

OUTER HOUSE, COURT OF SESSION

[2005] CSOH 80

OPINION OF M G THOMSON, Q.C.

(sitting as a Temporary Judge)

in the cause

X

Pursuer:

against

(FIRST) BRITISH BROADCASTING
CORPORATION and

(SECOND) LION TELEVISION
LIMITED (trading as LION
TELEVISION SCOTLAND)

Defenders:

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Pursuer: Dewar, Q.C., D.M.Thomson; John McGovern & Co, Glasgow

First Defenders: Cullen, Q.C., Dunlop; BBC Scotland Legal Department

Second Defenders: Creally; Boyds

22 June 2005

Introduction

[1] The British Broadcasting Corporation ("the BBC") commissioned Lion Television Limited, trading as "Lion Television Scotland" ("Lion") to make a documentary film, provisionally entitled "The Courtroom", concerning the work of Glasgow Sheriff Court ("the Documentary"). In the course of making the Documentary Lion filmed Miss X and her friend, Miss Y, in and in the immediate vicinity of Glasgow Sheriff Court. This

filming of Miss X and/or Miss Y took place on a number of days in April 2003. The first of these occasions was 10 or 11 April 2003. On that day Miss X and a representative of Lion signed a pre-printed "Contributor's Agreement" in terms of which Miss X was a contributor to the Documentary (No.6/2 of process).

[2] In due course filming by Lion was completed and the video film was edited to produce the Documentary. Lion recorded over four hours of video tape concerning Miss X ("the Rushes video") of which they used approximately five minutes towards the end of the Documentary which lasts for forty minutes. The material relating to Miss X in the Documentary is interwoven with another story line in the last ten minutes of the documentary.

[3] After various correspondence between solicitors on behalf of Miss X and the BBC's solicitor, the former wished to have all references to her removed from the Documentary which the BBC intended to broadcast and the latter, after making various changes to the material relating to Miss X contained in the Documentary, maintained their intention to broadcast the Documentary including the references to Miss X. In these circumstances Miss X raised the present action against the BBC and Lion in which she seeks production and reduction of the Contributor's Agreement or, alternatively, an order under section 3 of the Age of Legal Capacity (Scotland) Act 1991 ("the 1991 Act") setting aside (a) the Contributor's Agreement and (b) any other agreement between the parties in terms of which Lion filmed Miss X between about 11 and 23 April 2003, and for interdict against the BBC from broadcasting various categories of video film of or concerning Miss X between 11 and 23 April 2003. The case came before the court on the pursuer's motion for *interim* interdict. A video of the Documentary in the form in which the BBC intends to broadcast it was produced ("the Documentary video").

Factual background

[4] Historically the use of photographic and television cameras within Scottish Courts and their precincts was not permitted. That position changed by virtue of Directions issued by the then Lord President and Lord Justice General (Lord Hope) on 5 August 1992 ("the 1992 Directions"), which provided that filming might be allowed in certain circumstances. The 1992 Directions were headed "Television in the Courts" and provided *inter alia* as follows:

"The Lord President has issued the following directions about the practice which will be followed in regard to requests by broadcasting authorities for permission to televise proceedings in the Court of Session and the High Court of Justiciary. (a) The rule hitherto has been that television cameras are not allowed within the precincts of the court. While the absolute nature of the rule makes it easy to apply, it is an impediment to the making of programmes of an educational or documentary nature and to the use of television in other cases where there would be no risk to the administration of justice. (b) In future the criterion will be whether the presence of television cameras in the court would be without risk to the administration of justice. (c) In view of the risks to the administration of

justice the televising of current proceedings in criminal cases at first instance will not be permitted under any circumstances. (d) Civil proofs at first instance do not normally involve juries, but the risks inherent in the televising of current proceedings while witnesses are giving their evidence justify the same practice here as in the case of criminal trials..... (h) Requests from television companies for permission to film proceedings, including proceedings at first instance, for the purpose of showing educational or documentary programmes at a later date will be favourably considered, but such filming may be done only with the consent of all parties involved in the proceedings, and it will be subject to approval by the presiding judge of the final product before it is televised."

Against this background Lion entered into a contract with the Scottish Ministers acting through the Scottish Court Service ("the Lion Contract") in terms of which Lion was authorised to film the Documentary. That authorisation was conditional upon the terms and conditions of certain guidelines laid down by the Sheriff Principal of Glasgow and Strathkelvin ("the Guidelines"). The Guidelines were entitled "Guidelines for Filming Documentaries of Criminal Jury Trials". The Guidelines then provided:

"The following comprises a list of rules with which the Sheriff Principal of Glasgow and Strathkelvin would require Lion to comply in the recording of any proceedings in the Sheriff Courts of the Sheriffdom and in the use of any material which Lion have recorded for the purpose of a documentary programme."

Notwithstanding the title of the Guidelines, rule 12 clarified that the rules would apply to both solemn and summary criminal business and "*mutatis mutandis*" to the recording of civil proceedings. The Documentary is principally concerned with criminal proceedings.

[5] The Guidelines provided *inter alia*:

"(1) The recording of proceedings in court at the trial will require the prior consent of the trial sheriff, and his consent will be subject to such conditions as he considers appropriate [subparagraphs (a) and (b) detailed information to be provided to the sheriff by Lion with regard to the nature of the proceedings which Lion wished to film and the lighting, cameras and microphones which they proposed to use.]

(c) In dealing with the above the [*sic*] trial the sheriff will have the right to satisfy himself that the recording of the proceedings will not interfere with the working of the court and that there will be no risk to the administration of justice.

(d) Where the trial sheriff has given his consent it will be open to him to revoke or qualify his consent as he thinks fit at any stage in the light of circumstances which emerge in connection with the proceedings. In particular he will be entitled to require that any part of the proceedings be

excluded from recording where he is satisfied that its recording would not be in accordance with the interests of justice.

[There is no rule 2].

(3) The agreement of the Procurator Fiscal and the defence agent or agents must be obtained for the proposed recording of proceedings in court at any criminal trial before any approach is made to any of the likely individual participants in the trial, particularly witnesses.

(4) The consent of all those who are to be filmed will be required, whether or not they are to be named in the documentary.

(a) The main groups whose consent will be required are:-

(i) The trial sheriff, the clerk of court, the court officer and the shorthand writers;

(ii) The accused, his counsel and solicitors;

(iii) If appearing, the advocate-depute and the members of the staff of the procurator fiscal's offices who are in attendance;

(iv) The procurator fiscal depute;

(v) The witnesses;

(vi) The members of the jury;

(vii) Any police officer who may appear either as a witness, escort or in any other capacity.

(5) The following particular rules apply in regard to the witnesses:

...

(b) Before the beginning of the trial Lion shall send to such of the Crown and Defence witnesses as Lion have selected for filming an explanatory Statement and a form which the witness is invited to sign and to return to Lion indicating his/her consent to be filmed. See Schedule 2 attached.

(c) No witness is to be filmed at any stage during the giving of the evidence unless he or she has given his or her prior written consent and the trial sheriff is satisfied that such consent has been given.

(d) If a witness does not consent to be filmed, this is to be taken as a conclusive indication that consent is being withheld. Witnesses are not to be approached with a view to negotiating the conditions on which they would give their consent.

(e) If a witness does consent to be filmed, it will be open to the witness to withdraw that consent at any time up to twenty four hours after the conclusion of his or her evidence. The effect of withdrawing the consent is that the filmed evidence of that witness is not to be transmitted in the documentary.

(f) The withdrawal by a witness of his or her consent is not to give rise to a claim by you [Lion] for damages or reimbursement of expenditure against the witness, nor is it to give rise to any such claim against the prosecution or the defence or the court administration or any member of it.

(g) In the explanatory statement mentioned in paragraph 5(b)(i) [*sic*] the witness is to be provided with information as to the conditions under which proceedings are to be recorded and the uses which may be made of the recorded material. The witness will also be advised that he or she has an opportunity to consider and take advice in regard to the giving of consent, and has to [*sic*] the right to withdraw consent as mentioned above.

(h) Subject to what is stated in paragraph (5)(b) you are not to approach any witness immediately prior to or during the trial in relation to the giving of consent to be filmed or any other matter.

[Rule 6 was concerned with members of the jury.]

(7) There is to be no recording or transmission, as the case may be, of the following:-

...

(d) A view of members of the public present in the public gallery, sufficient to enable individual members of the public to be identified.

....

(f) A view sufficient to identify members of the public or others attending court within the precincts or corridors of the court building.

(8) The trial sheriff is to be shown a 'rough cut' copy of the whole documentary in order that he may be satisfied that these rules have been adhered to. The Sheriff Principal is to be given the opportunity, if he so wishes, to see a copy of the

documentary and any of the other documentaries in the same series. The documentary programme in its final form is not to be broadcast until it has been seen by the trial sheriff and, if he so requires, by the Sheriff Principal. They will be entitled to insist on the exclusion from the programme of any material which in their reasonable opinion contains legal, factual or other errors provided that such errors are notified to us [Lion] within two working days of receipt of such materials for approval purposes. They will be entitled to insist on the exclusion from the programme of any material which in their reasonable opinion it would be prejudicial to the administration of justice to broadcast. In addition Lion TV will give good faith consideration to making any changes requested by the Sheriff Principal regarding the portrayal of the operation of the Sheriff Court in the programme. No part of the documentary or of any of the material recorded for it is to be broadcast as part of any other programme either on television or radio without the express permission of the Sheriff Principal.

....

(11) No information which was obtained during the course of filming and which is either confidential or otherwise exempt from disclosure under Scottish law shall be broadcast or disseminated."

[6] Lion began filming the Documentary in about February 2003. By the beginning of April 2003 their filming was well advanced. On 10 or 11 April 2003 they encountered the pursuer, Miss Y and one or two others immediately outside the sheriff court building. The pursuer, who was then aged 17, was there to support her boyfriend who was appearing in court. Lion filmed the pursuer and Miss Y talking to camera in public areas both outside and inside the sheriff court building. Lion filmed the pursuer using a public telephone within the building to tell her mother what had happened to her boyfriend. The pursuer and Miss Y were of interest to Lion as representing a substantial group of people "on the fringe" of the administration of justice being conducted in the criminal courts within the sheriff court.

[7] Some time on the same day as this initial filming of the pursuer by Lion, the pursuer and Lion both signed the Contributor's Agreement. It was dated 11 April 2003 and gave that date as the "date of recording/contribution". Various additional information regarding the pursuer was handwritten on the pre-printed document. In particular, her date of birth was stated together with her age. The name and mobile telephone number of her solicitor were also stated. The Contributor's Agreement took the form of a notional letter signed by the pursuer which was then "agreed and accepted" on behalf of Lion. It was in the following terms:

"I hereby consent to the filming and recording of my contribution to and participation in the Programme subject to the terms and conditions specified below:

(1) I hereby agree that the copyright (if any) and all other rights, title and interest in and in respect of my contribution shall vest in and is hereby assigned to you (and this assignment shall operate to the extent necessary as a present assignment of future copyright) and that you shall have the unfettered right to deal with the Programme containing such contribution or any part of it in any way that you think fit.

(2) I agree that the Programme incorporating my contribution or any part of it may be exhibited or otherwise howsoever exploited (and such exploitation may include the exploitation of ancillary rights therein) in all media and formats throughout the universe for the full period of copyright and all renewals and extensions thereof and thereafter so far as may be possible in perpetuity.

(3) I agree that the rights referred to above include without limitation those rights known as the lending and rental rights in and to any programme incorporating my contribution and I agree that no further payment shall be due to me nor shall I make a claim for any further payment against you or your licensees or assigns in respect of the exploitation of such rights.

(4) I hereby waive any so called 'moral rights of authors' in the Programme and such rights under section 77 and section 80 of the Copyright, Designs and Patents Act 1988 as I now have or hereafter acquire in relation to the Programme and I hereby grant you consent under Part II of the Act to enable you to make the fullest possible use of my services hereunder.

(5) You may without my further consent use my name likeness biography photographs of me and recordings of interviews with me in advertising and publicising the Programme in all media and formats throughout the universe.

(6) You shall not be liable to me or my legal representatives for any loss or damage or injury to me or my property caused or suffered in connection with your making of the proposed Programme unless caused by the negligence of you and recoverable on that ground.

(7) I hereby undertake that my Contribution shall not contain anything which is untrue, or an infringement of copyright or which is calculated to bring you into disrepute or which is defamatory, blasphemous or obscene.

(8) I agree that I shall not at any time either personally or by other means make any statement or disclose any information to any third party including (without limitation) all media related organisations relating to the Programme or the general affairs of you or the BBC in connection with the filming and/or recording of my contribution hereunder.

(9) This agreement is governed by Scots law and subject to the jurisdiction of the Scottish Courts."

[8] The pursuer's ability to read and write was at that time extremely limited. She did not receive any legal advice before entering into the Contributor's Agreement. It is disputed between the pursuer and the defenders (a) whether the initial encounter between the pursuer and Lion was instigated by the former or by the latter, and (b) whether the Contributor's Agreement was signed before or after the filming occurred on that date.

[9] The pursuer and Miss Y were filmed by Lion on two further occasions. On 18 April 2003 they were both filmed before and after a visit by the pursuer to her boyfriend who was by then being held on remand in Barlinnie Prison. None of that filming, which can be seen on the Rushes video, was used for the Documentary video.

[10] The pursuer and Miss Y were again filmed by Lion on 23 April 2003. By then the pursuer's circumstances had changed. She appeared from custody at Glasgow Sheriff Court in respect of several outstanding warrants for her arrest. Her solicitor, Mr McGovern, was on holiday and she was represented in court by the duty solicitor, Ann Ritchie. She was filmed while in custody both before and after as well as during her appearance in court. She was filmed while in secure accommodation and while handcuffed to another detainee boarding a secure police vehicle having been remanded in custody.

[11] The Broadcasting Standards Commission provided its Fairness and Privacy Code ("the Code") in fulfilment of its statutory duty under the Broadcasting Act 1996. The preamble to the Code explains as follows:

"In any democratic society, there are balances to be struck between the citizen's right to receive information and ideas, and the responsibilities of broadcasters and journalists to behave reasonably and fairly and not to cause an unwarranted infringement of a citizen's basic right to privacy.

The guidance in this Code cannot resolve that dilemma. But it sets out what the Broadcasting Standards Commission considers are the principles to be observed and practices to be followed by all broadcasters (including the providers of teletext services) to avoid unjust or unfair treatment in radio and television programmes, and to avoid the unwarranted infringement of privacy in the making and broadcasting of such programmes. Broadcasters and broadcasting regulatory bodies should reflect this guidance in their own codes and guidelines....".

Paragraphs 3 to 13 of the Code are concerned with fairness generally and paragraphs 3 to 6 with "dealing fairly with contributors" in particular. Paragraph 3 provides:

"From the outset, broadcasters should ensure that all programme-makers, whether in-house or independent, understand the need to be straightforward and fair in their dealings with potential participants in factual programmes, in particular by making clear, wherever practicable, the nature of the programme and its purpose and, whenever appropriate, the nature of their contractual rights. Many potential

contributors will be unfamiliar with broadcasting and therefore may not share assumptions about programme-making which broadcasters regard as obvious."

Paragraph 4 then provides *inter alia*:

"Contributors should be dealt with fairly. Where they are invited to make a significant contribution to a factual programme, they should:

....

(v) be told whether their contribution is to be live or recorded; and, if recorded, whether it is likely to be edited;

....

(viii) if offered an opportunity to preview the programme, be given clear information about whether they will be able to effect any change in the programme...".

Paragraph 6 provides:

"All reasonable steps should be taken to ensure that guarantees given to contributors, whether as to content, confidentiality or anonymity, are honoured."

[12] Paragraphs 14 to 33 of the Code are concerned with privacy. Paragraph 16 provides as follows:

"For much of the time, the private lives of most people are of no legitimate public interest. It is important that when, for a short time, people are caught up, however involuntarily, in events which have a place in the news, their situation is not abused or exploited either at the time or in later programmes which revisit those events. When broadcasters are covering events in public places, they should ensure that the words spoken or images shown are sufficiently in the public domain to justify their broadcast without the consent of the individuals concerned. When filming or recording in institutions, organisations or agencies where permission has been given by the relevant authority or management, broadcasters are under no obligation to seek the individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public. However, in clearly sensitive situations in places such as hospitals or prisons or police stations, individual consent should normally be obtained unless their identity has been concealed. Broadcasters should take similar care with material recorded by CCTV cameras to ensure identifiable individuals are treated fairly. Any exceptions to the requirement of individual consent would have to be justified by an overriding public interest."

Human Rights Act 1998, section 12

[13] Section 12 of the Human Rights Act 1998 provides:

"(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied -

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to - (a) the extent to which - (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code.

(5) In this section - 'court' includes a tribunal; and 'relief' includes any remedy or order (other than in criminal proceedings)."

[14] The hearing of the pursuer's motion for *interim* interdict lasted for some eight days. Lion was represented by Mr Creally for the first four of those days, but he made no submissions in respect of the pursuer's motion and withdrew from the hearing when it became clear that the hearing was likely to last for several days more and that it was unlikely that he would be able to add to the information being provided to the court by counsel for the BBC, the defenders against whom the interdict was directed.

[15] It was a matter of agreement between counsel for the pursuer and the BBC that section 12 applied to the pursuer's motion for *interim* interdict. It was accepted by both parties, and I agree, that the Documentary video is "journalistic, literary or artistic material" within the meaning of subsection (4). It was also agreed that the Code was a "relevant privacy code" within the meaning of subsection (4)(b).

[16] Authoritative guidance on the meaning and application of section 12(3) is to be found in the decision of the House of Lords in *Cream Holdings Ltd v Banerjee* [2004] 3

W.L.R. 918. The leading speech was that of Lord Nicholls of Birkenhead, who considered, in particular, the meaning of the word "likely" in section 12(3). The argument in the case had been whether "likely" meant "a real prospect of success" or "more likely than not". After considering some of the practical difficulties in applying the latter interpretation, Lord Nicholls summarised the position (in paragraph 22) as follows:

"Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an *interim* order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for *interim* restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an *interim* restraint order unless satisfied that the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make *interim* restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short lived injunction is needed to enable the court to hear and give proper consideration to an application for *interim* relief pending the trial or any relevant appeal."

The reference to circumstances where the potential adverse consequences of disclosure might be particularly grave was a reference to paragraph 19 where his Lordship had stated:

"Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse consequences of disclosure, the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a 'probability of success' test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the disputed issue of fact can be resolved at the trial."

[17] In that case both the judge at first instance and the Court of Appeal issued separate confidential judgments in order to maintain the privacy of the information in issue. Lord Nicholls commented on this procedure (at paragraph 26) as follows:

"I recognise that without reference to the content of the confidential information this conclusion is necessarily enigmatic to those who have not read the private judgments of the courts below. But if I were to elaborate I would at once destroy the confidentiality the Cream group are seeking to preserve."

It was agreed by parties in the present case that, whatever my decision, I should adopt a similar procedure. I propose therefore to consider first whether the pursuer is more likely than not to succeed in her action at proof, secondly, if she fails to meet that test, whether she satisfies the "real prospect of success" test, thirdly, whether, if she meets this lower test, there are circumstances of the kind discussed by Lord Nicholls to warrant the application of this lower test and, fourthly, in any event, whether it would be appropriate for the court to exercise its discretion to grant *interim* interdict.

[18] In the course of the *interim* interdict hearing the pleadings were extensively adjusted, the conclusions were amended and numerous documents were produced including affidavits, witness statements and medical reports. While it is clear that many of the background facts are not in dispute, many material facts are in dispute and these differences are apparent from the pleadings and from the productions. It is also apparent that while parties are agreed on many aspects of the applicable law, there are significant differences both as to the law and its application to the facts. In these circumstances it would be quite inappropriate for me to attempt to make findings on disputed matters of fact or to make determinations as to the application of the law to any particular facts, but rather I propose to approach the "likelihood of success" test on a general view of the facts and the law as advanced by the parties in submission.

The issues

[19] The pursuer seeks reduction of the Contributor's Agreement on the basis that at the time of signing it she was intoxicated by alcohol and the drug valium so that she lacked the capacity to contract or give consent due to an absence of reason. She avers that she had been drinking heavily during the morning of 11 April 2003 as well as during preceding days, that she had a bottle of "Buckfast" wine with her when she attended Glasgow Sheriff Court on that date and that her state of intoxication would have been apparent to anyone speaking to her at that time. She had also consumed approximately fifteen valium tablets on the previous evening. The defenders admit that she was in possession of a bottle of "Buckfast" wine on that date and accept that she may have drunk from it, but explain that she appeared to be coherent and lucid. They deny that she appeared, or that she was in fact, intoxicated to the extent that she had lost all reason. I was invited to consider the pursuer's appearance as disclosed on both of the videos. This I did. While I formed the view that the pursuer's behaviour was immature and somewhat strange in that at one stage she was carrying what appeared to be a baby's dummy which she had put in her mouth, her speech and actions appeared to me to be entirely rational

and coherent and not to support the proposition that she lacked the necessary reason to contract. In the course of various interviews recorded on the Rushes video, the pursuer referred to herself as an alcoholic and there were references to her spending what available money she had on drink. It was not clear what she meant by the term "alcoholic", nor what quantities of alcohol she consumed on a regular basis, far less what effect that had on her ability to reason.

[20] The pursuer supports her case for reduction by averring that Mr Overton, the director and producer of the Documentary, on behalf of Lion "pressurised the pursuer to consent by persisting in his efforts to persuade her to participate". She also avers that Mr Overton "indicated to the pursuer that if she agreed to be filmed Lion would buy her Easter eggs and cigarettes." According to the pursuer, she queried whether her solicitor ought to read the Contributor's Agreement before she signed it. She was dyslexic and her reading abilities were extremely poor "even when sober". She felt pressurised into signing the Agreement. In any event, the pursuer argues that the Contributor's Agreement only authorised the filming of the pursuer on 11 April 2003 and not on any subsequent dates.

[21] The defenders deny the pursuer's account of events. According to them the pursuer was an eager participant. No incentive was offered to the pursuer. They explain that on a subsequent occasion when the pursuer and Miss Y were filmed at the latter's home, representatives of Lion took with them gifts of cigarettes and, "given the time of year", Easter eggs. These had not been promised in advance and were rather unsolicited gifts in recognition of the time given to filming. According to the defenders, the pursuer signed the Contributor's Agreement willingly.

[22] In respect of this and other episodes involving the pursuer and Lion, her position was that Lion pursued her and attempted to apply pressure to her and to others to be involved in recording those parts of the Documentary relating to her. The defenders' position was completely different. According to them, Lion was always sensitive to the privileged position which Lion enjoyed by virtue of the Lion Contract and were always at pains to comply with the Guidelines. They had too much to lose and would not risk the co-operation of the Sheriff Principal and the Scottish Court Service by indulging in anything that might be regarded as "sharp practice".

[23] The pursuer avers that when filming took place on the second occasion, namely 18 April 2003, she was again intoxicated by drink and drugs, but on that occasion her state of intoxication was not such as to deprive her of reason. She avers that on this occasion she raised with Mr Overton her concerns in relation to the filming which had taken place on 10 or 11 April 2003. She avers that she told Mr Overton that she had been drunk when she signed the Contributor's Agreement and that she did not wish to be filmed. She then avers:

"As a result of further pressure from Mr Overton to persuade the pursuer to consent to filming, the pursuer requested that she be allowed to view the footage which Lion had by that time taken prior to it being broadcast on the basis that if

she did not wish the footage, or any of it, to be used, it would not be used. Mr Overton on behalf of Lion agreed to this request."

According to the pursuer, this verbal agreement between her and Mr Overton on behalf of Lion amounted to a variation of the terms of the Contributor's Agreement and applied to Lion filming thereafter on 18 April 2003 and "impliedly in relation to any further filming of the pursuer which might take place."

[24] The defenders' position was that the pursuer and Miss Y were again willing participants in the filming which occurred on 18 April 2003. They deny that Lion could, would or did cede any form of editorial control to the pursuer. As a matter of fact, in terms of the contract between the BBC and Lion, the BBC and not Lion had ultimate editorial control. The defenders accept, however, that on 18 April 2003 Mr Overton and his associate producer, Ms Howitt, indicated to the pursuer that Lion would be happy to allow the pursuer to view the footage in advance of broadcast and to discuss with her "any concerns arising therefrom". According to the defenders, it was unusual for even this degree of prior viewing and discussion to be granted to a contributor and it was Lion's and the BBC's invariable practice not to cede editorial control to a contributor. So far as Lion was concerned, the terms of their Contract with the BBC would in any event have prevented them from so doing.

[25] This difference between the parties is another good example of the wider differences between them. The pursuer argues that she was induced to continue to allow herself to be filmed, particularly on 23 April 2003, by assurances that she would be allowed to see the film before broadcast. She argues that there is little practical reason to be given this right to view without a power of veto. The defenders' perception is very different. This may well be an example of paragraph 3 of the Code:

"Many potential contributors will be unfamiliar with broadcasting and therefore may not share assumptions about programme-making which broadcasters regard as obvious."

In any event, the matter was raised in correspondence between the parties and their solicitors after filming had ceased. On 12 June 2003 Mr Overton wrote to Mr McGovern, the pursuer's solicitor, referring to the discussion which took place on 18 April 2003. He stated:

"The pair then requested that they be allowed to view anything we planned to broadcast prior to transmission. This was something I agreed to and am still happy to honour. We continued filming on that basis clear that the girls had thought through the filming and were committed to contributing."

That position was repeated by Mr Overton in another letter dated 18 November 2003. It is significant, in my opinion, that the right of veto claimed by the pursuer was not asserted in terms by Mr McGovern in correspondence with Lion or the BBC prior to the raising of the present action in September 2004.

[26] The pursuer avers that on 23 April 2003, when the pursuer was in the cells before her case was called, Mr Overton and a camera crew from Lion appeared and began filming her. They did not ask for her consent to film her nor did she consent to the filming. Because the pursuer had previously been given a right of preview and veto she "proceeded on the basis that she retained the right to prevent the broadcast of any footage of her in the Documentary if she so wished". According to the pursuer, Mr Overton thereafter spoke to Ms Ritchie, the duty solicitor representing the pursuer, and asked for her agreement to being filmed representing the pursuer before the sheriff. The pursuer alleges that Mr Overton told Ms Ritchie that the pursuer had already agreed to such filming. At first Ms Ritchie told Mr Overton that she did not wish to be filmed but he continued to apply pressure to her until she agreed albeit on the basis that her face and identity would not be disclosed in any broadcast. The pursuer avers that Ms Ritchie did not check with the pursuer whether she, the pursuer, had consented to being filmed and relied on Mr Overton's representation on the matter.

[27] According to the pursuer she was not aware beforehand that Lion would be filming her in court. According to the defenders Mr Overton spoke to the pursuer in the cells prior to her case being called in the presence of a female police officer. He asked her if he could film her court appearance as well as taking footage of her before and after that appearance and she agreed to this in the presence of the same police officer. This is denied by the pursuer who explained that she was aware of a discussion between a policeman in the cell's area and Ms Howitt concerning the presence of cameras in court to film the pursuer's appearance. She further explains that she was nervous at the time about the possibility of being remanded into custody for the first time and that she was not paying attention to the conversation between Ms Howitt and the policeman.

[28] After the pursuer's appearance in court on 23 April 2003 she was seen by a court social worker, who discussed with her some of the practical arrangements regarding her impending detention in prison. She also asked the pursuer about the possibility that she might attempt to harm herself while in prison with a view to alerting the appropriate prison authorities to any such risk. The pursuer avers that Ms Howitt misrepresented to the social worker that the pursuer had consented to being filmed and thus induced the social worker to allowing the interview with the pursuer to be filmed. This is denied by the defenders who aver that the social worker inquired of the pursuer whether she was content that their discussions should be filmed by Lion and the pursuer responded in the affirmative.

[29] On 23 April 2003 Lion also filmed an interview with a bail officer who had previously been the pursuer's social worker. In the course of this interview the bail officer disclosed personal information about the pursuer. According to the pursuer and an affidavit of the bail officer, the latter had not consented to being filmed for broadcasting purposes. She had at first refused to participate but, after persistent persuasion by Mr Overton she had agreed to being filmed for what she believed to be a rehearsal only. It is apparent from the Rushes video that whatever the bail officer believed the purpose of the filming to be, there were certain aspects of the pursuer's history which she was not prepared to discuss on camera. The defenders' position is that the pursuer was well aware

that Lion had spoken to the bail officer, the pursuer was advised of what she had told Lion and the pursuer "expressed no difficulty therewith". The defenders also aver that, in any event, the information disclosed by the bail officer could not be described as confidential or was not private information or was information which had either been divulged already by the pursuer herself in the course of filming or by or on her behalf in the course of criminal proceedings against her which took place in open court. Furthermore, the information was contained in two Social Enquiry Reports which had been presented to and considered by the various courts before which she had appeared on criminal charges.

[30] The pursuer then argues that since she lacked the capacity to contract or to give consent to being filmed as a result of intoxication, and she was filmed without her consent, Lion have breached paragraph 4 of the Guidelines in respect of the filming on 23 April 2003 and paragraph 7(f) in respect of the filming on 10 or 11 April 2003. The pursuer contends that the Lion Contract created rights enforceable by the pursuer by way of *jus quaesitum tertio*. The pursuer contends that the purpose of obtaining the consent of the persons named in paragraphs 3 and 4 of the Guidelines was not simply to protect the administration of justice but rather

"to benefit the persons named in paragraphs 3 and 4 by providing them with the right to refuse to consent to filming, thereby retaining the rights of an accused person both prior to, and in terms of, the 1992 Directions."

Knowledge of this right to refuse to consent to filming has been communicated to the classes of persons with the right (i) by virtue of the public nature of the 1992 Direction, upon which the Guidelines are based, and (ii) the requirement of obtaining consent from such persons before filming may take place.

[31] The defenders deny that the Contract or the Guidelines created a *jus quaesitum tertio* in favour of the pursuer or any other person. The intention of the Guidelines was the safeguarding of the administration of justice, not the creation of rights attaching to unidentified third parties such as the pursuer. They point out that the Guidelines would apply equally to all persons attending Glasgow Sheriff Court and argue that there was no intention on the part of the parties to the Lion Contract, that such a wide potential audience would acquire a right to sue in private law under the Contract and the Guidelines. There was no delivery of the Guidelines or the Contract to the pursuer. Neither the Contract nor the Guidelines created substantive rights enforceable by the pursuer. Parties accepted the formulation of the law on the subject to be found in Gloag and Henderson on "*The Law of Scotland*", 11th ed., at paras 12.04 - 12.07. It is clear that the Lion Contract does not disclose an express intention on the part of the parties to that contract to confer a right on the pursuer or on any class of which the pursuer was a member. Whether such an intention can be implied may depend *inter alia* upon inquiry into the operation of the Guidelines as between the contracting parties.

[32] The pursuer's next argument is that if she did consent to the filming of her by Lion on 11 and 23 April, any such consent was a prejudicial transaction within the meaning of

sections 3(1) and 3(2) of the 1991 Act and ought to be set aside. Section 3 of the 1991 Act provides, *inter alia*:

"(1) A person under the age of 21 years ('the applicant') may make application to the court to set aside a transaction which he entered into while he was of or over the age of 16 years but under the age of 18 years and which is a prejudicial transaction.

(2) In this section 'prejudicial transaction' means a transaction which - (a) an adult, exercising reasonable prudence, would not have entered into in the circumstances of the applicant at the time of entering into the transaction, and (b) has caused or is likely to cause substantial prejudice to the applicant."

Section 9 defines "transaction" as meaning:

"a transaction having legal effect, and includes -

- (a) any unilateral transaction;
- (b) the exercise of testamentary capacity;
- (c) the exercise of any power of appointment;
- (d) the giving by a person of any consent having legal effect;
- (e) the bringing or defending of, or the taking of any step in, civil proceedings;
- (f) acting as arbiter or trustee;
- (g) acting as an instrumentary witness."

[33] The pursuer avers that the giving of consent to filming by a person such as the pursuer has legal effect. She avers:

"One of its effects would be to deprive the pursuer of any right to claim a breach of her right to respect for her private life in terms of Article 8 of the European Convention on Human Rights (the 'Convention'). It is required in terms of the Guidelines. In the absence of such consent the filming of the pursuer in Court by Lion would be a breach of the Guidelines, a contravention of Article 8 and a contempt of Court. *Esto* the giving of consent to filming by the pursuer did not have legal effect (which is denied), the pursuer is entitled to withdraw any consent which may have been given, and indeed the pursuer has, for the avoidance of doubt, done so. In such circumstances, the broadcast by the BBC of any of the footage featuring the pursuer taken by Lion would be in breach of the Guidelines and a misuse of private information relating to the pursuer, and ought not to be

allowed. The said footage, at the very least, shows the pursuer in an extremely embarrassing light. The footage taken on 11 April 2003 shows her habitually sucking a baby's dummy within the precincts of Glasgow Sheriff Court. It shows her in a state of drunkenness in an important public place, namely, Glasgow Sheriff court. It shows her in various states of distress. More fundamentally, it discloses personal information concerning the pursuer including (i) the various criminal charges the pursuer was then facing; and (ii) the fact that she had failed to appear at Court to answer those charges as a result of which she was remanded into custody. An adult exercising reasonable prudence would not have agreed to be filmed in such circumstances nor to having such facts disclosed publicly. Further, for the reasons hereinafter condescended upon, the broadcast of the film of the pursuer would cause substantial prejudice to the pursuer, as hereinafter condescended on."

[34] The defenders dispute that the various consents given by the pursuer to being filmed had "legal effect" as envisaged by the 1991 Act. Senior counsel for the BBC also argued that even if the various consents were covered by the definition of "transaction" in section 9, they did not constitute prejudicial transactions within the meaning of section 3(2). He drew attention to the fact that there are widely differing views about the merits of being filmed and having such a film broadcast. There is a widely held belief that any publicity is good publicity. What may seem sensible to an 18 year old may not seem sensible to someone aged 40 or more. Such considerations, he submitted, had to be borne in mind when considering the actings of the hypothetical adult in section 3(2)(a). He further submitted that the hypothetical adult should be a young adult from a background, and living in circumstances similar to those of the pursuer. In my opinion there is some force in this submission. To many people it may seem imprudent to allow oneself to be filmed being convicted or sentenced in the sheriff court, but that is precisely what other participants in the documentary have apparently consented to.

[35] Thus far the pursuer's arguments have been directed at reducing or setting aside the various consents given by the pursuer to being filmed. If she succeeds in proving the qualification of consent which she contends occurred on 18 April 2003 then she has an unqualified right of veto which she has exercised, at the latest in her pleadings. She also seeks a remedy based on a *jus quaesitum tertio* arising from the Contract. The remedy of *interim* interdict which she seeks is based, in addition to the claimed *jus quaesitum tertio*, on her seventh plea-in-law, which is in the following terms:

"*Separatim*, the pursuer being reasonably apprehensive that the first defenders will broadcast television footage obtained without the pursuer's consent and in breach of duties of confidence owed to her, all as condescended upon, decree of interdict should be granted as third concluded for, failing which as fourth concluded for."

The difference between conclusions three and four is that the former includes film taken on 11 April 2003, whereas the latter does not. The first defenders, the BBC, meet that plea-in-law with a general relevancy plea and also a plea that:

"There being no grounds for restraint of the defenders' freedom of expression, interdict should be refused and the defenders assolizied."

[36] The argument for the BBC broadly speaking, was that the pursuer throughout had been a willing participant in the filming. Any technical flaw in the consent which she had given was cured by her willing participation in the full knowledge that she was being filmed and the purpose for which she was being filmed. Different considerations applied to the images of the pursuer which the BBC proposed to broadcast and the information about her which is contained in the Documentary video. Senior counsel for the BBC argued that the BBC was entitled to broadcast images of the pursuer filmed in public places, namely the area immediately outside the sheriff court building, the public areas within the sheriff court building and in the particular court within the building. All these were public places. Even if the pursuer had not consented to being filmed there, she was not entitled to restrain the BBC from broadcasting that material. Even if Lion had breached the Guidelines, that did not give the pursuer a remedy. The purpose of the Guidelines was not to protect individuals such as the pursuer, but to ensure the administration of justice. The Sheriff Principal had been made aware of the pursuer's complaints and had chosen to take no action. This showed that he was satisfied that there was no risk to the administration of justice if the documentary was broadcast. The pursuer had no right of privacy when in a public place. That included the sheriff court and its environs. With regard to the information concerning the pursuer which is revealed in both the Rushes video and the Documentary video, counsel submitted that there was nothing which the pursuer could claim was confidential. He drew attention to what had been said on her behalf in open court both at the time of the remand hearing on 23 April 2003 and at her subsequent trials. He referred to the two Social Enquiry Reports dated 14 August 2003 and 13 September 2004 respectively which contained extensive details of the pursuer's personal background, including the information which the pursuer now seeks to protect. Those reports, he submitted, had been referred to in open court and, once that had happened, the confidentiality of the information which they contained was lost forever, so that there was no justification for the interdict now sought by her.

[37] The pursuer's response to this argument dealt with both her appearance in court on 23 April 2003 and the use subsequently made of the two Social Enquiry Reports. With respect to the former, she avers:

"Any information concerning the pursuer which may have been disclosed in open Court by her own Solicitor, the Procurator Fiscal or the Sheriff could lawfully have been the subject of contemporaneous reporting by organisations such as the BBC. To the knowledge of the pursuer there has been no such reporting of anything said in relation to her in Court. Such information is not otherwise held in any public records. In these circumstances, it would not simply be difficult for the information so spoken to in court to be discovered but, rather, it would be impossible, no matter how diligent the research which might be carried out."

The pursuer then avers the details of her subsequent court appearances. She concludes:

"During the course of each of the foregoing court appearances, including the appearances when reports were available, no detailed reference was made in Court to the terms of either the First SER or the Second SER. The Sheriffs in each case had read the relevant report beforehand and indicated that they were minded to proceed as hereinbefore condescended on without any material discussion of the position. Mr McGovern required to say very little in mitigation as he was content, on the pursuer's behalf, with the Sheriffs concerned proceeding to do as they did. In any event, as hereinbefore condescended upon, no public record of what was said in relation to the pursuer on any of the foregoing dates exists, nor, so far as the pursuer is aware, has there been any reporting or broadcast of such information. Accordingly, all of the information which the pursuer seeks to protect in the present action remains outwith the public domain. The pursuer would at the very least be humiliated and publicly embarrassed by the broadcast of the said footage."

[38] These arguments raise the question of the status of a Social Enquiry Report and of the information contained therein, especially where the terms of such a report are not read out in open court. The position is far from clear. I was referred to a standard textbook on the subject, Fabb and Guthrie on *"Social Work Law in Scotland"*, 2nd ed., at pp.232-234. The authors explain that most reports are prepared following a plea of guilty or a finding of guilt when the court adjourns the case under section 201 of the Criminal Procedure (Scotland) Act 1995 prior to the decision regarding sentence or disposal of the case. Section 27(1)(a) of the Social Work (Scotland) Act 1968 imposes a duty on local authority social work departments to provide reports relating to persons appearing before the court which the court may require for the disposal of the case. Such reports, Social Enquiry Reports, are then compiled in accordance with "National Standards". The authors then explain (at p. 233):

"The report is the property of the court and a copy of it is made available to the offender of his/her solicitor by the clerk of court. It will also be seen by the prosecutor and the judge, and some comment may be made on its contents in open court. Because of this, problems about confidentiality may arise. Sensitive information may need to be noted as such in the report with a request that it is not disclosed, or it may be omitted from the report and brought to the attention of the judge in chambers in the presence of the offender and the defence agent."

This advice recognises at least the risk that any information contained in a Social Enquiry Report may to be disclosed in open court.

[39] The next issue is whether, once a Social Enquiry Report is referred to in open court, its whole contents are disclosed or only those parts to which reference happens to have been made. If the judge, the prosecutor and the representative of the accused all had prior access to such a report very little may be said in open court about its contents, although those contents play a significant part in the judge's reasoning in determining what may be an appropriate disposal.

[40] A similar point arose in *Cunningham v Scotsman Publications* 1987 S.C. 107 which concerned the reporting of certain averments in a summons which had founded an application for *interim* interdict but which had not been aired in open court. Lord Clyde observed (at p.119-120):

"It is evident that for public confidence in the administration of justice to be maintained the public must be able to see and hear the proceedings for themselves. They must be able to attend a court and see and hear what goes on. But their attendance will be of little point if the proceedings are so conducted that the communications made in open court between counsel and the judge are not disclosed. The substance of the matter discussed in the proceedings may be of such complexity or technicality as to be beyond the ready understanding of every particular visitor, but if the public are to be informed of the proceedings, the proceedings ought to be intelligible. If justice is to be seen to be done what is done must be open to inspection. The public must have at least the opportunity of understanding what is going on and if they do not have the opportunity I do not consider that the hearing is a public one. If the hearing is a public hearing then it does not seem to me that that characteristic is destroyed simply because for perfectly proper reasons of convenience a document is referred to and not read out in full. Where a document had been incorporated into what counsel has said, the proceedings cannot be said to be open to the public unless the terms of the document can be seen by the public."

Senior counsel for the BBC pointed to this passage in Lord Clyde's Opinion as support for his proposition that once a Social Enquiry Report has been used in court for the purpose of assisting a sheriff to arrive at an appropriate disposal, the whole terms of that report entered the public domain. Once that had happened the relevant information remained in the public domain and could no longer be claimed to be confidential.

[41] Lord Clyde referred to the most recent previous Scottish case, *Harper v Provincial Newspapers Ltd* 1937 S.L.T. 462, and noted (at p.115):

"On the other hand it does provide an example of a case where the whole terms of the document which was at the heart of the proceedings were treated as having been published although only a summary of them was given orally and verbally in court."

In a later case, *Barclay v Morris* 1997 S.C. 74 at 80E, Lord Osborne expressly agreed with this passage of Lord Clyde's Opinion, although Lord Osborne found it not to be directly applicable to the facts of his case.

[42] Counsel for the pursuer submitted that "the public domain" and "open court" should not be assumed to be the same. He referred to Clayton & Tomlinson on *"The Law of Human Rights"* at p.789 where the authors state:

"Whether the publication of information has been so extensive as to destroy confidentiality is 'a question of degree depending on the facts of the particular case'. Where marital secrets had been discussed by both parties in a number of newspaper articles, they were no longer 'confidential information'. Furthermore, the confidentiality of information may be lost by the passage of time or change of circumstances. The fact that a matter has once been in the public domain cannot, however, prevent its resurrection, possibly many years later, from being an infringement of privacy; the determination is matter of fact and degree. It has been held that previous convictions and sentences cannot be confidential information, but this may be an overstatement of the position."

In support of these latter propositions the authors cited *inter alia* *R v Chief Constable of North Wales Police, ex p. Thorpe* [1999] Q.B. 396 at 429A, and *Elliott v Chief Constable of Wiltshire*, [1996] TLR 693. In the former case Lord Woolf, M.R., stated (at 429A-C):

"The issue here is not the same as it would be in private law. The fact that the convictions of the applicants had been in the public domain did not mean that the police as a public authority were free to publish information about their previous offending absent any public interest in this being done. As Lord Bingham C.J. stated, before this happens it must at least be a situation where in all the circumstances it is desirable to make disclosure. Both under the Convention and as a matter of English administrative law, the police are entitled to use information when they reasonably conclude this is what is required (after taking into account the interests of the applicants), in order to protect the public and in particular children."

In the latter case Sir Richard Scott, V-C stated (at p.694):

"The convictions had been announced in open court. They were therefore in the public domain and could not be confidential information. The notion that information about convictions announced in public in open court was confidential was absurd.

It seemed that the idea that the information was confidential had arisen because anyone other than a policeman would have difficulty collecting it. But a diligent researcher could have discovered it. Information that was not confidential did not become so just because it was disclosed by a policeman."

[43] Counsel for the pursuer also referred to one of the *Spycatcher* cases, *Attorney General v Guardian Newspapers (No.2)* [1990] 1 A.C. 109 and to the speech of Lord Goff of Chieveley at 282C-D. After considering the broad general principle that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others, his Lordship set out three limiting principles, the first of which was in the following terms:

"The first limiting principle... is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of the confidentiality can have no application to it."

Counsel for the pursuer submitted that the information which the pursuer seeks to protect in the present action had not entered the public domain in the sense described by Lord Goff. He referred to the pursuer's detailed averments concerning what had happened on each of her court appearances and the ways in which the two Social Enquiry Reports had been used. On the facts, there had been no disclosure in open court of the relevant parts of their contents. Counsel also drew attention to the practical difficulties which had been encountered by his instructing agent in obtaining copies of the two reports to lodge in the present proceedings. Requests to the relevant social work departments had failed, and when requests had been made of the sheriff clerk, the request, in each case, had been put before the sheriff.

[44] In my opinion, there is considerable force in the argument that the contents of a Social Enquiry Report are necessary to understand the reasoning of a judge imposing a particular sentence, whether or not the contents of the report have been referred to in open court. It follows that, if justice is to be seen to be done, the contents of the Social Enquiry Report ought to be publicly available to enable contemporaneous reporting to take place. If it is established in the present case that no such contemporaneous reporting occurred then the status of the contents of those reports is less certain. The cases cited in the passage in Clayton and Tomlinson on "*The Law of Human Rights*" referred to do not appear to assist directly in the present circumstances where allegedly confidential information may theoretically but not practically be in the public domain and the issue is whether, in the words of Lord Goff, "the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential."

[45] The pursuer argues *inter alia* that broadcast by the BBC of the Documentary video would infringe her rights under Article 8 of the Convention. The BBC maintains that it is entitled to broadcast this material by virtue of its rights under Article 10. These Articles provide as follows:

"Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country,

for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[46] The nature and extent of the rights afforded by Article 8 were considered by the European Court of Human Rights in *Peck v United Kingdom* (2003) 36 E.H.R.R. 41. The applicant in that case had been recorded on closed circuit television ("CCTV") walking around his local town centre, carrying a large knife in the process of attempting suicide. As a result of the CCTV coverage, the police were alerted to his situation and were able to recover the knife and prevent the applicant from causing any fatal harm to himself. The CCTV footage was owned by the local council who released it to the local press as an example of the success of CCTV in preventing crime and enabling the police to respond to incidents. A photograph of the applicant was used in the publicity material and the footage was subsequently provided to both the BBC and a commercial broadcast news agency. Images of the applicant were thus widely disseminated and, although some steps were taken to mask his identity, those steps were inadequate.

[47] In relation to Article 8 the court stated (at pp.737-8):

"Private life is a broad term not susceptible to exhaustive definition. The court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Art.8. The Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'..... However, the Court notes that the present applicant did not complain that the collection of data through the CCTV camera monitoring of his movements and the creation of a permanent record of itself amounted to an interference with his private life.

Indeed, he admitted that that function of the CCTV system together with the consequent involvement of the police may have saved his life. Rather, he argued, that it was the disclosure of that record of his movements to the public in a manner in which he could never have foreseen which gave rise to such an interference."

The court concluded (at p.739):

"As a result, the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on August 20, 1995.

Accordingly, the Court considers that the disclosure by the Council of the relevant footage constituted a serious interference with the applicant's right to respect for his private life."

[48] Article 8 and its interaction with Article 10 were considered by the House of Lords in *Campbell v MGN Ltd* [2004] 2 W.L.R. 1232. That case involved the fashion model, Naomi Campbell who, it was held, had courted publicity and had volunteered information to the media about her private life and had announced publicly, but untruthfully, that she did not take drugs. A newspaper then published articles which disclosed her drug addiction and the fact that she was receiving therapy through a named self-help group, gave details of group meetings which she attended and showed photographs of her in a street as she was leaving a group meeting. Miss Campbell sought damages from the newspaper. The Court of Appeal held that the publication had been justified in the public interest because the details disclosed were reasonably necessary to support the story that Miss Campbell had deceived the public. The House of Lords, by a majority of three to two, allowed Miss Campbell's appeal. Lord Hoffmann, in a dissenting speech, referred to the conclusion of the court in *Peck* and stated (at p. 1250G):

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

Lord Nicholls of Birkenhead, in the other dissenting speech, considered the scope of "private life" (at p.1239B) thus:

"21 Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

A similar approach is found in the speech of Lord Hope of Craighead (at p.1254F-G):

"92 The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed was private and not public. There must be some interest of a private nature that the claimant wishes to protect: *A v B Ltd* [2003] Q.B. 195, 206, para.11(vii). In some cases, as the Court of Appeal said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether the disclosure of the information about the individual ('A') would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary susceptibilities."

Baroness Hale of Richmond reached the same conclusion (at p.1268C-D). She put the matter thus:

"The position we have reached is that the exercise of balancing article 8 and article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential."

She believed that her approach accorded with the speeches of Lord Nicholls and Lord Hope. The interaction between Articles 8 and 10 was again considered in the House of Lords in *Re S (a child)* [2004] 4 All.E.R. 683, which concerned the possible publication of the identity of a mother, who was charged with the murder of one of her children, in the context of care proceedings in relation to her other child. The leading speech was delivered by Lord Steyn. He considered the matter (at p.692h) thus:

"[17] The interplay between arts 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v Mirror Group Newspapers Ltd* [2004] U.K.H.L. 22, [2004] 2 All.E.R. 995, [2004] 2 W.L.R. 1232. For present purposes the decision of the House of the facts of *Campbell's* case 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 of 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 first case."

His Lordship then considered the general rule:

"[18] In oral argument it was accepted by both sides that the ordinary rule is that the press, is the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional

circumstances. It is, however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule by reason of rights under art 8."

[49] Parties were agreed that this was the approach which should be followed in the present case. Before considering the competing submissions on the topic, it is necessary to say something about the pursuer's averments and submissions in support of her claim for *interim* interdict. She avers that the film footage taken of her on 10 or 11 and 23 April 2003 is highly embarrassing and prejudicial to her and contains information concerning her obtained in breach of obligations of confidentiality owed to her and which she would reasonably expect to be kept private. That includes information provided by the pursuer's friend, Miss Y, and by the bail officer. She further avers that the disclosure of this information would amount to a breach of her rights under Article 8. She argues that the various formulations of the test in *Peck* and *Campbell* are met. More seriously, she avers that there is a "real risk" that she may come to serious physical self-harm if the documentary was to be broadcast and that there was a "very real risk" that she would be subjected to physical violence, "possibly of a serious nature", if the same broadcast was to take place. As these arguments directly concern the information which the pursuer seeks to protect, I consider them in more detail in my private opinion.

[50] In the context of Lord Steyn's approach to the interaction of Articles 10 and 11 in *Re S*, senior counsel for the BBC made detailed submissions in relation to both Article 8 and Article 10. With regard to Article 8, he submitted, first that all the information which the pursuer sought to protect had already entered the public domain. In any event, even if it could be held that some of the information was private or confidential, there was only a low degree of confidentiality. Secondly, he submitted that on the psychiatric evidence there was no significant risk of the pursuer killing herself. In any event, that risk could be managed with the provision of appropriate support to the pursuer. Thirdly, the pursuer's concern that she might suffer physical or other harm from a third party was not a valid concern because her identity was already well-known to the possible perpetrators of that harm. The pursuer's real concern was simply embarrassment if the programme was broadcast and that was an irrelevant consideration. Fourthly, the Documentary did not seek to portray the pursuer in a censorious light but rather portrayed her as the sort of vulnerable person that the sheriff court had to deal with on a daily basis. There was no question of the pursuer being degraded or humiliated by her representation in the Documentary. Fifthly, while making all due allowance for the pursuer's unhappy background, the court should bear in mind that she has now been convicted of a number of criminal offences and that what she now seeks to restrain was clearly bound up with that offending, so that the court should be slow to restrain publication of such information. This, it was said, reinforced the point that what the pursuer was trying to keep out of circulation was information which was inherently public information. These five factors, it was submitted, showed that the pursuer's Article 8 rights were comparatively unimportant in the circumstances of this case.

[51] With regard to Article 10, counsel for the BBC submitted that those rights were of substantial importance, first because of the strong public interest in ensuring that

restrictions were not placed on the media's ability to report court proceedings and especially criminal proceedings unless it was absolutely necessary. The pursuer enjoyed no statutory protection as would have been the case for a child under 16 years of age (Criminal Procedure (Scotland) Act 1995, s.47). Secondly, it could not be suggested that the media were not entirely free to publish reports of proceedings in court as they occurred at any stage, including, it was submitted, the contents of Social Enquiry Reports, which were a prerequisite for certain types of disposal. Thirdly, if Lion or the BBC had happened to have a film crew outside the sheriff court on either 10/11 or 23 April they could have filmed the pursuer entering or leaving the building. On 23 April they might have been able to secure images of the pursuer being transported to prison. If they had been able to do so, such images could have been broadcast. Fourthly, in general, the media do not require consent to film, record or broadcast. Senior counsel questioned any rule against filming in court so long only as the administration of justice was not impeded. Fifthly, considerable regard should be had to the fact that the Sheriff Principal had apparently been satisfied that his guidance had been complied with. This demonstrated that he was satisfied that the administration of justice would not be harmed if the Documentary was broadcast. Sixthly, in any event, the Guidelines did not have the force of law. They were only guidelines and afforded the pursuer no remedy. On this basis counsel submitted, without prejudice to his primary position, that Article 8 was not engaged, that any interference with the pursuer's Article 8 rights was slight and unimportant as opposed to the serious and disproportionate interference with the BBC's rights under Article 10 which would occur if *interim* interdict was granted.

[52] Senior counsel for the pursuer's position was that Article 8 was engaged and that it was necessary to carry out a balancing exercise between Article 8 and Article 10 rights. With regards to Article 8, he disputed that the information in question was already in the public domain for the reasons already considered. He disputed the psychiatric evidence. He maintained that the Documentary showed the pursuer in a highly embarrassing and prejudicial light. She had been trying to put the whole episode behind her and it would be unfortunate and prejudicial to her to have such publicity at this stage. Furthermore, there was the risk of serious physical harm to her. Whether or not the programme showed the pursuer in an unfavourable light missed the point. The inclusion of material relating to the pursuer in even the finest documentary would infringe her rights. If the pursuer was no more than a typical person appearing in Glasgow Sheriff Court, then her inclusion in the programme was unnecessary and someone else could be substituted. The truth, it was said, was that the film of the pursuer was thought to be "good television" and that was why the BBC was anxious to broadcast it, but that, in the context of the pursuer's rights, was not a good reason to do so. In answer to the challenge that the pursuer's real concern was closely connected to her own offending and criminality, counsel referred to *Venables v News Group Newspapers Ltd* [2001] Fam. 430 which concerned the murder of a young child by two children who were aged 11 at the date of their conviction. They sought indefinite injunctions to restrain publication of confidential information relating to their identity, whereabouts and appearance after their release from detention because of possible danger to their lives and safety if they were then identified. In granting such protection, Dame Butler-Sloss P stated (at p.467):

"97. These uniquely notorious young men are and will, on release, be in a most exceptional situation and the risks to them of identification are real and substantial. It is therefore necessary, in the exceptional circumstances of this case, to place the right to confidence above the right of the media to publish freely information about the claimants. Although the crime of these two young men was especially heinous, they did not thereby forfeit their rights under English law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms. They have served their tariff period and when they are released, they have the right of all citizens for the protection of the law. In order to give them the protection they need and are entitled to receive, I am compelled to grant injunctions."

Counsel for the pursuer invoked the same principle.

[53] With regard to Article 10, counsel for the pursuer submitted that there was no public interest in the pursuer featuring in the documentary. He accepted that the programme had to some extent an educational roll, but there was no public interest in the pursuer. He referred to paragraph [30] of Lord Steyn's speech in *Re S* where the importance of contemporaneous reporting of criminal proceedings was emphasised, but that, he submitted, was not the position here. The inclusion of the pursuer in the Documentary was neither necessary for educational purposes nor of significance to the artistic or substantive content of the programme. The pursuer enjoyed rights under Article 8 and it was for this reason that any consent which she gave to Lion which affected those rights constituted a "transaction" within the meaning of section 9 of the 1991 Act.

[54] With regard to the Sheriff Principal's satisfaction that the Guidelines had been complied with, counsel submitted that not too much should be read into the letter (number 7/3 of process) which records that satisfaction. I note from the terms of a letter (number 6/3N of process) from the Sheriff Principal some three weeks earlier that the information with regard to the procedure used by Lion to obtain the pursuer's consent to appear in the Documentary, and which probably formed the basis for his conclusion that the Guidelines had not been breached, was provided by Lion. It was that information, and apparently that information alone, which led the Sheriff Principal to be satisfied:

"That the difficulty which arises is a private issue between [the pursuer] and the producers of the television documentary and is not one in which I should become involved." (number 6/3N of process), and to consider that the Guidelines had not been breached (number 7/3 of process).

The fact and the circumstances of the pursuer's consent are, of course, disputed in the present proceedings.

[55] In answer to the submission that the Guidelines did not have the force of law, counsel for the pursuer submitted that the Guidelines had been made a term of the Lion Contract. The pursuer claimed to enjoy a *jus quaesitum tertio* under the Lion Contract, but even if she did not, Lion would have been likely to have found themselves out of

favour at Glasgow Sheriff Court if the Guidelines had been breached. A court room was in a different position from any other public place. It was different because filming there was not allowed unless permission had been given and unless any conditions attaching to the grant of such permission had been met. Counsel for the pursuer submitted that the pursuer had a right under Article 8 not to be photographed or filmed in Glasgow Sheriff Court unless the Guidelines had been complied with.

The Decision

[56] Having considered the pleadings, the various documents lodged by both parties and the detailed submissions made in the course of the hearing of the pursuer's motion, I am satisfied that the pursuer has raised a question or questions to try and that she has "a real prospect of success". I find, however, that the disputed facts in the case at this stage are such that I am unable to conclude with any confidence that she is more likely than not to succeed at proof. While the applicable law was keenly argued by counsel on both sides, the application of that law is so closely bound up with the disputed facts that it would not be appropriate for me to comment on the law any more specifically than I have already done. I have considered carefully the documents and submissions in relation to the possibility of harm coming to the pursuer if the documentary was to be broadcast. Here again, the facts, in the form of competing expert opinions, are disputed. I conclude, however, for the reasons set out in my private opinion, that there is a significant risk of the pursuer suffering serious harm if the documentary was to be broadcast and accordingly that inability to satisfy the "more likely than not" test does not preclude the possibility of *interim* interdict to protect her.

[57] I am satisfied for present purposes that the pursuer has engaged rights under Article 8 of the Convention both in relation to images of her and information about her. I have therefore considered the competing submissions with regard to the balancing of Article 8 and Article 10 rights. I conclude that the images of the pursuer and the personal information about her are of considerable importance to her. The images show her to be a vulnerable and immature person and show her involved in the criminal justice system in graphic detail. If the pursuer has not given informed consent to the broadcast of this material, I do not accept that it enjoys only a low degree of confidentiality. I am mindful of the subjective nature of the test formulated in *Campbell v MGN Ltd*. The degree of the risk of physical harm to the pursuer is, in my opinion, an important factor in the balancing exercise. Whatever the legal status of the personal information regarding the pursuer and contained in the Social Enquiry Reports may be, as a matter of fact that information is not readily available and, again as a matter of fact, is not in the public domain. One or two people may remember the pursuer's appearance in court and the very limited disclosure of information which then occurred, but that information was extremely limited and the publication was virtually non-existent.

[58] With regard to Article 10, I appreciate the importance of these rights generally and to the BBC in particular. The circumstances of this case do not concern the contemporaneous broadcasting of criminal proceedings so that the considerations highlighted by Lord Steyn in paragraph [30] of his speech in *Re S* do not apply to the

present case. The documentary is nonetheless, in my opinion, an interesting and informative piece of journalistic work. Its broadcast should not be hindered unless there is good reason to do so. While it may be true that the parts of the Documentary relating to the pursuer could be removed and possibly replaced by other footage, the pursuer's "story" within the programme is illuminating. It shows her progression from being an observer of the criminal justice system to being a participant within it. It illustrates her views of that system at both stages and the steps which may be necessary to protect someone of her age and vulnerability to involvement in the system particularly at the stage of being remanded to prison pending trial. In my opinion this factor supports the importance of the Article 10 rights.

[59] Whether or not the Guidelines have been breached and, if so, to what extent, will be matters for proof. The conflict over the questions of consent at various different stages will not be easy to resolve. If the pursuer is able to prove that the Guidelines have been breached, I consider that that fact is more likely to be relevant to her claims based on Article 8 than any other right which she might have. While the Guidelines may not have the force of law, other than affecting the parties to the Lion Contract, they may nevertheless directly affect Convention rights.

[60] On balance, I conclude that at this stage the balancing exercise both in respect of Articles 8 and 10 and the balance of convenience test more generally, favours the pursuer and I am prepared to pronounce *interim* interdict against the first defenders to restrain broadcast of those parts of the Documentary video relating to the pursuer whether showing her directly or showing others referring to the pursuer thereby identifying her and disclosing personal information about her. I would be prepared to pronounce *interim* interdict in terms of the third conclusion of the summons, but before doing so, parties may wish to consider two points. First, conclusion 3(1) refers to 11 April 2003. As I understand the position, the relevant date may be 10 April 2003 and it may be appropriate to amend that date. Secondly, conclusion 3(2) contains information which, if contained in an interlocutor, might enable the pursuer to be identified, thereby defeating the object of the *interim* interdict.