Neutral Citation Number: [2011] EWHC 1157 (Fam)

Case No: EY08C0016

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2011

Before :

SIR NICHOLAS WALL THE PRESIDENT OF THE FAMILY DIVISION

- -

Between :

In the case of X, Y, and Z

Brian Morgan — **Applicant and Intervener**

A Local Authority — **Respondent**

Mr Morgan appeared in person – Applicant and Intervener
Piers Pressdee QC (acting *pro bono)* for the Local Authority - Respondent
Adam Wolanski for Dr M and the Medical Protection Society – Intervener
Bertie Leigh (solicitor) for the Royal College of Paediatrics - Intervener
Alistair MacDonald (acting *pro bono*) made submissions *de bene esse* in relation to the position of X, Y and Z
The mother of X, Y and Z

Hearing dates: 8th March 2011

- -

Approved Judgment

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

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SIR NICHOLAS WALL THE PRESIDENT OF THE FAMILY DIVISION

This judgment is being handed down in private on 11 May 2011. It consists of 21 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Sir Nicholas Wall P:

Introduction

1. In this application, Mr. Brian Morgan, a freelance journalist, has applied for an order "for permission for the media to name the medical expert witness" in the case (Dr M).

2. The background is care proceedings instituted by Coventry City Council (the local authority) on 20 June 2008 in relation to three children hitherto identified only by the initials X, Y and Z. X is a boy now aged 13; Y is a girl now aged 10. Z is a boy now aged 8. The proceedings were heard by His Honour Judge Bellamy, sitting as a judge of the High Court.

3. In a judgment handed down on 19 February 2010, Judge Bellamy gave the local authority leave to withdraw the proceedings but ordered it to pay £100,000 towards the publicly funded costs of the parents of X, Y and Z. That judgment has not been published. However, Judge Bellamy prepared what he described as an "abbreviated version of the judgment", which bears the same date, is published as [2010] EWHC B12 (Fam) and is now reported as ***Coventry City Council v X, Y and Z Care Proceedings: Costs)*** [2011] 1 FLR 1645. I shall call this judgment ***Re X,Y and Z***. In his judgment in ***X, Y and Z*** the judge was highly critical of Dr M's report, although, as will be apparent, he did not hear Dr M.

4. The two judgments referred to in paragraph 3 above did not name the local authority, and in a further judgment dated 27 September 2010 ([2010] EWHC B22 (Fam)), now reported as ***BBC v Coventry City Council and Others (Care Proceedings: Costs: Identification of Local Authority)*** [2011] 1 FLR 977), Judge Bellamy, on the application of the BBC gave permission for the local authority to be identified.

5. On 15 October 2010, Judge Bellamy, after discussion with me, at my suggestion but of his own motion, directed that a further application in ***Re X, Y and Z*** – the application identified in paragraph 1 of this judgment - should be listed for directions before myself. As will be apparent, the medical expert in the case, who is a paediatrician, had hitherto been identified only as Dr. M by Judge Bellamy, and the principal issue which I have to decide is whether or not Dr M's identity should be revealed.

6. When I had the case for directions on 20 January 2011, it occurred to me that it raised a number of broader issues relating both to the circumstances in which expert witnesses in family proceedings should be identified, and transparency in family justice generally. With the agreement of the parties, then before the court, therefore. I wrote to the Presidents of both; (1) the Royal College of Paediatrics and Child Health (RCPCH) and (2) the Royal College of Psychiatrists, alerting them to the fact that the issue was before the court. As a result, I received a long statement from the President of the RCPCH, Professor Terence Stephenson and, without opposition from the other parties, I granted his application for leave to intervene. I have heard nothing from the Royal College of Psychiatrists.

7. Dr. M initially did not seek leave to intervene, but then changed his mind. Both he and the Medical Protection Society (MPS) were represented by Mr. Adam Wolanski of counsel. Mr Piers Pressdee QC, who did not appear in the original care

proceedings, appeared *pro bono* for the local authority and Mr. Leigh appeared for Professor Stephenson and the RCPCH. Mr. Morgan and the mother of X, Y and Z appeared in person.

8. Mr Alistair MacDonald, who also appeared *pro bono* at the directions hearing on 20 January 2011, had originally offered to represent the children, but found himself in a difficult position in this respect, as the proceedings in relation of X, Y and Z had plainly come to an end, and the only people with parental responsibility for the children were their parents. In the event, given Mr. MacDonald's level of expertise, it was sensibly agreed that I should hear submissions ***de bene esse*** from him in relation to the position of children generally. This I did, and I am extremely grateful in particular to Mrs. C, the mother of X, Y and Z for her agreement that I should do so.

9. In the event, in addition to the papers I have already mentioned and oral argument, I had the following additional documents:-

    (1) submissions from Mr. Morgan;

    (2) Dr M's report in the case of ***X, Y and Z***, his Email correspondence with the judge and two letters written directly to myself defending his report;

    (3) a statement from Dr. Stephanie Bown, The Director of Policy and Communications at the MPS;

    (4) skeleton arguments from the local authority, the MPS and Mr. MacDonald.

10. I did not hear any oral evidence, and Mrs. C, who did not file a statement, made a powerful submission, to which I will refer in due course. At the conclusion of the oral argument, I reserved judgment.

Preliminary matters

11. Before turning to the issues in hand, I need, firstly, to offer the parties an apology to the length of time it has taken me to produce this judgment. This is in part due to pressure of other work, but is largely due to the importance of the issues raised, which, in their wider context, I have not found altogether easy to resolve.

12. It also occurs to me that I should declare an interest, in that I am the author of ***A Handbook for Expert Witnesses in Children Act Cases*** (Jordans 2007) the Second Edition of which contains a chapter (chapter 35) entitled: ***Will you be named? Anonymity in Proceedings Relating to Children.***

13. As will be apparent, the chapter (as well as the book as a whole) is written in the second person plural and is addressed largely to doctors. Whilst it endeavours to state the law accurately, the ***Handbook*** is in no sense a legal textbook,

14. Although I have not heard specific argument on the point, I do not think that anything I say in the ***Handbook*** generally (or in chapter 35 in particular) disqualifies me from adjudicating upon the instant case. I make it clear that the ***Handbook*** is not the place to continue what I describe as "the anonymity debate", and whilst I state that "the

question of anonymising a judgment is very much a matter for the individual judge", I do go on to state: -

> "35.5 …… The practice is to anonymise, on the basis that identification of professionals (for example the name and location of the solicitors instructed in the case) could well facilitate identification of the children ……
>
> 35.6 My own practice at first instance varied. If I thought the public interest required the doctors in a case to be named, or if their identities were otherwise transparent, I would name them. The critical anonymity which the court seeks to protect, after all, is that of the child.
>
> 35.7 It would, however, be courteous if judges, when they have it in mind to identify in any subsequent judgment experts who have given evidence in front of them, were to alert the expert in question to the fact that he or she might be named. My personal view favours transparency, provided the identity and whereabouts of the children concerned is protected. From your perspective, being named is only likely to cause you professional harm if you have fallen below the standard demanded by your profession and are properly criticised by the judge. If, as this Handbook constantly states, you have done your work conscientiously you have nothing to fear from the courts.
>
> It is, perhaps, worth pointing out that in the Court of Appeal, every word spoken in every child case is spoken in public, and is capable of being reported, subject of course to the rule that the children concerned should not be identified. My personal view is that greater openness will show the public the extreme difficulty and sensitivity of the decisions it has to make, and how conscientiously it goes about making them. I see no reason why you should not share fully in that process. "

The outstanding issues in the case

15. As I understand it, Dr. M has left the question of his identification to the court. In other words, he neither supports not opposes Mr Morgan's application. I shall deal in detail with the arguments advanced on his behalf later in this judgment. As he had not been heard by Judge Bellamy, however, he did ask, (in the event that I decided he should be named) that his rebuttal of Judge Bellamy's criticisms should also be made public.

16. Counsel were also agreed that if and in so far as there were questions arising from the principal issue identified in the preceding paragraphs about which I felt able to express a view – in particular the circumstances in which experts giving evidence in family proceedings should be named – then I should do so, even though what I say will, necessarily, be *obiter dicta*.

17. In these circumstances. I think I should make clear what I am deciding. First and foremost I am deciding the discrete issue left to me by Judge Bellamy. In no sense is this an appeal from his decisions in the care proceedings, and in so far as I mention them at all, it is to set the context for the main issue which I have to resolve.

18. I have already noted, however, that the judge was highly critical of Dr. M . It does not seem to me that it is for me to analyse the judge's reasoning in this regard or to express any view about the substance of Judge Bellamy's criticisms, Whether or not he was wise to make them in the particular circumstances of the case is another matter. On this point I am invited to comment, and propose to do so, since the fact of the criticisms inevitably forms part of the subject matter for my decision. Indeed, the judge himself is at pains to point out that Dr M was not called to give evidence at the hearing which led to the withdrawal of the proceedings, had not had the concerns about his report put to him, and thus has had no opportunity to date to respond to the judgment. Judge Bellamy appears to have taken the view that since Dr. M was not identified, he was not damaged by the criticisms. This is a point to which I will return.

The facts

19. These are set out by Judge Bellamy in considerable detail in the first of his published judgments, to which reference can be made: - see ***Re X,Y and Z*** . For my purposes, it is sufficient to state: -

    (1) that the local authority instituted care proceedings relating to X. Y and Z which it later sought permission to withdraw;

    (2) that in advancing a case of factitious or induced illness (FII) the local authority appeared to place reliance on the report of Dr. M;

    (3) that the children's mother and Mr. Morgan both wish to identify Dr. M.

The law: (1) general

20. This is an area of the law in which many of the recent judgments have been given by Munby J (as he then was) or Munby LJ (as he has become, although usually sitting, in this context, at first instance). Whilst those decisions, as I have previously made clear, are not binding on me, they are plainly highly persuasive, and I would like to take this opportunity to pay tribute to the erudition and industry displayed by the judge both in his analysis of what the law is and in his application of the law to the cases before him. Indeed, I can say at once that although I have taken the opportunity to read all the relevant cases, I am able to take the matter relatively shortly because I find myself in agreement with Munby LJ's analysis. The propositions which follow in paragraphs 29 to 32 below, therefore, set out my understanding of the present state of the law.

The law (2) Statutes and Rules

21. Two Statutes are of particular relevance in this respect. The first is the Administration of Justice Act 1960 (AJA 1960); the second is the Children Act 1989 (the Act).

22. For completeness, Mr Pressdee drew my attention to Part 2 of the Children, Schools and Families Act 2010 (CSFA 2010). CSFA 2010, it will be recalled, was passed during the "wash up" in the final days of the last administration. CSFA 2010 Part 2 has not been brought into force by the present government, and may never be. Formally, the position, as I understand it, is that the present government has stated that it will not implement CSFA 2010 Part 2 (under which fee earning experts generally are denied anonymity) pending the outcome of the Family Justice Review in September 2011.

23. I do not propose to consider CSFA 2010 Part 2. It is not part of the law of England and, as I have already stated, may never be. Family Law is littered with Statutes, and parts of Statutes which have never been brought into force. In my judgement, it would be quite wrong in principle were I to adjudicate on this case on the basis either that CSFA 2010 Part 2 was in force, or that it represented the will of Parliament. The canons of statutory construction are clear, and do not apply to prospective changes in the law. A Statute, as I understand it operates for a finite period between its commencement and its repeal: CSFA 2010 Part 2 has not been brought into force, and is not in force.

Section 12 of AJA 1960 (section 12)

24. As amended, section 12 reads, where relevant to this case, as follows: -

> **"Publication of information relating to proceedings in private."**
>
> (1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—
>
> (a) where the proceedings—
>
> (i) relate to 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 maintenance or upbringing of a minor ……
>
> (e) where the court (having the power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.
>
> (2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to a court include references to a judge ..... and to any person exercising the functions of a court…..and references to a court sitting in private include references to a court sitting…..in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court."

Section 97 of the Act

25. As amended, this reads, where material, as follows: -

"97 Privacy for children involved in certain proceedings."

……

(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify—

(a) any child as being involved in any proceedings before the High

Court, a county court or a magistrates' court in which any power under this Act ….. may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings…….

(5) For the purposes of this section –

'publish' includes –

include in a programme service (within the meaning of the Broadcasting Act; 1990; or

cause to be published; and

'material' includes any picture or representation"

26. In ***Clayton v Clayton*** [2006] EWCA Civ 868, [2006] Fam 83, the Court of Appeal (in a constitution comprising my immediate predecessor, Arden LJ and myself) came to the conclusion that the prohibition against identification contained in section 97(2) of the Act was limited to the duration of the proceedings but did not affect the limitation contain in AJA 1960 section 12. As the proceedings relating to X, Y and Z came to an end when Judge Bellamy acceded to the local authority's application that they be withdrawn, the only people with parental responsibility for the children are their parents, and section 97 of the Act has no application

The Rules

27. As Munby LJ points out in ***A v Ward*** [2010] EWHC 16 (Fam), [2010] 1 FLR 1497 (***Ward***) at paragraph 77, Family Proceedings Rules 1991 rule 11.2(2) made it clear that the Rules did not affect the interpretation of AJA 1960 section 12 The position remains the same under the Family Procedure Rules 2010 (the Rules): - see rule 12.73(2).

28. The Rules are, however, peripherally relevant in that they broaden and relax the scope of disclosure, and permit media attendance at, and reporting of, family proceedings held in private: see, for example, FPR 27.11(2)(f). However, where AJA 1960 section 12 continues to apply, the recipient of information from a party can only pass it on for specified purposes, and it remains a contempt to publish it to the world at large. Thus, for example, there is nothing to stop litigants talking to their Members of Parliament (MPs) about the way they perceive they have been treated in proceedings under the Act, but the MP is not at liberty to publish the information to the world at large: - see FPR r.12.75(3). AJA section 12 also applies to reporting by the media, unless the court gives permission for information "relating to the proceedings" to be reported.

The Law (3) Propositions

29. I start by adapting to this case the common ground between counsel as set out by Munby J in paragraphs 12 and 13 of ***BBC v CAFCASS Legal and Others*** [2007] EWHC 919 (Fam) [2007] 2 FLR 765 (***BBC v CAFCASS***), and repeated by him at paragraphs 24 and 25 of ***Ward*** :

> "i) the care proceedings in relation to X, Y and Z having come to an end, the restrictions imposed by section 97(2) of the Act 1989 no longer operate: ***Clayton v Clayton*** [2006] EWCA Civ 878, [2006] Fam 83;
>
> ii) the only relevant statutory restrictions are those imposed by AJA 1960, section 12:
>
> iii) AJA 1960, section 12, although it prevents the publication of Dr M's report and imposes restrictions upon discussion of the facts and evidence in the case, does *not* prevent publication of the names of the parties, the children or the witnesses: ***Re B (A Child) (Disclosure)*** [2004] EWHC 411 (Fam), [2004] 2 FLR 142 (***Re B***);
>
> iv) accordingly, unless I agree to exercise what has become known as the "disclosure jurisdiction" (see ***Re B*** at para [84]) Dr M's report cannot be published, and unless I decide to exercise what has become known as the "restraint jurisdiction" there will be nothing to prevent the public identification of Dr M;
>
> v) 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, at para [17] (***Re S***), and by Sir Mark Potter P in ***A Local Authority v W*** [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 (ECHR) which are engaged, leading to an 'ultimate balancing test' reflecting the Convention principle of proportionality: see ***Re B*** and ***Brandon Webster, Norfolk County Council v Webster*** [2006] EWHC 2733 (Fam)."

30. What Lord Steyn said in paragraph 17 of ***Re S*** was: -

> "The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in ***Campbell v MGN Ltd*** [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of ***Campbell*** and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

31. ***Re S*** involved the attempt, in care proceedings, to protect the subject child from identification as the son of woman who was to be tried the murder of a sibling. The judge dismissed an application for an injunction restraining the publication by newspapers of the mother's identity, and appeals on the child's behalf were dismissed. Although the right of the press under Article 10 to report a criminal trial featured strongly ("a public event": and "the glare of contemporaneous publicity ensures that trials are properly conducted") Lord Steyn's speech is plainly of wider importance, and he takes as a general position an extract from a speech by Lord Nicholls of Birkenhead in ***Reynolds v Times Newspapers Limited*** [2001] 2 AC 127 (***Reynolds)*** at 200G-H:

> "It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

32. I should perhaps add that I accept the ambit of AJA 1960 section 12 set out by Munby J in ***Re B*** at paragraph 81 and 82, which I need not reproduce. Suffice it for present

purposes for me to say that I agree with Munby J that AJA 1960 does not, of itself prohibit the publication of the identity of Dr. M although it does prohibit the publication of his report, which is plainly information relating to the proceedings.

The issues in the case refined

33. If it is the case that AJA 1960, section 12 does not, of itself, prevent the identification of Dr M, two questions, as it seems to me, arise. They are: -

    (1) should I exercise the "restraint" jurisdiction to protect him?

    (2) If the answer to question (1) is "no" should I exercise the "disclosure" jurisdiction to order publication of his report?

The argument for Mr. Morgan

34. Mr. Morgan described himself as "a freelance journalist with extensive experience in the issues that have been raised in this case". He submitted that there is public interest in knowing the identity of Dr, M, and he relied heavily on the decision of Munby LJ in ***Ward***, a copy of which was helpfully attached to his written argument. He acknowledged that Munby LJ had accepted, in paragraph 156 of his judgment, that the evidence could justify a different conclusion in another case, but argued that where FII was concerned the issues were just as serious as bone fractures, and expert paediatric testimony was at the heart of public concern.

35. Mr. Morgan also relied on the criticisms of Dr M made by Judge Bellamy. He argued that such a level of criticism was unprecedented in his experience and rendered it all the more important that the doctor was identified.

36. Mr. Morgan replied in writing to the submissions made on paper by counsel. Given that I do not propose to enter into the debate on the merits of Dr M's advice, I do not propose to comment on much of what Mr. Morgan agued. However, he made the point that without being able to identify Dr. M he was unable to either to verify or disprove the assertions which Dr. M made, and he could not look either at whatever work Dr M had done (which was in the public domain) nor could be read any of the papers Dr M had published.

37. I was, however, greatly heartened to read that if and insofar as Dr. M wished to defend himself, he would do so with Mr. Morgan's "fullest reporting assistance if needed". This, to my mind, went a long way to answering the questions which formed in my mind as the argument progressed, namely "will there be a true debate?" and "what is the forum?"

38. In relation to the evidence submitted by Professor Stephenson, Mr Morgan did not accept that paediatricians were in a unique position so far as incidents of violence were concerned: indeed, he submitted that of doctors working in hospitals the experience of the paediatric profession in relation to threats of violence ranked well below those of general medicine, psychiatry and surgery. He joined issue with Professor Stephenson generally in relation to the numbers which the latter cited.

The arguments for the local authority

39. Appearing *pro bono,* Mr Pressdee saw his task as identifying the issues, setting out the law as he saw it, and recording points both for and against identification. He also summarised the role of expert evidence within care proceedings and helpfully identified points of practice.

40. As to the law, I have already rejected consideration of the CSFA 2010. CSFA 2010 |Part 2 apart, however, Mr. Pressdee submitted that the approach of Munby LJ in ***Ward*** was correct and that there was an "inherent and compelling logic" in it.

The argument for Professor Stephenson and the RCPCH

41. Professor Stephenson produced a long and helpful statement, which formed the basis of Mr. Leigh's argument. This is clearly an important document, which runs to some 25 pages, which I will attempt to summarise. Professor Stephenson is well known, of course, not only the President of RCPCH, but as a highly competent expert witness.

42. Professor Stephenson does not suggest that what he says points unequivocally in any one direction. Moreover, he acknowledges that the court has to balance "complicated issues of law and human rights" on which he expresses no view. He does, however, have the advantage of giving evidence from the perspective of an expert who has been reported to the General Medical Council (the GMC) on two occasions, and who has been threatened with violence by angry parents.

43. Professor Stephenson points to the public vilification of Professor Sir Roy Meadow and Professor David Southall. He does not know who Dr M is. He (Professor Stephenson) is part of a working group of the GMC, chaired by Thorpe LJ, which is conducting a wide ranging review of the guidance which it can offer doctors involved in child protection cases. He points out that for the first time in its history the GMC now has a policy on vexatious complaints.

44. Professor Stephenson describes what he calls a "wariness and concern" amongst paediatricians about child protection work; and the development of a "damned if you do and a damned if you don't" criticism of paediatricians both for allegedly over-diagnosing chid abuse and for allegedly missing it. He associates himself with the evidence given to Munby LJ by his predecessors in ***Ward*** . He points to a 2004 survey and to the "profound impact on the professional and private lives of some paediatricians" which unproven complaints have had. Although less that 3% of the 763 complaints against 565 doctors in the survey had been upheld, their effect had been severe. He also points to a survey published in 2007 which concluded that unless the issues highlighted in the research were addressed "there will continue to be a reluctance to take on essential child protection roles".

45. Professor Stephenson also points to the effect on recruitment, and the risk of child abuse and maltreatment not being reported by doctors. Whilst not suggesting that anonymity would resolve the problem, he is of the view that there are very strong arguments for retaining anonymity for treating doctors who appear as witnesses of fact in Family Court cases, not least the need to protect the anonymity of the child. He recognises that there is a distinction between the expert witness and the treating clinician, but remains of the view that the promise of anonymity would encourage the right people to give evidence.

46. The balance of Professor Stephenson's statement seems to me to be divided between a defence of certain of Dr M's actions and conclusions, and a number of well directed shafts aimed at the judge for criticising Dr M without hearing him.

The arguments advanced by Dr. M and the MPS .

47. For Dr M, Mr. Wolanski made it clear that whilst the former's attitude remained one of neutrality, Dr M felt "justifiably aggrieved" at the fact that the judge had made such damning criticism of his work without giving him an opportunity to respond. Mr. Wolanski submitted that, at the very least, there existed "very cogent answers" to the criticisms made, and that the judge's decision not to alter his judgment was at least in part because the judgment did not identify Dr. M.

48. As Mr. Wolanski pointed out, this case is unusual. In the standard case, the experts have given evidence and been cross-examined. What matters is what the judge makes of their evidence, having heard it tested. Here, there has been no oral evidence by Dr M.

49. Mr. Wolanski accepted that there was no statutory prohibition upon the identification of expert witnesses (***Re B***) and that the onus was on Dr M to establish a convincing case for anonymity. Following ***In re S*** and ***A Local Authority v. W, L, W, T and R (By the Children's Guardian)*** [2005] EWHC 164 (Fam) [2006] 1 FLR 1 (***Re W. L, W, T and R***) the court had to consider whether ECHR Article 8 was engaged and, if so, whether any interference with that right was proportionate.

50. Mr. Wolanski submitted that the "private life" protected by ECHR Article 8 was not confined to one's personal life, but also could extend to professional and business activities – see (inter alia) ***Niemietz v Germany*** (193) 16 EHHR 97. It also extended to reputation, where the attack so seriously interfered with an individual's private life as to undermine his personal integrity – see ***HM Treasury v re Guardian News and Media*** [2010] UKSC 1 at paragraphs 37 et seq.

51. Mr. Wolanski submitted that there was a firm public interest in protecting reputation – see ***Reynolds*** and that the balance between ECHR Articles 8 and 10 lay essentially in the contribution which the material which it was proposed to publish made to the public debate. Mr. Wolanski made the point that paediatricians who learned that their work as an expert witness could be subjected to severe criticism without the expert being given the opportunity to respond were even less likely to become involved in cases of this nature.

52. Applying the principles he had identified to the case in hand, Mr. Wolanski submitted that the condemnation of Dr M's work without his being given an opportunity to respond offended against the principles of natural justice. The court should, accordingly, take steps to ensure that Dr. M's reputation was not unfairly traduced and, if the application by Mr. Morgan was granted should record in its judgment both that Dr M has answers to the criticisms levelled at him, and that those answers were supported by Professor Stephenson.

53. On behalf of the MPS, Mr. Wolanski relied upon the statement filed by Dr. Bown on its behalf, and indicated that the MPS was in particular concerned about the vilification of experts leading to a lack of paediatricians prepared to undertake this type of work together with the inability of experts to answer criticisms made of them given the duties of confidentiality which they owed.

Mr. MacDonald's argument

54. Mr. Macdonald submitted that any publication of Dr M's name had the potential to engage children's rights under ECHR Articles 6, 8 and 10, as well as various articles under the United Nations Convention on the Right of the Child (UNCRC).

55. Mr. MacDonald did not dissent from any of the propositions advanced in paragraph 29 above, and helpfully reminded me of a passage from paragraph 53 of Sir Mark Potter's judgment in ***W. L, W, T and R*** , in which the President had commented on Lord Steyn's speech and had said: -

> "There is express approval of the methodology in ***Campbell*** in which it was made clear that each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or "trumps" the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out. Having so stated, Lord Steyn strongly emphasised the interest in open justice as a factor to be accorded great weight in both the parallel analysis and the ultimate balancing test and stated that, at first instance, the judge had rightly so treated it. However, nowhere did he indicate that the weight to be accorded to the right freely to report criminal proceedings would invariably be determinative of the outcome. Indeed, he acknowledged that although it was the "ordinary" rule that the press, as public watchdog, may report everything that takes place in a criminal court, that rule might nonetheless be displaced in unusual or exceptional circumstances."

56. Mr MacDonald also reminded me that the ECtHR had held that it might be necessary in some circumstances to limit the principle that proceedings should be open and public in nature, it being essential in proceedings relating to children that witnesses should feel able to express themselves candidly on highly personal issues without fear

of public curiosity or comment: - see ***B v United Kingdom, P v. United Kingdom*** [2001] 2 FLR 261.

57. Mr. MacDonald submitted that issues of disclosure might well arise in relation to material imparted in confidence by children to experts, and whilst the principle that welfare was paramount did not apply in an application for the exercise of either the restraint or the disclosure jurisdictions, the Supreme Court had recently acknowledged in ***ZH (Tanzania) v. Secretary of State for the Home Department*** [2011] UKSC 4, [2011] 1 FCR 221 that in applying the proportionality test under ECHR Article 8 the best interests of the child must be a primary consideration. .

58. Mr MacDonald accepted that – on the facts – the risks to the children of the identification of Dr. M *per se* did not amount to a disproportionate interference with their ECHR Article 8 rights. However, he argued that the position of the children might be materially different were the publication of the identity of Dr M to be accompanied by details of the medical conditions and / or the medical records which Dr, M was required to consider in formulating his opinion. He therefore urged caution in relation to the prescription of the ancillary matters which might accompany any publication of Dr M's identity in order to ensure that the children's medical confidentiality was respected.

59. Mr MacDonald also made a number of practical suggestions. These included amendments to the ***Practice Direction: Experts and Assessors in Family Proceedings*** in order to spell out the law relating to anonymity and to ensure that the issue of identification was addressed in the letter of instructions to the expert. He also suggested that joint letters of instruction should contain a clear statement that there is no presumption of anonymity, and that any application to restrain publication of the identity of the expert should be made before the end of the proceedings so that the guardian could comment on it. Finally, he suggested that it dealing with an application to restrain publication, the court should provide the expert in question with the opportunity to make representations on the issue either orally or in writing.

60. I found Mr MacDonald's submission particularly thoughtful and helpful, and am extremely grateful both to him and to Mr. Pressdee for appearing *pro bono* in the best traditions of the bar.

The submission made by Mrs. C

61. Mrs C is, of course, the mother of X, Y and Z, and appeared in person. She plainly feels very strongly that Dr M should be identified. She told me that her husband's reputation has suffered as a result of the case and that he had been classified as a danger to children. She told me that she had to tell the children the result and the circumstances surrounding Dr M's report meant that she could not talk to the children. Her view was that Dr. M had made had a lot of false accusations against her, with the result that she and her husband had had to question everything they had done.

62. Mrs. C's case was that if Dr M's name was not brought into the public domain then it would go "on and on" – that is, if experts are allowed to hide behind closed doors. Her children, she said. wanted to be able to say what happened to them. If this case was not successful, she concluded, "there will be others".

Discussion (1) Judge Bellamy's decision to criticise Dr. M.

63. I acknowledge at once that an experienced judge such as Judge Bellamy has a wide discretion in relation to the manner in which he conducts proceedings under the Act, in this case, an application by the local authority for permission to withdraw care proceedings. This was a judicial decision, and Judge Bellamy could have refused the application. That said, however, I have come to the clear view that Judge Bellamy should not, in the circumstances of this case, have made such swingeing criticisms of Dr. M.

64. In my judgment, it was not necessary for Judge Bellamy to analyse Dr M's report in detail for the purposes of the orders which he made. The applications before him were (1) an application by the local authority for permission to withdraw; and (2) the question of costs. As to (1) the judge was persuaded that it was "not an appropriate use of the court's case management powers to endeavour to continue these proceedings in order to identify or resolve any disputed issues between the parties on matters falling outside the court's own statutory remit". That is a perfectly valid and in itself sufficient expression of a reason for granting permission to withdraw.

65. As to costs, the judge gave four particular reasons for ordering the local authority to pay costs. There were: -

(a) (it) has abandoned all of the matters relied upon in its original threshold document on the basis of a belated acknowledgement that there is little or no material which is capable of satisfying the threshold criteria;

(b) upon receipt of the reports Mrs G and Ms J, (it) failed to convene a strategy discussion or otherwise take steps to obtain and evaluate information relating to the children's extensive involvement with health services in order to determine whether there is evidence that this is a case of FII and, if so, whether steps needed to be taken to safeguard the children;

(c) in seeking to remove the children into foster care, (it) fell below accepted standards of best practice in the decisions-making process which led to its application to the court for interim care orders in 2009 and;

(d) (it) failed to raise with Dr M the shortcomings in his report, instead relying upon that report completely and uncritically in deciding to amend its threshold document to raise allegation of FII, in drafting those amendments and in proceeding with those allegations up to the 5th day of this fact finding hearing.

66. Only one of those reasons relates specifically to Dr, M's report, and the criticism – in so far as it relates to costs – is of the local authority for failing to raise matters with Dr. M. It was not, in my judgment, necessary for the judge to make specific findings about Dr M's report before either giving the local authority permission to withdraw or making an order for costs against the local authority.

67. Furthermore, in the section of his judgment headed "Lessons to be learned" the criticisms which the judge makes are of the local authority, including his adoption of Charles J's dictum in ***Re R (Care: Disclosure Nature of Proceedings)*** [2002] 1 FLR ***755*** that all those involved should consider and review the report of an expert when it is received and raise any outstanding points with the expert.

68. I can quite see – in the circumstances – that Judge Bellamy would not wish to exercise his proactive powers of case management to insist that Dr M be called. The local authority was applying to withdraw and was abandoning reliance on Dr. M's report. For this reason I do not accept Mr. Wolanski's submission that the condemnation of Dr M unheard constitutes a denial of natural justice. The impression left behind, however, is unfortunate, and enables the submission to be made. Nonetheless, I prefer to rest my decision on the proposition that the criticism was unnecessary.

Discussion (2) Naming Dr M

69. The fact remains, however, that Judge Bellamy did criticise Dr M, and if Dr. M's name is to go into the public domain as the author of the report, it seems to me to be elementary justice that he should be given the opportunity to debate his report and to defend his work.

70. On the law as it currently stands, it seems to be inevitable that Dr M's identity will be disclosed unless I exercise the "restraint" jurisdiction to prevent its publication. To do so, Dr M has to show a convincing case for an injunction or, to put the matter in ECtHR language, he had to show a compelling social need for my interference with the ECHR Article 10 rights of the media – in this case, Mr. Morgan.

71. Dr M does not begin to show such a case nor, to be fair, does he attempt to do so. He leaves the matter to the court.

72. There seem to me two principal arguments against disclosure. The first is essentially pragmatic, namely that Judge Bellamy retained Dr. M's anonymity at least in part because he had not heard him give evidence; the second is that the anonymity of expert witnesses is required to protect them from vilification and to encourage them to undertake child protection work as expert witnesses under the Act.

73. As to the first, it strikes me that the point can be remedied by Dr. M being placed in a position properly to defend his work. This means disclosure of his report and his release from his duties of confidentiality. There is nothing in AJA 1960 section 12 to stop him being named, but simply naming him without giving him the opportunity of defending himself would, in my judgement, be the worst of all worlds. The identity of the expert criticised unheard by Judge Bellamy would be known. The criticism would be in the public domain, but the answers would not. There would be no proper debate.

74. The second point troubles me much more. Ever since I began in practice, it has been a constant theme of child protection work under the Act that there are insufficient experts – particularly paediatricians and psychiatrists - and that the disincentives for undertaking forensic child protection work (vilification, unjustified reporting to the GMC, suspensions and damage to careers and reputations) gravely outweigh the advantages. Indeed, one of the three reasons I gave for writing my ***Handbook*** (as the

Introduction to the first edition makes clear) was "to encourage doctors and mental health professionals who have expertise in relation to children to undertake work in Children Act proceedings as expert witnesses".

75. I have, however, come to the clear view that – at least on the facts of the instant case – the arguments on the other side are more compelling. I propose to rehearse them, both in the hope that they will become better known, and to demonstrate that they do not, in my judgment at least, offer insuperable obstacles to competent and well-informed expert evidence.

76. It is, in my judgment, of the utmost importance that the Family Justice System should be as transparent as possible, consistent always with the need to protect the identities of the children who are involved in it. A number of myths about expert witnesses need to be exploded. The first is that they are "hired guns" supporting invariably the side which pays them. In my experience, nothing could be further from the truth. The FJS depends upon the integrity of the expert witness, and the duties of the expert witness to the child and to the court are spelled out in case law, in the Rules and in the ***Practice Direction.***

77. Judges do not decide cases on the words of expert alone. Expert witnesses are just that. They have an expertise which the rest of us do not share, but which the judge analyses and debates in the context of all the evidence in the case. It is by reference to the latter that the judge decides the case, not simply the evidence of the expert.

78. Although they do the work voluntarily, experts are nonetheless paid to advise. Their advice is normally given within the proceedings themselves: normally, the judge reads the report and hears the witness. The expert's view is then tested in cross-examination in the overall context of the case and other expert evidence. That is how the system operates in practise

79. Where this occurs, the judge fully explains the conclusions he or she has reached and where such a judgment is either written or transcribed, I see no reason why it should not be published, and many reasons why it should. Indeed, I have long been of the view that it is highly desirable for judges to publish their judgments in disputed care and family cases. Unfortunately, particularly in the county court, where the pressure is greatest, there are rarely either the resources or the time for this to be done. But that there needs to be a debate about the quality and content of expert evidence I have no doubt.

80. It is, in my judgment, equally important that it is an informed debate. In the same way that the Court of Appeal is rightly critical of a judge who lacks impartiality or whose work is not properly informed, we are and should be similarly critical of any media source which proceeds from a tendentious, biased or ill-informed standpoint, or which has a particular agenda.

81. In this respect, it is, I think, worth pointing out that the cases in which paediatricians or other medical experts are involved are a small minority, albeit often the most difficult.

82. In my judgment the arguments advanced by Professor Stephenson, powerful as they are, must be subservient to the more powerful arguments under ECHR Article 10. It

cannot be an argument for anonymity that an expert witness's professional body is perceived by that expert to have ineffective processes. There is, in my judgment, considerable force in the observation made by Munby LJ in ***Ward*** at paragraph 152 that it is not for the family court by controlling the information it allows to be disseminated to seek to control the disciplinary procedures. In other words, if there is a problem here, I agree that 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.

83. I would not wish it to be thought that I had overlooked other arguments – such as those advanced to Munby LJ in ***Ward*** namely; (1) the confidentiality of the proceedings themselves; (2) the legitimate expectation that the expert would not be named; and (3) the need for absolute frankness in proceedings under the Act. In my judgment, however, none is sufficiently persuasive to enable me to say that there is a "pressing social need" for anonymity.

84. I am also impressed, if I may say so, by the list of arguments against anonymity compiled by Munby LJ at paragraph 147 of ***Ward***, even though the judge is there repeating what he had previously said in ***BBC v. CAFCASS.***

85. Conducting the intense balance required by ***Re S*** I am in no doubt that it comes down in favour of identifying Dr. M. Mr. Morgan is therefore entitled to succeed on his summons.

86. Before leaving this point, I wish to add two things. The first is a plea to paediatricians in particular to undertake this work. As I am at pains to point out in my ***Handbook*** the work is extremely important both for children and for the Family Justice System. Experts are experts because they know more about their subject that anyone else. The extract I have cited from paragraph 35.7 of the ***Handbook*** shows that where work is properly done and the methodology is professionally sound paediatricians have nothing to fear from the courts. Professor Sir Roy Meadow was cleared of serious professional misconduct by the courts: - see ***Meadow v GMC*** [2006] EWCA Civ 1390, [2007] 1 FLR 1398. Professional witnesses can thus be confident that they will have judicial support if their work has been conscientiously done, whether the judge ends up agreeing or disagreeing with it.

87. Secondly, there will be cases in which the anonymity of the expert will need to be preserved. If, for example, a child makes it clear to a psychiatrist that the child simply will not engage in the process - or refuses to be interviewed by an individual psychiatrist - if there is any possibility either of confidential information entering the public domain or the name of the psychiatrist being made public, I can well see the argument for invoking the protective jurisdiction, and the court forbidding disclosure of the psychiatrist's identity: - see, in this respect, the powerful views of Dr. Danya Glaser as published in the October 2009 issue of the magazine ***Family Law*** (2009 Fam Law 911) and the decision of Sir Mark Potter P in ***Re X (a child) (Residence and Contact: Rights of Media Attendance)*** [2009] EWHC 1728 (Fam) [2009] 3 FCR 370.

Disclosure of Dr. M's report

88. In my judgment, the simple identification of Dr. M does not meet the exigencies of this case. Indeed, as I have already indicated, it leaves us in my view in the worst of all worlds. The nature of the advice, and the terms in which it was given will not be known, nor will the doctor's justification for what he said. If there is to be a debate it must be a real debate, and a real debate requires the material for the debate to be available. In my judgment, this can only be achieved by the disclosure of Dr M's report.

89. The report does, of course, identify not only the three children but also their parents and a number of the treating doctors, including their general practitioner. Although I have not heard argument on the point (which, of course, I will do if any part of the order which I make is not specifically covered by the arguments addressed to me), my judgment is that informed discussion of Dr. M's report is not dependent upon the children being identified, and that the report should be published in redacted form, with the children remaining as X, Y and Z, and their parents remaining as "the mother" and "the father" respectively. I assume that Dr M's report is available electronically. If so, redaction (which would normally be undertaken by the guardian) should be a relatively easy task, and will have to be undertaken either by Dr. M or the local authority. Copies of Dr M's two letters to me will also be annexed to this judgment

90. Dr M's report does, of course, also name a number of the treating doctors, including the children's general practitioner. This is a point which I have considered carefully, but have come to the view that these names should not be redacted. The local authority has been identified, and the GP's practice is, of course, within the local authority's area. Taking all the arguments adduced in ***Ward*** into account, I have come to the conclusion that in this respect the risk to the children being identified in the ensuing debate is minimal, and that, in this instance the ECHR Article 10 arguments prevail over the ECHR Article 8 rights of the children..

Discussion (3) Future Practice

91. My decision to order disclosure of Dr. M's report, albeit in a redacted form, leads me to consider what, in the future, the practice should be on the questions of the anonymity of experts and the publication of their reports.

92. Mr. Morgan's argument, and the arguments of the media generally would, I think be based on the proposition that without knowledge there can be no true investigation and no true debate. Where an expert's name and nothing else is disclosed, it seems to me that no-one is any the wiser. It will be known that Dr X advised in the case. The result of the case will also be known. What scope does this leave for debate?

93. The anonymity of the child and the real risk that if the expert is identified the child will refuse to engage in the forensic process seem to me two good reasons against the disclosure of reports. But if they can be addressed, I can see little reason for a refusal to disclose the report of an expert to the world at large, either at the close of proceedings or if the facts warrant it, as the case progresses.

94. I would therefore like to see a practice develop, in which expert reports would be routinely disclosed, and the media able to comment both on the report and on the use

to which they were put in the proceedings. This would mean that the views of the judge on the expert evidence would also be disclosed.

95. It will, of course, be necessary in each case for an application for disclosure to be made. In this respect, I am minded to repeat what both my predecessor and I said in ***Clayton*** at paragraphs 77 and 145 respectively: -

> "77. The practical consequence which flows from this judgment is that henceforth it will be appropriate for every tribunal, when making what it believes to be a final order in proceedings under the 1989 Act, to consider whether or not there is an outstanding welfare issue which needs to be addressed by a continuing order for anonymity. This will, I think, be a useful discipline for parties, judges and family practitioners alike. If there is no outstanding welfare issue, then it is likely that the penal consequences of s 97 of the 1989 Act will cease to have any effect, and the parties will be able to put into the public domain any matter relating to themselves and their children which they wish to publish, *provided* that the publication does not offend against s 12 of the 1960 Act. "

96. The only point which I added in ***Clayton***, was the impression that there were unlikely to be many cases in which the continuation of protection would be required: but that such considerations were, in my view, best addressed at the time when the parties and their advisers were still before the court at the final hearing.

97. Although ***Clayton*** was concerned with section 97 of the Act, and not AJA 1960 section 12, it seems to me that in this context similar considerations apply. If disclosure is ordered – as in the instant case – the jury will be out to see what use the media make of the information. If it is put towards the concept of debate and fair and balanced reporting, everyone will benefit. If the system is abused, the media may well find judges reluctant to order disclosure.

Coda

98. Finally, I should take the opportunity to refer to the ***Experts Practice Direction*** and the duty of the solicitor to inform the expert of the use made by the court of his or her report. In my judgment, not only should this be done routinely, as the ***Practice Direction*** requires, but where a judgement has been transcribed, that judgment should routinely be sent to the expert with permission if necessary to show it to the expert's professional body.

99. Equally, if experts are attacked for their views, judges may well wish to give permission not only for the doctor to be allowed to contribute to the debate but for any judicial reaction to be made public.

100. I will also consider the other practice amendments recommended by Mr. MacDonald and Mr. Pressdee and will consult on them

Postscript

101. Whilst this judgment has been in draft, His Honour Judge Bellamy has delivered judgment in the case of *Re L (a Child: Media Reporting* [2011] EWHC B8 (Fam) (*Re L)* which he handed down on 18 April 2011, and which is publicly available on the *Bailii.org* website.

102. I only wish to make one point. It is that although I disagree with Judge Bellamy's decision – and this is something which I do not hesitate to say - to make critical observations about Dr M in the instant case I agree entirely with paragraphs 185 to 193 of his judgment in *Re L* under the heading "Transparency" and in which the judge deals with the tendentious and inaccurate reporting of the case. See also, in this context, my judgment in the case of ***Re H (Freeing Orders: Publicity)*** [2005] EWCA Civ 1325; [2006] 1 FLR 815 at paragraph 23 et seq.

103. If the press is to engage in fair and accurate reporting of court proceedings, it must be just that. In paragraph 193 of his judgment, Judge Bellamy quotes the well known dictum, of Lord Hobhouse in *Reynolds v Times Newspapers Ltd [2001] 2 AC 127 at p.238* that "No public interest is served by publishing or communicating misinformation". I entirely and respectfully agree, and look forward with interest to the public debate about Dr. M's report.