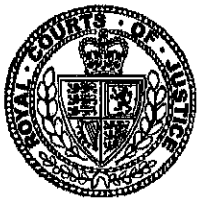

Neutral Citation Number: [2015] EWCA Civ 96

Case No: B3/2013/3735

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**Mr. Justice Tugendhat**
**[2013] EWHC 3956 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2015

**Before :**

**LORD JUSTICE MOORE-BICK**
**Vice-President of the Court of Appeal, Civil Division**
**LADY JUSTICE BLACK**
and
**LORD JUSTICE LEWISON**

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**Between :**

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|---|---|
| **JX MX**<br>**(by her mother and litigation friend AX MX)** | **Claimant/ Appellant** |
| **- and -** | |
| **DARTFORD & GRAVESHAM NHS TRUST** | **Defendant/ Respondent** |
| | |
| **PERSONAL INJURY BAR ASSOCIATION**<br>**and**<br>**THE PRESS ASSOCIATION** | **Interveners** |

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**Miss Elizabeth Anne Gumbel Q.C. and Mr. Henry Witcomb**
(instructed by **fieldfisher LLP**) for the **appellant** (acting pro bono)
**The respondent** did not appear and was not represented
**Mr. Robert Weir Q.C, and Mr. William Latimer-Sayer**
(instructed by **Colemans-Cutts**) for the **intervener**
**Mr. David Barr Q.C.** (instructed by the **Treasury Solicitor**) as **friend of the court**

Hearing date : 3rd December 2014

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# Approved Judgment

**Lord Justice Moore-Bick :**

1. This is the judgment of the court.

2. This appeal raises an important question relating to the principle of open justice and the exercise of the court's power to withhold from the public the names of parties to litigation, a practice commonly referred to as "anonymisation". It arises in the context of an application for approval of a compromise of a claim for damages for personal injury brought by a child.

3. All settlements or compromises of claims by or against children must be approved by the court if they are to be binding on the parties, whether they are reached before or after proceedings have been started: see CPR 21.10. Approval is likewise required for the settlement or compromise of any claim by or against a protected party. If substantive proceedings are pending, approval is sought by application in those proceedings. If substantive proceedings are not pending, approval is sought using the Part 8 procedure. In either case the child or protected party appears in the court documents as claimant or defendant acting by a litigation friend.

4. The claimant in the present proceedings, who is now aged six, suffered very severe injuries at the time of birth. Her expectation of life is limited and she will be a protected party when she becomes an adult. Acting by her mother she brought proceedings in the High Court against the defendant hospital trust alleging negligence on the part of those who were responsible for her care. In due course the defendant agreed to settle her claim by paying a very significant sum in damages. The damages included both a large lump sum and substantial periodical payments. An application was then made to the court seeking approval of the settlement. The matter came before Tugendhat J., who was asked to make various orders designed to ensure that the claimant's identity was withheld from the public indefinitely. They included an order prohibiting persons other than the parties to the proceedings from obtaining copies of the statements of case from the court records. The judge declined to make an order preventing publication of the claimant's name, but he did direct that her address should not be disclosed. He gave permission to appeal and made orders protecting the identity of the claimant pending determination of any appeal. This is the claimant's appeal against the judge's dismissal of her application for anonymity.

*Open justice*

5. The principle of open justice has long been considered to be of the utmost importance. It is of ancient origin, but for present purposes it is unnecessary to trace its existence back beyond the decision of the House of Lords in *Scott v Scott* [1913] A.C. 417, a case involving a suit by a wife for a declaration of nullity on the grounds of her husband's impotence. The question for their Lordships was whether the court at first instance had jurisdiction to order a hearing in camera on the grounds of public decency and to punish as a contempt of court the subsequent publication of a transcript of the proceedings. Much of what was said assumed the existence of the principle of open justice and was directed to the circumstances in which the court might be justified in departing from it, but clear statements of its nature and importance can be found, in particular in the speeches of Lord Atkinson and Lord Shaw of Dunfermline. Lord Atkinson said at page 463:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

6. Lord Shaw, quoting Bentham, said at page 477:

> ""In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity.""

7. Nonetheless, all their Lordships recognised that there are occasions on which the principle of open justice must give way to the need to do justice in the instant case. Thus, Viscount Haldane L.C. said at page 437:

> "While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is

> expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

8. The emphasis on necessity might suggest that the involvement as parties of children or those lacking mental capacity (now "protected parties") would not justify an order for the proceedings to be held in private, but in *Scott v Scott* their Lordships all accepted that cases of wardship, cases involving protected parties and cases involving secret processes provided exceptions, or apparent exceptions, to the general rule. The justification for excluding cases involving wards of court and protected parties was that the court was exercising a function of a kind essentially different from that involved in determining disputed causes. The passage from the speech of Viscount Haldane to which we have referred is to that effect and it is clear from the speeches of Lord Halsbury, Lord Atkinson and Lord Shaw that they were of a similar opinion. Thus, Lord Shaw said at page 483:

> "The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention - trade secrets - is of the essence of the cause. The first two of these cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

9. A recent authoritative analysis of the principle of open justice, its historical importance and the jurisdiction of the courts to determine its scope, including the scope of any exceptions to it, is to be found in the judgment of Lord Reed J.S.C. in *A v British Broadcasting Corporation* [2014] UKSC 25, [2014] 2 W.L.R. 1243, in particular at paragraphs 23-41. In that passage Lord Reed recognised that there may be many different cases in which the court must have regard to the need to do justice in a wider sense than merely reaching a just determination of the issue between the immediate parties.

10. These principles are reflected in Part 39 of the Civil Procedure Rules, which seeks to encapsulate both the general rule of open justice and the particular cases in which it may be appropriate to depart from it. Rule 39.2(1) provides:

> "The general rule is that a hearing is to be in public.",

but rule 39.2(3) provides:

> "A hearing, or any part of it, may be in private if—
>
> . . .

> (d) a private hearing is necessary to protect the interests of any child or protected party; [or]
>
> . . .
>
> (g) the court considers this to be necessary, in the interests of justice.

11. The authorities to which we have referred thus far were concerned with hearings in private, but in *Attorney-General v Leveller Magazine Ltd* [1979] A.C. 440 the same principles were held to apply to the withholding by anonymisation of the identity of a witness. CPR Rule 39.2(4) now provides that:

> "The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

12. In paragraph 2 of his judgment in *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38, [2014] A.C. 700 Lord Neuberger P.S.C described the principle of open justice as "fundamental to the dispensation of justice in a modern, democratic society", but he continued:

> "However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum – see, for instance *A v Independent News & Media Ltd* [2010] EWCA Civ 343, [2010] 1 WLR 2262, and *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue."

13. Much of the court's jurisdiction in relation to the welfare of children and the administration of the affairs of those who lack capacity is now governed by statute. It has become an important component of the business of the courts. In those circumstances we do not think that it is possible any longer to exclude those areas of judicial activity from the general principle of open justice on the grounds that the court is acting on behalf of the crown as parens patriae rather than exercising its ordinary judicial function of deciding disputes. The court's role nowadays includes determining disputes between public authorities and private individuals, one obvious example being proceedings brought under the Children Act 1989 for care and supervision orders. It might therefore be argued that the functions of the courts in relation to the welfare of children and adults who lack capacity are broader than the "exceptions" identified in *Scott v Scott* and that such cases cannot be treated as constituting a class to which the principle of open justice does not apply. Any exclusion of such proceedings from that principle therefore must be found in an

overriding need to ensure that justice in the broader sense is done in the individual case.

14. In *Bank Mellat v Her Majesty's Treasury (No. 1)* Lord Neuberger spoke of what is strictly necessary to achieve justice between the parties. That might be understood in the narrow sense of reaching a correct decision on the issues which divide the parties, but his words have to be read in the context of the case before him. The court in that case was not concerned with a question of the kind that arises in this case and we do not think that he can have intended to exclude from the court's consideration the need to avoid exposing one or other of the parties to an injustice of a broader kind. Proceedings involving children and vulnerable adults will often call for a measure of privacy, not necessarily because of the inherent nature of the issues to which they give rise, but because such persons may suffer a distinct injustice if they are exposed to the publicity that may be generated if the proceedings are held in public. Moreover, a claimant who is, or will in due course grow up to be, a protected party may need protection from those who would seek to gain access to the funds that are intended to provide compensation for the injuries in respect of which they were awarded.

15. The resonance between the classes of proceedings that were recognised in *Scott v Scott* as justifying a departure from the principle of open justice and the wider modern categories of cases involving children and vulnerable adults is plain. It is no surprise, therefore, that recent developments in the rules governing such proceedings assume that it is necessary to protect the privacy of children and vulnerable adults involved in proceedings about their welfare or personal affairs. Thus, CPR rule 39.2(3)(d), to which we have already referred, recognises that it may be necessary for the hearing to be held in private in order to protect the interests of a child or protected party. The Family Procedure Rules 2010 go even farther, providing that proceedings to which they apply (even if contentious) are to be held in private unless the court directs otherwise (rule 27.10). Similar provision is made in the Court of Protection Rules 2007. In *Independent News and Media Ltd v A* [2010] EWCA Civ 343, [2010] 1 WLR 2262 at paragraph 19 this court expressed the view that the provisions for private hearings in the Court of Protection "mirror and re-articulate one longstanding common law exception to the principle that justice must be done in open court".

16. It does not follow, however, that the protection of the interests of children and protected parties requires complete derogation from the principle of open justice. Accredited representatives of the media are normally allowed to attend private hearings in family proceedings by virtue of rule 27.11(2)(f) of the Family Procedure Rules, but reporting of the proceedings is restricted. Section 97(2) of the Children Act 1989 prohibits the publication of material which identifies, or is likely to identify, a child involved in proceedings in which any power under the Children Act 1989 or the Adoption and Children Act 2002 may be exercised. Section 12 of the Administration of Justice Act 1960 has the effect of prohibiting the publication of information relating to proceedings before a court sitting in private if those proceedings relate to the exercise of the inherent jurisdiction of the High Court with respect to minors, are brought under the Children Act 1989 or the Adoption and Children Act 2002, or otherwise relate wholly or mainly to the maintenance or upbringing of a minor. These various provisions show how the balance has currently been struck in cases of this type between the imperative of open justice and the particular needs of children and vulnerable adults. In *B & P v The United Kingdom* (Appln Nos. 36337/97 and

35974/97) the European Court of Human Rights recognised that the need to protect the privacy of a child and to avoid prejudicing the interests of justice may justify holding hearings in private (see, in particular, paragraphs 38-39).

17. The identities of the parties are an integral part of civil proceedings and the principle of open justice requires that they be available to anyone who may wish to attend the proceedings or who wishes to provide or receive a report of them. Inevitably, therefore, any order which prevents or restricts publication of a party's name or other information which may enable him to be identified involves a derogation from the principle of open justice and the right to freedom of expression. Whenever the court is asked to make an order of that kind, therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose. The approach is the same whether the question be viewed through the lens of the common law or that of the European Convention on Human Rights, in particular articles 6, 8 and 10. As to the latter, see *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010 2 A.C. 697 at paragraphs 43-52. In *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 W.L.R. 1645 this court provided guidance on the manner in which applications for injunctions to prevent publication of private information should be approached. The case did not concern an application for approval of a settlement involving a child or protected party, but the making of an anonymity order in the context of an attempt to prevent publication of personal information. To that extent there are obvious differences between that case and the present, but in paragraph 21 of his judgment Lord Neuberger M.R. identified the following principles which are of general application and therefore of direct relevance to applications of the present kind:

(i) an order for anonymity should not be made simply because the parties consent to it;

(ii) the court should consider carefully whether some restriction on publication is necessary at all, and, if it is, whether adequate protection can be provided by a less extensive order than that which is sought;

(iii) if the application is made on the basis that publication would infringe the rights of the party himself or members of his family under article 8 of the Convention, it must consider whether there is sufficient general, public interest in publishing a report of the proceedings which identifies the party concerned to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

18. He continued:

> "22. Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy

> the need for the encroachment in a way which minimises the extent of any restrictions."

19. In a series of cases which includes *LK v Sandwell and West Birmingham Hospitals NHS Trust* [2010] EWHC 1928 (QB), [2011] Med. L.R.1, *JXF v York Hospitals NHS Foundation Trust* [2010] EWHC 2800 (QB), [2011] Med. L.R. 4 and *A (A Child) v Cambridge University Hospital NHS Foundation Trust* [2011] EWHC 454 (QB), [2011] E.M.L.R. 18 and *MXB v East Sussex Hospitals NHS Trust* [2012] EWHC 3279 (QB), [2013] Med. L.R. 13 Tugendhat J. sought to apply these principles to applications for anonymity orders in the context of applications for the approval of settlements of claims by children and protected parties. In each case the judge proceeded on the basis that such orders were to be considered on a case by case basis, regardless of the consent of the defendant, rightly emphasising the need for any derogation from the principle of open justice to be based on necessity. He considered that it was necessary in each case to weigh up the competing demands of the need to protect the identity of the claimant and the principle of open justice, which includes as a necessary concomitant the right of the press to report proceedings in court. In *A (A Child) v Cambridge University Hospital* the judge was asked to, and did, make an order under section 39 of the Children and Young Persons Act 1933 prohibiting the publication of information calculated to lead to the identification of the claimant. He considered that such an order would involve a lesser interference with the principle of open justice than an anonymity order would and was therefore to be preferred. However, in the later case of *MXB v East Sussex Hospitals* he recognised that it was at least arguable that such an order would not provide adequate protection in the long term, given the opportunity for informal publication of information on the internet and the likelihood that information published in that way might remain available and easily accessible indefinitely.

*The judgment below*

20. In the present case the judge asked himself whether there were any specific risks to the claimant that made it necessary for him to make an anonymity order to protect her interests. In support of the application he had before him a brief witness statement from the claimant's mother and litigation friend, in which she referred in general terms to the harrowing events surrounding the labour and birth of her daughter and the very great distress which the family had suffered as a result. She also expressed concern about the risk of unwelcome attention from those who might seek to obtain a share of the claimant's damages as well as the risk of an invasion of the family's privacy if the settlement were the subject of reports in the national or local press. The judge described the statement as "formulaic" and it was certainly very brief. He noted that the claimant's mother had not identified any specific facts which might give rise to a risk from which the claimant needed protection and that she was primarily concerned about the distress that the family would suffer if the matter received widespread publicity. The judge pointed out that there was no evidence of any enhanced risk of theft of valuable equipment or of circumstances that might render the family vulnerable to demands from people who might unreasonably and unjustifiably ask for money to which they were not entitled. He also noted that the claimant would never be able to manage her own affairs and that her property would therefore be managed by a professional Deputy. For those reasons he was unable to accept that her mother's fears and concerns were objectively well founded, or that the risks of harm

were such that a derogation from open justice in the form of an anonymity order was a necessary, much less a proportionate, measure to address them. Nonetheless, he was willing to make orders designed to prevent publication of the family's address, though it is not clear from his judgment what harm he considered made an order of that kind necessary.

*The parties' submissions*

21. Miss Gumbel Q.C. submitted that there was no material distinction to be drawn between the present case and those to which we have referred, in each of which the judge had been satisfied that it was necessary to make an anonymity order for the protection of the claimant. He ought, therefore, to have recognised that this was also a case in which an anonymity order was required to prevent interference with the claimant's private and family life and that of her immediate family. The risk of such interference was self-evident and did not need to be articulated in a witness statement.

22. Mr. Weir Q.C., who appeared on behalf of the Personal Injury Bar Association as intervener, supported Miss Gumbel's submission, but went much further in inviting us to hold that normally the identity of the claimant should not be disclosed in reports of approval hearings. He put forward three main justifications for that approach: first, that the court's function when approving settlements is essentially protective and fundamentally different from its normal function of resolving disputes between the parties to proceedings; second, that the publication of highly personal information about the claimant's medical condition involves a serious invasion of his and his family's right to privacy; and third, that, unlike adult litigants of full capacity, who are free to settle their claims in private, children and protected parties have no choice but to seek the court's approval of their settlements in proceedings open to the public and are thus placed at a significant disadvantage to other litigants in obtaining respect for their private and family lives, contrary to article 14 of the Convention. He submitted that anonymisation of reports of approval hearings would ensure that the discrimination against children and protected parties, which is necessary to ensure that their interests are properly protected, is no greater than necessary and proportionate to the end sought to be achieved. He also submitted that withholding the claimant's identity would not prevent publication of those features of the case which might be of genuine public interest.

23. We received written submissions from Mr. Mike Dodd on behalf of the Press Association, also acting as intervener. As well as calling attention to the importance of open justice, he reminded us that the Press acts as "the eyes and ears of the general public" (per Sir John Donaldson M.R. in *Attorney-General v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109.183), the importance of which has been recognised judicially on many occasions. He also reminded us that in *Guardian News and Media Ltd, Re H.M. Treasury v Ahmed* [2010] UKSC 1, [2010] 2 A.C. 697 Lord Rodger recognised that without a name to attach to it a story will command much less interest among the readers of newspapers and consequently may be of little interest to the Press. He submitted that the judge was right to refuse anonymity in the present case for the reasons he gave. He also submitted that in most cases an order under section 39 of the Children and Young Persons Act 1939 will be more appropriate than an anonymity order, despite the concerns voiced by Tugendhat J. in *MXB v East Sussex Hospitals*.

24. We also had the benefit of submissions made by Mr. Barr Q.C. as friend of the court, who very helpfully reminded us of the principles to be derived from the authorities and drew our attention to potential obstacles in the way of Ms. Gumbel's and Mr. Weir's submissions.

*Discussion*

25. The issue in this appeal is whether any report of the approval proceedings should be anonymised, so that, in conjunction with the judge's order that her address not be disclosed, the claimant's identity will be protected indefinitely. Such an order clearly involves a derogation from the principle of open justice; the question is whether it is necessary to enable the court to do justice in this case. In *R v Legal Aid Board Ex parte Kaim Todner* [1999] Q.B. 966 at page 978 (a case concerning allegations of dishonesty made by the defendant against former employees of the applicant firm of solicitors), Lord Woolf M.R. observed that when deciding whether to make an order restricting disclosure of a party's identity it is appropriate to have regard to the nature of the order being sought as well as the nature of the proceedings and the positions of the parties to them. But he also warned against the danger posed by "the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases."

26. In paragraph 13 of his judgment Tugendhat J. observed that advocates commonly address the question as simply one of balancing the demands of privacy and freedom of expression. He rejected that analysis, however, holding that the true question for decision is whether it is *necessary* for the court to grant a derogation from open justice and thus from the rights of the public at large. In our view he was right to do so and he was also right to hold that the absence of any objection from the defendant or the media does not relieve the court of the duty to consider whether a derogation from the principle of open justice is necessary.

27. Any application of the present kind, therefore, gives rise to tension between the principle of open justice and the need to do justice in the individual case; or, if the matter is considered in Convention terms, a question whether it is necessary to interfere with the rights of the public and the Press under article 10 in order to protect the rights of the claimant and his or her family under article 8 and vice versa. The constitutional importance of the principle of open justice, as recognised in the authorities, is such that any departure from it must be justified strictly on the grounds of necessity. The same may be said of the right to freedom of speech. In either case the test is one of necessity. Although that usually involves a decision based on the judge's evaluation of the facts of the case before him, it is important to be clear that the decision does not involve an exercise of discretion. Accordingly, although this court will accord proper deference to the judge's assessment, it will in an appropriate case consider the matter afresh and decide for itself whether the proposed derogation from the principle of open justice is indeed necessary. It follows from the fact that the test is one of necessity that in order to be justified the derogation must be the minimum that is consistent with achieving the ultimate purpose of doing justice in the instant case. Quite rightly, none of those who appeared before us suggested that approval hearings should generally be conducted in private; it is accepted that sufficient protection for the claimant and her family can be achieved by a full anonymity order.

28. The judge did not, of course, have the benefit of the very full submissions that have been addressed to us. Had he done so, we think it likely that he would have concentrated less on the existence of specific risks of tangible harm to the claimant and her family, such as theft of equipment, exploitation by unscrupulous carers and unwanted attention from those seeking to obtain a share of the claimant's assets, and more on the invasion of the family's privacy which a report of the approval hearing would involve if the claimant's identity became public. It may be difficult for a claimant's parents or litigation friend to put into words the effect that an invasion of privacy is likely to have on the family's life and whatever fears are expressed may not in the end be realised. For that reason statements which attempt to deal with such matters may well appear to be formulaic, but we do not think that the importance of maintaining the family's privacy should be underestimated as a result.

29. Although, as we have indicated, we do not think that approval hearings lie outside the scope of the principle of open justice, we think there is force in the argument that in the pursuit of justice the court should be more willing to recognise a need to protect the interests of claimants who are children and protected parties, including their right and that of their families to respect for their privacy, in relation to such proceedings. Such a willingness is reflected both in the Family Procedure Rules and in the Court of Protection Rules. It might be thought that approval hearings, whether involving children or protected parties, are comparable in nature and deserve to be viewed in a similar light, although it has not been suggested that in general such hearings should be held in private. The function which the court discharges at an approval hearing is essentially one of a protective nature, as it was when it exercised the function of parens patriae on behalf of the Crown in relation to wards of court and lunatics. The court is concerned not so much with the direct administration of justice as with ensuring that through the offices of those who act on his or her behalf the claimant receives proper compensation for his or her injuries. The public undoubtedly has an interest in knowing how that function is performed and the principle of open justice has an important part to play in ensuring that it is performed properly, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity.

30. By virtue of article 14 of the Convention children and protected parties are entitled to the same respect for their private lives as litigants of full age and capacity (who are free to settle their claims without resort to the court), subject only to the need to ensure that their interests are properly protected. In many, if not all, cases of this kind the court will need to consider evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care needs and matters of a similar nature. In our view that is an important matter which the court is bound to take into account when deciding whether anonymity is necessary in order to do justice to such a claimant, notwithstanding the public interest which is served by the principle of open justice. Withholding the name of the claimant mitigates to some extent the inevitable discrimination between these different classes of litigants. In some cases it will be possible to identify a specific risk of dissipation of the sum awarded as damages when the claimant reaches the age of majority (as was the case, for example, in *JXF v York Hospitals*). If such a risk exists it will provide an additional argument in favour of anonymisation. Although a fear of intrusive Press interest is sometimes said to provide grounds for relief, we accept Mr. Dodds's submission that in general the Press seeks to act responsibly in reporting matters of this kind.

31. Mr. Barr reminded us that the range of settlements that come before the court for approval is very wide and submitted that we should be cautious about accepting Mr. Weir's submission that anonymity orders should generally be made in such cases. He suggested that we should go no farther than to hold that each case should be considered on its own merits. In our view he was right to counsel caution, but, ultimately we have been persuaded that, although each application will have to be considered individually, a limited derogation from the principle of open justice will normally be necessary in relation to approval hearings to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives. In some cases it may be possible to identify specific risks against which the claimant needs to be protected and if so, that will provide an additional reason for derogating from the principle of open justice, but we do not think that it is necessary to identify specific risks in order to establish a need for protection. The circumstances giving rise to the settlement will inevitably differ from case to case, but the interference with the right to private and family life will be essentially the same in almost all cases. It is sufficient in our view that the publication of the circumstances giving rise to the settlement would, in the absence of relief, involve injustice in the form of an interference with the article 8 rights of the claimant and his or her family.

32. The task is then to decide what form of order will provide the necessary protection while at the same time ensuring that the derogation from the principle of open justice is kept to a minimum. We are not persuaded that in the case of a child an order under section 39 of the Children and Young Persons Act 1933 is adequate for that purpose, both for the reasons articulated by Tugendhat J. in *MBX v East Sussex Hospitals* and because such an order ceases to have effect when the child reaches the age of majority: see *R (JC and RT) v Central Criminal Court* [2014] EWCA Civ 1777]. In any event, no such order is available in the case of an adult protected party. An anonymity order, however, (by which we mean an order prohibiting the publication of the claimant's name and address and a restriction on access by non-parties to documents in the court records) seems to us to provide a reasonable degree of protection both against an unwarranted invasion of privacy and an interference with the right to family life and against such other risks as there may be, whether of dissipation of assets or otherwise.

33. An important aspect of justice is consistency. The question for decision in each case is whether a derogation from the principle of open justice is necessary in order to ensure that justice itself is done. At one level that must depend on the facts of the individual case, but it is important to ensure a reasonable measure of consistency in order prevent the administration of justice being brought into disrepute. This is an area in which fine distinctions are difficult to justify and not easily understood. Proceedings of this kind are sadly not uncommon and some or all of the issues to which this appeal gives rise regularly confront judges dealing with such applications. It appears that applications for anonymity orders are becoming more frequent and, according to the very experienced judge who dealt with the matter below, there is uncertainty among judges about the course that should be taken. In those circumstances we think it appropriate for us to provide some guidance for judges at first instance.

34. In our view the court should recognise that when dealing with an approval application of the kind now under consideration it is dealing with what is essentially private business, albeit in open court, and should normally make an anonymity order in

favour of the claimant without the need for any formal application, unless for some reason it is satisfied that it is unnecessary or inappropriate to do so. Such an order should be drawn in terms that prohibit publication of the name and address of the claimant and his or her immediate family and also (if not already covered) the name of his or her litigation friend. The court must also recognise, however, that the public and the Press have a legitimate interest both in observing the proceedings and making and receiving a report of them. Accordingly, the Press should be given an opportunity to make submissions before any order is made restricting publication of a report of the proceedings, but for obvious reasons it will be unnecessary to notify the Press formally that an application for an anonymity order will be made. If the Press or any other party wishes to contend that an anonymity order should not be made, it will normally be necessary for it to file and serve on the claimant a statement setting out the nature of its case.

35. With that in mind we suggest that the following principles should apply:

(i) the hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;

(ii) because the hearing will be held in open court the Press and members of the public will have a right to be present and to observe the proceedings;

(iii) the Press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if different, the names and addresses of his or her parents) and restricting access by non-parties to documents in the court record other than those which have been anonymised (an "anonymity order");

(iv) the judge should invite submissions from the parties and the Press before making an anonymity order;

(v) unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;

(vi) if the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;

(vii) the judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the Press on request as soon as possible after the hearing.

36. It follows that in our view the judge was wrong in the present case not to make an order preventing publication of the names of the claimant and her parents. We therefore allow the appeal.