From privacy to publicity: controlling the disclosure of allegations of abuse in litigation

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Allegations of domestic abuse are ventilated daily across the criminal and family courts. Less commonly they arise in civil courts, for example where proceedings for breach of confidence/privacy or harassment are brought by an alleged victim of abuse to prevent disclosure of allegations, frequently alleging blackmail; and where an alleged abuser seeks to vindicate their reputation through libel proceedings.

In this article, we explore how the English courts grapple with questions of transparency and open justice in cases involving allegations of abuse, both where the applicant for privacy is the victim of abuse and where it is the alleged perpetrator who seeks privacy.

Civil proceedings

The strong starting point in the civil courts in England and Wales is that cases are to be heard in public.[1] The public are free to attend the hearing and the media able to report everything that is said, including the identity of parties and witnesses and the full contents of oral and written evidence given at trial. The courts have the power to derogate from this starting point, but these are exceptional measures which are rarely granted, and must be no more than necessary to ensure that justice is done.[2]

The most restrictive measure available to the court is to sit in private – ie behind closed doors. Such an application may be granted where the criteria under CPR, r 39.2(3) are satisfied (including where publicity would defeat the object of the hearing) and where it is necessary to secure the administration of justice. For example, an application to sit in private was granted in respect of a portion of Amber Heard's evidence in the libel claim *Depp v News Group Newspapers* [2020] EWHC 1618 (QB) in respect of the most sensitive allegations of abuse. The (redacted) public judgment makes it clear that the judge was persuaded by the fact that neither party would be disadvantaged by the hearing of the evidence in private, and that the allegations discussed were likely to be 'of a different order to what has been made public so far'.[3]

The parties will, however, be expected to consider whether the necessary protection can be provided using less draconian methods. There are a variety of options available to the courts – some of which are set out in the Master of the Rolls' *Practice Guidance on Interim Non-Disclosure Orders*[4] – and include: anonymising the names of one or both parties;[5] imposing reporting restrictions; requiring submissions to be redacted before being provided to the press;[6] restricting access to the publicly available documents on the court file;[7] directing that the hearing is not recorded; or recording terms of any settlement in a Tomlin order.

1 CPR, r 39.2(1); *Scott v Scott* [1912] AC 417.
2 Master of the Rolls' Practice Guidance, citing *Abrosiadou v Coward* [2011] EWCA Civ 409 at [50]–[54].
3 Ibid at [11].
4 [2012] 1 WLR 1003.
5 CPR r 39.2(4).
6 See eg, *GUH v KYT* [2021] EWHC 1854 (QB) at [17].
7 Ibid.

Certain factors are likely to be material when domestic abuse claims form the backdrop of an application to derogate from open justice in civil cases:

(1) Where the purpose of the proceedings is to prevent publication of information about a claimant which is plainly private or confidential, courts are generally ready to grant orders conferring anonymity on the claimant. This is to ensure that the purpose of the proceedings is not undermined by the process of litigation: see *JIH v News Group Newspapers* [2011] EWCA Civ 42. As a result, as Nicklin J explained in *Khan v Khan* [2018] EWHC 241 (QB) at [89]:

> 'There are very few privacy claims, in which interim injunctions are sought to prevent disclosure, where the parties are named.'

(2) Alleged victims of sexual abuse are afforded lifelong anonymity under s 1 of the Sexual Offences (Amendment) Act 1992. Where this applies, the threshold for a derogation from open justice is likely to be met. In *Depp* however s 1 of the Sexual Offences (Amendment) Act 1992 did not apply, as the alleged offences had been committed overseas.

(3) The status in the proceedings of the person sought to be protected by the derogation is also relevant. A party who brings proceedings may have a weak claim to privacy measures since s/he may be deemed to accept that publicity is the price to be paid for bringing proceedings. A defendant to a civil claim rarely chooses to be sued, so may have a stronger claim to anonymity, although sometimes will prefer to be identified so as to be able to clear his or her name once proceedings have concluded. Witnesses may have a stronger claim to privacy measures. As Lord Woolf MR stated in *R v The Legal Aid Board ex p Kaim Todner* [1999] QB 966 at [8], a witness with no interest in the proceedings has:

> 'the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation.'

(4) Where blackmail is alleged, the alleged victim (who is often the claimant in civil proceedings) will have a strong claim to anonymity: *LJY v Persons Unknown* [2017] EWHC 3230 (QB).

(5) The stage proceedings have reached is a relevant factor. Courts on occasion grant anonymity to respondents to injunctions who have not had an opportunity to put their side of the case: *NPV v QEL* [2018] EWHC 703 (QB) at [17].

(6) The degree of sensitivity of the allegations will also be material. The more intrusive and private the allegations, the more likely a court will grant privacy measures.

(7) Derogations from the general rule are more likely to be granted in civil proceedings where necessary to protect the identity of parties in parallel related (private) family proceedings. For example, an application for anonymity and to seal the court file was granted in *BHX v GRX* [2021] EWHC 770 (QB), a civil claim issued in libel, misuse of private information, harassment and malicious falsehood concerning allegations of sexual assault and paedophilia. Master McCloud ordered that the parties be anonymised to protect the identity of parties to related family proceedings concerning the defendants' two children and their relationship with the claimant. Further, the allegations potentially engaged the alleged victim's rights to lifelong anonymity s 1 of the Sexual Offences (Amendment) Act 1992.

(8) Where there are parallel criminal proceedings, a reporting restriction may be warranted under s 4(2) of the Contempt of Court Act 1981 to prevent a substantial risk of prejudice to the administration of justice in those proceedings. However, this measure will

> operate to postpone, and not permanently injunct, reporting of the proceedings.[8]

Historically, applications for anonymity brought solely to protect the identity of the alleged abuser would be almost certain to fail, following the long line of case law to the effect that there is no confidence in the disclosure of iniquity.[9] However, this principle has been eroded in the recent case *ZXC v Bloomberg* [2022] UKSC 5. The Supreme Court held that the fact of being under investigation by a law enforcement body was information over which a person has a reasonable expectation of privacy. *ZXC* was not a case in which the open justice principle arose for consideration, and the court made clear that any expectation of privacy will evaporate once charges are brought. However, the case potentially provides scope for those identified in proceedings as being under investigation for criminal offences to seek derogations from open justice.

Family proceedings

The position in the family courts in England and Wales, at least in so far as proceedings concerning children are concerned, is fundamentally different. Almost all family proceedings are held in private with only certain third parties be permitted to attend – including duly accredited members of the press.[10] Further, s 97 of the Children's Act 1989 and s 12 of the Administration of Justice Act 1960 have the combined effect of restricting almost all publicity in cases concerning children. Accusations of domestic abuse made during such cases can therefore seldom be reported unless the court gives permission.

A recent example of where permission has been given is *Al Maktoum v Al Husein* [2020] EWCA Civ 283. The decision permitted the publication of serious allegations of abusive behaviour by the father (the Ruler of the Emirate of Dubai), namely, intimidation and harassment of the mother (Her Royal Highness Princess Haya bint Husein). Unusually in that case, the glare of publicity was held to serve as a protective shield for the mother and the children subject to the proceedings, and worked to promote their Art 8 rights, whilst also serving the Art 10 interests of the press. A perhaps more widely applicable factor – the father's sense of intrusion into his private and personal matters – was not sufficient to outweigh these interests, as it was said to be suffered by every litigant in such findings of fact hearings.

The position in family proceedings which do not concern children is different. The question as to whether the law permits unfettered reporting of such proceedings is complex; in a series of recent cases Mostyn J held that there is no restraint on reporting financial remedy proceedings since the 'implied undertaking' as to the confidentiality of information disclosed under compulsion does not operate on members of the press who lawfully attend such cases: see *Xanthopolous v Rakshina* [2022] EWFC 30. Given that his conclusions are at least arguably at odds with previous Court of Appeal authority[11] they remain controversial.

Reform is afoot in family cases. The President of the Family Division's Transparency Pilot,[12] which applies only in Leeds, Cardiff and Carlisle, requires the court to consider whether a 'Transparency Order' should be made whenever a 'pilot reporter' (accredited reporter) attends a hearing concerning the Children Act 1989, Parts II or IV, placement order and certain other child welfare proceedings. Such orders permit reporting of the case, save for any information that would identify a child and notably 'in cases involving alleged sexual abuse, the details of such alleged abuse'. The exception does not, however, state that the abuse must involve the child, and therefore

8 *R (Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434.
9 *Gartside v Outram* (1856) 26 LJ CH 113.
10 FPR, rr 27.10 and 27.11
11 *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315; [2011] 1 FLR 1427.
12 www.judiciary.uk/wp-content/uploads/2022/12/TIG.Pilot_.Guidance-and-TO.Approved1.pdf.

arguably covers any allegations of domestic abuse as between the caregivers, for example.

Criminal proceedings

By contrast with the family courts, criminal courts in England and Wales almost always sit in public.

Certain statutory derogations from open justice apply in criminal courts. They include: the above-mentioned lifelong anonymity for victims of sexual offences (s 1 of the Sexual Offences (Amendment) Act 1992); and the prohibition on reporting the identity of defendants appearing in the youth court (s 49 of the Children and Young Persons Act 1933), all of which apply automatically.

Other restrictions require a specific order, such as the prohibition on reporting the identity of any child or young person appearing in the magistrates' court or Crown Court as a victim, witness or defendant (s 45 of the Youth Justice and Criminal Evidence Act 1999); and the power to prohibit reporting of a name or other specific matter (s 11 of the Contempt of Court Act 1981) where that matter has been lawfully withheld from the public. However, the CPS emphasises that this latter power is to be used sparingly and with defined terms and duration, as the CPS guidance[13] states:

> 'Section 11 is not enacted for the comfort and feelings of defendants (*Evesham Justices ex p McDonagh* [1988] QB 553).'

The criminal courts remain slow to curtail open justice reporting without strong justification. The clearest statement of the weight afforded to the open justice principle in the criminal courts is found in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, where Lord Steyn identified 'the general rule' that 'the press, as the watchdog of the public may report everything that takes place in a criminal court', adding that 'in European and in domestic practice, this is a strong rule. It can only be displaced by unusual or exceptional circumstances'.[14]

As stated in *Khuja v Times Newspapers* [2017] UKSC 49 at [34(2)], publicity for litigants may be embarrassing for those involved but 'the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public'.

Khuja was a particularly stark example of the open justice principle in play. Mr Khuja had been arrested as part of a child sexual exploitation operation but released without charge. He was subsequently named as a perpetrator of abuse by a witness at trial. He was not a witness at trial and so was not given any opportunity in court to answer the allegations, which he strongly denied. He failed to obtain an injunction preventing reports of the case identifying him as an alleged abuser.

Despite both *Khuja* and *ZXC* being applications to restrain the disclosure of the identities of those subject to criminal investigations, they were different in one key aspect: Mr Khuja had been named in open court by the time he brought his application for an injunction. Therefore, his application engaged the rights of the press and associated interests in free reporting of judicial proceedings, and this was a decisive factor in the decision to permit the reporting of Mr Khuja's identity. The information in *ZXC* had, however, not been made public through judicial proceedings and therefore retained its privacy. The distinction is an important one and serves as a sage warning to act fast when seeking derogations: once the cat is out of the bag it will be very much more difficult to obtain an injunction restraining publicity.

Conclusion

Those representing litigants wishing to protect certain information or their own

13 www.cps.gov.uk/legal-guidance/contempt-court-reporting-restrictions-and-restrictions-public-access-hearings.
14 *Re S* at [18].

identities should consider the relevant forum's approach to transparency and use it to inform strategy decisions from an early stage. Regardless of the forum, courts are united in their reluctance to adopt measures which restrict open justice, and litigants should be alive to this.

Adam Wolanski KC acted for the successful defendant in Depp v News Group Newspapers *and has appeared in a number of cases concerning publicity in legal proceedings, including* Khuja v TNL *and* Lykiardopulo v Lykiardopulo.

Lily Walker-Parr recently appeared for the partially successful appellant in Hinduja v Hinduja & Others *[2022] EWCA Civ 1492, an appeal brought against a decision to lift all reporting restrictions in the Court of Protection.*