Neutral Citation Number: [2010] EWHC 16 (Fam)

Case No: FD07C01234

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(In Private)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 January 2010

Before :

MR JUSTICE MUNBY
(now LORD JUSTICE MUNBY)

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Between :

In the matter of WILLIAM WARD (dob 21.4.2005)

(1) DOCTOR A
(2) DOCTOR B
(3) CAMBRIDGE UNIVERSITY HOSPITALS NHS FOUNDATION TRUST
(4) CAMBRIDGESHIRE PRIMARY CARE TRUST
(5) CAMBRIDGESHIRE COUNTY COUNCIL — **Applicants**

- and -

(1) VICTORIA WARD
(2) JAKE WARD — **Respondents**

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Mr Adam Clemens (instructed by Rex Forrester of the Medical Defence Union) for the First and Second Applicants
Mr David Lock (instructed by Mills & Reeve LLP) for the Third and Fourth Applicants
Ms Barbara Connolly (instructed by Legal Services, Cambridgeshire County Council) for the Fifth Applicant
Mr and Mrs Ward in person
Ms Kate Wilson (instructed by the BBC Litigation Department) lodged a skeleton argument on behalf of the British Broadcasting Corporation

Hearing dates: 16-17 June 2009
Further submissions dated 22-23 July 2009

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Judgment

LORD JUSTICE MUNBY

This judgment was handed down in private but the judge hereby gives leave for it to be published

Lord Justice Munby :

1. This is the much delayed sequel to a judgment I gave as long ago as 30 March 2007: *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765.

2. The case as it is now presented raises two questions of fundamental importance in relation to the practice and procedure of the Family Division, indeed of all family courts:

   i) The first relates to the meaning and effect of section 12(1)(a) of the Administration of Justice Act 1960 and involves a question the answer to which, despite the by now extensive jurisprudence on the topic, is seemingly not altogether clear.

   ii) The second relates to the anonymity of professional witnesses in care proceedings under Part IV of the Children Act 1989: specifically, whether three categories of witness – medical experts, treating clinicians (in which phrase I include nursing as well as medical staff) and social workers – should have their anonymity protected by *contra mundum* injunctions.

3. I emphasise at the outset that, although these questions have to be resolved in the context of the concrete facts of the specific case – after all, as Lord Steyn made clear in *In Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, at para [17], "an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary" – the truth is that the particular factual context here is largely unexceptional. Without for a moment seeking to diminish the tremendous significance of the proceedings for the three human beings most directly involved – Mr and Mrs Ward and their son William – the fact is that the care proceedings which give rise to the issues I now have to resolve did not exhibit, from the forensic perspective, any particularly unusual or striking features. And with only two exceptions (see below) none of the professionals involved was singled out by the judge who tried the care proceedings, Her Honour Judge Isobel Plumstead, either for blame or for praise. So the reality is that the issues presented to me for decision arise in a singularly 'pure' context. This is not, so far as the central issues are concerned, a fact-specific case. I emphasise the point at the outset because the inescapable reality is that the issues I have to address are in large measure points of pure principle and that my answers to the questions posed are likely to be determinative of similar questions in many, indeed even in the generality, of care cases hereafter.

The factual background: the care proceedings in the County Court

4. I take the facts from the summary which I set out in my previous judgment: *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at paras [2]-[5].

5. William Ward was born on 21 April 2005. On 21 July 2005 he was discovered to have fractures of his right tibia. On 16 December 2005 the local authority, Cambridgeshire County Council (CCC), began care proceedings. The case was based entirely upon the fractures, for CCC accepted that there was no other evidence of ill-treatment or poor parenting. A fact-finding hearing, to establish whether the threshold for making a care order had been passed, took place in the county court before Judge Plumstead.

6. Mr and Mrs Ward were unable to identify any cause for William's injuries from anything they had themselves seen. They hypothesised that his foot may have become trapped between his cot and their bed, which was immediately beside the cot, and that he may have twisted and fractured his leg as he pulled his foot free. In addition to hearing evidence from the parents, Judge Plumstead read contemporaneous notes or later reports prepared by, and in some cases also heard oral evidence from, various professionals.

7. Judge Plumstead gave judgment on 8 December 2006. She found in favour of the parents and dismissed the case. She made three crucial findings. First (para [81]), she found that:

> "The possibility that William caused these fractures himself is in my judgment established. The medical opinion is that it is so, albeit that they agree that they consider it improbable."

Secondly (para [94]), she said that:

> "I have formed the conclusion that their [scil, the parents'] evidence has not been shaken. I prefer the evidence of Mrs Ward to that of Ms A [the social worker] concerning the interview on 22 July."

Thirdly (para [96]), she found that:

> "There is no cogent evidence that these parents injured their son. I am accordingly not satisfied that the significant harm suffered by him was due to him not having received the care to be expected for a reasonable parent."

That is, of course, a reference to the statutory test in section 31(2) of the Children Act 1989.

8. In her judgment, Judge Plumstead referred to a large number of professionals by name. In the anonymised version of her judgment whose publication I authorised (see *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at paras [19], [70]) these names were replaced by initials. It

is convenient at this point to refer to the various groups of professionals referred to by Judge Plumstead:

i) Treating clinicians: Dr D and Dr E (the family's general practitioners); Staff Nurse A, Dr F, an SHO, Dr G, a paediatric clinical fellow, Dr H, a consultant paediatrician, and Dr I and Dr J, both consultant radiologists (all employees of Cambridge University Hospitals NHS Foundation Trust at Addenbrooke's Hospital, to which William had been referred); and Dr K, a consultant community paediatrician (an employee of Cambridgeshire Primary Care Trust);

ii) Expert witnesses: Dr A, a consultant paediatrician, Dr B and Dr L, both consultant paediatric radiologists, Dr C, a rheumatologist, Dr M, a consultant radiologist, and Dr N, a consultant paediatric orthopaedic surgeon.

iii) Social workers: Ms A and her manager Ms B.

Judge Plumstead also referred to the police officer from the child protection team who, together with Ms A, had interviewed both Mr and Mrs Ward.

9. Judge Plumstead singled out two of these professionals. She was critical of Dr C, observing (para [80]) that it was:

> "perhaps not surprising that in the end no party, and in particular neither parent, argued that I should place any reliance on [his] evidence. Nor would I have done. I formed the clear view that he was unwise and unprofessional in his initial response to Mrs Ward's email, and that he failed to be guided by the duty of professional detachment that the court requires of experts."

In contrast (para [56]), she said that Dr A's paediatric overview had been of "tremendous assistance". Speaking generally of the four experts other than Dr C who had been instructed for the purpose of the proceedings – Dr A, Dr B, Dr M and Dr N; Dr L, it should be noted, had been instructed previously by the police with a view to criminal proceedings which in the event were never brought – she said (para [55]) that their evidence "demonstrated their impartiality regardless of the source of their instructions."

The factual background: the proceedings in the High Court

10. The background to the proceedings in the High Court is described in my earlier judgment: *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at paras [6]-[9].

11. At the hearing before me on 6 March 2007, it became clear (para [10]) that although there was no objection to the public identification of the family, the child, the children's guardian, the local authority, the hospital or the Cambridgeshire Constabulary, the social workers, the police officer, and some at least of the treating clinicians and the expert witnesses preferred to preserve their anonymity. But this raised issues which, as I made clear (para [37]), could not be resolved within the

confines of what was only a comparatively short directions hearing. They were, moreover, issues of some complexity on which I required more detailed argument and, furthermore, issues in relation to which the parties might, as it seemed to me, wish to adduce further evidence. Accordingly, while making an order the effect of which was to permit the identification of the family, the hospital and the local authority, the publication of Judge Plumstead's judgment and the disclosure by the family to the BBC of various video tapes, I granted an interim *contra mundum* injunction (para [53]) prohibiting the identification of the social workers, the police officer, the treating clinicians and the expert witnesses pending full argument on the outstanding issues.

12. For reasons which there is no need for me to rehearse, but which are fully explained in my earlier judgment, that order was expressed (para [70]) as ceasing to have effect 28 days after written notification was given by the BBC to the parties of one or other of a number of matters. In the event notice was given by the BBC on 5 October 2007.

13. On 1 November 2007 the expert witnesses, Dr A, Dr B and Dr L, applied for the interim *contra mundum* injunction I had granted to be extended pending final determination of the issues left outstanding by my judgment. The same day Hedley J extended the interim injunction until 5 December 2007. On 16 November 2007 Dr A, Dr B and Dr L applied for the *contra mundum* injunction to be extended until 1 January 2025. It may be noticed that no application has ever been made by Dr C, Dr M or Dr N, and that in due course Dr L withdrew from the proceedings. So in relation to the expert witnesses the only extant applications are by Dr A and Dr B.

14. On 19 November 2007 a similar application, again seeking a *contra mundum* injunction until 1 January 2025, was made by Cambridge University Hospitals NHS Foundation Trust on behalf of the various treating clinicians at Addenbrookes Hospital, Staff Nurse A, Dr F, Dr G, Dr H, Dr I and Dr J, and also by Cambridgeshire Primary Care Trust on behalf of Dr K. There was no application by or on behalf of either of the GPs, Dr D or Dr E. On 4 December 2007 Hedley J further extended the interim injunction until the determination of the substantive issues.

15. The substantive hearing had originally been fixed for 14 May 2008. Very shortly before then an agreement was entered into between Cambridge University Hospitals NHS Foundation Trust and Cambridgeshire Primary Care Trust (which I shall refer to as "the Trusts") and Mr and Mrs Ward. The terms of that agreement (which I shall refer to as "the Agreement") can be summarised as follows:

    i) Save as provided in the Agreement the Trusts agreed on their own behalf and on behalf of their staff that they would not at any time take any legal action to restrain Mr and Mrs Ward from expressing their opinions orally or through any media outlet in relation to the medical treatment provided to William by any staff of the Trusts or the actions of any member of their staffs in relation to child protection proceedings in respect of William.

    ii) Mr and Mrs Ward agreed that they would ensure that no statement made by either of them would lead to the identification by any third party of any individual member of staff employed by either of the Trusts who was concerned in any way with the medical treatment provided to William or child protection proceedings in respect of William.

iii) The Agreement might be disclosed to me and the Trusts and Mr and Mrs Ward "shall both invite the Judge … to make a *contra mundum* order to reflect the terms of this agreement" but the Agreement "shall be enforceable by the parties hereto whether the said order is made or otherwise."

iv) Save for inviting me to make an order in those terms, the Trusts agreed to take no further part in the proceedings "and shall not seek any order for costs against Mr and Mrs Ward."

v) "Mr and Mrs Ward shall not seek any order for costs against" the Trusts.

16. In the event, the hearing fixed for 14 May 2008 had to be vacated. On 14 May 2008 I extended the interim injunction until further order and gave certain directions, pursuant to which on 23 May 2008 Mr and Mrs Ward issued an application seeking to have section 12 of the 1960 Act "disapplied" in relation to a long list of documents, including if not all then the vast bulk of the documents that had been in the trial bundles before Judge Plumstead. I gave further directions in an 'own motion' order that I made on 29 July 2008.

17. By my order of 29 July 2008 I had re-fixed the hearing for 8 December 2008, but that hearing also had to be vacated, essentially to meet Mr and Mrs Ward's requirements. On 13 March 2009 I re-fixed it for 16-17 June 2009 making it clear that there was to be no further adjournment.

18. Very shortly before the hearing, on 10 June 2009, CCC gave notice that it was applying for a *contra mundum* order prohibiting, again until 1 January 2025, the naming of the social care professionals whose names appear in the documents. The order is sought not merely in relation to the two social workers referred to by Judge Plumstead in her judgment, Ms A and her manager Ms B, but also in relation to six other social workers, five other managers, three child and family workers, the Chair of the Child Protection Case Conference, the review manager, the Head of Safeguarding and Standards, two minute takers, a complaints handler and the Head of Human Resources – all in all a total of twenty-three employees of CCC.

<u>The hearing</u>

19. The matter eventually came on for hearing before me on 16 June 2009. Mrs Ward appeared in person (her husband was looking after the children, so was not in court). The expert witnesses, Dr A and Dr B, were represented by Mr Adam Clemens, the Trusts by Mr David Lock and CCC by Ms Barbara Connolly. All three counsel had produced most helpful skeleton arguments. From Mr and Mrs Ward I had the two position statements they had prepared for the abortive hearing on 14 May 2008 and a skeleton argument prepared for the hearing on 16 June 2009. I also had the skeleton argument which Ms Kate Wilson had prepared on behalf of the BBC for the hearing on 14 May 2008. By then the BBC no longer intended to make a programme about the case and appropriately, from its point of view, had decided not to make any oral submissions, but helpfully, from the court's perspective, lodged written submissions setting out what Ms Wilson described as "points of principled opposition" to the applications being brought against Mr and Mrs Ward.

20. The hearing lasted into a second day. At the end of the hearing on 17 June 2009 I reserved judgment, though in the circumstances referred to below I received further written submissions on 22-23 July 2009.

The applications

21. As will be appreciated from the foregoing narrative, there were four applications before me:

    i) First, there were the applications by two of the expert witnesses, Dr A and Dr B, by the Trusts and by CCC for *contra mundum* injunctions to protect the anonymity of Dr A and Dr B, the treating clinicians and the social workers.

    ii) Second, there was the application by Mr and Mrs Ward to "disapply" section 12 of the 1960 Act.

    There was no application by or on behalf of either the Cambridge Constabulary or the police officer.

The evidence

22. By the time of the hearing a substantial volume of written evidence had been filed by or behalf of the various applicants:

    i) On behalf of Dr A and Dr B there were witness statement from Rex Forrester of the Medical Defence Union dated 16 November 2007 and 16 January 2008 and from Dr A, Dr B and Dr L dated respectively 17, 16 and 17 January 2008.

    ii) On behalf of the Trusts there were witness statements from Dr H, Dr J and Dr K dated respectively 18, 22 and 17 January 2008.

    iii) On behalf of CCC there was an undated witness statement from Gordon Jeyes, the Deputy Chief Executive.

    iv) In addition I had statements from Professor Sir Alan Craft, the Immediate Past President of the Royal College of Paediatrics and Child Health, dated 5 January 2008, Dr Patricia Hamilton, the President of the Royal College of Paediatrics and Child Health, undated, and Dr Martin Samuels, a Consultant Paediatrician and founding member of PACA (Professionals Against Child Abuse), dated 21 November 2008.

23. In addition to this evidence I had the following materials:

    i) The Royal College of Paediatrics and Child Health's 'Child Protection Survey' published in March 2004.

    ii) 'Paediatricians and Child Protection' by Professor Sir Alan Craft in (2007) 75 Medico-Legal Journal 55.

    iii) The Royal College of Paediatrics and Child Health's 'An investigation into the nature and impact of complaints made against paediatricians involved in child

protection procedures', by Dr Jackie Turton and Linda Haines, published in January 2007.

iv) Extracts from the website 'MAMA – Mothers Against Munchausen by Proxy Allegations' (www.msbp.com) as accessed on 16 November 2007.

v) 'Complaints in child protection' by Linda Haines and Jacqueline Turton in (2008) 93 Arch Dis Child 1.

vi) 'The future of child protection' by D M B Hall in (2008) 99 JRSocMed 6.

vii) A letter dated 16 February 2008 sent by the Chair of PACA to the Chairs of Local Safeguarding Children Boards.

viii) 'The Failure of Medical Regulation and the Consequences for Child Protection': Evidence to the Select Committee on Health submitted by PACA in September 2008.

ix) Newspaper articles about the present case in the Guardian (9 April 2007), the Sunday Times (9 December 2007) and the Cambridge Evening News (14 December 2007).

The legal framework

24. It is convenient to start with what I said in *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at para [12]:

> "It was – correctly – common ground between counsel that:
>
> (i) The care proceedings in relation to William having come to an end, the restrictions imposed by s 97(2) of the Children Act 1989 no longer operate: *Clayton v Clayton* [2006] EWCA Civ 878, [2006] Fam 83, [2007] 1 FLR 11.
>
> (ii) The only relevant statutory restrictions are those imposed by s 12 of the Administration of Justice Act 1960.
>
> (iii) Section 12, although it … imposes restrictions upon discussion of the facts and evidence in the case, does not prevent publication of the names of the parties, the child or the witnesses: *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142.
>
> (iv) Accordingly, unless I agree to exercise the 'disclosure jurisdiction' (see *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at [84]) [nothing] … (to the extent that it contains … material the disclosure of which would otherwise constitute a breach of s 12 of the Administration of Justice Act 1960) can be published, and unless I decide to exercise the 'restraint jurisdiction' there will be nothing to prevent the public identification of the social

> workers, the police officer, the treating doctors and the expert witnesses."

25. No-one dissents from what I went on to say (at para [13]) namely that:

> "both the disclosure jurisdiction and the restraint jurisdiction have to be exercised in accordance with the principles explained by Lord Steyn in *In Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, sub nom *Re S (Identification: Restrictions on Publication)* [2005] 1 FLR 591, at [17], and by Sir Mark Potter P in *A Local Authority v W, L, W, T and R (by the Children's Guardian)* [2005] EWHC 1564 (Fam), [2006] 1 FLR 1, at para [53], that is, by a 'parallel analysis' of those of the various rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention), which are engaged, leading to an 'ultimate balancing test' reflecting the Convention principle of proportionality".

26. As will be appreciated, Mr and Mrs Ward are asking me to exercise the disclosure jurisdiction, while Mr Clemens, Mr Lock and Ms Connolly are asking me to exercise the restraint jurisdiction. But before turning to those different aspects of the dispute I must first address the logically prior question of just what it is that section 12 of the 1960 Act applies to. For analysis of the list of documents that Mr and Mrs Ward wish to be able to disclose indicates that many of the documents, including some which from their point of view are the most important, are arguably not within the ambit of section 12 at all.

The parties' submissions

27. First, however, it will be convenient to summarise the various contentions of the parties. I start with Mr and Mrs Ward.

The parties' submissions: Mr and Mrs Ward

28. Mr and Mrs Ward's position throughout has been clear and readily understandable. They wish to be able to speak publicly about their experiences of the child protection system, both to encourage further investigation into the area of infant fractures and to help other families involved in the child protection system – "to communicate to others what happened and what it felt like, to share our experiences with others, to speak openly and rationally about our experiences". They have, as they put it, no wish to 'name and shame' doctors nor to vilify those who were involved in their particular case. But to achieve their aims they say they need to be able to speak fully about the medical evidence presented in their case. Expressing themselves as sympathetic to the arguments being put forward by Mr Lock and to the difficulties faced by doctors in the position of the treating clinicians, they say "We do not wish to name the hospital doctors involved but we would like to be able to provide details of their treatment and the information that they gave us about medical and child protection issues." Similarly, they say, they have no wish to name the CCC staff whose names appear in the documents. "Our sole wish is to be able to enter into a free and open discussion

about our experiences of the child protection and family court systems." But they made clear that although they have some sympathy for the position in which the social workers find themselves, they are not so sympathetic to them as to the treating clinicians and would not have been willing to agree, as they put it, to 'sign away their rights' in relation to CCC or its employees.

29. On the other hand, they feel that naming the medical expert witnesses is "essential" because "in order to put their reports and statements made in court into context, we need to be able to provide details of their experience and seniority." They add that some of the statements made by the medical experts are "helpful for other families who find themselves in a similar position, as they support the need for doctors to consider a third category alongside the 'accidental' and 'non-accidental' diagnoses – that of truly unexplained injuries." They also suggest that identification of the expert witnesses will assist other families in ascertaining who are the available experts and evaluating which experts may best be able to assist in similar cases in future.

30. They add that "our aim was not to launch a campaign to name the medical experts in the case and, given a choice between naming them and being able to discuss their evidence, we would choose the latter option." That said, they still "feel strongly" that there are advantages in naming Dr A and Dr B who, as they point out, are well-known experts who have published in medical journals and spoken at conferences – information which is freely available on the Internet – "thus they cannot submit that their child protection work is kept confidential." And, as they ask rhetorically, "Why are they concerned about vilification and harassment when their reports stated the medical facts as they perceived them and were not subject to any criticism during the proceedings?"

31. They say they "both feel strongly" that Dr L, the expert consulted by the police whose view, they say, was "over-ruled" by the experts instructed in the family proceedings, should not have the protection of anonymity, asserting that "the view that he expressed was so extreme that it caused the police to pursue a case against us when there was no other evidence" and that had they not had the benefit of other medical experts who did not share this view "we could easily have been charged with and convicted of a crime."

32. They are also concerned about the implications of the proceedings in relation to the Enhanced Criminal Records Certificate which Mrs Ward has received from the Criminal Records Bureau in relation to her helping out in the crèche at her church – a certificate which in practical terms prevents her working with children even in the voluntary sector. She wishes to challenge what is said in the certificate, which she believes to be founded essentially on Dr L's views, "but to do this I also need to be able to discuss the facts of our case fully and to disclose the dissenting opinions of the other doctors."

33. They explain that their application, as they put it, to "lift" section 12 is to "allow us to speak freely, without restriction". They say that their application "stems from our confusion about what information may and may not be disclosed relating to care proceedings and our family's involvement with social services prior to proceedings being brought against us", adding their "understanding that any information which became part of the care proceedings, even solely by being included in the care proceedings bundle, is subject to the same restrictions as the evidence given during

the proceedings." They justify what they call the comprehensive list of documents they wish to be able to disclose so that they do not find themselves being "accidentally in contempt of court when discussing, for example, what happens at child protection conferences" – they wish, for example, to be able to refer to the minutes of the Child Protection Conferences, showing, they say, that there were no historic injuries – and, more generally, to the actions of CCC, both before and after the commencement of the care proceedings.

34. In relation to the Agreement, they explain their willingness to enter into discussions with the Trusts' solicitors as being because they have no wish to name the hospital doctors, but say that their main reason for signing it was to prevent any application being made against them for costs "as we are not in a financial position to pay costs without losing our home." They seem to have come very quickly to regret having signed the Agreement, for in their second position statement prepared for the hearing on 14 May 2008 they say they would like to "withdraw" from it.

The parties' submissions: Dr A and Dr B

35. The witness statements of Dr A, Dr B and Dr L are to much the same effect. Dr A says that "when I agreed to assist in these care proceedings, it was on the clear understanding that the normal rules of engagement were in operation, namely that all correspondence, reports and evidence would be treated as confidential to the court, as has always been the case in care proceedings." Dr B says the same: "when I agreed to assist in these care proceedings, it was on the clear understanding that all correspondence, reports and evidence would be treated as confidential to the court." Dr L says: "I knew that as care proceedings were likely, the identity of those named in the family court evidence or judgment would remain unknown."

36. Dr A adds "I regard the confidential nature of the work to be a fundamental principle and I would not have agreed to assist or become involved in this case had I known that there was (or would be) any intention to disclose details of my involvement, or my evidence, to the media."

37. Dr L also says this:

> "I am very concerned at the prospect of being named because I felt, and feel, that my professional reputation and, more importantly, my professional credibility and, therefore, eligibility to continue to assist as an expert witness in future cases, whether on behalf of a child or an authority, would be compromised by what I have reason to believe would be a one-sided account of my involvement … any allegation that I am in some way 'anti-parent' would be grossly unfair and inaccurate."

He concludes: "If doctors are to be subjected to 'trial by media' each time there is a difference of opinion or the court finds against their opinion, I believe that there will be a great reluctance for any doctor to give evidence."

38. Evidence in support of Dr A, Dr B and Dr L has been filed by their solicitor, Rex Forrester of the Medical Defence Union. Much of what Mr Forrester has to say is

argumentative, though none the worse for that (and I have of course taken it all very much into account), but it contained much important factual material. He produced the extracts from the MAMA website which, he says, although not directly related to the facts of this case is nonetheless "indicative of the sort of treatment that doctors involved in child protection cases can expect, if their anonymity were to be compromised." He adds:

> "clinicians who are subjected to the sort of sustained attacks (that this website is but a sample) have little in the way of an effective remedy. Even if were practical for them to do so, they could not contradict the allegations made against them, because of their ongoing professional and ethical duty of confidentiality."

He pointed to the article in the Sunday Times of 9 December 2007 linking Mr and Mrs Ward's situation to the case of Professor David Southall, commenting that "experts are coming in for increasing scrutiny, partly as a result of high profile cases such as Professor Meadow and Professor Southall" and adding "in my capacity as solicitor at the MDU, and just from reading newspapers, it is apparent to me that there is a movement – with increasing momentum – to expose expert witnesses as either incompetent, biased or both."

39. Dr A and Dr B also rely upon the important evidence of Professor Sir Alan Craft and Dr Patricia Hamilton, respectively immediate Past President and President of the Royal College of Paediatrics and Child Health. Because their evidence is so important, I set out the key passages at some length in Appendix A.

40. The evidence of Professor Sir Alan Craft and Dr Patricia Hamilton, as also the evidence of Dr Martin Samuels (see below) and the various materials they refer to, have much to say about how paediatricians involved in child protection work are being targeted, complained about, vilified and harassed. But most of this was expressed at a high level of generality and without any specific detail or elaboration of what was being referred to. When I inquired of counsel as to whether there was anything in the material before me which, complaints to the GMC apart, detailed exactly what it was said paediatricians were being exposed to, I was taken to what Professor Sir Alan Craft had said in the course of an address to the Medico-Legal Society on 14 December 2006 as published, under the title 'Paediatricians and Child Protection', in (2007) 75 Medic-Legal Journal 55 at page 58. Referring to a study in 2000 by the British Association for Child Abuse and Neglect, he said:

> "They did a survey of almost 300 people who were attending a meeting, professionals across the whole of the spectrum, and this is what these people had been exposed to: a third to violence; two-thirds to threats; even more than that to intimidation; and a third to complaints.
>
> Specific examples were:
>
> "The violent and abusive father of four children who were taken into care threatened someone with death."

> "The man said if the children were not returned to his care he would shoot me and my family, verbally threatened me and my children to the extent that the police were involved."
>
> "With a colleague in the interview, the client got an axe out."
>
> "A man produced a gun."
>
> "I've been attacked with scissors and a knife, physically assaulted in court and attacked by a father of an emotionally abused child."
>
> Is there any wonder that paediatricians feel that they are under pressure?"

41. Mr Clemens submits that the 'parallel analysis' leading to the 'ultimate balancing test' comes down in favour of Dr A and Dr B for two reasons: first in terms of their personal interest and, second, because of the wider public interest.

42. The first – their personal interest in favour of anonymity – arises, he says, because (i) they gave evidence in the legitimate expectation that their identity would remain confidential; (ii) although, he accepts, the expectation of anonymity cannot be absolute or assumed to apply in all circumstances, their "actual expectation is a powerful factor, not least because it impacts on both how they as experts have acted and how they (and other experts will act in the future"; and (iii) the fear of unjustified vilification and possible harassment, compounded by unrealistic avenues of redress once identification is in the public domain, is well-grounded – Mr Clemens referring in this context to what he calls the "demonisation" in the media of Professor Sir Roy Meadow and Professor David Southall.

43. The second – the wider public interest – points, he says, to privacy and anonymity in that (i) the court should keep faith with and preserve the expectations of independent expert witnesses by reinforcing those expectations; (ii) frankness in children's cases is to be encouraged, not only to guard against a defensive approach at the sharp end and when examining and commenting on possible non-accidental injury in the early stages, but so as not to deter witnesses from carrying that through to giving evidence; and (iii) the co-operation of doctors and independent expert witness in the family courts is essential. In relation to this last point

45. In conclusion, he says, the personal interests of Dr A and Dr B coincide with the wider public interests at play. The proposed restrictions on the rights of Mr and Mrs Ward and, indeed, the media are justified and do not amount to a disproportionate interference with their rights.

46. In relation to Mr and Mrs Ward's application to 'lift' or 'disapply' section 12, Mr Clemens submits that the onus is on Mr and Mrs Ward to put forward a compelling case as to why the confidentiality imposed by section 12 should be abrogated and, moreover, in relation to each particular document that they wish to publish, for, he says, the onus is on those who seek to disapply a clear statutory provision. He says that their concerns are fully addressed by the publication of Judge Plumstead's anonymised judgment, which, he says, contains all the material they might need to clear their names and/or draw attention to the particular problems raised by this sort of case. Alternatively, and to the extent that I am persuaded that it is necessary or desirable that certain otherwise confidential material should be released from the provisions of section 12, that release should, he submits, be confined to the minimum necessary to achieve that purpose.

47. That said, Mr Clemens makes clear that the principal interest of Dr A and Dr B is in relation to the confidentiality relating to their own involvement in the matter and submits that their names (or other ancillary information that might otherwise identify them) should be redacted.

<u>The parties' submissions: the Trusts</u>

48. The evidence of Dr H and Dr J is identical. Both say they are

> "dismayed to learn that I may be identified as having been involved in this case and that comment may be printed about me in the press and the actions I took may be criticised in some quarters",

adding

> "I … not concerned about [Mr and Mrs Ward] specifically, but I am aware that there are certain elements of the public who regard doctors involved in child protection work as 'fair game'. I am concerned that if I am identified in the media, or details are published which allow me to be identified, I may become the subject of a campaign of harassment for nothing more than doing my job."

49. Dr K says that he is "concerned about the potential risks to the welfare of my family and myself if my name was put in the public domain." He elaborates this as follows:

> "I am concerned that if I am identified, either I or my family may be targeted. I have children and an elderly parent and do not want to expose them to any risk that may arise from simply doing my job, which at the end of the day is designed to protect vulnerable children.

> I am aware of certain groups on the internet who identify doctors involved in child protection work, and I am aware of a considerable amount of hostility towards some specific paediatricians, and possibly paediatricians in general, who they perceive as 'playing god' with families in situations where there are unexplained injuries or other forms of abuse. I do not want to be identified in this case as I am concerned that I will be perceived as one of those paediatricians and subjected to harassment as a result.
>
> I must emphasise that I have no concerns whatever about Mr and Mrs Ward's taking action against me. I do not believe they would do anything like that. However, I am concerned that if they publicise their case, and as part of that I am identified, other members of the public may try and seek me out through a misguided sense of vengeance or hostility."

50. The Trusts also rely upon the important evidence of Dr Martin Samuels, a founding member of PACA. Again, because his evidence is so important, I set out the key passages at some length in Appendix B.

51. It is convenient at this point to refer to certain materials which Mr Lock understandably emphasised as important in understanding the context in which treating clinicians, and in particular paediatricians, practise.

52. Section 47 of the Children Act 1989 imposes on local authorities duties to investigate, and if appropriate intervene, if they "have reasonable cause to suspect that a child … is suffering, or is likely to suffer, significant harm." Section 11(2)(a) of the Children Act 2004 requires NHS Trusts, NHS Foundation Trusts and Primary Care Trusts to "make arrangements for ensuring that … their functions are discharged having regard to the need to safeguard and promote the welfare of children" and section 11(4) provides that they "must" in discharging that duty "have regard to any guidance given to them for the purpose by the Secretary of State."

53. 'Working Together to Safeguard Children' was issued by the Secretary of State in 2006. Paragraph 2.66 says that "paediatricians need to maintain their skills in the recognition of abuse, and be familiar with the procedures to be followed if abuse and neglect is *suspected* (emphasis added)" and adds that "paediatricians should be sensitive to clues suggesting the need for additional support or enquiries."

54. 'Working Together to Safeguard Children' refers to 'Every Child Matters: What to do if you're worried a child is being abused', also issued by the Secretary of State in 2006. Paragraph 10.4 (which is addressed to "All practitioners working with children and families") says that they "should … refer any *concerns* about child abuse or neglect to children's social care or the police (emphasis added)" and paragraph 11.2 says that "if you consider the child is or may be a child in need you should refer the child and family to children's social care. This may include a child who you believe is, or may be, at risk of suffering significant harm." Appendix 3 deals with information sharing. Paragraph 2 identifies as one of the "key points on information sharing" that "where there is *concern that the child may be suffering* or is at risk of

suffering significant harm, the child's safety and welfare must be the overriding consideration (emphasis added)."

55. In the case of clinicians, this Ministerial guidance needs to be read in conjunction with the relevant guidance from their professional bodies. Paragraph 29 of the GMC's 'Code of Conduct on Confidentiality' says that:

> "If you believe a patient to be a victim of neglect or physical, sexual or emotional abuse and that the patient cannot give or withhold consent to disclosure, you must give information promptly to an appropriate responsible person or statutory agency, where you believe that the disclosure is in the patients' best interests."

Guidance published in February 2004 by the Royal College of Paediatrics and Chid Health, 'Responsibilities of Doctors in Child Protection Cases with regard to Confidentiality', spells out as a "key message" that:

> "the key test for reporting a case to the social service department … under s 47 is a reasonable belief that there is a real risk of 'significant harm'."

56. In other words, and this is how Mr Lock puts it, the evidential burden before a duty to refer arises is set at a low level; the threshold is low.

57. Mr Lock submits that, on the facts of this case, the balance comes down decisively in favour of a *contra mundum* order to prevent identification of the Trusts' staff because:

i) there is, he says, no substantiated evidence to support criticisms of the individual members of staff; the fact that the eventual decision of the court was that CCC had not proved its case does not mean that the reference by the paediatricians was incorrect, and on any objective view, he says, their actions were entirely appropriate;

ii) the evidence before me demonstrates that there is a real risk, in what Mr Lock calls the febrile atmosphere which surrounds issues of child protection, that if the names of individual members of staff are brought into the public domain they will be subject to campaigns of personal harassment and/or otherwise have unjustified interferences with their private lives; paediatricians, he says, are in an almost uniquely impossible position and, moreover, facing what he calls "unjustified" complaints to the GMC;

iii) there is a significant and important wider public interest in protecting the anonymity of treating clinicians in child protection cases in order to promote the effective working of the child protection system; if treating clinicians are publicly 'named and shamed' and subjected to vilification for merely doing their jobs properly, there is a legitimate concern that they will become understandably reluctant to make child protection referrals and/or consciously or subconsciously require a higher standard of proof before doing so; or they may simply refuse to accept the personal risks of becoming involved in this

area of work – consequences all of which would be profoundly against the public interest;

iv) the arguments in favour of anonymity here are essentially the same as in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142; the situation for paediatricians has not improved substantially since 2004 and if anything, he says, the high profile pressure on them is growing; and

v) there is no evidence of any need to name individual treating clinicians as part of any legitimate debate that Mr and Mrs Ward or any media organisation may wish to engage in; indeed the fact that Mr and Mrs Ward have entered into the Agreement shows that they accept that they can exercise their rights to freedom of expression without 'naming names' yet without undue hindrance.

58. Mr Lock further makes the point that the treating clinicians are, vis-à-vis the court, in a fundamentally different position from that of expert witnesses; unlike the expert witness they do not *choose* to become involved in the court process or to give evidence.

59. Mr Lock seeks to head off the argument that if such relief is granted in this case then similar orders would be made in every child abuse case by, first, praying in aid the mantra that every case turns on its own facts and, second, submitting that this case would not set any precedent in a case where there were legitimate concerns raised about the actions of a particular clinician or some other good reason for calling that person to account.

60. So far as concerns the Agreement, Mr Lock submits that it is supported by proper consideration (namely the agreement as to costs) and that Mr and Mrs Ward should be held to it. But the Agreement alone will not, he says, suffice to protect the treating clinicians, because it does not and cannot bind third parties – hence the need, he says, for a *contra mundum* injunction.

61. In relation to Mr and Mrs Ward's application to 'lift' or 'disapply' section 12, Mr Lock makes common cause with Mr Clemens, his submissions being *mutatis mutandis* the same.

<u>The parties' submissions: CCC</u>

62. CCC questions the wholesale 'disapplication' of section 12 being sought by Mr and Mrs Ward but is more particularly concerned to prevent the identification of its staff, something which, as it points out, cannot be guaranteed, whatever Mr and Mrs Ward themselves may say and do, unless there is a *contra mundum* injunction.

63. Ms Connolly acknowledges the right of Mr and Mrs Ward to speak of their experiences and, indeed, the wider public interests in disclosure. CCC's concern, she says, has been, and remains, to protect its employees from unwarranted intrusion into their private and professional lives and infringements of their Article 8 rights. But CCC is also concerned about the wider ramifications for social care staff and child protection in general if those engaged in the 'front line' fear that in every case they will be at risk of being named – vilified – in the media and by the wider public, whose motives may not, as she puts it, be entirely benign.

64. Ms Connolly, building on points made by Mr Jeyes in his witness statement, prays in aid arguments which are familiar:

i) There is a public interest in encouraging frankness in children's cases, particular in the difficult area of child protection, to ensure that social workers and others are not deterred from giving evidence for fear that they are unfairly exposed to public gaze or intrusion.

ii) In the interests of children generally there is a need to maintain and encourage frankness and co-operation between professionals and others, who may be deterred from giving information or evidence in confidence by the risk of publicity.

iii) Social workers and other professionals engaged in safeguarding children invariably take some actions which parents dislike. It is in the interests of children in general that they are able to carry out the proper performance of their duties without fear of publicity and media or other intrusion into their private and professional lives such that they may be distracted or prevented from undertaking them.

iv) Maintaining confidence in the family justice system and preserving faith with those who give evidence in the belief that it would remain confidential.

v) The rights of the individuals concerned to respect for private (and professional) life without unwelcome intrusion from media and other groups.

vi) There continues to be a national shortage of qualified social workers. CCC, like many other local authorities, faces chronic difficulties in recruiting and retaining good quality staff to work in child protection. Naming social care staff is likely to deter others from entering the profession and/or encourage others to leave safeguarding work, resulting in inadequate protection and support for vulnerable children and their families.

65. Ms Connolly further comments that this is a not a case in which the trial judge felt it necessary to criticise the actions of individual social workers. Moreover, it is not, she says, a case of a miscarriage of justice, for from the perspective of Mr and Mrs Ward Judge Plumstead reached the right decision. Insofar as the case is 'newsworthy' or Mr and Mrs Ward wish to have a public debate about it, enough material is already in the public domain. The publication of Judge Plumstead's albeit anonymised judgment which I authorised is, she says, sufficient to enable Mr and Mrs Ward to achieve their stated objectives. Given that, the balancing exercise, she says, now comes down firmly against further disclosure of information, save, perhaps, specific disclosure for the purpose of enabling Mrs Ward to challenge the Enhanced Criminal Records Certificate – as to which CCC says it is "sympathetic".

66. All that said, CCC's real objection is to the identification of its staff. In her position statement dated 9 July 2008 Ms Connolly acknowledged that, in general terms, and provided that names or other identifying information were removed, CCC would not object to the disclosure being sought by Mr and Mrs Ward, though questioning the need, as she put it, for such wide-scale disclosure for the stated purpose. And Mr Jeyes, in his witness statement, stated CCC's position as being that "we would not

oppose Mr or Mrs Ward being allowed to discuss the issues in the case *or the content of the documents*" (emphasis added). "However we do object to their being allowed to publicly identify our social care staff. Our social workers have a right and, crucially, a need to do their jobs without the distraction and fear of unwarranted publicity." CCC's position in this regard was reiterated in an email sent to everyone on 12 June 2009: "The position remains as set out in the statement of Gordon Jeyes … We take no issue with Mrs Ward's application other than that, if the Court decides to lift Section 12, then we wish to preserve the anonymity of our social care staff." The reasons for that are elaborated by Mr Jeyes in his witness statement at some length; the key passages are set out in Appendix C.

The BBC's submissions

67. Basing her submissions upon a careful analysis of the relevant authorities (see further below) and of the various rights engaged under Articles 8 and 10 of the Convention, Ms Wilson correctly identifies the starting position as being that section 12 confers no anonymity upon either the treating clinicians (as the Trusts have always accepted) or the expert witnesses.[1] She observes that it is unfortunate that, despite the exposition of the scope of section 12 to be found in the authorities, Dr A, Dr B and Dr L and their solicitors continue, as she puts it, to adduce evidence or labour under the misunderstanding that their identities and involvement in the care proceedings are prima facie protected. And she castigates as a "heresy" pervading the evidence of Dr A, Dr B and Dr L, their reliance upon what she describes as an absolute (albeit vague) promise that their evidence in the care proceedings would remain confidential and not be disclosed outside the confines of the proceedings. She acknowledges that section 12 and what she calls 'family court practice' make confidentiality the norm, but submits it is not absolute. The same goes for the treating clinicians. The BBC, she says, "profoundly disagrees" with the very broadly stated principle upon which the application by the Trusts is based, namely that it is generally 'desirable' to grant treating doctors involved in child care proceedings anonymity.

68. Ms Wilson accepts that the doctors' *legitimate* expectations are clearly relevant, but submits that when the court reaches the ultimate balancing exercise it should give weight only to *legitimate* expectations of confidentiality, and not to misapprehensions, however unfortunate it may be for these experts that they failed to realise the true legal position; moreover, she submits, even their legitimate expectations are only one factor to be taken into account in the balancing exercise.

69. Turning to the evidence filed by or on behalf of Dr A, Dr B and Dr L, Ms Wilson characterises it as in some cases mere assertion and elsewhere as demonstrating, as she puts it, only vague or even generic concerns. She submits that none of the expert witnesses can demonstrate any high risk of interference with their core Article 8 rights. First, she says, the confidentiality which they rely upon is not a confidence akin to Article 8's protection of privacy; the confidentiality is the court's. Second, she says, their names as experts and their professional opinions do not engage Article 8,

[1] At the time Ms Wilson prepared her skeleton argument CCC had not yet made its application for a *contra mundum* injunction, so unsurprisingly she does not consider the position of the social workers; no doubt if she had done so her submission would have been to similar effect. Nor had Mr and Mrs Ward yet applied to 'disapply' section 12, so I do not have the benefit of Ms Wilson's submissions on the issues raised by that application.

for the disclosure of these does not impinge on their ability to develop professional relationships or affect their personal autonomy or development. Third, she says, it follows that the only matter raised by the expert witnesses which truly invokes Article 8 is the risk of harassment as a result of being identified, but what is striking here, she submits, is that it is only mentioned in passing (if at all) by the applicants themselves and that Professor Sir Alan Craft's evidence appears to be very similar to that adduced in other proceedings: compare, for example, *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at paras [87]-[89]. And apart from one matter referred to by Dr B (which, she says, may or may not be connected to these proceedings) there is simply nothing, she submits, to which the court can even start to give an intense focus. She suggests that the MAMA website, although being highly critical of Professor Sir Roy Meadow, does not appear to give rise to any severe risk to doctors generally and submits that, whilst Professor Sir Alan Craft alludes to these problems, he gives little specific detail. Taken as a whole, she submits, the evidence falls short of showing a 'pressing need'.

70. Ms Wilson makes similar submissions in relation to the treating clinicians. Insofar as Dr H and Dr J are concerned about the possibility that they may be criticised this is a matter for the law of defamation. In relation to harassment Dr H, Dr J and Dr K all expressly disavow any concerns about Mr and Mrs Ward. Instead, she says, they rely upon wholly unspecified and unparticularised concerns about becoming subject to a campaign of harassment, but these concerns, she says, are based solely on a belief that some parts of the public consider doctors in child protection work to be 'fair game'. As to the argument that doctors will not refer children they suspect of child abuse she observes acidly that the court should require compelling evidence – which has not been adduced – that, if an injunction is refused, the doctors would disregard their legal and professional duties as set out in the various materials to which I have already referred.

71. On the other side, Ms Wilson submits, there are powerful aspects of the public interest engaged by these applications. She points to the important contribution which open justice makes to public confidence in the judicial system and to public understanding of both the vital role and the limitations of expert evidence in family proceedings. She points to the value to the courts of knowing whether an expert has been criticised in other proceedings and suggests that it is important to distinguish between the real public policy concerns which arise from naming experts and more general problems experienced in the area of child protection. She asks rhetorically, "If injunctions are granted in this case, in what circumstances will they ever be refused?"

72. The BBC and other organs of the media should be allowed, she says, to contribute to the ongoing debate about the family courts. She points in this connection to what the Strasbourg court said in *Bladet Tromse and Stensaas v Norway* (2000) 29 EHRR 129 at para [64]:

> "The most careful scrutiny on the part of the Court is called for when … the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern."

And the role of the media should not be limited to commenting on cases of actual or alleged miscarriages of justice – an approach which Ms Wilson submits is both unprincipled and hardly desirable in the public interest, for if debate is confined to such cases that can only lead to a misunderstanding of the work of the family courts and loss of public confidence.

73. Moreover, Mr and Mrs Ward have what Ms Wilson calls "strongly engaged" rights under both Article 8 and Article 10. "There is no other party to these proceedings whose life has been affected so directly or severely by the matters which the Wards wish to speak about and yet they are currently restrained from speaking freely about them."

74. Turning to the balancing exercise, Ms Wilson submits that the balancing exercise here clearly favours refusing the injunctions sought, for the evidence of any potential interference to the applicants' Article 8 rights is weak whereas an injunction would amount to a severe interference with Mr and Mrs Ward's Article 8 and Article 10 rights as well as a restriction on the media's Article 10 rights. The court, she says, should be wary of extending through precedent a situation where expert witnesses and clinicians treating children suspected of abuse are always granted anonymity even though Parliament has not chosen to legislate for that situation. And the concern that paediatricians will not assist the courts cannot, she submits, be allowed to become a trump card.

<u>The legal framework: the ambit of section 12</u>

75. So much for the opposing contentions. I return to section 12 of the 1960 Act.

76. I can conveniently start with the summary which I set out in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [82]:

> "(i) Section 12(1)(a) of the Administration of Justice Act 1960 has the effect of prohibiting the publication of:
>
> > 'information relating to proceedings before any court sitting in private … where the proceedings (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; (ii) are brought under the Children Act 1989; or (iii) otherwise relate wholly or mainly to the … upbringing of a minor.'
>
> (ii) Subject only to proof of knowledge that the proceedings in question are of the type referred to in s 12(1)(a), the publication of such information is a contempt of court.
>
> (iii) There is a 'publication' for this purpose whenever the law of defamation would treat there as being a publication. This means that most forms of dissemination, whether oral or written, will constitute a publication. The only exception is where there is a communication of information by someone to a professional, each acting in furtherance of the protection of children.

…

(v) Section 12 does not of itself prohibit the publication of:

(a) the fact, if it be the case, that a child is a ward of court and is the subject of wardship proceedings or that a child is the subject of residence or other proceedings under the Children Act 1989 or of proceedings relating wholly or mainly to his maintenance or upbringing;

(b) the name, address or photograph of such a child;

(c) the name, address or photograph of the parties (or, if the child is a party, the other parties) to such proceedings;

(d) the date, time or place of a past or future hearing of such proceedings;

(e) the nature of the dispute in such proceedings;

(f) anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place;

(g) the name, address or photograph of the witnesses who have given evidence in such proceedings;

(h) the party on whose behalf such a witness has given evidence; and

(i) the text or summary of the whole or part of any order made in such proceedings.

(vi) Section 12 prohibits the publication of:

(a) accounts of what has gone on in front of the judge sitting in private;

(b) documents such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of the judgment (this list is not necessarily exhaustive);

(c) extracts or quotations from such documents;

(d) summaries of such documents.

These prohibitions apply whether or not the information or the document being published has been anonymised."

77. That, of course, preceded the amendment of section 12(4) of the 1960 Act and the introduction of the new FPR Part XI (see *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam), [2009] 2 FLR 1152), which have the effect of much extending what can be disclosed. But I need not go any further into these recent changes, because FLR rule 11.2(2) provides that:

> "Nothing in [Part XI] permits the communication to the public at large, or any section of the public, of any information relating to the proceedings."

78. The effect of rule 11.2(2), read in conjunction with section 12(4), is that neither the person communicating any information in circumstances permitted by Part XI nor anyone into whose hands it comes can, without prior judicial sanction, put the information into the public domain. And if they do so they will be guilty of contempt of court, for they will not, within the meaning of section 12(4), be acting in a manner "authorised" by Part XI: see *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam), [2009] 2 FLR 1152, at paras [63] and [70].

79. Accordingly, so as far as concerns dissemination of information to the public at large – which is what is in issue here – the law remains as I sought to summarise it in *Re B.*

80. The present case in fact raises two critical issues which I did not have to consider in *Re B* and which are accordingly not considered in that summary:

    i) The first is whether section 12 applies not merely to the various types of *documents* which I referred to in *Re B* but also (and, if so, to what extent) to the *information* contained in such documents.

    ii) The second is whether section 12 applies not merely to documents prepared for the purpose of the proceedings but also to documents which, although put on the court file (for example by being attached as exhibits or annexures to a witness statement), have not themselves been prepared for the purpose of the proceedings.

81. It may be convenient to record at this stage that a point somewhat analogous to the first of these issues arose in relation to the now revoked FPR rule 4.23, the meaning and effect of which was considered in *In re G (A Minor) (Social Worker: Disclosure)* [1996] 1 WLR 1407, sub nom *Re G (Social Worker: Disclosure)* [1996] 1 FLR 276, and *In re W (Minors) (Social Workers: Disclosure)* [1999] 1 WLR 205, sub nom *Re W (Disclosure to Police)* [1998] 2 FLR 135.

82. I need not go through these authorities in detail. It suffices for present purpose to note that rule 4.23 applied only to documents which had actually been filed with the court, that it "protect[ed] only the pieces of paper and not the contents" and that it did not prevent disclosure of the existence of such documents: see *Re W (Disclosure to Police)* [1998] 2 FLR 135 at pp 139-140 and *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [60]. In *Re B* a question arose in relation to a letter written to the mother by the social worker which had never been filed with the court but was included in a bundle of party and party and other correspondence prepared for the purpose of one of the hearings. I said (at para [61]):

> "In my judgment rule 4.23 does not apply to this letter. More generally, rule 4.23 does not apply to such letters merely because they are included in a bundle of correspondence prepared for use in the proceedings, nor merely because they are included in an exhibit to an affidavit or witness statement filed with the court."

83. The resolution of both these issues turns, in the final analysis, upon the true meaning and effect of the crucial statutory phrase "information relating to proceedings before [a] court sitting in private", wording which, although section 12 has been amended from time to time down the years, has remained unchanged from the first introduction into the House of Lords in March 1960 of the Bill which on 27 October 1960 became the 1960 Act.

84. The potential significance of these issues only became apparent during the course of Mrs Ward's submissions. Given their importance and the fact that Mr and Mrs Ward were unrepresented, I requested further assistance, which was speedily volunteered by Mr Clemens and Ms Connolly, as to the legislative history of section 12 – I wondered whether there was anything in *Hansard* which might throw light on the meaning of the crucial words – and as to whether there was any illumination on the point to be found in the case-law. In due course I received further written submissions from both of them. Mr Clemens, in written submissions dated 23 July 2009, explained the legislative history of the 1960 Act; he very fairly pays tribute to the invaluable assistance he received, just as I should like to pay tribute to the invaluable assistance I have thereby received, from a pupil in his chambers, Mr Alex Young, who assisted him in his research. It is not their fault that their research, historically fascinating as it is, does not in fact throw any light on the issues before me. For her part, Ms Connolly in written submissions dated 22 July 2009 (with a supplemental note dated 23 July 2009) has taken me to the relevant case-law. I am grateful to all of them.

85. The legislative history I can take very quickly. The Bill was introduced into the House of Lords in March 1960. It was criticised by *The Times* in leaders on 9 March 1960 and 24 March 1960 for not going far enough. Substantive consideration of the Bill took place in the House of Lords on Second Reading on 24 March 1960 (*Hansard 5th series* Vol 222 cols 247-304) and in Committee on 10 May 1960 (*Hansard 5th series* Vol 223 cols 561-591 and 1108-1123) and then in the House of Commons on Second Reading on 1 July 1960 (*Hansard 5th series* Vol 625 cols 1693-1757) and in Committee on 12 and 14 July 1960 (*Hansard 5th series* cols 3-52 and 55-94). Much of the debate at each stage was taken up with other provisions of the Bill and insofar as clause 12 (now section 12) was concerned there was neither explanation nor debate as to the meaning of the words with which I am now concerned. The Second Reading debate in the House of Lords is chiefly interesting for the participation of Lord Parker of Waddington CJ, Lord Denning, Lord Goddard and Viscount Simonds (though none of them expressed any views of relevance to anything I have to decide) and for the irony that, as Mr Clemens puts it, had there been recourse to *Hansard* (and, in particular, col 254, where Viscount Kilmuir LC said that "Nothing in Clause 12 will have the effect of making something punishable as contempt of court which could not have been punished as contempt under the existing law") the great point which subsequently arose – before Lord Denning, by then Master of the Rolls – in *In re F*

(Orse A) (A Minor) (Publication of Information) [1977] Fam 58 could have been answered swiftly and definitively.

86. I turn, therefore, to the case-law as it has been analysed for me by Ms Connolly. She has taken me in turn through *In re F (Orse A) (A Minor) (Publication of Information)* [1977] Fam 58, *In re S (Minors) (Wardship: Police Investigation)* [1987] Fam 199, sub nom *Re S (Minors) (Wardship: Disclosure of Material)* [1988] 1 FLR 1, *In re W (Minors) (Social Workers: Disclosure)* [1999] 1 WLR 205, sub nom *Re W (Disclosure to Police)* [1998] 2 FLR 135, and *In re M (Disclosure: Children and Family Reporter)* [2002] EWCA Civ 1199, [2003] Fam 26, [2002] 2 FLR 893.

87. I start with *In re F (Orse A) (A Minor) (Publication of Information)* [1977] Fam 58, where the Court of Appeal drew a clear distinction between, on the one hand, the publication of information about a child (a ward), the publication of which was not of itself a contempt at common law, and is not a contempt under section 12, and, on the other hand, the publication of information relating to proceedings about the child (ward), which is in principle a contempt if the court has been sitting in private.

88. I go first to what Lord Denning MR said (at page 88):

> "There is no suggestion anywhere that it was a contempt of court to publish information about *the ward herself*, be it favourable or adverse, helpful or injurious to her. But there are cases to show that it was a contempt of court to publish information relating to the *proceedings in court* about a ward … When the court … sat in private to hear wardship proceedings, the very sitting in private carried with it a prohibition forbidding publication of anything that took place, save only for the formal order made by the judge or an accurate summary of it [emphasis in original]."

Referring to section 12 he continued (at page 90):

> "the prohibition would, I think, apply, not only to information given to the judge at the actual hearing, but also to confidential reports submitted beforehand by the Official Solicitor, or social workers, or the like."

89. Scarman LJ said much the same. Having observed (at page 95) that if, prior to the 1960 Act, the wardship court had sat in private "it was a contempt of court to publish an account of the proceedings unless the judge expressly authorised publication", he continued (at page 98), referring to section 12:

> "[The judge] construed the statutory words "information relating to proceedings before a court sitting in private" as having a wider meaning than information relating to an actual or imminent hearing. Indeed, he construed the words so as to include information about the ward irrespective of whether the information related to a hearing or not. He accepted that there was no reported case at common law which went further than to declare an account of the proceedings (or of the order made)

> to be a contempt; but, bearing in mind the nature of wardship, he interpreted "proceedings" as meaning "a continuing state of affairs for as long as the wardship lasts."
>
> I do not so interpret the section. I think the judge … gave too wide a meaning to "proceedings" …
>
> Prior to 1960, as the judge recognised, no court is known to have treated as a contempt anything that was not an account of legal proceedings. By retaining the word "proceedings" Parliament must have intended to maintain the relationship between contempt of court and a court's proceedings. As I read the section, what is protected from publication is the proceedings of the court; in all other respects the ward enjoys no greater protection against unwelcome publicity than other children. If the information published relates to the ward, but not to the proceedings, there is no contempt; as North J commented in *Martindale's* case [1894] 3 Ch 193, 201, there would have been no contempt in that case had the newspaper confined its report to the fact of the ward's marriage".

90. I shall return to *Martindale* below.

91. Geoffrey Lane LJ (at page 105) posed the question:

> "what is meant by "proceedings"? Obviously a report of the actual hearing before the judge or part of it is included. But the words must include more than that; otherwise it would have been unnecessary to use the expression "information relating to proceedings … "
>
> The object is to protect from publication information which the person giving it believes to be protected by the cloak of secrecy provided by the court. "Proceedings" must include such matters as statements of evidence, reports, accounts of interviews and such like, which are prepared for use in court once the wardship proceedings have been properly set on foot."

92. In *In re F* the contempt proceedings related to the publication by a newspaper of extracts from a report by a social worker and a report by the Official Solicitor, both of which had been prepared after the commencement and for the purpose of the wardship proceedings. Both Scarman LJ (at page 100) and Geoffrey Lane LJ (at page 105) held that what was published was "information relating to [the] proceedings" within the meaning of section 12.

93. At this point it is convenient to examine *In re Martindale* [1894] 3 Ch 193. As Scarman LJ said in *In re F* at page 94, it "is a revealing case. The judge treated the cloak of secrecy as covering only the proceedings." The facts were that Miss Martindale was made a ward of court on 11 April 1894. Knowing that she was a ward of court a young poet and novelist named Ford Madox Hueffer – better known to

posterity as Ford Madox Ford – married her in May 1894.[2] On 1 June 1894 North J granted an injunction restraining Hueffer from holding communication with her, it not being known then that he had married her. The case came back before North J on 6 June 1894. Reports of the proceedings on that day, heard in private, appeared in a number of newspapers[3] which were then proceeded against for contempt. North J (at page 201) said that:

> "The paragraph … was intended to appear to be and would be understood as a concise statement of what took place in my private room … But … there was no contempt in announcing the fact that the ward had become the wife of *Hueffer*; the contempt was in purporting to give the public information, though meagre, of what the Judge had decided ought not to be disclosed, by determining to hear the case in private and excluding the public."

So, as Scarman LJ put it, the contempt lay in publishing an account of the proceedings of the court, not in publishing the fact of the marriage, even though, I might add, that fact was undoubtedly information contained in documents put before the court.

94. Returning to the modern authorities the next case to be noticed is *In re S (Minors) (Wardship: Police Investigation)* [1987] Fam 199, sub nom *Re S (Minors) (Wardship: Disclosure of Material)* [1988] 1 FLR 1. That was a wardship case where Booth J was concerned, so far as material for present purposes, with two types of document: (i) the local authority case records and (ii) a verbatim extract from the case records which was exhibited to an affidavit from a social worker.

95. In relation to the case records, Booth J posed the question (at page 204) "whether the words in the section "information relating to proceedings" should be construed to cover documents which do not themselves form part of the evidence but which contain information upon which evidence was based", a question which she proceeded (at page 205) to answer it in the negative:

> "I am satisfied that so far as the case records do not relate to matters which were placed in evidence before the court, there could be no basis upon which the court could, or should, give the local authority any directions as to their use …
>
> I have been less clear as to the position with regard to those case records upon which evidence placed before the court was based, although they do not of themselves form part of that evidence. Undoubtedly, such records continue to be protected from disclosure by reason of the principle of public interest immunity: see *In re S. and W. (Minors) (Confidential Reports)* (1983) 4 FLR 290. Although the court has the statutory right and duty to protect a child by means of its control over

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[2] According to the ODNB, the marriage, which was on 17 May 1894, was not a success.

[3] The account in the principal defendant, the Star, was summarised by North J as follows (at page 199), "that on the day in question a rarely romantic story was unrolled before a Judge in Chancery, sitting in private, with reference to a female ward; which proceedings might have been comparatively tame, but for the fact that it turned out the lady had been married to Heuffer three weeks before."

> information relating to proceedings heard in private, this must be balanced against the right of the local authority to preserve the confidentiality of its records and thereby to control access to them.
>
> Since confidentiality in the records could not be considered to have been waived by reason only of the fact that they have been relied upon as the foundation for the social workers' evidence, I have come to the conclusion that those records also do not fall within the ambit of section 12(1) of the Administration of Justice Act 1960. To come to the contrary decision could have the effect of placing an unrealistic fetter upon the local authority in the course of their day-to-day use of their records".

96. Turning to the verbatim extract exhibited to the affidavit, Booth J said this (at page 206):

> "In my judgment, a distinction must be made with regard to the verbatim extract from the case records, which in this case was exhibited to an affidavit made by a social worker. This exhibit was disclosed and filed by the local authority as part of its evidence to the court. Confidentiality in respect of this part of the case records has clearly been waived.
>
> The exhibit undoubtedly contains information relating to the proceedings since it constitutes a part of the evidence. I am satisfied that for this reason the extract of the case records comes within the ambit of section 12(1) of the Administration of Justice Act 1960 and that its publication is precluded without leave of the court."

97. I do not read anything Booth J said as conflicting with the analysis of North J in *Martindale* or of Scarman LJ in *In re F*; on the contrary it is entirely consistent with that analysis.

98. The next case is *In re W (Minors) (Social Workers: Disclosure)* [1999] 1 WLR 205, sub nom *Re W (Disclosure to Police)* [1998] 2 FLR 135, which I have already referred to in relation to FPR rule 4.23. So far as concerns section 12, the court was concerned with an admission made by a mother to a social worker during an assessment being undertaken in the course of and for the purpose of care proceedings. The admission was recorded in the social worker's notes – what were referred to as the 'working papers' – and in the assessment report filed with the court. Amongst the questions which the Court of Appeal had to consider was the application of section 12 to these materials.

99. In relation to the assessment report itself there was no difficulty. If it – that is, the document itself – was to be disclosed, then (page 213) the leave of the court was required. For present purposes the more interesting question related to the working papers. Counsel for the local authority had argued that the working papers themselves were caught by section 12. In response to this, Butler-Sloss LJ said this (at page 210):

> "[Counsel] has relied principally on the provisions of section 12 in order to support her argument that documents not filed with the court are nonetheless protected from disclosure to the police. Section 12 is designed to protect information from publication in child family cases heard in private. The protection covers the proceedings, principally the actual hearing before the court and those proceedings cannot be, for instance, reported in the press. This section was not intended to cover documents held by social workers which have not been filed with the court nor used in the proceedings heard by the court in private. It does not seem to me that the control by the court either under the umbrella of rule 4.23 or of section 12 extends to documents outside the court proceedings. The argument of [counsel] supporting the judge's approach is, none the less, at first sight, very attractive since, if the purpose of rule 4.23 is to protect the information contained in the documents, there seems little point in having a rule which protects only the pieces of paper and not the contents. It is not, however, necessary for the court to give rule 4.23 the extended meaning suggested. The appropriate protection of information, notes and other papers from disclosure can be achieved by another route which does not do violence to the clear words of rule 4.23."

100. Having explained that the working papers and similar papers created, obtained or held by the social services department of a local authority in the course of its statutory duty are in any event confidential, quite apart from rule 4.23 or section 12 (*Re M (A Minor) (Disclosure of Material)* [1990] 2 FLR 36), Butler-Sloss LJ went on to conclude (at page 213) that:

> "The notes of the two interviews with the mother and the notes of the social workers' meeting are not documents held by the court relating to proceedings nor are they covered by the provisions of section 12."

101. Again, this is entirely consistent with the analysis in *Martindale* and *In re F*.

102. The last of the cases referred to by Ms Connolly on this point is *In re M (Disclosure: Children and Family Reporter)* [2002] EWCA Civ 1199, [2003] Fam 26, [2002] 2 FLR 893, where the question arose as to whether a Cafcass officer acting as a children and family reporter (CFR) in private law proceedings required the permission of the court before referring to the local authority's social services department for further investigation allegations by the child's mother about the child's father made by her to the CFR in the course of the CFR's inquiries but before the CFR had prepared her report. Both Thorpe LJ (at para [22]) and Wall J (at para [64]) held that the information given to the CFR by the child's mother was "information relating to the proceedings" within the meaning of section 12, both relying for this purpose on the passage from Geoffrey Lane LJ's judgment in *In re F* which I have already quoted.

103. Again, if I may respectfully say so, the decision is readily intelligible and entirely consistent with the analysis in both *Martindale* and *In re F*. After all, the information

in question emerged during the course of information gathering, for the purpose of proceedings already on foot, by the CFR who, as Thorpe LJ observed (at para [24]), is the officer of the court appointed to make a report to the court – so it is hardly surprising that such information was held to be "information relating to the proceedings" within the meaning of section 12.

104. Ms Connolly also mentioned the recent decision of the Court of Appeal in *Re H (Children)* [2009] EWCA Civ 704 and my own recent decision in *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam), [2009] 2 FLR 1152, but as she correctly commented they both turned on particular provisions of the Family Proceedings Rules and do not assist in relation to the ambit of section 12.

The legal framework: the ambit of section 12 – discussion

105. I return to consider the issues I identified in paragraph [80] above.

106. As Ms Connolly points out, section 12 refers to "information" in contrast to FPR rule 4.23 which referred to "documents", so one cannot simply transfer from the rule 4.23 case-law into the section 12 jurisprudence the aphorism that what is protected is "only the pieces of paper and not the contents." And, as *In re M (Disclosure: Children and Family Reporter)* [2002] EWCA Civ 1199, [2003] Fam 26, [2002] 2 FLR 893, demonstrates, there will be circumstances where "information" gathered outside the court-room is protected by section 12 even though it may not (yet) have been reduced into writing in some document lodged with the court.

107. On the other hand, it is quite clear from the analysis of North J in *Martindale* and of the Court of Appeal in *In re F* – all three judges made the point though the passage from the judgment of Scarman LJ which I have quoted in paragraph [89] above perhaps puts it most clearly – that not all information about the child is within the scope of section 12, only information "relating to" the proceedings. Moreover it is equally clear that information does not "relate to" the proceedings merely because it is information communicated to the court or contained in documents put before the court. To repeat, in *Martindale*, as both North J and Scarman LJ said, there would have been no contempt if the newspaper had confined its report to the fact that the ward had married Mr Hueffer, notwithstanding that that fact was, as I have said, undoubtedly information contained in documents put before the court; the contempt arose because what the newspaper published was (or purported to be) an account of the proceedings before the judge.

108. Likewise, as a moment's reflection will make obvious, the mere fact that some document has been put on the court file (for example by being attached as an exhibit or annexure to a witness statement) does not, without more ado, mean that section 12 thereafter prohibits publication of that document. It would be absurd to suggest, to take a very obvious example, that section 12 prohibits the publication of a birth certificate or of the information contained in it merely because the birth certificate has been lodged with the court or even if it has been referred to in and annexed to a witness statement or report which is itself plainly within the protection of section 12.

109. Ms Connolly submits that the fact that documents exist outside the proceedings does not prevent those documents being caught by section 12 if (a) filed with the court and (b) containing information relating to the proceedings. If by 'relating to' she means no

more than 'deployed in' then, with respect, I cannot agree, for the proposition is inconsistent with authority and, as my example of the birth certificate shows, absurd in its consequences. Indeed, Ms Connolly accepts that, as she puts it, not every document before the court could, or should, be protected by section 12, giving the example of a letter contained in a bundle of party and party correspondence prepared for use in the proceedings – which I agree would not, as such, be within the ambit of section 12. Yet, she submits, confidential social work records disclosed and filed within and for the purpose of the proceedings, as here, do fall within section 12. Otherwise, she says, local authorities and the court would need to be far more restrictive about (a) what information is disclosed into proceedings and (b) the extent to which it may be distributed and/or used.

110. I cannot agree with Ms Connolly. In my judgment the fact that a document is for some other reason already confidential no more brings it within the scope of section 12 merely because it is lodged with the court or annexed to a witness statement or report than would be so with a document lacking the quality of intrinsic confidentiality. What brings a document within the scope of section 12 depends not on whether it is otherwise or already confidential but whether it is "information relating to [the] proceedings." Moreover, Ms Connolly's submission does not, in my judgment, accord with what Butler-Sloss LJ said in *In re W (Minors) (Social Workers: Disclosure)* [1999] 1 WLR 205, sub nom *Re W (Disclosure to Police)* [1998] 2 FLR 135.

111. The point can be tested by an example which was canvassed during the course of argument. Suppose that a local authority in exercise of its duties under section 47 convenes a child protection conference at a time when there are no proceedings on foot and, indeed, when there has not even been consideration of whether or not proceedings should be commenced. Now whatever other restrictions there may be upon the use of the document, section 12 plainly cannot apply and the publication of the minutes of that conference cannot be a contempt of court, because there are no proceedings on foot. But why should the self-same act – publishing the minutes *but without any reference to the proceedings* – be a contempt of court merely because proceedings have in fact been commenced and the minutes lodged with the court attached to some witness statement or report? Why should the question of contempt in relation to a publication which does not refer to any proceedings at all depend upon whether or not proceedings have been commenced and upon whether, if they have, the particular document has been produced to the court as an exhibit? In my judgment it makes no sense. And it makes no sense because it is not the law and because it does not focus upon the statutory language.

112. Where, then, is the line to be drawn? The key is provided, of course, by the statutory principle, reproducing the common law principle to be found in *Martindale*, that what is protected, what cannot be published without committing a contempt of court, is "information relating to [the] proceedings". And from the various authorities I have been referred to one can, I think, draw the following further conclusions[4] about what is and what is not included within the statutory prohibition:

    i) "Information relating to [the] proceedings" includes:

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4 That is, further to and supplementing the summary in paragraph [76] above.

a) documents prepared for the purpose of the proceedings; and

b) information, even if not reduced to writing, which has emerged during the course of information gathering for the purpose of proceedings already on foot.

ii) In contrast, "information relating to [the] proceedings" does *not* include:

a) documents (or the information contained in documents) not prepared for the purpose of the proceedings, even if the documents are lodged with the court or referred to in or annexed to a witness statement or report; or

b) information (even if contained in documents falling within paragraph (i)(a)) which does not fall within paragraph (i)(b);

unless the document or information is published in such a way as to link it with the proceedings so that it can sensibly be said that what is published is "information relating to [the] proceedings".

113. Put shortly, it is not a breach of section 12 to publish a fact about a child, even if that fact is contained in documents filed in the proceedings, if what is published makes no reference to the proceedings at all. After all, as Lord Denning MR said in *In re F*, it is not a contempt to publish information about the child, only to publish "information relating to the proceedings in court". Or, as Scarman LJ put it, "what is protected from publication is the proceedings of the court".

114. In other words one has to distinguish between, on the one hand, the mere publication of a fact (fact X) and, on the other hand, the publication of fact X in the context of an account of the proceedings, or the publication of the fact (fact Y) that fact X was referred to in the proceedings or in documents filed in the proceedings. The publication of fact X may not be a breach of section 12; the publication of fact Y will be a breach of section 12 even if the publication of fact X alone is not.

115. It follows that there is much material contained in the trial bundles which Judge Plumstead had before her – much information and many documents – the publication of which will *not* involve any contempt of court under section 12 *unless* (and I wish to emphasise the point) the information or documents are published as part of or in the context of an account of the care proceedings or in such a way as to link them with the care proceedings – in which case there will, as I have explained, be a contempt under section 12.

116. The trial bundles run to many hundreds of pages. It is no part of my function at this stage to go through the laborious process of determining which documents fall on which side of the line. That, at least initially, must be a matter for the parties, seeking to apply the principles I have laid down.

117. Before parting from this topic I must emphasise that I have been considering, and considering only, the impact of section 12. It will be apparent, not least from some of the authorities I have referred to, that there may be other restrictions upon the publication of, for example, local authority case records. That is not a topic which I

have been invited to consider, and I have not done so. Mr and Mrs Ward need to appreciate that the mere fact that section 12 does not prohibit the publication of a particular document does not mean that there may not be some other restraint or fetter upon publication of that document.

The legal framework: the 'disclosure jurisdiction' and the 'restraint jurisdiction'

118. In the present case, as in almost such cases, the balancing exercise in relation to both the 'disclosure jurisdiction' and the 'restraint jurisdiction', the 'parallel analysis' leading to the 'ultimate balancing test', involves consideration of Articles 8 and 10 and also (I emphasise the point) Article 6 of the Convention. They are so familiar I need not set them out. There is, however, one point to be noted. The 'private' life protected by Article 8 is not confined to one's personal life; it may extend, as both Mr Clemens and Mr Lock correctly assert, to certain professional or business activities: *Niemietz v Germany* (1993) 16 EHRR 97 at para [31].

119. In the nature of things the particular and conflicting interests which are here in play are very similar to those which I had to consider in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at [93], and in *Re Webster; Norfolk County Council v Webster and Others* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, at [80]. I need not repeat the analysis.

120. Central to the disputes here is the confidentiality which is traditionally seen as applying to care cases and other proceedings relating to children. That confidentiality, which of course underpins section 12 of the 1960 Act, was given classical recognition in *Scott v Scott* [1913] AC 417. In more recent times, though before the coming into force in 2000 of the Human Rights 1998, it was explained and expounded in a series of cases in the Court of Appeal: *Brown v Matthews* [1990] Ch 662, *Re D (Minors) (Wardship: Disclosure)* [1994] 1 FLR 346, *In re Manda* [1993] Fam 183, [1993] 1 FLR 205 and *In re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725. All this learning has now, of course, to be evaluated in the light of the Human Rights Act 1998 and the Convention, but, subject to that important caveat, the traditional jurisprudence is still as valid as ever.

121. Attempting to summarise part of this jurisprudence in *Re X (Disclosure of Information)* [2001] 2 FLR 440 at para [24], I said this:

> "Wrapped up in this concept of confidentiality there are, as it seems to me, a number of different factors and interests which need to be borne in mind:
>
> (i) First, there is the interest of the particular child concerned in maintaining the confidentiality and privacy of the proceedings in which he has been involved, what … Balcombe LJ referred to as the "curtain of privacy".
>
> (ii) But there is also, secondly, the interest of litigants generally that those who, to use Lord Shaw of Dunfermline's famous words in *Scott v Scott* [1913] AC 417, 482, "appeal for the protection of the court in the case of [wards]" should not

> thereby suffer "the consequence of placing in the light of publicity their truly domestic affairs". It is very much in the interests of children generally that those who may wish to have recourse to the court in wardship or other proceedings relating to children are not deterred from doing so by the fear that their private affairs will be exposed to the public gaze – private affairs which often involve matters of the most intimate, personal, painful and potentially embarrassing nature. As Lord Shaw of Dunfermline said: "The affairs are truly private affairs; the transactions are transactions truly intra familiam".
>
> (iii) Thirdly, there is a public interest in encouraging frankness in children's cases, what Nicholls LJ referred to in *Brown v Matthews* [1990] Ch 662, 681C, … as the frank and ready co-operation from people as diverse as doctors, school teachers, neighbours, the child in question, the parents themselves, and other close relations, including other children in the same family, on which the proper functioning of the system depends … it is very much in the interests of children generally that potential witnesses in such proceedings are not deterred from giving evidence by the fear that their private affairs or privately expressed views will be exposed to the public gaze.
>
> (iv) Fourthly, there is a particular public interest in encouraging frankness in children's cases on the part of perpetrators of child abuse of whatever kind …
>
> (v) Finally, there is a public interest in preserving faith with those who have given evidence to the family court in the belief that it would remain confidential. However, as both Ralph Gibson LJ in *Brown v Matthews* [1990] Ch 662, 672B … and Balcombe LJ in *In re Manda* [1993] Fam 183, 195H … make clear, whilst persons who give evidence in child proceedings can normally assume that their evidence will remain confidential, they are not entitled to assume that it will remain confidential in all circumstances … "

122. This last point, which has a particular resonance here, requires some elaboration. Balcombe LJ was very clear in *In re Manda* [1993] Fam 183, emphasising, in a passage at page 195 which Ms Wilson understandably relied upon, that:

> "if social workers and others in a like position believe that the evidence they give in child proceedings will in all circumstances remain confidential, then the sooner they are disabused of that belief, the better."

123. Moreover, as I pointed out in *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at para [29], the assumption of confidentiality is, in the light of more recent developments, probably less justified

now than in the early 1990s – and events since I made that comment some 33 months ago serve only to emphasise the point.

124. Ms Wilson also directed my attention to the important observations of Ryder J in *British Broadcasting Company v Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam), [2007] 1 FLR 101, at para [32]:

> "The fact that witnesses may be named illustrates the fact that the general practice of affording privacy in children cases does not extend to preserving the privacy of expert witnesses involved in the proceedings. The privacy of the expert participants is not always and may not generally be necessary to achieve the object of the proceedings."

I agree.

125. Before moving on there are a number of further points which I need to emphasise at this point.

126. First, it is, in my judgment, a matter of considerable importance that the applications before me relate to care proceedings – public law proceedings – and not to private law proceedings. This fact carries with it a number of significant implications:

i) First, it is elementary that no local authority, no social worker, can take a child into care without either the consent of the parent or an order of the court. Only a court can make a care order. Only a court can authorise the placing of a child for adoption or make an adoption order: *R (G) v Nottingham City Council* [2008] EWHC 152 (Admin), [2008] 1 FLR 1660. So the process in which Mr and Mrs Ward found themselves involved was, inevitably, a *judicial* process.

ii) Second, the commencement of care proceedings, leading potentially to the making of a care order and even, it may be, an adoption order against the protests of the parents, involves a massive intrusion by the State – both the State in the guise of the local authority and the State in the guise of its judicial authorities – into the quintessentially private life of the family. And the family, whatever form it takes, is, of course, the bedrock of our society and the foundation of our way of life. I make no apologies for repeating again the observation that I first made in *Re L (Care: Assessment: Fair Trial)* [2002] EWHC 1379 (Fam), [2002] 2 FLR 730, at para [150]:

> "it must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which judges of this Division are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. It is a terrible thing to say to any parent – particularly, perhaps, to a mother – that he or she is to lose their child for ever."

iii) In *Moser v Austria (Application No 12643/02)* [2007] 1 FLR 702 at para [97], the Strasbourg court drew a distinction between (to use our terminology)

private law proceedings and public law proceedings, indicating that in the latter context, opposing an individual to the State, "the reasons for excluding a case from public scrutiny must be subject to careful examination." As I said in *Re X, London Borough of Barnet v Y and X* [2006] 2 FLR 998, at para [166], referring to public law care cases:

> "Such cases, by definition, involve interference, intrusion, by the State, by local authorities, into family life. It might be thought that in this context at least the arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling."

127. Following on from this, the involvement of those who in the present case seek to protect their anonymity is essentially as witnesses, and moreover – and this, I think, is a point of some significance – as witnesses giving evidence in each case in their professional capacities, whether as social workers, treating clinicians or expert witnesses. The evidence they are giving is not about their own private affairs; it is either evidence about other people – about those who are parties to or subjects of the proceedings – or evidence of professional opinion. So although Article 8 is in play, the Article 8 interests of the applicants – the social workers, the treating clinicians and the expert witnesses – are far removed from the intensely private and personal Article 8 interests engaged in cases such as *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam), [2009] 2 FLR 1152.

128. In contrast, and as Ms Wilson correctly asserted, Mr and Mrs Ward have "strongly engaged" rights under both Article 8 and Article 10. From their perspective the proceedings could hardly have been graver. For many months they suffered the agony of fearing that they might lose their child. Even those of us who spend our professional lives in the family courts can have but little real awareness of what they must have been going through. It is hard to imagine a predicament which more obviously and more intensely engages Article 8. And in the same way they have a strong call upon the protection of Article 10. For the workings of the family justice system and, very importantly, the views about the system of the mothers and fathers caught up in it, are, as Balcombe LJ put it in *Re W (Wardship: Discharge: Publicity)* [1995] 2 FLR 466 at 474, "matters of public interest which can and should be discussed publicly".

129. Much play has been made of the fact that this is not a case involving either 'junk science' or a miscarriage of justice and therefore, so it is said, not a case where there is any need on the part of either Mr and Mrs Ward or the media to identify the various professionals involved nor any public interest in doing so. Accepting the premise, the conclusion does not necessarily follow. A similar point arose in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at para [125]:

> "[Counsel] says that there is no public interest in naming the local authority. That may or may not be so, but it is, I think, largely beside the point. It is for the local authority to establish a convincing case for an injunction to restrain the media publishing something which is prohibited neither by the general law nor by s 12. It cannot establish such a case merely by demonstrating – even assuming it can – that there is no public

> interest in the identity of the local authority, for that is to put the boot on the wrong foot."

That was applied by Sir Mark Potter P in *Medway Council v G and others* [2008] EWHC 1681 (Fam), [2008] 2 FLR 1687, at para [62].

130. Now the reference there may have been to the local authority but the same must surely apply in principle to anyone who seeks to obtain by *contra mundum* injunction the anonymity denied by section 12.

131. I do not want to be misunderstood. I am not of course asserting that the absence of such factors is irrelevant. The fact that Mr and Mrs Ward may not be able to pray in aid in support of their objections to the orders being sought against them arguments based on either 'junk science' or miscarriage of justice, is of course relevant insofar as it may deny them additional arguments as to why the orders sought should not be made against them. But they have other and powerful arguments. And in any event the fundamental point remains: it is not for Mr and Mrs Ward to show that the *contra mundum* injunctions being sought should not be granted, let alone to establish some public interest in identifying the applicants; it is for the applicants to demonstrate good reason why Mr and Mrs Ward and the media should be restrained from publishing something prohibited neither by the general law nor by section 12.

132. There is one final point. The present dispute is only part of an on-going debate as to where in the family justice system the lines should be drawn, where the balance should be struck, as between the often starkly opposed arguments, on the one side in favour of preserving the traditional privacy and confidentiality of family proceedings and on the other side in favour of greater 'transparency', to use the vogue expression. My duty here is to determine the present case according to law – that is, the law as it is, not the law as some might wish it to be or even the law as it may yet be if Part 2 of the Children, Schools and Families Bill currently before Parliament receives the Royal assent.

133. But the law has to have regard to current realities and one of those realities, unhappily, is a decreasing confidence in some quarters in the family justice system – something which although it is often linked to strident complaints about so-called 'secret justice' is too much of the time based upon ignorance, misunderstanding, misrepresentation or worse. The maintenance of public confidence in the judicial system is central to the values which underlie both Article 6 and Article 10 and something which, in my judgment, has to be brought into account as a very weighty factor in any application of the balancing exercise. And where the lack of public confidence is caused even if only in part by misunderstanding or, on occasions, the peddling of falsehoods, then there is surely a resonance, even for the family justice system, in what Brandeis J said so many years ago. I have in mind, of course, not merely what he said in *Whitney v California* (1927) 274 US 357 at page 77:

> "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

I have in mind also his extra-judicial observation that, and I paraphrase, the remedy for such ills is not the enforced silence of judicially conferred anonymity but rather the disinfectant power of exposure to forensic sunlight.

Discussion

134. It is against this background that I turn to consider the various applications before me. I deal first with the application by Mr and Mrs Ward to 'lift' or 'disapply' section 12 of the 1960 Act.

Discussion: the 'disapplication' of section 12

135. Mr and Mrs Ward invite me to exercise the 'disclosure' jurisdiction so as to enable them to publish whatever materials in the trial bundle before Judge Plumstead would otherwise be subject to the restraints imposed by section 12. I propose to consider the question initially leaving to discussion in due course the subsidiary question of whether there should be any restraint upon publication of the names of the expert witnesses, treating clinicians or social workers, whether by redaction or otherwise.

136. The starting point, in the particular circumstances of this case, is that the State is no longer involved with Mr and Mrs Ward and their family. The care proceedings came to an end without the making of any order. The local authority does not have parental responsibility for William and he is not a ward of court. The only persons with parental responsibility for him are Mr and Mrs Ward. Insofar as the disclosure of information about a child of William's age involves an exercise of parental responsibility then it is for Mr and Mrs Ward to exercise that responsibility, not the court or any other public authority. There are no grounds for any interference by the State – whether the state in the guise of the local authority or the state in the form of the High Court – with the exercise by Mr and Mrs Ward of their parental responsibility. No one has made any application for a specific issue order. Mr and Mrs Ward have not sought the assistance of the court in the exercise of their parental responsibility: compare *Re B; X Council v B (No 2)* [2008] EWHC 270 (Fam), [2008] 1 FLR 1460, at para [17].

137. Accordingly, in my judgment, so far as concerns any decision as to whether or not it is in William's interest for any of this material to be put into the public domain, and if so how and for what purpose, the decision is one for Mr and Mrs Ward. It is a matter for them. And it is for them, not the court, to assess the wisdom or otherwise of what they are proposing to do: *Re B; X Council v B (No 2)* [2008] EWHC 270 (Fam), [2008] 1 FLR 1460, at para [20(iv)].

138. Having reached this point in the analysis, and given Mr and Mrs Ward's decision to 'go public', the question then becomes whether the balancing exercise, that is, striking the balance as between, on the one side, the private interests of the Ward family and the various public interests they can pray in aid and, on the other side, whatever other private and public interests are involved, comes down in favour of 'lifting' section 12. In my judgment it does.

139. Questions of anonymity apart, and whatever the position may be in other cases or in other kinds of care case, it has not been suggested that the trial bundles in this case include materials about other people or materials in relation to which people other

than the Ward family have any significant private interest in maintaining their privacy or confidentiality. So, questions of anonymity apart, the balance here is not, as may often be the case, a balance between differing and conflicting *private* interests; it is, essentially, a balance between, on the one side, the private interests of the Ward family and the various public interests they can pray in aid and, on the other side, those public interests summarised in *Re X (Disclosure of Information)* [2001] 2 FLR 440 at para [24] which point in favour of confidentiality. And that balance, in my judgment, comes down in favour of allowing Mr and Mrs Ward to speak out as they would wish to do so and allowing them, in doing so, to make use of the documents in the trial bundles.

140. I am wholly unpersuaded that allowing Mr and Mrs Ward to do what they propose in this particular case is going, in any significant way, to discourage frankness in, or otherwise imperil the integrity of, other maybe very different cases in future. And why should they – why should William when he is older – be prevented from speaking out if they wish about what has happened to them and, moreover, from being able to do so by reference to all the papers in the case? After all, if CCC's involvement had not led to the institution of proceedings at all, there would have been nothing in section 12 to prevent Mr and Mrs Ward speaking out and making whatever use they wished of all the paperwork generated by the local authority's involvement or, as they might see it, unjustified interference. Why should things be so very different merely because proceedings were brought which ultimately failed? There will be cases where there is a ready answer to this rhetorical question and where the balance of competing interests, whether private or public, will fall the other way, but in this case, given the nature of the issues in the care proceedings, the outcome of the proceedings and all the other circumstances, the balance, as I have said, falls, in my judgment, in favour of Mr and Mrs Ward being allowed, both for themselves and on behalf of William, to make use of – to publish – even those documents which would otherwise be subject to the restrictions imposed by section 12.

141. The question then remains as to whether the documents should be redacted so as to preserve the anonymity of the various professionals. In my judgment, this stands or falls with the separate issue of whether those professionals are entitled to the *contra mundum* orders they seek. If they are, then *cadit questio*, for their anonymity will be protected; if they are not, then I can see no independent reason for affording them anonymity, through the backdoor as it were, by a process of redaction. Anonymity is not, after all something they are afforded either by the general law or by section 12.

142. I shall, accordingly, make an order in appropriate form 'disapplying' or 'lifting' section 12.

143. I should add that I would in any event, and without the slightest hesitation, have made an order permitting the disclosure to the Criminal Records Bureau of whatever documents Mr and Mrs Ward may think appropriate for the purpose of challenging any Enhanced Criminal Records Certificate. It would in my judgment be little short of monstrous to allow section 12 to stand in the way of such a challenge.

<u>Discussion: anonymity</u>

144. In my earlier judgment I sketched out the general contours of the dispute in relation to the crucial issue of anonymity: *British Broadcasting Corporation v Cafcass Legal and*

others [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at paras [26]-[37]. Because the further argument I have since heard has done nothing to shake the analysis and because it still seems to me that is essentially sound, I draw again upon the central core of the analysis, taken from paras [30]-[37], starting with some general observations I made at paras [30]-[31]:

> "[30] It needs to be borne in mind that, although the children's guardian, the social workers, the police officer, the treating doctors and the expert witnesses may have a common desire for anonymity, they stand in what may be significantly different positions. Treating doctors are only infrequently and incidentally involved as witnesses in care proceedings – and then essentially as witnesses (and, it is to be noted, compellable witnesses) of historical fact. Social workers and police officers in child protection teams, in contrast, are employed in jobs which, in the nature of things, mean that they will not infrequently – social workers more frequently than police officers – have to give evidence in care proceedings, evidence which is often a mixture of historical fact and opinion. A children's guardian is employed to perform a task whose very raison d'être is the giving of evidence to the court and whose primary function, in addition to reporting what the child, if old enough, has said, is to offer advice to the court. And an expert witness is someone who, in consideration of the payment of a fee, and in marked contrast, for example, to the treating doctors, has chosen to proffer expert opinion evidence for the purpose of the particular proceedings.
>
> [31] These differences are reflected in the fact that, whereas Mr Lock on behalf of some of the treating doctors focused his submissions on Art 8, Mr Brompton on behalf of Dr A and Dr B, two of the expert witnesses, extended his submissions to embrace also Art 6: cf, the analysis in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at [127]–[130] and in *British Broadcasting Company v Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam), [2007] 1 FLR 101, at [37]."

145. I then said this at para [32]:

> "The children's guardian, as I have said, does not claim anonymity. And one can see certain obstacles in the way of any claim to anonymity for the social workers and the police officer given the observations of Thorpe LJ in *Re W (Care Proceedings: Witness Anonymity)* [2002] EWCA Civ 1626, [2003] 1 FLR 329, at [13], and, more generally, the reasoning and the decision of Ryder J *in British Broadcasting Company v Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam), [2007] 1 FLR 101. That said, difficult issues may arise in relation to the claims for anonymity by the

> social workers, the police officer and, even more so perhaps, the treating doctors."

146. I shall return to this when I come to consider the application by CCC on behalf of the social workers. First, however, I should turn to consider the claim to anonymity by the expert witnesses.

Discussion: anonymity – the expert witnesses

147. Immediately following the passage in *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at para [32] which I have just set out I continued as follows:

> "[33] However, and be all that as it may, there is, as the analysis in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, at [87]–[90], [100]–[103], [127]–[131], demonstrates, an especially acute and difficult dilemma when it comes to considering the position of Dr A and Dr B and the other expert witnesses.
>
> [34] On the one hand there are powerful arguments, founded in the public interest, for denying expert witnesses anonymity. These include the following, though no doubt there are others:
>
> (i) First, there is, it might be thought, a general public interest in knowing the identity of an expert witness. As Watkins LJ memorably observed in *R v Felixstowe Justices ex parte Leigh* [1987] QB 582 at 595, 'There is … no such person known to the law as the anonymous JP'. Advocates do not have anonymity. In the same way, it might be thought, the courts should be chary (to put it no higher) of admitting the anonymous expert.
>
> (ii) Secondly, there is a particular and powerful public interest in knowing who the experts are whose theories and evidence underpin judicial decisions in relation to children which are increasingly coming under critical and sceptical scrutiny.
>
> (iii) Thirdly, there is the equally important public interest, especially pressing in a jurisdiction where scientific error can have such devastating effects on parents and children, not only of exposing what Sedley LJ (in *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148, [2003] 2 FLR 1095, at [36]) once called 'junk science' but also of exposing other less egregious shortcomings or limitations in medical science.
>
> (iv) Fourthly, and leading on from the last two points, there is a powerful public interest in knowing whether or not someone putting himself forward as an expert has been

criticised by another judge or other judges in the past. Thus the sorry saga of Dr Paterson can be traced through the successively reported judgments of Cazalet J in *Re R (A Minor) (Experts' Evidence) (Note)* [1991] 1 FLR 291, of Wall J in *Re AB (Child Abuse: Expert Witnesses)* [1995] 1 FLR 181 and of Singer J in *Re X (Non-Accidental Injury: Expert Evidence)* [2001] 2 FLR 90. In each of those cases, it may be noted, Dr Paterson and the other expert witnesses were named in otherwise anonymised judgments. But in contrast the identity of the so-called 'independent social worker' and 'counsellor' Jay Carter criticised in damning terms in *Re JS (Private International Adoption)* [2000] 2 FLR 638 and again in *Flintshire County Council v K* [2001] 2 FLR 476 (the 'internet twins' case), was not known to the public until she was publicly exposed and named in the judgment in *Re M (Adoption: International Adoption Trade)* [2003] EWHC 219 (Fam), [2003] 1 FLR 1111. As a commentator has observed (Camilla Cavendish, The Times, 29 March 2007), 'In the dark, we cannot see whether patterns of injustice exist'.

[35] On the other hand, there is an important public interest which, it might be said, justifies preserving the anonymity of expert witnesses involved in care proceedings. This work, though very important, is voluntary. The concern is that if expert witnesses in care cases are publicly identified this will be likely to lead to a further drain on the already diminishing pool of doctors and other experts willing to do child protection work. Doctors and experts in other disciplines may be yet further disinclined to do such work if they see that the evidence they give to the court on the understanding that it (and their own identities) will remain confidential may become public knowledge and be the subject of public criticism. The already inadequate number of experts willing to assist the courts in vitally important child protection cases may, it is feared, be even further reduced.

[36] In this context I note that the Family Justice Council in its response in November 2006 to the Government's Consultation Paper, Confidence and confidentiality: Improving transparency and privacy in family courts (CP 11/06) (TSO, 2006) recognised, at para 34, that:

> 'There is likely to be an increasing reluctance on the part of professional and expert witnesses to participate in court proceedings if they are to be subjected to the scrutiny of the media. This could lead to increasing delay in dealing with some family cases.'

[37] Thus there are important public interests involved here, just as there are the important personal interests of the social workers, the police officer, the treating doctors and the expert

> witnesses to be borne in mind. And these interests require careful consideration and, where appropriate, proper protection."

148. I now have the advantage of much more evidence – much more material – in relation to these issues than I had at that stage or, indeed, at the time I gave judgment in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142. This material is of the first importance but, I should add, as much for what it does *not* say as for what it does. Much of it, as Ms Wilson observed, is couched in terms of generalities and even mere assertion.

149. Broadly speaking I accept Ms Wilson's analysis as I have summarised it in paragraph [69] above, just as I accept her submissions and the submissions of Mr and Mrs Ward to the effect that Dr A and Dr B have not made out a sufficient case to justify the *contra mundum* order they seek.

150. The assumption or expectation of anonymity as it was relied upon by both Dr A and Dr B was, in my judgment, justified neither in principle (see paragraphs [122]-[124] above) nor in practice: the pages of the Family Law Reports and Family Court Reports contain many reports of cases where expert witnesses are named. On the contrary, and whatever may be the situation in relation to other witnesses or other professional witnesses, there are, as I have already observed, powerful arguments, founded in the public interest, for denying expert witnesses anonymity: see *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at para [34] cited in paragraph [147] above.

151. No, if the anonymity of expert witnesses such as Dr A and Dr B is to be justified it can only be, as Ms Wilson rightly submitted, on the basis of the various concerns identified in particular by Professor Sir Alan Craft, by Dr Hamilton and by Dr Samuels; concerns which, I accept, engage both the private interests of the expert witnesses themselves, insofar as they fear that if identified they will be subjected to targeting, harassment and vilification, and also the public interest, insofar as the consequence of such fears may be, as I said in *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at para [35], a further drain on the already diminishing pool of experts prepared to do child protection work.

152. One of the concerns referred to is in relation to what are said to be groundless complaints to the GMC. As to this, whatever the factual merits or otherwise of what is being said – a topic on which I have and express no views whatever – I have some difficulty in seeing how this is something that can properly or appropriately be taken into account by the court when considering the question with which I am concerned. Put bluntly, if there is some problem here, it is a problem to be solved by others – by the GMC, by the medical profession, by Parliament – not by the family court controlling the information it allows to be disseminated or the form in which it allows such information to be disseminated. Judicial control of the GMC and its processes is, after all, a function of the Administrative Court, not the Family Division.

153. In this connection I would also observe that, not merely is there a strong public interest in the family courts making disclosure of otherwise private or confidential information and documents to the GMC – reflecting the public interest in the effective

regulation of the professions and in maintaining public confidence in them – but that it is not for the family court to seek to evaluate, let alone to pre-judge, the strength or otherwise of the case to be investigated by the GMC: see *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam), [2009] 2 FLR 1152, at paras [44]-[48] (application for permission to appeal dismissed [2009] EWCA Civ 1345). Moreover, the recently introduced FPR rule 11.4(1)(c) permits a party to family proceedings to disclose the papers in the case to the GMC without any need first to obtain judicial permission: *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam), [2009] 2 FLR 1152, at para [62]. So the scope for control by the family court of complaints to the GMC by disgruntled litigants is limited. And if that is so, what justification can there be for the family court seeking to exercise some wider degree of control where the complaint comes from someone other than a litigant?

154. Accordingly it seems to me that Ms Wilson is correct in submitting that, at the end of the day, the case comes down to the arguments based on or deriving from the asserted fears of targeting, harassment and vilification.

155. I do not, of course, overlook the account given by Professor Sir Alan Craft as I have set it out in paragraph [40] above, but my conclusion at the end of the day, taking into account all the evidence and other material which has been put before me and all the various submissions I have had on the point, is that neither the risks of targeting, harassment and vilification (which I accept are made out to a certain extent) nor the consequential risks of a flight of experts from child protection work (which again I accept are made out to a certain, though I think more limited, extent) are such as to the demonstrate the 'pressing need' which alone could begin to counter-balance what in my judgment are the powerful arguments, the *very* powerful arguments, founded in the public interest, for denying expert witnesses anonymity.

156. I accept that there may be cases where the evidence will justify a different conclusion, though those will probably, I suspect, be cases where the risk is peculiar to a particular individual rather than, as it is put here, generic to a whole class of expert witnesses. But the evidence here, even taking it at its highest, seems to me to fall far short of even approaching the tipping point.

157. When all is said and done, it seems to me to be a very strong thing to say that the identities of expert witnesses giving evidence in care cases – cases where the consequences for both child and parent are potentially so serious – should be concealed from the public. And quite apart from the more severely pragmatic of the reasons for needing to know who are the experts giving evidence in such cases, does not the public in this context have an interest not merely in knowing what is being done in its name but also in knowing who the experts are whose evidence may have led (though not of course in this case) to a child being removed from his parents and placed for adoption?

158. And in this connection there is a further point to be borne in mind. On occasions the very same circumstances will give rise both to care proceedings in the family court and criminal proceedings in the Crown Court and, in consequence, the situation where precisely the same expert witnesses give precisely the same expert evidence in both courts. It is unthinkable that, save conceivably in highly exceptional and unusual circumstances which I have to say I have some difficulty imagining, there should be any question of an expert witness who gives evidence in such a case in the Crown

Court being afforded anonymity. Why then should matters be any different in the family court? After all, it might be thought that the risks of targeting, harassment and vilification are every bit as great in relation to an expert giving evidence in the Crown Court as in relation to an expert giving the same kind of evidence in a family court.

159. Be all that as it may, in the circumstances of this case, and in the light of all the evidence and other material before me, I am wholly unpersuaded that any proper case has been made out for affording Dr A and Dr B the anonymity they seek. I shall accordingly dismiss their application.

Discussion: anonymity – the social workers

160. I turn to consider the claim to anonymity by CCC on behalf of the social workers.

161. I have referred above to the observations of Thorpe LJ in *Re W (Care Proceedings: Witness Anonymity)* [2002] EWCA Civ 1626, [2003] 1 FLR 329, at [13], and the reasoning and the decision of Ryder J in *British Broadcasting Company v Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam), [2007] 1 FLR 101, And I have suggested that they may present certain obstacles in the way of any claim to anonymity for the social workers. I need now to consider these authorities in more detail.

162. In *Re W (Care Proceedings: Witness Anonymity)* [2002] EWCA Civ 1626, [2003] 1 FLR 329, the question was whether the identity of a social worker who was to be called to give evidence in care proceedings should be concealed from the parents in a case where (see at para [3]) the father, who had had access to guns, had, as Thorpe LJ described it, made "repeated wild threats to do away with family members, himself, professional people (particularly social workers), the guardian and the experts should he lose his children at the end of the case." The judge at first instance had directed that the witness could testify anonymously from behind a screen, but was reversed by the Court of Appeal. The key passage for present purposes (at para [13]) is where Thorpe LJ said this:

> "As a generalisation, I think it must be recognised that social workers up and down the country, day in day out, are on the receiving end of threats of violence and sometimes of actual violence from adults who are engaged in bitterly contested public law cases at the end of which the parents face permanent separation from their children, at least during their childhood and adolescence. Social workers generally must regard this as a professional hazard. I have not myself ever had experience of a local authority seeking anonymity for a professional worker in these circumstances. I am unaware of any previous ruling to this effect. Obviously the court must exercise a discretion, and it is quite impossible to set any useful bounds on the exercise of that discretion. Perhaps it is enough to say that cases in which the court will afford anonymity to a professional social work witness will be highly exceptional."

163. I recognise that the anonymity which was there in issue was not the same as the anonymity with which I am here concerned (for there is here no question of the social

workers' identities being concealed from Mr and Mrs Ward) but this does not mean that Thorpe LJ's observations do not also have a resonance here: see what Ryder J said on the point in *British Broadcasting Company v Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam), [2007] 1 FLR 101, at para [64].

164. In *British Broadcasting Company v Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam), [2007] 1 FLR 101, the question for Ryder J was whether the anonymity which had been granted to two social workers, X and Y, by Douglas Brown J in the 'Rochdale satanic abuse case' (see *Rochdale Metropolitan Borough Council v A* [1991] 2 FLR 192) should be continued given that the children concerned were now adults and had waived their own anonymity and privacy. The BBC was proposing to broadcast a documentary identifying and criticising X and Y. Ryder J summarised the case put forward by X and Y as follows (para [26]):

> "X and Y say that:
>
> (1) social workers as public servants working in a confidential environment should be protected by a cloak of anonymity, save where there has been dishonesty or bad faith;
>
> (2) they support open public debate and do not oppose the making of the documentary;
>
> (3) they left the local authority's employment as a matter of personal choice and not in consequence of the judgment and have both in their different ways gone on to considerable professional success elsewhere;
>
> (4) their professional competence has not been called into question since the judgment;
>
> (5) their Art 8 Convention rights are engaged and, having regard to the nature and extent of the agreed disclosure, the maintenance of their anonymity is a proportionate restraint, whereas the publication of their identities would add so little of value that it would be a disproportionate interference;
>
> (6) they both fear:
>
> (a) a negative impact on their professional standing with colleagues and families with whom they now work;
>
> (b) a negative impact on future career prospects (I deliberately do not enlarge on this issue because it would tend to identify the social workers present professional activities and the BBC has undertaken not to reveal their present employments but I stress that I have considered the detail of that which is set out in the affidavits that have been sworn);

(c) the possibility of an unfair or inaccurate portrayal of them including by any failure to consider the actions of others with whom it is asserted they acted at the time (eg management representatives);

(d) intrusive media interest;

(e) harassment and/or behaviour from others towards themselves or their families that they would regard as threatening;

(f) a seriously detrimental emotional impact (described as enormous) upon their closest relatives, including children who do not know of their past involvement with this case and parents who are elderly."

165. Having rehearsed the 'balancing exercise' is a context where, as here, conflicting rights under Articles 6, 8 and 10 of the Convention were engaged, Ryder J concluded that the balance came down in favour of the BBC and the children and against the social workers.

166. The whole judgment, if I may say so, repays the most careful study, but I concentrate on the key passages. I have already quoted what Ryder said at para [32] (see paragraph [124] above) and can conveniently go next to what he said at paras [38]-[39]:

"[38] Likewise, there is a public interest in encouraging the frankness which is essential in cases involving the welfare of children. That includes promoting, rather than deterring witnesses, including professional witnesses, from giving evidence. It should be noted that this interest is usually characterised as a need to preserve confidential sources and information rather than as an incident of any right to personal confidentiality or anonymity in the professional witness who relays that material to the court, although the various aspects of confidentiality will have greater or lesser weight on the facts of each case: see Munby J in *Re X (Disclosure of Information)* [2001] 2 FLR 440, at para [24]. Such witnesses are not entitled to assume that their evidence will remain confidential in all circumstances, nor that their identity will normally be protected for this purpose: see the analysis of Balcombe LJ in *Re Manda* above at 191–196 and 211–215 respectively. The submission that social workers, among others, can expect that the 'confidentiality of their identities' will be respected unless there has been dishonesty or bad faith is not a correct statement of the law and has not been for some time, if it ever was.

[39] This court has not received any direct evidence touching on the arguments of frankness, deterrence or the availability of child protection, professionals, although strong submissions have been made to that effect. Despite this, I take

> notice of the fact that there is a continuing shortage of social care professionals, particularly in child protection and that there have been and are campaigns against them which can have a serious effect upon an individual's private life. Further, there is a public interest in encouraging social workers and others to engage in this difficult work. Great weight is placed on this by the local authority and by X and Y, and, although I should take these factors into account and I do, no one suggests that they are the determinant or predominant factual issues in this case."

I respectfully agree with all of that.

167. Ryder J expressed his conclusions as follows (paras [69]-[71]):

> "[69] There is no longer any interest of a particular child or children generally in retaining the anonymity of X and Y. The justification for the original anonymity ruling no longer exists.
>
> [70] The evidence served in support of the applications of the local authority and X and Y does not, in my judgment, convincingly establish a pressing social need for the restraint asked for. That restraint would in my judgment be a disproportionate interference with the Art 10 Convention right. In the shorthand, it does not establish an exceptional case for an interference with Art 10. Publication of the identities of X and Y will be an interference with X and Y's Art 8 rights but one that is in pursuit of a legitimate aim, namely, informed and open discussion in the media of the public interest issues relating to these proceedings and to family proceedings generally. In my judgment that interference would be proportionate.
>
> [71] The Art 10 Convention rights of the BBC and the former wards, and the public interest, reinforced by Art 6, in enabling public scrutiny of court proceedings and family justice, should on the facts of this case prevail over the Art 8 rights of the applicants."

Again, I respectfully agree.

168. In the present case, as in that case, CCC's application cannot be justified by any reference to William's best interests. His identity, like his parents', is in the public domain. And arguments based upon expectations of confidentiality face the same difficulties as when put forward on behalf of the expert witnesses. The evidence relied upon by CCC and Ms Connolly's submissions really boil down to three key propositions: first, the difficulties which it is said CCC and other local authorities will face in recruiting and keeping staff if the identities of their social workers are not protected; second, the risk that social workers if they are identified will be exposed to targeting, harassment and vilification, so that they, their families and their careers may suffer; and, thirdly, the consequentially disadvantageous effects all this may have on the child protection and family justice systems.

169. I recognise at once that the public interest arguments in favour of identifying social workers may be somewhat less powerful than in the case of expert witnesses, though they are certainly not wholly absent: see, for example, *Re B, X Council v B* [2007] EWHC 1622 (Fam), [2008] 1 FLR 482, at para [18]. But with that qualification many of the arguments on both sides are, as will be appreciated, much the same with both categories of claimant.

170. So far as concerns the first of what I have called the three key propositions, it is really the same as an argument which is regularly rehearsed by local authorities seeking to protect their own identities and it is not one which has tended to cut much ice with the court. The point arose in *S (A Child acting by the Official Solicitor) v Rochdale Metropolitan Borough Council and the Independent Reviewing Officer* [2008] EWHC 3283 (Fam), [2009] 1 FLR 1090, where counsel submitted (see at para [85]) that if the local authority were to be identified, it might further add to its and other local authority's difficulties in recruiting trainee social workers and senior management and thus compound the very problems which in many respects had been central to the issues in that case. I rejected the claim for anonymity, remarking (at para [91]) that the "argument it is no more compelling today – if anything, even less compelling today – than it was when I rejected very similar arguments in *Re F, F v Lambeth London Borough Council* [2002] 1 FLR 217."

171. So far as concerns the second proposition, and without seeking to depreciate the reality of the fears which have been expressed, there are, I think, three things to be said: first, that, as in the case of the expert witnesses, much of the evidence being relied upon here is expressed in terms of generalities and mere assertion; secondly, that, as Thorpe LJ put it in *Re W*, this is something that social workers generally must regard as a professional hazard; and, thirdly, that arguments which in substance were to very much the same effect failed before Ryder J in the *X and Y* case.

172. So far as concerns the third proposition this is very closely analogous to the similar proposition put forward on behalf of the expert witnesses and, as it seems to me, carries no more weight, though certainly no less weight, in this context than in the other.

173. At the end of the day, and for very much the same kind of reasons as commended themselves to Ryder J in the *X and Y* case, my conclusion, taking into account all the evidence and other material which has been put before me and all the submissions I have had on the point, is that the various factors prayed in aid by CCC do not suffice to justify the *contra mundum* order which is sought, do not counter-balance the arguments in favour of openness, and do not establish a 'pressing need' for a kind of protection which, to repeat, is conferred on social workers neither by the general law nor by section 12.

174. I am unpersuaded that any proper case has been made out for affording the social workers the anonymity which CCC seeks. I shall accordingly dismiss its application.

<u>Discussion: anonymity – the treating clinicians</u>

175. I turn finally to consider the claim to anonymity by the Trusts on behalf of the treating clinicians. I deal with first with the Agreement.

176. I agree with Mr Lock that the Agreement is valid and enforceable. It is supported by good consideration. There is nothing contrary to public policy in such an agreement: see *S (A Child acting by the Official Solicitor) v Rochdale Metropolitan Borough Council and the Independent Reviewing Officer* [2008] EWHC 3283 (Fam), [2009] 1 FLR 1090, at para [70]. Nothing which has been said by Mr and Mrs Ward entitles them to resile from the Agreement. In my judgment the Trusts are entitled to hold them to it.

177. But this does not, of course, mean that the court is bound by the Agreement or that there is anything in the Agreement which, without more ado, entitles the Trusts to the *contra mundum* relief they are seeking. It is for the Trusts to persuade me if they can that it is appropriate to grant them such relief. They have failed to do so. I decline to make the *contra mundum* order they seek.

178. The practical effect of this may be less real than apparent, for all that is in the public domain is Judge Plumstead's *anonymised* judgment and whether or not I grant *contra mundum* relief Mr and Mrs Ward will be contractually bound not to put the names of the treating clinicians into the public domain. That said, however, and for entirely understandable reasons, the Trusts seek a *contra mundum* order and I must explain why, in my judgment, they are not entitled to such relief.

179. I acknowledge that, as I explained in *British Broadcasting Corporation v Cafcass Legal and others* [2007] EWHC 616 (Fam), [2007] 2 FLR 765, at para [30] cited in paragraph [147] above, the treating clinicians stand in a position rather different from either social workers or expert witnesses. That said, however, the starting point is the same, namely that they are not afforded anonymity either by the general law or by section 12, and accordingly they, like the other claimants, need to be able to demonstrate that the balancing exercise tips in their favour. In my judgment, and for reasons which will by now very largely be apparent, they fail in that endeavour. I am not of course saying that their claim fails because the other claims have failed. Each of the three claims – that by the expert witnesses, that by CCC on behalf of the social workers and that by the Trusts on behalf of the treating clinicians – is a separate and distinct claim that has to be assessed on its own merits. But for reasons which are too obvious to require further elaboration, many of the arguments are much of a muchness and many of the reasons why the other two claims in my judgment fail are also, *mutatis mutandis*, reasons why this claim also fails.

180. In particular, the arguments founded upon the fear of being exposed to targeting, harassment and vilification, with consequent risk to families and careers, and the consequentially disadvantageous effects all this may have on the child protection and family justice systems, are, broadly speaking, about as valid but certainly no more valid than in the other two cases. Again here, as there, the evidence is, by and large, general rather than specific and as striking for what it does not say as for what it does. One can sympathise with conscientious and caring professionals who cannot understand why they should be at risk of harassment and vilification for only doing their job – and a job, moreover, where participation in the forensic process is not, as it were, part of the 'job specification' as in the case of social workers and expert witnesses. But the fact is that in an increasing clamorous and decreasingly deferential society there are many people in many different professions who, however much they might wish it were otherwise, and however much one may deplore the fact, have to put up with the harassment and vilification with which the Internet in particular and

the other media to a lesser extent are awash. And the arguments based upon the risk of unfounded complaints being made to the GMC has, as it seems to me, no more weight in the case of the treating clinicians than in the case of the expert witnesses.

181. The question, at the end of the day, is whether having regard to all the evidence and other material before the court, the balance comes down in favour of conferring anonymity. And the fact is that in the case of the treating clinicians, as in the case of both the expert witnesses and the social workers, the claim for injunctive relief here is *not* being put by reference to the particular circumstances or particular vulnerabilities of specific individuals. On the contrary, the treating clinicians disavow any concerns in relation to Mr and Mrs Ward. The claim in all three cases is, in reality, a 'class' claim, that is, a claim that any professional who falls into a certain class – and in the case of both the social workers and the treating clinicians the membership of the class is very large indeed – is, for that reason, and, truth be told, for that reason alone, entitled in current circumstances to have their identity protected, in plain language to have their identity concealed from the public. That is a bold and sweeping claim, to be justified only by evidence and arguments more compelling than anything which Mr Lock or his clients have been able to put before me.

182. There is a further consideration to be borne in mind in the case of the treating clinicians. Typically, as in this case, their involvement with their patient will have begun and ended before there are any proceedings on foot. And in many cases, even where there may at some stage be suspicion, there will never in fact be any proceedings. Is a distinction to be drawn between those treating clinicians involved in a case which ends up in court and those involved in a case which does not? And if so, on what rational basis, for their involvement in each case may be precisely the same? And if no such distinction is to be drawn, are the courts to be faced with claims for *contra mundum* orders in cases where there has been no judicial intervention of any kind at all, merely because a treating clinician is faced with an argumentative parent who he fears is threatening to go to the media?

183. Be that as it may, in the circumstances of this case, and in the light of all the evidence and other material before me, I am wholly unpersuaded that any proper case has been made out for affording the treating clinicians anonymity. As with the expert witnesses and as with the social workers, the balancing exercise, in my judgment, comes down in the case of the treating clinicians against the grant of any *contra mundum* order. I shall accordingly dismiss that part of the application by the Trusts.

Order

184. I invite counsel to collaborate in drafting an order to give effect to this judgment which, given that Mr and Mrs Ward are not represented, can conveniently be sent to me for my consideration at the same time as it is sent to Mr and Mrs Ward.

Appendix A – evidence of Professor Sir Alan Craft and Dr Hamilton

185. The key passages from the witness statement of Professor Sir Alan Craft are as follows:

> "From 2002 to 2006 I was president elect and then President of the Royal College of Paediatrics and Child Health. The College

represents all paediatricians in the UK including consultants and trainees. The total membership is now almost 10000. During the period of my presidency I became very aware of the enormous pressures facing paediatricians in their work with regard to child protection. This was a particular issue because of the high profile cases involving Sir Roy Meadow and Professor David Southall, both leaders of the profession, and pioneers in the field of child protection. In addition there was a huge increase in the number of complaints against paediatricians, both to their employers and to their regulatory body, the General Medical Council. The College undertook a survey of its members and had a very high response rate of over 80%. Of the 4500 respondents 14% had a complaint against them in the recent past. A total of 786 complaints were reported. The annual number had increased from 20 in 1996 to over 100 in 2003. The vast majority of these were resolved at Trust or NHS ombudsman level and of the complaints to the GMC only 1 case resulted in a finding of serious professional misconduct. The fourfold increase in complaints does have to be set in the context of a pervading culture of complaining. The overall number of complaints to the GMC for all reasons increased 15-fold between 1990 and 2003, an annual increase of 33%. In spite of the fact that many of these cases come to nothing, when a complaint is made, especially to the GMC one cannot underestimate the enormous effect that this has on the doctor and his family. Complaints can take a year or more to resolve and the pressure endured by these doctors cannot be underestimated. During my period of office we were aware of the difficulties in finding doctors willing to take on specialist roles in child protection. Each district should have a designated doctor for child protection and many of these posts were unfilled. There was also a severe shortage of doctors willing to act as experts in child protection cases. The Research Division of the RCPCH undertook a follow up interview project with a sample of those paediatricians who had responded to the original survey and who had received a complaint in connection with their child protection work. A paper describing the results of this study were recently published in the Archives of Disease in Childhood …

There is no doubt of the adverse impact of high profile child protection cases over the last few years. Professionals working in health and social care have been subjected to a high degree of media attention and scrutiny. This has focussed on a perceived failure to intervene to safeguard a child when such intervention seemed indicated or for intervening when it was not necessary ie when the end result of child protection proceedings is that the child was deemed not to have been abused. The tragic Victoria Climbie case was an example of a failure to take appropriate action and there are many examples

such as the Cannings and Clark cases where the courts decided that abuse had not occurred. The media portray these cases as black and white failing to recognise the extreme complexity in many of the cases. Damned if you do and damned if you don't intervene has certainly been the perception of many professionals.

Child protection is part of every paediatrician's every day work. They never know whether the child presented to them may not be as straightforward as the parent or carer indicates. Indeed paediatrics is most unusual in medical practice. The classical medical method decrees that when a person presents the first thing to do is to take a good history. Indeed generations of students have learned the aphorism "listen to the mother, she is telling you the diagnosis." A good history is followed by examination investigation if necessary and the formulation of a diagnosis and treatment plan. If a child has been abused the parent or carer responsible will usually give a misleading or inaccurate history making the whole medical encounter extremely difficult. In every paediatric consultation the doctor has to have in the back of his mind that the parent may not be telling the truth.

Once a suspicion of child abuse has been made the duty of the paediatrician is to activate the child protection system. There is clear guidance as to how to proceed in the DH document "Working Together".

If the paediatrician does not act then there is good evidence that abuse will recur and may be fatal. Every day in the UK a child dies because of non accidental injury, usually at the hands of their parents or carers. Even if the first presentation is of relatively minimal abuse this can well be followed by something much more severe which can result in death or disability.

Paediatricians recognise the pivotal role that they play in protecting children by having a suspicion and activating the child protection system. The concern over the past few years has been that in less severe cases, or where there is uncertainty, that paediatricians might err on the side of not voicing their suspicions

The specific difficulties of engaging paediatricians in this vital part of their work are described in a recent report from the National Children's Bureau – "A Shared responsibility. Safeguarding Arrangements between Hospitals and Children's Social Services, March 2007". They report that many of the lessons from Lord Laming's enquiry into the death of Victoria Climbie have not been learned. They report social workers concerns that doctors and nurses are often reluctant to intervene

and that social workers become frustrated with doctors who were not prepared to make a decision as to whether a child's injury was accidental or not, because they did not want to be seen as the one that labelled a family as abusive

In spite of a great many measures put in place by the College and the DH/DFES, there remains a climate of fear amongst paediatricians. The most recent workforce data available from the RCPCH suggest that at least 25% of "designated doctor" posts are unfilled.

… Paediatricians remain very concerned that they will suffer complaints and adverse publicity. The complaints will undoubtedly still come and both the GMC and the DH are trying to find a way to handle these in an expeditious manner. However adverse publicity can be minimised if the courts continue to protect professionals in their work.

The real concern is that if the confidentiality which normally attaches to child protection is lifted, and professionals are identified in the media, then they may be subjected to reprisals or campaigns of harassment. It is well known by paediatricians that there is what appears to be an orchestrated campaign against doctors involved in child protection. Much of this has been concerned with those acting as experts but not exclusively. This has been a campaign both in the media and on the internet. Further details of this are given in the … paper which I presented to the Medico Legal Society at the Royal Society of Medicine in December 2006.

It is my firm belief that the anonymity of professionals involved in child protection work must be maintained. Child protection work, which is a potential part of every paediatrician's everyday practice, is enormously stressful, and adding the further worry that they could be named in the media is an unnecessary extra burden. It is very likely to make paediatricians err on the side of self protection rather than child protection. This will not be good for children and will potentially lead to more children being allowed to "slip through the net" and ultimately suffering more serious abuse which could have been prevented.

… It is a duty of society to protect children and in all of these matters the needs of the child are paramount. If paediatricians are to continue to play their pivotal role in protecting children then they must be able to do this in the knowledge that they will be protected by the courts from unnecessary disclosure of their identity to the press."

186. The key passages from the witness statement of Dr Hamilton are as follows:

"We believe that different considerations apply in relation to expert witnesses on the one hand and treating staff on the other. In large part, these comments relate to staff who are directly involved in 'front-line' child protection work rather than those doctors who are employed in a professional capacity to provide expert evidence. It must however be recognised that staff actively involved in treating patients may commonly find themselves called to give evidence in court ostensibly of a factual nature but only by virtue of their professional qualification and employment. The factual evidence that they give will often include an opinion as to whether injuries are characteristic of those caused accidentally or non-accidentally. The distinction between expert witnesses and treating staff may be misleading: the child and the court depend upon both being prepared to give their evidence without fear or favour.

The Courts will be aware of the adverse impact of high profile Child Protection cases since the new century began. In these cases professionals working in health and social care have been criticised and subject to intense media attention. This has focussed either on a perceived failure to intervene to safeguard a child when such intervention was indicated, or for intervening when it was not necessary. Perhaps inevitably the representation of these cases in the mass media appears sensationalist and very 'black and white' – failing to recognise that in this area one is often working with uncertain data and possible deliberate or subconscious deception against a background that one is 'damned if you do and damned if you don't'.

There is no doubt that work to protect children from abuse is essential. Violence in our society is a continuing problem and children are amongst its most vulnerable victims. There is however very real cause for concern that media attention in this area is discouraging professionals from this work, and thereby putting children at risk.

… In 2004 Professor Sir Alan Craft, as President of the RCPCH wrote to all paediatricians and said:

> "the last few months has seen an unprecedented number of media attacks of Paediatricians. Although this has largely been around high profile Court Cases, the impact on the whole of Child Protection has been enormous. The public, and indeed many professionals, are confused. Paediatricians are deeply concerned, both for themselves and for their families. That this is causing a major problem is evident from the fact that paediatricians are becoming reluctant to become involved in Child Protection, unless they absolutely have to do so. A substantial number of Designated and Named Doctor posts are unfulfilled."

These difficulties remain. Recruitment to specialist child protection posts continues to be very difficult. The Named and Designated doctor posts are statutory requirements (Working Together to Safeguard Children, A Guide to Interagency Working to Safeguard and Promote the Welfare of Children HM Government 2006), but too many remain unfilled. Despite intense efforts being made by employers, with the support of the College, I believe there has been no real improvement since Sir Alan gave evidence. The most recent workforce data available to the RCPCH suggests that at least 25% of these posts remained vacant in 2006-7 as they were in 2004.

The specific difficulties of engaging paediatricians (in child protection work) are described in the recent National Children's Bureau report (National Children's Bureau, a Shared Responsibility, Safeguarding Arrangements between Hospitals and Children's Social Services March 2007). There are clear indications that many of the lessons from Lord Laming's enquiry in 2003 have not been met. The report describes social worker's concerns that doctors and nurses are "often reluctant to intervene", and report that they (social workers) were frustrated with Medical staff who were "*not prepared to make a decision about whether a child's injury was accidental or not, because they did not want to be the one that labelled a family as "abusive"*." I am afraid that the experience reported to the RCPCH by our members suggests that that is not an unfair judgement.

The RCPCH has made strenuous efforts to address these difficulties. This includes the development of training programmes in clinical and courtwork, as well as work with the General Medical Council. We have published our "Child Protection Survey 2004" our own Guidance, the "Child Protection Companion" in April 2006. We helped the Chief Medical Officer to produce his initiative "Bearing Good Witness" in October 2006, which was specifically concerned with the problem of medical evidence in this area.

None of this suggests that this problem has been resolved. It remains an uphill struggle and with the continuation of adverse media coverage, paediatricians remain extremely worried about their involvement in this critical area of paediatric care.

I do appreciate that the court will be aware that there are other public interests at stake here and that the balance may have to be struck in favour of publication. It is not for me to express any view of that question. However I do think it is proper that I make it clear to the Court that we believe that professionals doing this work are still liable to be vilified when identified, that that is certainly the view of many paediatricians, and that it

is part of the explanation for the continuing problem in persuading them to take on this role."

Appendix B – evidence of Dr Samuels

187. The key passages from the witness statement of Dr Samuels are as follows:

> "The diagnosis of child abuse to account for unexplained injuries, failure to thrive and neglect has really only been better recognised as an important part of the work of paediatricians over the last 50 years. During this time new manifestations of child abuse have become increasingly recognised, such as emotional abuse, child sexual abuse and FII. The diagnosis of child abuse is commonly not straightforward, involving the piecing together of various bits of information including the history and physical findings, as well as information from Social Services and Police. Paediatricians have a duty to report cases of possible child abuse to the statutory authorities (Social Services and Police) and to engage in subsequent child protection procedures. It is regrettable but inevitable that, with a proportion of entirely proper referrals, a case of possible child abuse will be investigated and found to be unsubstantiated. When this happens it can be very distressing for the parents or others involved in the child's care, but it is an unavoidable consequence in this complex area. The only practical alternative would be to ask paediatricians to only report definite cases of child abuse. If the evidential threshold we were required to apply was much higher, many cases of possible child abuse would not be reported and therefore not be investigated. It seems inevitable that this would lead to a situation where some vulnerable children would remain unprotected.
>
> When paediatricians or other health professionals make a report of possible child abuse to Social Services or Police, parents will be informed provided this does not threaten the child's safety. It is not uncommon that parents may become upset about such referrals and the subsequent procedures usually aim to acknowledge this upset and provide support to parents. Such upset is all the more likely when reports made by health professionals of possible child abuse are unsubstantiated following investigation by the statutory authorities. Thus it is a regular part of paediatricians' practise to expect some parents to be upset and to help try and resolve this.
>
> In the last 10-15 years, there have been increasing levels of action taken by parents involved in child abuse cases where either the abuse has been unsubstantiated or where parents have denied alleged abuse. The actions include use of employer complaints procedures, complaints to regulatory bodies and use of politicians and the media to support their 'cause'. Various

websites developed to aid communication and provide support for parents who alleged they had been falsely accused. One of the most notable was the site that dealt with parents who alleged false accusations of fabricated or induced illness: Mothers Against Munchausen's Syndrome by Proxy Allegations or MAMA (www.msbp.com). This site was used to co-ordinate public meetings, including with Members of Parliament and the General Medical Council and in addition, posted a variety of libellous and threatening messages against professionals involved in child protection. In the last year, this site has been removed by the American authorities following complaints by medical professionals to the US Attorney General.

Such actions have extended to include not only those by parents accused of alleged abuse, but also other individuals, including journalists, a minority of health professionals, and a few members of Parliament. One particular activist, Ms Penny Mellor, a self-acclaimed 'child advocate', has made extensive reports of health professionals involved in child protection work to the professional regulatory bodies, police, employing authorities, politicians and the press. A common tactic has been to report a professional and then publicise that the individual is under investigation for making false allegations of abuse against parents. The success of the campaign against paediatricians and other professionals in child protection is evident in speeches in both the House of Commons and House of Lords, which include denials of certain types of abuse (eg FII) (available in Hansard). The above activist was imprisoned for conspiracy to abduct children from the care of social services in a case of FII, although her complaints against paediatricians and others continue to be listened to.

I would like to stress to the court that the active campaigners who are involved in this see their campaign against individual paediatricians as a "cause". They are rarely involved in the original cases but once they decide on a paediatrician to target, the doctor finds himself at the centre of a web of allegations and complaints. It is often very difficult to locate the source of these complaints and they can be generated by people who have nothing to do with the original medical or legal case, but jump on to the facts as yet another example, as they see it, of paediatricians abusing their professional status and power. As the court will accept, I profoundly disagree with their agenda because, even where investigations do not eventually prove there has been child abuse, I believe that doctors should be committed to the process in order to protect vulnerable children. However we have to live and work in an environment where there are a sizeable number of individuals who appear to be committed to seeking to prevent us doing our job.

… Because of increasing concerns by paediatricians, the Royal College of Paediatrics & Child Health undertook a survey of complaints against paediatricians. Their initial report of this RCPCH survey showed a marked increase in the numbers of complaints against paediatricians. Further qualitative interviews with paediatricians have identified that they are now less likely to become engaged in child protection work and more careful about the reports they make to child protection authorities.

There have also been substantial consequences from the high profile cases in the media, including those of Professor Sir Roy Meadow and Professor David Southall: paediatricians, child psychiatrists and other health professionals involved in child protection such as radiologists, orthopaedic surgeons etc are withdrawing from providing their expertise in child protection cases. This has led the Chief Medical Officer to examine the way expert witnesses are sought for child protection cases. Trainees in paediatrics are now less likely to want to undertake careers involving child protection and an increasing proportion of advertised jobs for child protection now remain unfilled.

… Paediatricians are particularly concerned that the medical regulator, the GMC, is taking actions against internationally acclaimed paediatricians in child protection as a result of a campaign of complaints. Many in the profession consider that the actions taken by the GMC against Professor Sir Roy Meadow, the founding President of the Royal College of Paediatrics & Child Health, and Professor David Southall were inappropriate. As a result, the Royal College of Paediatrics & Child Health voted almost unanimously at their Annual General Meeting in March 2008 with grave concerns about the actions of the GMC and the effects on child protection.

… In deciding whether to make a report of possible child protection, paediatricians are professionally and legally required solely to focus on the needs of the child. Thus they should be considering all the evidence that either supports or refutes a diagnosis of possible abuse, as well as the relative likelihood of the presenting condition being caused by abuse. If a paediatrician has reasonable concerns that this may be a case of abuse, the paediatrician should make a referral. However, in recent years, paediatricians have also had to consider the fact that if they make a referral to child protection services and the abuse remains unsubstantiated, the parents could use disciplinary procedures and the complaints systems and this may well generate publicity which is adverse to the paediatrician. Paediatricians are also concerned that they could become the target for the campaigners I have referred to above or otherwise targeted in the press. This obviously has the potential to bring substantial stress to the paediatrician and his

or her family. However it can also make it much more difficult for the paediatrician to deliver proper care to other patients. A paediatrician who faces accusations in the press of taking children away from parents in unjustified circumstances and who is reported to be "under investigation" by the GMC for unprofessional conduct will never know if the parents of the next child who he or she sees is worried about having their child taken away. This has the potential to undermine the professional confidence of the doctor and to undermine the doctor-patient relationship. The real victims here are other children whose successful treatment depends on the doctor establishing a trusting, professional relationship with the parents.

I accept that some paediatricians make mistakes and that some act in ways that are not in accordance with the highest standards of our profession. Whilst that is inevitable, as a profession those of us who are working in child protection increasingly feel we are working in siege conditions, where we face the possibility of public exposure and unjustified and vicious criticism just for doing our job properly. Given this possibility I regret that I have to report to the court that my view is that paediatricians have increasingly become more wary in making referrals for child protection.

The evidence for this change in referral threshold is soft, in that there are no routine data collected on reports and substantiation rates. However, paediatricians' concerns are recognised by the fact that they are less willing to undertake child protection work, jobs remains unfilled, and trainees are less likely to want to go into child protection work. In recent years there has been a general reduction in child protection plans around children (data from Department for Children, Schools and Families), while paradoxically there has been an increase in the numbers of adults who have been convicted for child abuse offences (Home Office data).

There is also evidence that professionals engaged in child protection work have been subject to physical and verbal intimidation. A survey was carried out in 2000 at the Annual Meeting of the British Association for the Study and Prevention of Child Abuse and Neglect (BASPCAN) and results from nearly 300 professionals in child protection documented a range of verbal and physical abuse that they had received as a result of their involvement in child protection cases. This possibility clearly may influence professionals' involvements to engage in child protection work.

Doctors have also become increasingly worried about the risks of being referred to the General Medical Council. Although Professors Southall and Meadow have been the most high

profile cases, a number of other professionals engaged in child protection work have also been referred to the General Medical Council. After what are often prolonged investigations, most of these cases are dropped, but they undoubtedly instil a great deal of anxiety in the professionals who have to undergo investigations.

Professionals Against Child Abuse considers that nothing must be done to deter health professionals' engagement in child protection work, but the campaign in recent years and referrals to the General Medical Council are clearly acting as deterrents. Whilst we accept that those in authority, including regulatory powers, politicians and employing authorities recognise that professionals in child protection act in good faith to do their best for children where abuse is suspected, there are times when it does not feel like that. These professionals now have to consider their own professional and personal safety – this is a major deterrent to effective child protection."

Appendix C – evidence of Mr Jeyes

188. The key passages from the witness statement of Mr Jeyes are as follows:

"The Council has a statutory duty to investigate in every case in which child protection concerns arise, and the social workers in this case were simply doing their jobs. Many parents take exception to the child protection process and social workers sometimes suffer hostile reactions. It is a difficult and often stressful job, requiring a high level of knowledge and skill and the ability to make finely balanced judgments under pressure. They are responsible for protecting the most vulnerable members of society. Their decisions can have very serious implications for children and families.

The threat of publicity or media intrusion in to their professional and/or private lives would only add to the difficulties which social workers already face. Effective child protection processes rely on professionals being able to take decisions which are in the best interests of children, not of the adults caring for them. They have to take these decisions in the face of opposition from parents and in times when tensions and emotions are, understandably, running high. The added threat of being the subject of publicity, and all that entails, would serve only to inhibit appropriate decision-making and sharing of information. Further, it will deter others from entering a profession in which there is already a nationwide shortage.

Local authorities who have children's services functions will, in any given case, be the lead agencies in safeguarding children, and the children's social worker is usually the lead professional. The lead professional will obtain information and

sometimes advice from the other agencies, such as Health, Police, Education or Probation, but it remains the children's services authority which has the legal duty and responsibility to take Court action to protect children. Social care staff who take difficult decisions as to what action to take are in the front line, facing the family's emotions and anxieties. I know, from talking to many social workers, that they worry about these things.

Courts and Safeguarding Boards have the skills and knowledge to properly consider the local authority's actions and decisions. Most sectors of the media do not. In appropriate cases, particularly where the system has failed, sometimes with disastrous consequences, it is right that the role of individuals is held up to more public scrutiny and in these cases it may be that individuals should be named. This already happens and social care staff have to expect this. Were this to become routine practise or the norm, the concern is the impact of yet further pressure upon staff trying to do an extremely difficult job in difficult circumstances, and consequently the impact upon the families they are trying to help.

Social workers find themselves in a difficult position of needing to work closely with children and their families, often over a long period of time. They may need to address with the parents issues over their care of the children and often have to say difficult things. At the same time, they are expected to maintain good working relationships both with the children and parents, and with other professionals with whom they may have differences of professional opinion. Their overriding objective is to keep the best interests of the children at the forefront of their minds and as a paramount consideration in their decision making.

Social care staff are acutely aware that their actions and decisions will come under scrutiny and may come in for criticism from a variety of quarters, especially (but not restricted to) the Courts. This is just one of the things which they have to worry about and live with. If they make mistakes or decisions which turn out to be wrong, a child could die or suffer serious harm. Few professions carry such a high level of responsibility.

Publicity, for those who neither want nor seek it, and who are already doing a difficult and stressful job, will inevitably affect their ability to do their work. This, in turn, affects all the children and families for whom they are case responsible.

Mrs Ward states that she has no wish to vilify those involved in William's case. Mr and Mrs Ward would not be able to control that process, or what is printed. Nor can they control the

investigations or behaviours of others who may take a different approach.

Social workers are bound by duties of confidentiality towards service users. Their right of reply to anything which may be printed about them, or about a case, is therefore limited. They may not feel able to adequately defend themselves.

The high levels of stress which social workers experience inevitably affects their sickness levels and the ability to recruit and retain staff. During August 2008, 30 members of staff in Children's Services took time off work due to stress or related reasons, and 194 working days were lost. This accounts for 8% of total sickness absences for that month.

Some of our children's social care teams have, from time to time, experienced very high levels of vacancies. They have had to continue operating through periods of crisis, when there are not enough qualified and/or experienced workers to respond to continuous new referrals as well as deal with open cases. Rolling programmes of recruitment, and use of agency staff, are in place but the national shortage of qualified and experienced social workers means that we often struggle to fill vacancies. This is not due a lack of funding. We have seen some teams' budgets underspent. There simply are not enough social workers willing and able to deal with child protection work. Even where posts can be filled, reliance on agency workers and a high turnover of staff affect case continuity and, therefore, standards of practice.

The effect is felt by children and families, as acutely as it is felt by our workers. Managers have to prioritise work and manage risks. A shortage of social workers can mean that only those cases assessed as the most serious or the most high risk actually receive the social work attention which they need. This potentially leaves children in need having to wait longer for the support and services which would benefit them.

It is absolutely right that social workers and social care managers are accountable for their practice and their decisions. Accountability exists through the legal system, through the GSCC, through the Local Government Ombudsman and through councils' complaints and representations procedures. Mr and Mrs Ward wish to advance public debate. No issue is taken with that. However, publicly naming social care staff in that process is unnecessary and undesirable for all the reasons stated. It would not advance the public debate about infant fractures, about the family court system or about child protection systems."