the re-feeding, namely that the appropriate anaesthetic gel was not used and that the first fluid was given at the incorrect temperature. It did not accept that these matters were other than accidental. The judge held that this was consistent with the findings of Professor Sines.

51. At [45] to [51] the judge considered the position with regard to certain further leaks or alleged leaks but, so far as we can see, they do not relate to the PACIS records and are not directly relevant to the issues in this appeal, save perhaps to note that Mr McCabe, who was a retired Police Chief Superintendent who was asked to investigate the circumstances in which a press photograph was obtained of Mr Brady, recommended that certain steps be taken to tighten security.

52. Mr Phil Walker of the NHS Information Policy Unit conducted an inquiry into who was responsible for the disclosure to the *Mirror* of the information published on 2 December 1999. The judge quoted extensively from the report at [53]. Mr Walker failed to identify the source. He did however identify a number of defects in the hospital's system for the protection of information and records. A flavour of the report can be seen from these extracts quoted by the judge:

> "7. … whilst the present … (PACIS) in use at Ashworth is unsatisfactory, it has many redeeming features in terms of clinical and administrative functionality. Rather than focus on the failings of PACIS, it is perhaps more relevant to consider the equally unsatisfactory standards that apply to the handling of paper records and reflect on Ashworth's overall approach to confidentiality and IM&T security…
>
> 8. …in contrast to physical security, information security has received little attention and responsibility is diffuse and ill defined. …
>
> 10. … access controls and audit procedures were neglected.
>
> …
>
> 12. By December 1999, a large number of Ashworth staff had 'read only' access to clinical records held on PACIS, with the ability to print copies being restricted to a sub-set of that number. Read only access would permit hand written notes to be made, screens to be photographed and in this case those with fairly basic computing skills could cut and paste sections of records within the Windows operating system environment, e.g to a floppy disk. The precise number and identities of those with each type of access could not be established with confidence, registration and de-registration procedures had been inconsistently applied. The limited audit facilities supported by PACIS were not routinely used…
>
> 14. Paper record management at Ashworth has largely been devolved to ward level where administrative staff print out each month's PACIS record for filing purposes. However, paper records are kept on the ward where the RMO for each patient is based, not necessarily on the patient's own ward, inevitably complicating consideration of who should have access to which PACIS records. Access to the paper record is controlled largely by restrictions on access to the ward office areas – anyone who

can gain access to these parts of a ward can gain access to unlocked and unmonitored records storage and nearby photocopying facilities. Actual physical remove of paper records is permitted for short periods, nominally subject to an unmonitored logging out procedure though it was evidence that no all staff followed the rules.

15. Although there appeared to be an expectation that there should only be a single paper record for each patient, this appeared to be unregulated and the existence of copies could not be discounted with confidence. There did not appear to be any clear policy on the destruction of printed material extracted from PACIS. Hospital social workers maintain their own paper records, largely of non-clinical information associated with a patient and his/her family, and occasionally need to take records off the premises to support their work all around the country…

…

17. The extent to which patients themselves disclose information, e.g. through correspondence with journalists, which would otherwise be held subject to a duty of confidence, is not currently known though there is clear evidence that it does occur. …

…

…"

19. … The audit undertaken for 1999/2000 appeared to be an honest appraisal and provides an organisational profile for Ashworth that, I believe, reflects the situation prior to December 1999. Notably, Ashworth:

- …

- Had no staff code of conduct in respect of confidentiality.

- Provided minimal training and awareness support as part of staff induction.

- …

- Had not included confidentiality requirements in the contracts of significant number of staff….

- Had not introduced effective controls for managing access to confidential information".

53. The judge observed at [54] that those recommendations appear to have been drafted by Mr Walker by reference to 'Protecting and Using Patient Information: A Manual for Caldicott Guardians', which was published by the NHS Executive in March 1999 and of which he was the author. The judge concluded, in our view with considerable force, that Mr Walker's report therefore carried considerable weight.

54. An important part of the judge's judgment contains an analysis of the evidence of Mr Ackroyd, whose evidence was not of course available in the *MGN* case. His evidence is considered in some detail at [129] to [138] under the heading 'What the source disclosed'. As an investigative journalist, Mr Ackroyd was interested in the way the hospital operated. During November 1999 he investigated the events surrounding both Mr Brady's move and his hunger strike. Mr Ackroyd gave oral evidence about his investigation and the information he received from the source or sources.

55. Although, as the judge put it, Mr Ackroyd's memory was not clear and he was somewhat confused between what he recalled from November 1999 and what he had learned since, his recollection was that the pages of the notes provided to him were about twelve in number and did not contain all the information in the PACIS notes which were available to the judge, but which were not available in the *MGN* case. Mr Ackroyd had destroyed what was given to him as soon as he had sent it to the *Mirror*, which was over six years ago. The title of the version provided to the court is "Ashworth Hospital Mersey Care NHS Trust Clinical Notes Report", which was not on the document he had received. It was that document which the *Mirror* referred to as a diary. Mr Ackroyd said that he had prepared an article which he sent to the *Mirror* and which did not differ greatly from the one that the *Mirror* published. At that date he did not have the Sines report, although he was aware of some of the things that Prof Sines had been told. Mr Nelson submitted that those findings of fact did not entitle the judge to find, as he did at [193(iv)], that Mr Ackroyd himself limited the information he made available to the public. However, we do not accept that submission. As Mr Millar submitted, it is a reasonable inference that the *Mirror* would have reverted to Mr Ackroyd if it had wanted to publish an article in different terms from the draft which he had submitted.

56. At the time Mr Ackroyd received the records, he had not heard of PACIS. He has never been provided with PACIS notes for Mr Brady or for anyone else other than the ones relating to Mr Brady for the period of October 1999. His source informed him that these records were different from the medical records held in paper form. He discussed the story with more than one source. Compared with the version supplied to the court, the version provided by the source had been significantly edited. It did not, for example, include clinical details about the condition of Ian Brady's wrist, which was a topic that interested Mr Ackroyd at the time. The reason he gave for not thinking that they were medical notes was that they were a record of observations by staff and did not contain any confidential conversations between doctor and patient.

57. The judge accepted at [132] that Mr Ackroyd was endeavouring to tell the truth in so far as he could recall it. The judge held that he was plainly mistaken in thinking that the records were not medical notes but expressly said that little turned on that because Mr Ackroyd knew that the record was intended to be confidential. Indeed the *Mirror* article says that the records were confidential.

58. The judge held at [133] that it was at least as probable as not that the source was not a person who had electronic access to the PACIS system, but that it was someone who had access to one or more of the different paper versions which were made and kept. He added that Mr Millar was correct to say that the form of the *Mirror* article would also be consistent with the source having cut and pasted the notes from the screen as contemplated in the Walker Report. Dr Collins confirmed what was said in the Walker Report about the production of paper records. In addition to the paper copies kept routinely on the ward for all patients, there were a number of paper versions made for the purposes of the people investigating Mr Brady's complaints.

59. At [134] the judge accepted Mr Ackroyd's evidence that the sources disclosed more than was published in the Mirror article, but considerably less than was in the print out provided to the court. He also accepted that the source did not disclose information about Ian Brady's wrist. Apart from that, he said that he could not make any finding as to what information which is in the print out provided to the court, but which was not in the Mirror article, was disclosed to Mr Ackroyd. The judge correctly held that it followed that his findings of fact differed from those on which both this court and the House of Lords proceeded in the *MGN* action: see [20] and [63] in this court and [14] in the House of Lords (quoted above), where Lord Woolf said that it was the overwhelming likelihood that the source provided the intermediary with a print out from Ashworth's computer database which was used to record data about patients and that this meant the source was probably an employee of the authority. The judge found that the source edited the material and disclosed only a proportion, probably a little over half, to Mr Ackroyd and that it was impossible to say whether he abstracted it from the PACIS database directly, or from one of the paper versions which were in existence at that time.

60. The judge accepted at [135] that what was disclosed to Mr Ackroyd was information that appeared to him to be based on observation by the writer, rather than information appearing to have been communicated by Mr Brady to the writer of the notes. He correctly held that even within such a sensitive category of information as medical records there is a range of sensitivity and he found as a fact that, while the information disclosed was plainly private or confidential, it was not information that could be described as intimate or highly sensitive. We do not think that (as was submitted on behalf of the hospital) that conclusion was contrary to the evidence of Dr Collins, who gave oral evidence before Rougier J that the PACIS material was sensitive. The judge accepted that that was so but added that, although it was sensitive, it was not highly sensitive. In our opinion the judge was entitled both to reach that conclusion of fact and to hold that that was a relevant consideration to weigh in the balance.

61. We have already referred to the fact that the judge held (at [138]) that it was probable that the source was someone who was working at the hospital in the course of his or her employment, although he added that whether or not that person was employed by the hospital was not something he could decide on the evidence available to him. At [137] the judge had held that the potential number of people with access to the PACIS records was large. He said at [138] that there is very little evidence of who might have had access to what paper records at the time. There was not even a list of those who currently had, or had had, electronic access to the PACIS database, although it might have been expected that that at least was a list that could have been prepared in

December 1999. On this footing the judge did not find that the source was an employee of the hospital.

62. The judge considered the possible justification for the disclosure by the source. At [141] he accepted Mr Ackroyd's evidence that the source did not disclose the information for payment and that he did not pay for the information or solicit its disclosure. At [142] and [143] the judge considered the position of Mr Brady himself, noting that he was the most obvious person to benefit from the disclosure. He ultimately concluded that the source was sympathetic, not necessarily to Mr Brady himself, but to Mr Brady's allegations of mistreatment. As to Mr Ackroyd, the judge held that Mr Ackroyd was concerned about the possibility of mistreatment and to expose wrongdoing as the hospital, if it was occurring, "as he had exposed other wrongdoing at the hospital in the past".

63. At [144] the judge rejected a submission made by Mr Nelson that, since money was not the motive of the source, the motive must have been either spite against the hospital or the desire to do Mr Ackroyd a good turn by providing him with a story. He expressed his conclusions thus:

> "An attempt to provide support for Ian Brady's allegations seems to me the most probable purpose. Put briefly, Ian Brady was alleging that he had been mistreated, and it was subsequently accepted by the hospital that he was mistreated. Ian Brady had ventilated his complaints in letters to the media, to which the hospital had responded in a manner which gave little by way of confirmation at the time. A reader of Ian Brady's letters as published in the media might have been sceptical as to what he was claiming. The matters which gave rise to Ian Brady's allegations were not recorded by hospital staff in the PACIS notes for 30 September or 29 October. A person aware of and concerned about these matters could have taken the view that Ian Brady's complaints were so serious that the PACIS should be disclosed in the public interest, at least to show that Ian Brady really was putting his own life at risk following mismanagement at the hospital, and probably to show that the hospital was not recording what it should have been recording (this was Ian Brady's case being made to Prof Sines at the time). There have never been any other leaks of anyone's PACIS notes, before or since, so far as the evidence before me is concerned. It seems to me that the co-incidence in time of the mistreatment issues and the disclosure make the mistreatment the most likely explanation of the disclosure, in particular given the evidence that I accept that there was no money involved."

We see no reason to reject that analysis.

64. A little later, at [147] the judge held on balance that Mr Brady probably did encourage or authorise the leak. As the judge put it, he was only too glad to have the opportunity to use the leak as a stick to beat the hospital with. In these circumstances the judge held that the facts did not support the inference that there was any breach of the duty

owed to Mr Brady. However, (as already stated) he held that there was wrongdoing as against the hospital. All those permitted to be present at the hospital owed the hospital a duty not to disclose, other than for the purposes of their work, information contained in the PACIS notes, whether they were members of staff or not and whether their contracts contained a confidentiality clause or not.

65. At [149] to [157] the judge considered and rejected Mr Millar's submission that the source would have had a public interest defence. We are not directly concerned with that analysis in this appeal. However, in that part of the judgment, there do appear to us to be findings of fact which are relevant to the key question for decision by the judge, namely whether it was necessary and proportionate to order disclosure of the source.

66. At [151] the judge noted that Mr Ackroyd gave evidence that he understood the source to be acting in the public interest with a view to giving a balanced version of the treatment of Mr Brady. However the judge held, for reasons given by Mr Nelson, that the notes were not very strong material to support the purpose of giving a balanced view to the public. The judge added:

> "However, the Defendant also said, and I accept, that the PACIS notes were intended to help him build a more complete picture of what had happened during the period of Ian Brady's transfer to Lawrence Ward, his hunger strike and his re-feeding, as well as to show that the hospital records were inaccurate and incomplete."

We see no reason to hold that the judge was not entitled to reach this conclusion.

67. The judge said at [155] to [157]:

> "155. I am not concerned in this action with the question whether the Defendant would have a public interest defence if the claim for compensation against him were being pursued. Those claims are not pursued and that seems to me to be a different issue. The Defendant stated that his main purpose in sending the draft article to the Mirror was to disclose publicly Ian Brady's mistreatment, including aspects not yet publicly disclosed or acknowledged by the hospital. I accept this explanation. The Defendant's position is different from the source's. The Defendant did not have a relationship with the hospital such as those who work there do, and the Defendant did not disclose to the public at large all that the sources disclosed to him. The Defendant had in the past disclosed matters of concern, not only in the press, but also to those in government who had responsibility for such matters. But his role has been that of a journalist and he has a history of acting responsibly.

156. Authorities cited by Mr Nelson QC, such as *X v Y*, make clear the difficulty facing a person claiming to be justified in disclosing medical information to the public at large in the public interest. The force of those authorities is not diminished by the approach to public interest disclosure approved by the Court of Appeal in *London Regional Transport*. The effect of disclosure of medical records on a patient, particularly a psychiatric patient in a secure hospital, and the effect of such disclosure on other interested persons, such [as] those responsible for his care, and other patients, is not something which any individual is likely to be in a position to evaluate. There is clearly a pressing social need for such records to be kept private, subject to limited exceptions, as prescribed by law. Some restriction on informing the public at large will almost always be proportionate. A person wishing to contend that it is not proportionate is likely to have to explain that there were not other persons within the NHS or the police to whom the disclosures could be made, or that such internal or limited disclosures had been made and had not had the appropriate effect. There may be some analogy with the statutory provisions relating to official secrets discussed by Lord Bingham of Cornhill in *Shayler* at paras 25-31. Since the source is not a party to these proceedings, no such case had been advanced. It is not to be expected that the Defendant would know the facts relevant to this. And even if he did, he is unlikely to be in a position to advance such a case without identifying the source in process, which would defeat his purpose in defending these proceedings.

157. In my judgment, on the material before me and the balance of probabilities, there was no public interest justification for the disclosure which was in fact made by the source. And I would reach this conclusion if I assumed (without making any finding) that Ian Brady's complaints were all correct (contrary to the findings of Prof Sines). I conclude that the hospital has established that there was wrongdoing against itself in which the Defendant was involved, so as to pass the *Norwich Pharmacal* threshold test. However, the degree of wrongdoing that I have found is a relevant consideration in relation to other questions. In particular, the facts that the source did not commit a wrong against Ian Brady, and that his or her purpose was to act in the public interest, are considerations that may be relevant to other questions I have to decide."

68. That seems to us to be an eminently balanced analysis of the position. On the one hand, the judge is careful to stress the importance of the confidentiality of medical records, whereas on the other hand he has regard both to the role of Mr Ackroyd as a responsible journalist investigating striking events at a closed hospital and to his conclusion that the purpose of the source was to act in the public interest.

69. The judge then turned to one of the principal planks of the case for the hospital. He described it at [158]:

> "Amongst the main arguments advanced for making a disclosure order are the need to remove from innocent employees the cloud of suspicion which the leak created and the need to take disciplinary action against any employee who was responsible. The possible involvement of employees in the leak is also relevant for consideration of the risk of future disclosure and the measures that may be taken to prevent future disclosures. Disclosure of the source is sought to deter employees from doing the same again in the future. So I turn to consider the evidence relating to the involvement of an employee, and the alternative measures that may be taken to prevent future disclosures, other than making a disclosure order in this case."

70. The evidence to which the judge turned was that of Dr Collins, upon whose testimony much emphasis was placed by Mr Nelson both before the judge and before us. The judge described this paragraph as the high point of his evidence:

> "No one knows the source of the disclosure and how this information was received by Mr Ackroyd. There are many within the hospital who have potential access to the records and properly so. However, whilst the source remains unidentified, a cloud of suspicion lingers, and is felt particularly, it seems to me by ward staff. This is not only unfair, but is also bad for staff morale".

71. The judge correctly observed that that evidence was not challenged in cross-examination. He then summarised evidence which he said had been adduced on behalf of Mr Ackroyd in order to try to determine the weight to be given to it. This included evidence, which the judge accepted, that 1,030 of the hospital's current employees were employed at Ashworth in December 1999. He said that it was impossible to ascertain the exact numbers who had had access to the PACIS records. Mr Brewster, who is (or was) the Head of Information Governance at the Mersey NHS Care Trust and had been an Information Manager at the time of the leak, gave evidence. He had said in 1999 that about 200 people at the hospital might have had access to the PACIS records.

72. The judge considered Mr Brewster's evidence in some detail between [161] and [167] and concluded as follows at [168]:

> "I conclude that the number of people with access to the information from the PACIS records of Ian Brady was not

> limited to a figure of about 200, and that it is not possible to establish anything like a comprehensive list of those having access to that information. I find that the situation at the hospital is best described in the words of the Walker Report cited above. This was a highly authoritative external report, written following an investigation which took place after Mr Brewster signed his witness statement which formed the evidence at the MGN trial. This finding is therefore different from the finding by the Court of Appeal in the MGN case (para 21). The finding in that case was that in all about 200 people had access to all the material on the general records held on PACIS."

We see no reason to reject those conclusions.

73. At [169] to [172] the judge considered evidence about leaks since 1999, and in particular since the *MGN* case. We set these paragraphs out because of the importance attached by Mr Nelson on behalf of the hospital to Dr Collins' evidence and to what was described in argument as the cloud of suspicion point. The judge said this:

> "169. Ms Anderson gave evidence at this trial, as she had at the MGN trial. Ms Anderson gave some evidence which relates to events since the MGN proceedings. She stated that, following the other leaks already referred to (to the photographer and of the Sines Report), and the commencement of the MGN action, there was a marked decrease in the number of leaks concerning the hospital. Her witness statement continues:
>
> > "However, when the Court of Appeal judgment was handed down this changed – immediately and dramatically. We were notified of the decision by our solicitor towards the end of the morning of 16th May 2003. Within a matter of hours I was approached by two national newspaper reporters (The Sun and The Daily Mail) who had been given scurrilous and untrue information regarding a named Ashworth Hospital patient (not Mr Brady) which I was able to refute entirely. No stories appeared."
>
> 170. This is the only evidence of leaks in the intervening period of now nearly three years. It does not suggest that leaks are a significant problem. This evidence is confirmed by the Defendant. He states he was offered some information by a source in the hospital in 2002 (about the alleged possession of child pornography by two members of staff), but that the current litigation has had a profound chilling effect on his journalistic

> work. He states that he has been unable to continue his investigative work at the hospital. He cannot make information available unless he can guarantee the protection of his sources.
>
> 171. Mr Paterson also gave evidence at this trial, as he did at the MGN trial. In October 1999 he was the Acting Head of Security at the hospital and later became Director of Security. In October 2003 he retired from the hospital. He gave evidence about the unsuccessful inquiry into the leak, but could give no evidence as to the state of affairs at the hospital since 2003.
>
> 172. I cannot make any finding as to the reasons why the Defendant's sources have not recently made information available to him. What I do conclude is that leaks are not the problem at the hospital that they were."

74. At [173] the judge drew together his conclusions with regard to the force of the evidence of Dr Collins, part of which is quoted above. He said this:

> "173. A number of conclusions follow from these. First, on these facts, the cloud of suspicion point carries less weight than it did six years ago, and less weight than it would in a case where the people under suspicion can be identified and numbered. In some leak enquiries the suspects can be reduced to a small number, each of whom is then under the cloud. Where the number of potential suspects is so large that they cannot be identified, then the cloud is so thinly spread that it is not plausible to suppose that any individual will suffer significantly, although I accept that this may still have an effect on morale. Moreover, there is no evidence before me as to the class or number of people, if anyone, who remain under suspicion today. Even in relation to the 200 counted by Mr Brewster for Ms Roberts in 2000, it is not possible to say whether any of them remains an employee of the Claimant. The list is no longer available, and Mr Brewster did not attempt to recreate it for these proceedings. The individuals concerned, or some of them, may be among the 600 or so employees who have left the hospital since then, and they, or many of them, may by now have retired from this type of work, or from all work. The evidence as to the position at the hospital today, or since the hearing in the MGN action, goes no further than that given by Dr Collins, as I have indicated above."

75. Mr Nelson criticises those conclusions, which he says are to be contrasted with those of Lord Woolf in the House of Lords in the *MGN* case, especially at [63]. We have

already referred in detail to [63] of Lord Woolf's speech: see [18], [24], [25], [28], [33], [41] and [59] above, especially [41], where we have set out his views as to the evidence of Dr Collins and Mr Brewster as to the cloud of suspicion and the particular importance of the confidentiality of medical records in the case of the class of patients that the hospital is responsible for caring for. As we see it, the judge had these aspects of the case well in mind but was trying to assess what weight to give them in the light of the evidence that was available as to the position in 2006. We are not persuaded that the judge erred in principle in approaching the evidence of Dr Collins and the other evidence before him as he did. As the last part of [173] shows, he accepted Dr Collins' evidence but put it in the context of all the evidence available to him.

76. At [174] to [177] the judge considered the relevance of the conduct of the journalist in a case like this and concluded at [177] that it was potentially relevant to the judgment that has to be made before an order for disclosure of sources can be made. He did so in particular by reference to the approach to qualified privilege demonstrated in Lord Nicholls' speech in *Reynolds* at page 205 and to the approach to interfering with freedom of expression in *Fressoz and Roire v France* (2001) 31 EHRR 2 at [55] and [56] in the light of Lord Hoffmann's speech in *Campbell* at [140]. We are not sure that it is said that the judge was wrong in this regard but, in any event, it is our view that he was correct. In deciding whether an order for the disclosure of the journalist's source is proportionate it is, in our judgment, potentially relevant to consider the particular role of the particular journalist.

77. The judge then considered the problems faced by the hospital in the late 1990s. These included the events and problems exposed in the Fallon Report: see the judgment at [178] and [179]. Some of those problems were extremely serious and worrying. Mr Ackroyd himself investigated some of them. At [188] the judge gives an example of his writing an article in the *Express* newspaper in January 1997, which was based on information from the hospital, in which he reported a search at the hospital which had led to the discovery of a suspected bomb, weapons, drugs and child pornography. In addition, at [189] the judge referred to references to Mr Ackroyd in the Fallon Report in which the Inquiry accepted his account of what he had been told.

78. The judge concluded as follows:

> "182. The Defendant therefore has a good record of fulfilling the role of the press to which the House of Lords referred in cases such as *Simms*, *Turkington* and *Shayler*. This record is not confined to this case, but extends to other stories which it is not necessary for me to expand upon in this judgment. It is in the public interest that his sources should not be deterred from communicating with him. This is evidence relating to this journalist in relation to the hospital bringing this case.
>
> 183. Whether these proceedings are the reason why the Defendant has received no more stories from his sources at the hospital is not a matter on which I can reach a finding of fact. That state of affairs is also

> consistent with the hospital having succeeded in getting its affairs in order since the Fallon Report, and in impressing upon all those who work at the hospital of the need to protect patient confidentiality in accordance with the law, their contracts and their professional obligations."

We see no reason why the judge should not have taken these aspects of the evidence into account.

79. The judge set out his conclusions at [187] to [193] and followed them with some concluding remarks at [194] to [197]. Although, they are lengthy, it is we think preferable for us to set them out in full rather than to attempt to summarise them. They are, after all, the key material upon which our decision must be based. They are in these terms:

> "CONCLUSIONS
>
> 187. It follows from my findings that I am not able to say whether the hospital were ever in a position to take any action against the individual who disclosed the information, and the position now, given the uncertainty of the numbers and classes of individuals who might have been the source, is that I can reach no finding as to whether or not the source was ever an employee, and if so whether he or she is still in employment at the hospital, or at all. I can form no view as to whether the hospital would suffer damage if it fails to obtain the order it seeks.
>
> 188. A further consequence flows from my finding that there was no financial motive, but rather a misguided attempt to act in the public interest. If the motive were financial there would be the obvious risk of repetition, referred to in the MGN case. And the fact that no repetition has occurred so far would be little indication to the contrary. It would be consistent with the source lying low, as found by the Court of Appeal in the MGN case (at para 38), and that his venality would lead to the sale of further confidential information (para 93). But a source who misguidedly thought he or she was acting in the public interest in the extraordinary circumstances of October 1999 (when Ian Brady had a well founded complaint of mistreatment by the hospital which followed the dreadful history set out in the Fallon report), is not a person who can be said to present a significant risk of further disclosure, at least unless there were to be a repetition of events such as occurred on 30th September and 29th October 1999. No one suggests that that is likely to recur.

189. Moreover, I am in a position to make a further finding, which could not have been made in the MGN action. Since the delivery of the Walker Report in April 2000, and its acceptance by the Board shortly after that, I am confident that, as was Ms Roberts' and Mr Brewster's task to achieve, steps have been taken to improve the information security arrangements at the hospital, not only up to the time when the MGN proceedings were heard, but in the subsequent years. There is also no evidence of any repetition of the very grave matters that occurred in the hospital prior to 1999, and which were the subject of the Fallon Report.

190. Ms Roberts gave evidence to me, as she had at the MGN trial. In her recent witness statement she explained that after her arrival at the hospital those who were then responsible for it started to pull things together. They had a new management structure. She and they were the new broom, as she put it. The publication in The Mirror came at a really bad time, as they were giving the hospital a new sense of direction. It would have helped enormously to know who the culprit was, in order to identify the way in which systems might respond. I accept this evidence. But the corollary is that now, six years later, the position is different. I have heard no evidence from anyone at the hospital that the position now is as she describes it to have been then. The witnesses from the hospital who are working there today were the current Medical Director Dr Fearnley and Dr Collins. Dr Fearnley gave unchallenged evidence as the importance of confidentiality, which I accept. He expressed concern about the risk of a future disclosure, as did Dr Collins. But they did not give evidence about the current position at the hospital which suggests that the hospital is in still in the difficult position it found itself in during 1999 and 2000.

191. The hospital has established the threshold condition that there has been wrongdoing, of which it is the victim, and in which the Defendant was involved: para 157 above. So I turn to focus on the comparative importance of the specific rights being claimed in this case.

192. For the hospital the main points are the following:

i) The rights and obligations to keep the patients' records from unauthorised disclosure, and so the wrongdoing of which it is the victim, are matters

of the highest importance: paras 87 and following.

ii) The leak has had the effects on patient care described by Dr Collins and summarised in para 100 above.

iii) The leak has had an effect on staff morale: para 173.

iv) There remains a risk of another unauthorised disclosure.

193. For the Defendant, the main points are the following:

i) The expression for which the Defendant invokes freedom in this case is expression of a kind which attracts the highest protection: see paras 105 and following, above.

ii) The wrongdoing of the source, serious though it is, is not as serious as it would be but for the following findings: the disclosure consisted of only part of the notes excluding medical information of high sensitivity, I cannot say that it was made without the consent of Ian Brady, it was similar to information which he had already made available to the public, and the disclosure was motivated by an erroneous belief that it was in the public interest: see paras 134, 135, 144 and 147.

iii) The effect in terms of there being a cloud of suspicion is not at the high end of the scale, and it is now impossible to find out whether there is anyone against whom the hospital could obtain the redress they seek, or even who among those who were employed in 1999 is still employed at the hospital: paras 173 and 190.

iv) The Defendant himself limited the amount of information which he made available to the public, and he has a record of investigative journalism which has been authoritatively recognised, so that it would not be in the public interest that his sources should be discouraged from speaking to him where it is appropriate that they do so: para 174 and following.

v) There has been no similar disclosure before or since November 1999, and the risk of future

unauthorised disclosure, while it exists, is not now high: para 188.

vi) The necessity for a disclosure order has been diminished by the apparent success of the measures taken since the Fallon Report to impress upon those working at the hospital the need for patient records to be kept confidential and to avoid the serious faults which have occurred in the past: para 189.

194. Considering the facts as I now do in January 2006, in my judgment it has not been convincingly established that there is a today pressing social need that the sources should be identified. An order for disclosure of the Defendant's sources would not be proportionate to the pursuit of the hospital's legitimate aim to seek redress against the source, given the vital public interest in the protection of a journalist's source.

CLOSING REMARKS

195. I am conscious that the decision I have reached is the opposite of that reached by the Courts, up to and including the House of Lords, in the MGN action.

196. The first point to note is that this is not because I have considered that medical records are less private or confidential, or less deserving of protection, than those Courts held. On this point, as on all points of law, I have followed the House of Lords, and nothing in this judgment should be taken as providing any encouragement to those who would disclose medical records.

197. The second point to note is that the facts as I have found them to be today are different from the facts as they had been found to be in the MGN action. This is partly due to the new evidence that I have heard, and partly due to the passage of time since 1999. As Lord Keynes said: "When the facts change, I change my mind". Important facts that have changed are mentioned above. They include that the hospital no longer contends that the source acted for money, with the result that I have had to find afresh what the purpose of the source was, and to re-assess the risk of further disclosures now, in the light of that fact, and in the light of the absence of any similar disclosures since 1999. The extent of the disclosure by the source was more limited than was previously understood to be the case. I have not found that the source was one of a

> number of people limited to 200, but that it is impossible to say how large the group is. I have not found that the source was probably an employee, although he or she may have been, and even if it was an employee, the numbers who have left the hospital since 1999 represent about a third of those who worked there in 1999. So the likelihood of the hospital being able to obtain the redress it seeks against the source is correspondingly diminished. In addition, the stance of Ian Brady has changed, and I have not found that the disclosure was made without his consent. Finally, unlike the courts in the MGN action, I have heard the evidence of Mr Ackroyd and have concluded that he was a responsible journalist whose purpose was to act in the public interest.

Conclusions

80. As already stated, the question for the judge was whether he was persuaded by the hospital that it was necessary and proportionate to order Mr Ackroyd to disclose his source. That involved a balancing of considerations that could properly be urged on one side and the other. As explained above, the carrying out of that balance was essentially a matter for the judge, with whose conclusion this court, as an appellate court, should not interfere unless persuaded that he erred in principle in carrying out the balancing exercise, or that he reached a conclusion that a reasonable judge could not have reached after having had regard to all relevant considerations and having disregarded all irrelevant considerations.

81. It can be seen from the above discussion of the findings of the judge on the facts, and his conclusions based on them, that he took into account the key considerations on either side of the argument. In these circumstances we do not think that there is any basis on which we could properly interfere with the balance he struck. For the reasons the judge gave at [188], [189] and [197], the evidence before him and thus the facts he found were significantly different from the evidence given and the facts found in the *MGN* case and, by contrast with the position in that case, he was of course considering the position in 2006.

82. The judge was in our opinion quite entitled to hold that the position in 2006 was very different from that which it would have been if this action had come to trial in, say, 2000, when the *MGN* case came before Rougier J. Having explained the various differences, the judge said this at the end of [188] in a passage which we have already quoted:

> "But, a source who misguidedly thought he or she was acting in the public interest in the extraordinary circumstances of October 1999 (when Ian Brady had a well founded complaint of mistreatment by the hospital which followed the dreadful history set out in the Fallon report), is not a person who can be said to present a significant risk of further disclosure, at least unless there were to be a repetition of events such as occurred

> on 30th September and 29th October 1999. No one suggests that that is likely to recur."

We see no reason to disagree with that analysis or (at least) to hold that it was not open to the judge.

83. Some key features of the evidence before the judge which he emphasised at [197] as being different from the evidence in the *MGN* case were that the purpose of the source was not to receive payment, that Mr Brady's stance had changed and that, although Mr Ackroyd was mixed up in the wrongdoing so as to engage the principle in the *Norwich Pharmacal* case, the disclosure of the notes was not in breach of a duty owed to Mr Brady. Mr Nelson submitted that those features of the case were not relevant distinguishing factors. We do not accept that submission. The conclusion that the source was paid for the information was regarded as a relevant factor in the *MGN* case and the stance of Mr Brady was naturally much relied upon by the hospital when it supported the hospital's position on disclosure. Indeed, Dr Collins continued to rely upon it in a statement dated 28 November 2005. In all the circumstances, the judge was in our opinion correct to hold that these were relevant factors. Mr Nelson further submitted that the judge placed too much weight upon them. However the weight to be given to a relevant factor in the overall balance was essentially a matter for the judge.

84. We should perhaps add that it was submitted on behalf of the hospital that the judge was wrong to hold that procedures were tightened as a result of the Fallon Report. However, the point made by the judge at [193(vi)] was that the necessity for a disclosure order had been lessened by the apparent success of the measures taken *since* the report, in order to impress upon those working at the hospital the need for patient records to be kept confidential and to avoid the serious faults which had occurred in the past. The judge was there emphasising the important point that the matter had to be judged in the light of the position as at 2006. We might add that we can see nothing in the judge's judgment which would encourage the source to disclose further confidential information now.

85. In all the circumstances, the judge was in our opinion entitled to hold that it was not convincingly established that there was in 2006 a pressing social need that the source or sources should be identified. He was also entitled to hold that an order for disclosure would not be proportionate to the pursuit of the hospital's legitimate aim to seek redress against the source, given the vital public interest in the protection of a journalist's source. It follows that we dismiss the appeal.

Postscript

86. Like the judge, we would like to emphasise that nothing in this judgment is intended to lead to the conclusion that medical records are less private or confidential, or less deserving of protection, than was held by this court and the House of Lords in the *MGN* case.

87. There is, however, a very important further point to make. We have already referred at [39] above to the curious feature of the *MGN* case by contrast with this case. It was there assumed that, if the court made (or upheld) an order that MGN disclose its source, the ultimate source or sources in the hospital would be disclosed. That

Rougier J, this court and the House of Lords should consider the matter on the basis of a false assumption is disturbing. Further, given that the editor knew that his information had come from Mr Ackroyd, and it is not suggested knew anything else, it is difficult to see how this misapprehension could have arisen, although we repeat our view that there is no evidential basis upon which the falsity of that assumption can be held against Mr Ackroyd and, without hearing MGN on the matter, it is, of course not possible to go further.

88. The consequences of this false assumption are real. First, if Mr Ackroyd's name had been disclosed in May 2000, the ultimate trial of the action involving him would be likely have taken place before the first anniversary of the disclosure and not over five years later than that; and it would not have been possible to pray in aid the fact of the delay in defence of the proceedings. Secondly, it is almost inconceivable that this court or the House of Lords would have given permission to appeal the decision of Rougier J, had it been appreciated that far from disclosing the ultimate source, all that could be disclosed was the journalist who provided the story and who would have his own right to maintain the confidence of his source to be determined. Thirdly, an enormous amount of money and, perhaps more significantly, energy on the part of the hospital would have been saved and better directed to other activities. In relation to this case, all that is water under the bridge but it does prompt the question how this problem can be solved in the future.

89. First and foremost, the underlying principles are now reasonably clear, so that it should not be necessary for cases of this kind to come to this court or go to the House of Lords in the future. It should be possible for any dispute to be resolved by the judge carrying out the balancing exercise discussed above.

90. Secondly, we can at present see no reason why an editor should not be asked to confirm that the source for an article or programme is not a journalist whose own article 10 and section 10 rights would fall to be considered if his or her identity were disclosed. Failure to do so might give rise to an inference that these very important issues are likely to arise in subsequent litigation and, depending on any other question raised by proceedings against the editor, might legitimately give rise to an application for summary disposal on the basis that it is difficult to see what possible justification there could be for refusing to disclose that fact. Disclosing the name of a journalist would focus the attention of the court on the critical issue of the disclosure of that journalist's source at an early stage. This is important because it is obviously highly desirable that disputes of this kind are resolved as soon as possible after the relevant incident has occurred.