Neutral Citation Number [2006] EWHC 107 (QB)

Case No: HQ02X02160

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2006

**Before** :

**MR JUSTICE TUGENDHAT**

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**Between :**

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| **MERSEY CARE NHS TRUST** | **Claimant** |
| **- and -** | |
| **ROBIN ACKROYD** | **Defendant** |

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**Mr Vincent Nelson QC & Mr Jonathan Bellamy** (instructed by **Capsticks**) for the **Claimant**
**Mr Gavin Millar QC & Mr Anthony Hudson** (instructed by **Thompsons**) for the **Defendant**

Hearing dates: January 17th – 20th, 23rd &25th 2006

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# Approved Judgment

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

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MR JUSTICE TUGENDHAT

## Mr Justice Tugendhat:

INTRODUCTION

1. In this trial the Claimant applies for an order against the Defendant journalist that he disclose his source for information he obtained about Ian Brady in November 1999. In particular what is sought is an order that he explain how he came into possession of medical records kept by the Claimant, and that he identify any persons involved in his acquiring them, including any employee of the Claimant. Some information from these records was published on 2nd December 1999 in the Mirror newspaper in an article attributed to Gary Jones. The Defendant provided the information and a draft article to him. The claim originally included applications for other relief, including delivery up of the records, an injunction to restrain further publication, and an inquiry as to damages for breach of confidence or an account of profits. None of these other claims were pursued at the trial. The Claimant obtained a disclosure order against Mirror Group Newspapers Ltd ("MGN") following a trial in April 2000. That order was affirmed on appeal to the Court of Appeal and to the House of Lords. As a result the Defendant was identified as an intermediate source and this action was commenced against him.

2. The Claimant, Mersey Care NHS Trust, succeeded to Ashworth Hospital Authority on 1st January 2002. In 1999 Ashworth Hospital was, as it is now, a secure hospital provided by the Secretary of State for Health under the National Health Services Act 1977 for persons subject to detention under the Mental Health Act 1983 who require treatment under conditions of special security on account of their dangerous, violent or criminal propensities. I shall refer to it as the hospital.

3. The Defendant is, and was in 1999, a freelance investigative journalist. He has been writing articles for national and regional newspapers for more than sixteen years. For most of this time he has specialised in the areas of crime policing and punishment, including the treatment of serious offenders in prisons and high security hospitals.

4. Ian Brady was in 1999, and still is, an inmate of the hospital. He is notorious as one of the "Moors Murderers" convicted in 1966. He and Myra Hindley were sentenced to life imprisonment for the murders of John Kilbride (12), Lesley Ann Downey (10) and Edward Evans (17). They were later also convicted of the murders of Pauline Reade (16) and Keith Bennett (12). At first he was in prison. In 1985, when his mental illness was diagnosed, he was transferred to the hospital under the Mental Health Act. While at the hospital he was at Newman Ward for the first ten years. In 1995 he was moved to the then newly opened Jade Ward in the hospital's secure east site.

30th SEPTEMBER TO 28TH OCTOBER 1999

5. On 30th September 1999 Ian Brady was moved to Lawrence Ward, in the hospital's north secure site. The move was made by force, and from his arrival in Lawrence Ward he has refused to eat, or take any nutritional drink. This is a protest. He immediately complained to his solicitors that he had been assaulted. He spoke to them by phone at 1615 hrs that day. The hospital called in the police to investigate the complaint, and arranged for an internal investigation, and for there to be a hearing of the complaint, which was subsequently conducted by Professor Sines. He is Executive

Dean of South Bank University, Faculty of Health and Social Care. He is also a Fellow of the Royal College of Nursing. In November 1999 he was Professor of Community Health Care and Nursing and Dean of the Faculty of Health at South Bank University.

6. At 7.15pm on 30th September 1999 there started a period of intense media activity. At that time the press first contacted Ms Anderson. She was the Director of Communications at Ashworth, and had been since November 1998. She became Associate Director of Communications on 1st April 2001 and ceased to work at the hospital on 31 March 2004. She called it a torrent. It appeared to her that the media had a very well informed source, who had detailed information about Ian Brady's ward move, and linked it to a recent security alert. In her evidence at the trial of the action against MGN she had said that she felt the source was very close to the patient. The recent security alert had concerned the finding on his ward of an object, capable of being used as a knife. This had been the subject of an article in the Mirror by Gary Jones on 23 September 1999. Ms Anderson was in constant contact with journalists, and she issued some twelve press releases drafted in consultation with Dr Collins, the Chief Executive, Mr Clarke, the Medical Director Dr Diane Jones, and on at least one occasion with lawyers as well. Dr Collins took over as the Responsible Medical Officer (RMO) for Ian Brady on Ian Brady's arrival at Lawrence Ward. Dr Rajan had been the RMO on Jade Ward. The first press release was dated 30th September 1999, the last in the series being 11th January 2000.

7. On 2nd October 1999 the hospital issued a press statement. It stated that Ian Brady "has exercised his right to refuse permission for the hospital to disclose any clinical details about him… the hospital has no grounds for concern about this patient". However, in the following weeks a considerable amount of information did appear in the media from unidentified sources, and Ian Brady did himself make details of his clinical condition public by letters to the news media which were published by them.

8. The story broke on Sunday 3rd October 1999. The News of the World published an article headed "Evil Brady Starving Himself to Death". The article reported that "The evil child killer has refused all food or water and medical treatment for a broken wrist since being removed from his cushy ward at Merseyside's Top Security Ashworth Hospital on Thursday". Included in the article are three quotations, the first two from an unnamed source, and the third from Ms Anderson, the Director of Communications of the hospital. The third quotation is the hospital's press release. The other quotations are as follows:

> "Last night a hospital insider said: "If he continues he will be dead in a week. This is the end for Brady. He is prepared to die"…. The hospital source said "staff swooped on Brady with no warning and separated him from the patients he knew. It has caused huge problems the hospital is now in chaos"".

9. On 5th October the hospital issued another press release. It stated that on Monday 4th October Ian Brady had been interviewed by the police in the presence of his solicitors. It added that the police were investigating a complaint by Ian Brady that excessive force was used in moving him between wards on 30th September 1999, and that his official complaint to the hospital would be investigated in the normal way once the outcome of the police investigation was known.

10. On 10th October 1999 the Sunday Mirror published an article headed "Moors Killer Brady to Sue for Damages". The article includes the following:

> "Moors murderer Ian Brady is planning to sue a mental hospital for a "five figure sum" after a scuffle with nurses. The child killer claims he suffered a fractured wrist as a result of six staff grappling with him while he was being transferred from his room. His planned court action, which will be funded by legal aid, has outraged the families of his victims… Four days later he made a statement to police demanding that one of the male nurses who handled him be charged with causing actual bodily harm. The hospital describes Brady's injury as "a chipped bone". They argue that he was accidentally injured because he resisted attempts to take him out of his room. Last night an insider said the killer was determined to sue regardless of the outcome of the police probe. "Brady is devious and after financial gain. Because he has made an official complaint, the police have to send a file to the Crown Prosecution Service or he would cry foul. You can see he is playing clever with the aim of dragging the hospital through the civil courts. He has the upper hand. But even if he is awarded a payout, there are only so many Mars bars and packets of cigarettes he can buy at Ashworth. "

11. On 11th October 1999 Ian Brady wrote a letter, parts of which were quoted in an article in the Mirror on 19th October. It includes the following clinical information:

> "I have had eight x-rays on my wrist but the bruising was too severe and swollen to ascertain the damage".

12. An extract from a letter dated 15th October 1999 to the BBC (as subsequently published on their website on 30th October) reads:

> "Here are the facts. On the morning of 30 September I was sitting on my bed, writing legal notes, door wide open when a crowd of warders rushed in dressed in riot gear, visored crash helmets and plastic shields.
>
> Without explanation my arms were wrenched violently up my back, fracturing a bone in my wrist, and my head held down to the floor.
>
> I was then dragged into an empty cell and always pinioned in the same position, stripped and searched. Again always violently pinioned I was eventually dragged into a van and transported to a ward. The unprovoked attack by the riot-gear prison warders continued for over an hour. My solicitors brought in the police to lay charges against the warders and are suing the hospital regime and taking action through other multiple channels.

> In reaction to the unprovoked attack I stopped eating on 30 September, drinking only milkless, sugarless tea-coffee, and am still doing at present. In my thirty five years of captivity I have never touched a prison official or warder.
>
> As the riot gear warders dragged me round I repeatedly said I could walk, but was completely ignored.
>
> Obviously the whole unprovoked attack was meant to suggest violence on my part, and, second to impress or intimidate – which it has failed to do. I had to wait ten days before I could write legibly.
>
> I've had a splint on my wrist for the past fifteen days but it still aches. Multiple x-rays fail to ascertain bone damage as the wrist was too severely bruised and swollen for x-rays to penetrate.
>
> Recent further x-rays revealed a cracked bone. A consultant from outside said I should have a plaster cast, but nothing was done. I've still been given no explanation whatsoever.

13. On Monday 18th October 1999 the hospital issued another press release. It included the statement that Merseyside Police were investigating his complaint of assault, and that his official complaint to the hospital was being investigated in the normal way. Between 15th and 25th October Ian Brady wrote a number of letters to the media. On 18th October 1999 the BBC News published information about Brady which appeared on their website under the heading "Moors Murderer Refusing Food". It reads as follows:

> "Moors murderer Ian Brady is refusing food at Ashworth top security psychiatric hospital, it has been confirmed.
>
> Brady, 61, has refused all solid food for eighteen days at the Merseyside hospital, taking only tea and coffee with artificial sweeteners.
>
> Staff say he is being monitored regularly and there is no immediate fear for his health…
>
> In an open letter to his solicitors, Brady alleges rough treatment by staff during the move.
>
> He said he was strip searched and pinned down for over an hour in an assault which he suffered a badly swollen wrist.
>
> He also alleges he could not write for ten days because of injuries he suffered when his arms were violently twisted up his back.
>
> Officials at Ashworth hospital are conducting an investigation into the matter.

> A statement said: "As Ian Brady himself has chosen to make details of his clinical condition public, Ashworth hospital can confirm that he has not eaten since 30 September 1999 but that he has been taking plenty of sweetened hot drinks. Obviously he is monitored regularly but there are no grounds for concern about his condition. External medical consultants have examined his wrist and their opinion has been reassuring".
>
> A spokesman for Merseyside police said:
>
> "Investigations are continuing but they are still in the early stages". …"

14. Extracts from Ian Brady's other letters were published by the BBC on their website on 30th October. They read

> 21 October
>
> I am still drinking sugarless, milkless tea and coffee eating nothing since 30 September. They are systematically isolating me from the outside world and have been doing so for the past 18 months – no visits at all except solicitor and QC.
>
> 23 October
>
> I still haven't access to my main stationery – A4 blue carbon paper, or blank envelopes, stamps and pens. The riot squad prison warders trashed my room for four hours after I was dragged over to the ward.
>
> If they sought to intimidate the oppressed population of this hospital by making an example of me, they have failed in that as well – several patients, including a woman, are now on hunger strike in this "hospital".
>
> I am still only drinking sugarless, milkless tea since 30 September. Many consultants have seen me. They now want blood samples everyday, my arms being now black and blue. As you can see, I am still functioning perfectly mentally, despite the multi trauma of malicious events and noise.
>
> 25 October
>
> Saw a professor last week – a consultant from outside, which explains why, with good intent, he gave me advice he'd given outsiders. I listened politely, then answered, "I have been in captivity for thirty five years. I shall remain in captivity until I am dead".
>
> Therefore, I am not in the least interested in being kept breathing merely to keep an ever increasing, overmanned army of prison warders in lucrative unemployment.

> What my life now boils down to is, I am a cottage industry, a gold mine for prison warders and that is all they are interested in. The authorities here, by starting this circus, by deliberately planning an unprovoked attack on me by riot gear thugs for over an hour, are now intent for punishing me for having my wrist broken, calling the police to lay charges, and having legal action taken against this corrupt regime. The questions I have put to my (solicitor) today: Can an injunction be taken out to stop the "medical" interference now being imposed on me in an oblique attempt to make me resume eating? Or can a question be put in the House to similar effect?
>
> This morning I posted seven lengthy letters – sufficient evidence that I am still functioning perfectly, despite circumstances".

## 29TH OCTOBER TO 2ND DECEMBER

15. On Friday 29th October 1999 the hospital commenced to feed him by force, through a nasograstric tube, which was inserted that day at the medical centre. He has continued to be fed in this way ever since. Ian Brady complained of ill treatment in the insertion of the tube, and then in the first feed. His complaints were that the tube was inserted without the use of an anaesthetic gel, that it was not correctly inserted at the first attempt, that he was mocked by one of those who were in attendance at the procedure (who allegedly made a gagging noise), and that when he was back on his ward, the first feed to be put through the tube was cold, being straight from the fridge, when it should have been at room temperature. These complaints were also made by him publicly through the media, as set out below. On the same day, 29th October 1999, the hospital issued a two page press release explaining the decision to re-feed Ian Brady that had been implemented that day.

16. On 29th October 1999 the BBC News published a further story headed "Moors Murderer Brady Force Fed". The website includes the following:

> "Staff at Ashworth secure hospital on Merseyside have begun force feeding moors murderer Ian Brady a month into his hunger strike. Brady, who has served more than 30 years in jail and psychiatric hospital for his crimes, says his human rights are being infringed.
>
> He began his hunger strike as a protest against conditions in the hospital after he was moved to a high security wing, following a review on 30th September.
>
> His solicitor Robin Makin told BBC News 24 that Brady wanted to take legal action against a potential breach of human rights.
>
> He said: "The critical issue is this: do the authorities have the right to force feed somebody who does not want to be forcibly

> fed – even if that means they die? Certainly if he was still in prison there would be no question of force feeding him."
>
> He added he is very against what is being done to him and wishes to take whatever steps can be taken:
>
> 'Risks increasing'
>
> Managers at Ashworth hospital said in a statement: 'Ian Brady has also been assessed by external clinicians and it is now the opinion of both Ashworth clinicians and external clinicians that the risks involved will become greater the longer he refuses his food'.
>
> The hospital said Brady was told he could either agree to start taking nourishing drinks or he could refuse to take nourishment, in which case a programme of re-feeding would begin.
>
> Brady decided not to take nourishment conventionally, and therefore a programme of feeding had begun on Friday, the hospital said.
>
> Doctors are feeding him through a fine tube passed up his nose and down into his stomach.
>
> The hospital added: 'The patient's well-being is given top priority throughout the process and both the patients physical and mental health is constantly monitored'.
>
> Brady said he was strip searched and pinned down for over an hour during a recent move to the high security wing. He says he suffered a badly swollen wrist.
>
> Officials at Ashworth hospital are conducting an investigation into the matter.
>
> Although he had refused food since 30 September he was taking regular sweetened hot drinks…"

17. On 2nd November 1999 Ian Brady published his complaints about his re-feeding in a letter to the BBC. On 16th November the BBC website included the following extracts, containing clinical details:

> "On 29th Oct they started force-feeding me, threatening violence if I resisted. Next my 'doctor' wanted blood samples, again threatening violence if I resisted. They took three attempts and three x-rays simply to insert the tube up my nose and down my throat. The first attempt went into my duodenal. I've now had the tube in my nose and throat five days – helping me lose what little sleep I get. They syringed freezing fluids

> straight from the fridge into my stomach and I've been wearing an overcoat to keep warm ever since".

18. On 4th November 1999 a press statement from the hospital confirmed that Ian Brady had complained of assault immediately after the move on 30th September and the police were currently investigating his allegation. It also confirmed that he had made a complaint to the hospital via the NHS Complaints Procedure, and, in order to investigate it, the hospital had requested the details from Ian Brady's solicitor. It stated that the hospital had initially approached Professor Kevin Gournay to conduct this investigation, but that, it was agreed with him, that as a result of his previous involvement with the hospital, it would be more appropriate for him to withdraw, as he might not be seen as sufficiently independent. The press release concluded that Professor David Sines had agreed to replace Professor Gournay and that he would conduct the investigation the next week.

19. On 9th November 1999 Ian Brady's then solicitors wrote to the Chief Executive of the Mental Health Act Commission. They considered that the investigation by Prof Sines should be authorised by the Commission, not the hospital. They said that the force feeding needed to be investigated as well as the assault. They continued:

> "There are other issues which, also, need to be investigated including the delay in releasing Mr Stewart Brady's records notwithstanding the serious concerns about inaccuracies in those records and Ashworth's media comments (including Mr Clarke appearing on television). Ashworth's own guidelines make it clear that they will not release any confidential information about a patient without their consent and Mr Stewart-Brady has not consented to the release of confidential information. Ashworth have been obstructive in us progressing matters and releasing the required information…"

20. On 11th November 1999 the Chief Executive of the Commission responded. He accepted the extension of Prof Sines' terms of reference to cover the force feeding, but did not otherwise agree.

21. On 30th November 1999 Prof Sines completed the first version of his Report. I have not seen the first version. The second version runs to 56 pages. It relates to the complaints both about the transfer to Lawrence Ward and to the re-feeding. It is provided in confidence for the purpose of these proceedings. For the purpose of the report, Prof Sines had conducted interviews, including with Ian Brady, his legal representatives and advocates, with staff and managers, and had scrutinised and analysed Ian Brady's patient and clinical records. To facilitate his task, he had been provided with two support staff selected by himself from the hospital.

22. The first version of the Sines Report contained certain passages omitted from the second version, for reasons of confidentiality, at the request of Mr Clarke, the Acting Chief Executive of the hospital. The request was made by letter dated 7th December 1999, which acknowledged receipt of the Report. By that time the Regional Office and the Mental Health Act Commission already had copies of the first version (referred to in the letter as the 'current draft').

23. On 2nd December 1999 the Mirror published the article on Ian Brady which has given rise to these proceedings. They did so using information provided by the Defendant in printed form which had been derived from records kept electronically by the hospital. These records are produced on a computer database known as "Patient Administrative and Clinical Information Service", or PACIS. They are printed out for various purposes. It will be necessary to refer to them in more detail below.

24. The article in the Mirror is spread over one column on page 4 and the whole of page 5. Half of page 5 is a photograph of Ian Brady next to the title "DEATH WISH DIARY - Hunger Strike Brady is determined to die". I have compared the article with the original PACIS (as printed out in March 2002). These were made available to this court with a request that they be kept private. They were not made available to any of the judges that have heard this case before the last hearing in the Court of Appeal in May 2003. The square brackets show where the quotation omits passages from the original, or misquotes it. The article includes the following:

> "Brady's desperation to die is revealed in a confidential 'diary' of his deteriorating condition kept by the authorities at Merseyside's Ashworth Hospital …
>
> It discloses how he told staff charged with keeping him alive 'One way or another I will get away from this place [This is a quotation from the notes for 29th October]… f***** screws [This is a quotation from the notes for 28th October], f*** all of you [This is not a quotation from the notes, but may be misquotation from the notes for 26th October]'.
>
> Asked for a blood sample, replied: 'They can take the lot'. [This is a quotation from the notes for 24th October] Once he told of his wish that he had killed himself when arrested more than 30 years ago [This is a paraphrase of the notes for 5th October].
>
> … The search took place on September 30. By tea time, he was observed by two members of staff around the clock and nurses were warned he could be a suicide risk.
>
> The diary starts the following day:
>
> October 1
>
> 'His only communication with nursing staff has been to philosophise on his current position and his perception that he is being mistreated. Stated: 'I have nothing so say that cannot be resolved by the courts. […] All dietary intake has been refused. […] Weighed at 13st 7lb…"

25. The article continues in the same vein with extracts from the documents covering a few lines of the column for a selection of days: 4, 5, 6, 7, 18, 19, 20, 21, 24, 26, 27 and 28 October (those for 7th to 24th October are set out in the Court of Appeal judgment in the MGN case at para 10). The quotations are mainly of what members of

staff, or Dr Collins, observed about Ian Brady's physical and psychological state, and what he was doing, but include occasional quotations of what he had said to them (the entries in the complete notes are not confined to those made by nurses and doctors). The longest extract from the so-called 'diary' (the PACIS notes) is for 28th October. It reads:

> "Dr Collins informed patient within next 24 hours he would be given four documents containing following information with [regard re-feeding] […] Dr Collins requests nursing staff to monitor and record accurately […] changes in physical, behavioural and psychological condition. […] Brady appeared to be more agitated and tense than earlier. […] Attempts to discuss any problems with staff met with ignorance [and] appeared angry/agitated. […] Began briskly pacing up and down day area for […] 15 minutes. Also […] heard muttering 'f***ing screws'. […] He reiterated he saw the hospital as having deteriorated and now being little, if at all, different to a prison. […] He point out the hospital had moved him to the most notorious ward'".

26. There then follows 35 lines of the newspaper column which are not derived from the PACIS notes. There is one passage which includes a reference to the tube not being inserted correctly at the first attempt, but then goes on to a point that does not correspond to anything else in the documents or evidence, and is inconsistent with Ian Brady's complaint that no anaesthetic gel was used. It reads:

> "Nurses struggled twice to insert the plastic tube in his nose, before a doctor was called and told them to use anaesthetic gel to make the process less painful".

27. There are also included in this passage two other complaints that Ian Brady did make:

> "The liquid came straight from a fridge, rather than being warmed to room temperature. And as the tube was being pushed down Brady's throat a manager mocked him by making gagging and gurgling noises, an independent inquiry into the treatment was told".

28. This indicates that one of the Defendant's sources had access to information about what Prof Sines was told, although not necessarily the source who disclosed the notes. There then follows a passage which is again a quotation from the 'diary' although that fact is not clear, because it refers to it as 'the report' (square brackets again indicate where comparison with the print out given to the court shows omissions in the article):

> "Brady claims he was mistreated and is determined to seek 'justice'. All that was said in the report was: 'The tube was inserted […] An X-ray confirmed that it was appropriately placed […] Mr Brady was clearly expecting at some level that something along those lines would take place and took it all in a resigned fashion. He was courteous throughout …"

29. The article then continues, and in this passage the word 'report' refers to Professor Sines' report:

> "The report into Brady's allegations, by Professor David Sines of South Bank University was delivered to the Health Department yesterday".

THE CONTENTS OF THE PACIS NOTES AND SINES REPORT

30. Ian Brady's solicitors' letter of 9th November 1999 alleged that there were serious concerns about the accuracy of the hospital's records. This issue was explored at the trial. It is relevant to the issue of the purpose which the source might have had, and any justification he or she might have had for disclosing extracts from them.

31. As already mentioned, the court was provided by the hospital with copies of the Sines Report and a print out of the PACIS notes made in March 2002 for the days 30th September to 31st October 1999. These cover about 21 pages in small print. Only a fraction of this, of the order of 5%, is reproduced in the Mirror article. During the course of the hearing the defendant also provided me with a bundle of contemporaneous documents including a witness statement by Ian Brady dated 26th October 1999 relating to the ward transfer, a statement given to the Merseyside Police dated 11th November 1999 about the insertion of the nasogastric tube, a medical report dated 8th December 1999 from a Consultant Orthopaedic surgeon on the wrist and a record of the hospital's Post Incident Review conducted on 15th October 1999 on the ward transfer.

32. Professor Sines was told about both the feed coming from the fridge and the allegation of mocking. The complaint about the fridge was never in dispute (the staff acknowledged they had made a mistake by not warming the first feed). Professor Sines upheld it. The complaint about the mocking was made too, but was not upheld by, Professor Sines. The PACIS notes include no reference to either of these complaints. Nor do they include any reference to Ian Brady's complaint about the omission to use anaesthetic gel. That complaint was considered by Professor Sines, who records that all persons present at the procedure confirmed this complaint to be correct. Nor is there any dispute about the fact that the tube was not correctly positioned at the first attempt. But Professor Sines adds that Ian Brady had advised that he did not believe that the nurse involved would intentionally seek to inflict any unnecessary pain on him.

33. There is another matter not mentioned in the PACIS notes. The Notes for 30th September (as made available to this court) do not contain any description of the move from Jade Ward. There is no more than a one line entry recording that he was removed by a Control and Restraint Team under supervision of named managers. There is nothing in the notes to explain why he called his solicitors on 30th September (that he did call them is recorded) or what he meant by the words quoted in the article: "his perception that he is being mistreated. Stated: 'I have nothing to say that cannot be resolved by the courts'". According to the article, the 'diary' in the form available to the Mirror 'starts the following day', that is 1st October.

34. The PACIS notes as made available to the court do contain certain references relating to Ian Brady's wrist. They are entered on 1st October, and timed after the words

quoted in the article. They refer to Ian Brady complaining of a pain in his right wrist, and of his wrist being examined and x-rayed and looked at by an orthopaedic consultant. It is recorded that the consultant's view was that it was unlikely that the wrist was fractured (there are a number of subsequent entries on whether it was a fracture or not). It is immediately following this entry on 1st October that there appears the entry which formed the subject of the press release by the hospital on 2nd October (referred to in para 7 above), namely:

> "Mr Brady said that if the hospital were to be contacted and the issue of any injury raised then he would prefer that a 'no comment' was given to the press – he had no wish for the hospital to reveal details of this aspect of his case'".

35. It is not until a PACIS note dated 4th October that there is an entry by a nurse explaining Ian Brady's complaint about his wrist. That entry records his being interviewed by police in the presence of his solicitors. It reads:

> "Ian has made it known that he believes his apparent wrist injury was a direct result of the intervention of the C&R team…"

36. There is an entry on 6th October by Dr Collins which records what Ian Brady said to Dr Collins about the ward transfer on 30th October. It is a brief summary of part of what Ian Brady wrote in his letter of 15th October quoted in para 12 above. That was Dr Collins' second entry in the notes. He put that in because, he said, there are 'always two sides to a story'. But the hospital's side of the story is not in the notes. Dr Collins' first entry, on 1st October, mentions that Ian Brady said he would be raising issues about the nature of his move through his solicitor, but is otherwise a description of Ian Brady's condition. Dr Collins accepted that the PACIS notes for 30th September 1999 do not do the move justice. His view from the start was that the move was what he called 'heavy handed'. He agreed the notes were inadequate on this point in omitting a description. Whoever saw the move should have made an entry about it (Dr Collins had not been involved in the move himself). This should have contained the essentials of what Professor Sines found to have occurred. Dr Collins did not ask at the time why the notes were incomplete, although with hindsight he said he should have done. His priority at the time was how to make Ian Brady start eating again.

37. Dr Collins was also asked about the PACIS notes for the intubation on 29th October 1999. He did not consider that these did omit anything that happened and that should have been recorded. The allegation of mocking was false, although it may have been a misunderstanding of a demonstration. And in his view the intubation passed in a proper way. He regarded the points about the anaesthetic and the cold first feed to be minor. The problem about the cold feed had been brought to his attention promptly, but had already been addressed by the nurses. He thought Ian Brady was by this time willing to use any lever to hand in his complaints about the hospital. I accept Dr Collins' evidence as to the notes, and what should have been in them, and what did not need to be in them. But a person who claimed that Ian Brady's complaints about the intubation were all true, and that the two which were upheld were serious complaints, would also claim that the notes were incomplete for failing to record those matters on 29th October.

RESPONSES TO THE LEAK

38. On the same day, 2nd December at 10.30am, the hospital issued a statement saying that the story in the Mirror appeared to be a major breach of patient confidentiality, and that they were consulting the police and lawyers. In an internal Briefing note that day, Ms Anderson reported that the police were investigating. Amongst the matters being checked, she wrote, was whether "the information could have been passed on to the Mirror by the patient or his agent". The hospital pursued inquiries, but has not succeeded in discovering who leaked this information.

39. In the course of those enquiries, on 6th December 1999 solicitors for the hospital wrote to Ian Brady's then solicitors asking if the information contained in the article

> "was released directly, or indirectly, by you or your client or with the approval of your client. Could you also tell us whether you are satisfied that it could not have been released without the consent of you or your client, by someone to whom you have sent your client's medical notes? In this respect, our client would be grateful if you would be willing to provide specific details of those with whom you have shared some or all of the medical records provided to you by our client within the Access to Health Records Act".

40. On the same day Ian Brady's solicitors replied, having taken advice from specialist counsel. They said that

> "The article did not appear with their clients' consent. The patient records published in that article were not released or published with the consent of our client or ourselves and nor were they released by anyone instructed by us. … You will appreciate that Ashworth are most closely connected with the material published and, as a public body, which 'takes very seriously its responsibilities as regards patient confidentiality' it ought to bring proceedings against MGN Ltd without further delay. You will, also, be aware of the need to protect our client's rights under the European Convention on Human Rights (in particular Art 8)… If you consider that our client must be joined in the proceedings please let us know. However, we do not consider that this should hold back your clients in bringing proceedings including, in particular, for an injunction restraining publication of extracts from our client's continuous medical records, without further delay"

41. On 10th December 1999 Mr Clarke, the Acting Chief Executive, wrote to Ian Brady's solicitors enclosing a copy of the second version of the Report on a confidential basis. The letter included four apologies in respect of aspects of the transfer between wards, including for the strain to Ian Brady's wrist. The letter also included apologies for two of Ian Brady's complaints about the re-feeding, namely that the appropriate anaesthetic gel was not used and that the first fluid was given at the incorrect temperature. He did not accept that these matters were other than accidental. This was consistent with the findings of Prof Sines.

42. On 13th and again on 20th December 1999 solicitors for the hospital wrote to the Editor of the Daily Mirror inviting disclosure of the source of the medical records and an undertaking that there would be no further breach of patient confidentiality.

43. On 21st December 1999 solicitors for Ian Brady requested the hospital to institute proceedings against the Mirror without delay. On the same day the Mirror replied declining the hospital's request and stating that the Editor had no immediate plans to return to the subject matter of the article complained of.

44. There then followed legal proceedings, first against the publishers of the Mirror then against the Defendant. Proceedings were first issued on 8th January 2000 and the Particulars of Claim were served on the publishers of the Mirror on 17th January 2000. I shall refer to those proceedings as the MGN case.

45. There were two further leaks relating to Ian Brady which have been referred to in these proceedings. The first of these related to a visit of Ian Brady to Fazakerly hospital on 11th January 2000. The visit had been made by prior arrangement under conditions intended to preserve confidentiality. Mr McCabe was appointed on that same day to investigate the circumstances under which a press photograph was obtained of him. Mr McCabe is a retired Police Chief Superintendent and Vice Chairman of Greater Manchester Ambulance Service NHS Trust. He also investigated a security breach in relation to another patient.

46. The leaks are described in a statement by Mr Clarke dated 28th March 2000 for the purposes of Mr McCabe. Mr Clarke's statement includes the following:

> "This brings us to the recent investigations into an apparent leak to the Daily Mirror of parts of Mr Brady's medical record … and an apparent leak to the Echo of the planned attendance of a Mr Brady at Fazakerley. It is my understanding that the first of these rapidly identified that the numbers of people who could have had access to the relevant medical records made it unrealistic that we could expect to identify a culprit. The investigation has therefore been one which has focussed much more on analysing our current controls environment. I expect the report to identify a far reaching preventive strategy of controls process and information management. In this sense the investigation has become more akin to a post incident review. It is clear that the very serious apparent breach of confidentiality (for which there are credible explanations other than that it was the responsibility of one or more members of staff) has focussed attention on shortcomings which had not previously been fully recognised. The shortcomings have no bearing on the appearance of the material in the media, but warrant attention regardless of that".

47. Mr Clarke did not give evidence. No document, and no witness who did give evidence, has been able to explain what he meant by saying of the publication in the Mirror, that it was an "apparent breach of confidentiality for which there are credible explanations other than that it was the responsibility of one or more members of staff".

48. Mr Clarke then turned to the third leak relating to Ian Brady. This became known on 2nd February 2000 when Prof Sines was contacted by a journalist from the BBC. In that conversation Prof Sines was satisfied that the BBC had sufficient details to satisfy him that the journalist had a copy of his report. On 9th February the BBC Correspondent referred on air to a security concern which had been detailed in the first version of the Report, but which had been omitted from the second version for reasons of confidentiality. The statement includes a list of the small number of persons to whom the first draft had been distributed.

49. There has never been any inquiry into this leak of the Sines Report. In cross-examination Dr Collins accepted that the Report contains significant clinical details about Ian Brady.

50. On 7th March 2000 Mr McCabe delivered a report. He concluded that the Liverpool Echo were informed in advance of the movement operation involving Ian Brady on 11th January. He was unable to identify the source of that leak. His report includes the following:

> "7.3 The motive behind such divulgence, whilst interesting to consider, presents little challenge. Financial gain often creates the incentive to take risks and if one pauses to consider the fact that a current photograph of Ian Stewart Brady has a media value of £40,000 - £50,000, then it is easy to balance the figures against the risks.
>
> 7.4 An additional factor for consideration is that of the individual who may seek to bring discredit on Ashworth Hospital by such publicity. The patient himself makes no secret of his feelings towards the hospital, staff and management. He has a reputation for guile, cunning and manipulation, and can never be discounted from being the architect behind matters of this nature.
>
> 7.5 Furthermore, I have taken account of the PACIS record for 6th January 2000 recording Mr Brady's alleged comment, 'make sure that they think it has not come from me', to his solicitor. The implication behind this is of a future disclosure being made relating to a matter that Mr Brady would not wish to be linked with.
>
> 7.6 This conversation, however, took place at 1214 hours and it was not until 1645 hours that Mr Brady was seen by David McKenna and Dr Collins regarding the treatment consent form. Even then he should not have been aware of the actual time and date of his visit to Fazakerley but one wonders…".

51. Mr McCabe made the following recommendations:

> "(1) A review of access to PACIS records (currently being undertaken by 'Caldicott Enquiry')

> (2) A strategy for a culture change regarding patient confidentiality to be devised and taking account of (a) introduction of a staff Code of Conduct covering confidentiality as priority issue, (b) confidentiality training for staff to be addressed as a matter of urgency including induction training and bank staff training, (c) the question of confidentiality within staff contracts to be urgently considered.
>
> (3) Internal publicity throughout the hospital to be considered aimed towards promoting and protecting patient confidentiality"

52. The hospital's investigation into who was responsible for the disclosure to the Mirror of the information published on 2 December 1999 was conducted by Mr Phil Walker of the NHS Information Policy Unit. He was assisted by the Merseyside Police and the hospital's own management team. There is in the papers an undated report from him copied on 14 April 2000 by Dr Diane James, the Medical Director, to a number of the hospital's senior personnel.

53. The report includes:

> "3. In the event, it proved impossible to establish the source of the disclosure or even to determine whether or not an unlawful breach of confidence had in fact occurred… The Ashworth management team were faced with an impossible task as the existing procedures allowed relatively unregulated access to the records in question by a surprising number of staff. My colleagues and I have little confidence that at the time of the disclosure, it would have been possible to establish anything like a comprehensive list of those having access.
>
> 4. A number of weeks elapsed, including the Christmas period, between the publication of the Mirror article and the start of my work at Ashworth. Whilst this delay inevitably closed down a number of technical avenues that might have been checked in the hours following the incident, it was unavoidable given the decision to seek outside help. It would be wrong to overstate the importance of this missed opportunity – in my view it is unlikely that the limited audit that might have been possible would have proved productive…
>
> 7. … whilst the present … (PACIS) in use at Ashworth is unsatisfactory, it has many redeeming features in terms of clinical and administrative functionality. Rather than focus on the failings of PACIS, it is perhaps more relevant to consider the equally unsatisfactory standards that apply to the handling of paper records and reflect on Ashworth's overall approach to confidentiality and IM&T security…
>
> 8. …in contrast to physical security, information security has received little attention and responsibility is diffuse and ill

defined. The two types of security overlap to some extent, but there was little evidence that the existing physical procedures would readily detect computer media e.g. floppy disks, as potential security risks…

10. … access controls and audit procedures were neglected.

11. In the months prior to the apparent unauthorised disclosure of information that resulted in the Daily Mirror article on 2 December 1999, the IT staff charged with the implementation of the PACIS system, had concentrated on the key aspects of bedding the system in and delivering the functionality demanded by the various staff/user groups. … the suppliers of the PACIS system, were clear that enhanced information security had always been an option, albeit at a cost in terms of system performance, but the PACIS team were understandably focused on delivering a cost-effective product that was demonstrably useful. Indeed, it became apparent that in the initial months of implementation the rudimentary access controls that had been built into PACIS had not been applied with the degree of rigour and consistency that had been anticipated.

12. By December 1999, a large number of Ashworth staff had 'read only' access to clinical records held on PACIS, with the ability to print copies being restricted to a sub-set of that number. Read only access would permit hand written notes to be made, screens to be photographed and in this case those with fairly basic computing skills could cut and paste sections of records within the Windows operating system environment, e.g to a floppy disk. The precise number and identities of those with each type of access could not be established with confidence, registration and de-registration procedures had been inconsistently applied. The limited audit facilities supported by PACIS were not routinely used…

14. Paper record management at Ashworth has largely been devolved to ward level where administrative staff print out each month's PACIS record for filing purposes. However, paper records are kept on the ward where the RMO for each patient is based, not necessarily on the patient's own ward, inevitably complicating consideration of who should have access to which PACIS records. Access to the paper record is controlled largely by restrictions on access to the ward office areas – anyone who can gain access to these parts of a ward can gain access to unlocked and unmonitored records storage and nearby photocopying facilities. Actual physical remove of paper records is permitted for short periods, nominally subject to an unmonitored logging out procedure though it was evidence that no all staff followed the rules.

> 15. Although there appeared to be an expectation that there should only be a single paper record for each patient, this appeared to be unregulated and the existence of copies could not be discounted with confidence. There did not appear to be any clear policy on the destruction of printed material extracted from PACIS. Hospital social workers maintain their own paper records, largely of non-clinical information associated with a patient and his/her family, and occasionally need to take records off the premises to support their work all around the country…
>
> 17. The extent to which patients themselves disclose information, e.g. through correspondence with journalists, which would otherwise be held subject to a duty of confidence, is not currently known though there is clear evidence that it does occur. …
>
> 19. … The audit undertaken for 1999/2000 appeared to be an honest appraisal and provides an organisational profile for Ashworth that, I believe, reflects the situation prior to December 1999. Notably, Ashworth:
>
> - …
>
> - Had no staff code of conduct in respect of confidentiality.
>
> - Provided minimal training and awareness support as part of staff induction.
>
> - …
>
> - Had not included confidentiality requirements in the contracts of significant number of staff….
>
> - Had not introduced effective controls for managing access to confidential information".

54. These recommendations appear to have been drafted by him by reference to 'Protecting and Using Patient Information: A Manual for Caldicott Guardians' published by the NHS Executive in March 1999, of which he is the author. His report therefore carries considerable weight.

THE LEGAL PROCEEDINGS

55. On 8th January 2000 the hospital commenced proceedings against MGN. On 9th February 2000 Wright J made an Order giving directions for the hospital's application for disclosure of MGN's source. He granted no injunction, since MGN provided a contractual undertaking not to publish again. There has been no further publication of the information derived from the PACIS notes to which these proceedings relate.

56. According to the evidence in this case, a leak of such information from the hospital had never happened before, and has not happened since, whether in relation to Ian

Brady, or any other patient at the hospital. I have not been told of any leak of such information from any other hospital.

57. On 10th March 2000 Maurice Kay J (as he then was) heard an application for judicial review made on behalf of Ian Brady challenging the legality of the hospital's decision to continue to feed him forcibly. Maurice Kay J dismissed the application. He held that the decision was justified by reference to s.63 of the Mental Health Act 1983 "because what arose was the need for medical treatment for the mental disorder from which [Ian Brady] was and is suffering. The hunger strike is a manifestation or symptom of the personality disorder". He held that it was in all respects lawful rational and fair. See [2000] Lloyd's Law Rep Med 355, paras 44, 51, 65 and 74. The report also contains a history of his incarceration and diagnoses of mental illness in paras 1 to 3. Maurice Kay J said at para 14:

> "There is intense and legitimate public interest in the case and, whereas it was appropriate for that to be overridden in the interests of the Applicant patient during the hearing which he attended, different considerations prevail in relation to the giving of the judgment when his presence is not essential".

58. There are many reasons why the public interest is legitimate. Some are related to the horrific nature of Ian Brady's crimes, and to the natural and proper concern that is felt for the families of the children who are the victims of his crimes. Amongst other reasons for the public interest are that the events involve an individual whose life has been in danger while in the custody of servants of the state. The case involves the workings of the penal system. There is also the question of whether an individual who wishes to die should be permitted to do so.

59. On 17th April 2000, following a trial, Rougier J ordered MGN to disclose their source. He did not consider an injunction to be appropriate, given the undertaking already given, and the unlikelihood of further repetition in any event. I have the witness statements and the transcripts of the evidence of the witnesses who gave oral evidence to him. They all gave evidence to me, adopting, and adding little to, what they had told Rougier J.

60. On 9th October 2000 the Court of Appeal heard MGN's appeal against the order of Rougier J, and by judgment delivered on 18th October the appeal was dismissed. It is reported at [2002] 1 WLR 515. On 13th March 2002 MGN's appeal to the House of Lords was heard and on 27th June 2002 the appeal was dismissed. See [2002] 1 WLR 2033.

61. These proceedings were commenced against the Defendant immediately after he had identified himself as the source (as he did the next day). On 18th October 2002 the hospital obtained summary judgment for an order that he disclose his source: [2002] EWHC 2115 (QB). On 26th March 2003 the Court of Appeal heard the Defendant's appeal against that order and on 16th May 2003 the Court delivered its judgment allowing the appeal. See [2003] EWCA Civ 663; [2003] EMLR 36. On 9th January 2004 the Defendant served his Defence in these proceedings. The trial started before me on 17th January 2006.

62. Maurice Kay J described (in paras 4 to 12 of his judgment) the move, Ian Brady's refusal to eat, the re-feeding, and the internal investigation into the move conducted by Professor Sines. Maurice Kay J saw, as I have seen, the report of Professor Sines, dated 30th November 1999, but it was not available to the other judges who heard this case or the MGN case. As Maurice Kay J records, Prof Sines was trenchantly critical of the manner in which the move was carried out, but concluded that the move was justified and the commencement of force feeding were correct. As Maurice Kay J held (at para 6), there is "substantial consistency between [Ian Brady's] account of these events and the accounts of those who carried the move".

IAN BRADY'S STANCE TOWARDS THE CURRENT PROCEEDINGS

63. The letter from Ian Brady's then solicitors dated 6th December is quoted above. By 19th October 2002 (the day after summary judgment had been given against the Defendant) Ian Brady's position had changed. In a letter written by himself on that date he refers to the hospital's action against MGN. The letter is full of criticism of the hospital, which he refers to as a 'corrupt regressive penal institution'. The letter includes the following:

> "(1) I am willing to give evidence / testify against Ashworth on behalf of journalist Robin Ackroyd (Mirror 19th Oct 2002)…
>
> (6) I have no ambition other than exposure of Ashworth and exit from it, the latter objective already evidenced by my two Judicial Reviews, to halt the present force feeding… A copy of this letter may be forwarded to said Mr Ackroyd…"

64. On 6th January 2006, shortly before the start of this trial, Ian Brady wrote to the solicitors who now represent him, with a copy to Thompsons, the Defendant's solicitors. It includes:

> "… I grant Thomsons carte blanche access to all documents held by you and former solicitors E Rex Makin & Co which they require re Ashworth v Robin Ackroyd. And also grant Thomsons similar access to all documents, in the possession of your office and that of E Rex Makin, written by me since 30th Sept 99 in relation to Ashworth and my legal actions against Ashworth, including all my written submission to the public MHRT and in connection with the multiple court actions taken by Ashworth these past four years to have the public MHRT quashed. Please send Thomsons all copies of my submissions to the said MHRT and courts in relation to it. I also grant Thomsons permission to use all the said documents, including the 3rd January 06 statements by me they refer to, in any way they wish and in the public domain…."

65. The letter continues with a strongly worded criticism of Professor Sines and his report. He is plainly very dissatisfied with that report for not being more critical of Ashworth.

66. It is clear from the exchange of correspondence between the hospital's solicitors and Ian Brady's on 6th December 1999, and from the recent reply to a question raised in the pre-trial correspondence, that copies of the PACIS notes for the period 1st October 1999 to 28th October 1999 had been disclosed to Ian Brady or his representatives before 3rd December 1999. That was the date of the visit to Ian Brady by Mr Maden with a view to preparing his expert evidence in support of Ian Brady which he gave to Maurice Kay J. They are accordingly covered by the permission given by Ian Brady in his letter of 6th January 2006 to the Defendant disclosing them to the public at large.

THE JURISDICTION TO ORDER DISCLOSURE OF INFORMATION

67. The Court's jurisdiction to order a person to disclose the identity of another person in the context of this case is commonly referred to as the *Norwich Pharmacal* jurisdiction. It was explained by Lord Woolf CJ in the MGN case in the House of Lords at para 26:

> "Under this jurisdiction, there is no requirement that the person against whom the proceedings have been brought should be an actual wrongdoer who has committed a tort or breached a contract or committed some other civil or criminal wrongful act. In *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 itself, the Customs and Excise Commissioners were an entirely innocent party. The commissioners had, however, because of their statutory responsibilities become involved or mixed up in the illicit importation of the chemicals manufactured abroad which Norwich Pharmacal alleged infringed their patent. The *Norwich Pharmacal* case clearly establishes that where a person, albeit innocently, and without incurring any personal liability, becomes involved in a wrongful act of another, that person thereby comes under a duty to assist the person injured by those acts by giving him any information which he is able to give by way of discovery that discloses the identity of the wrongdoer. While therefore the exercise of the jurisdiction does require that there should be wrongdoing, the wrongdoing which is required is the wrongdoing of the person whose identity the claimant is seeking to establish and not that of the person against whom the proceedings are brought."

68. One of the issues in this case is whether there was wrongdoing at all, that is, wrongdoing by the source. In the House of Lords Lord Woolf CJ at para 26 stated that "the exercise of the jurisdiction requires that there should be wrongdoing … of the person whose identity the claimant is seeking to establish…" In the Court of Appeal in this case at para 65 May LJ stated that he was prepared to assume without deciding that, if there were no wrongdoing by the source (because he had a public interest defence to a claim against him by the hospital) that the *Norwich Pharmacal* jurisdiction would not be established for want of a wrongdoer. The Court of Appeal did not consider this issue because it considered that the appeal succeeded on grounds which were available to the Defendant even if there were a wrongdoer.

69. In some cases (such as *Norwich Pharmacal*) it may be clearly established that there is a wrongdoer. Where the wrongdoing alleged is misuse of private information (the title to the wrong approved by Lord Nicholls of Birkenhead in *Campbell v MGN* [2004] 2 AC 457 at para 14), and the disclosure order is sought against a journalist, the position can present difficulties. The parties to the present case are the hospital and the journalist. The source is not only a party, but since the object of the journalist is to keep his identity secret, there is very little that the journalist can be asked to say about the source. Mr Nelson QC referred me to The Council of Europe Committee of Minister Recommendation Nor R (2000) 7. The Definition section and the Explanatory Memorandum para 18 list information which might identify a source and so is protected from disclosure by Principle 3. These include "the factual circumstances of acquiring this information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist". Mr Nelson QC conducted his cross-examination of the Defendant with corresponding restraint.

70. The law relating to the disclosure of private or confidential information provides that public interest may be a justification for disclosure. If there were a claim against the source (or if the claim for substantive relief against this Defendant had been pursued) there might be issues as to where the burden of proving public interest might lie. But in this claim for a disclosure order, the burden of proving that there was wrongdoing must fall on the hospital. Where, as here, a Defendant submits that there is material that raises the possibility of a public interest justification for the disclosure, the court is at a disadvantage without evidence from the source. The court may gain little assistance from the interpretation or use that the journalist or a subsequent publisher places on the information disclosed. The manner in which the story is reported, if it is reported, may or not be what the source intended. Journalists and publishers are not the puppets of their sources. They may not know, or may fail to understand, the source's purpose, and they may have purposes of their own which are different.

71. Public interest is not the only issue which can raise this difficulty in information cases. Consent is another. It is clear from the documents cited above that Mr Walker at least, and perhaps also Mr Clarke, considered it possible that Ian Brady might himself be the source, or to have consented to what the source did. A disclosure made with consent of the person entitled to enforce the non-disclosure obligation negates any wrongdoing. As Sedley LJ pointed out in *Interbrew SA v Financial Times Ltd* [2002] EWCA Civ 274; [2002] 2 Lloyd's Rep 229:

> "It should not be forgotten that in this country, then as now, the principal source of unattributable leaks to the media – in the form of off-the-record briefings - and therefore the principal beneficiary of a rule protecting the secrecy of sources, was government itself (see Peter Hennessy, *Whitehall* (1989) p.363-4)."

72. A journalist to whom a disclosure has been made indirectly may not know that the source is the person entitled to make disclosure, or is a person authorised by the person entitled to make disclosures. It follows that even where, as here, there is a trial, the court does not have the benefit of the pre-trial disclosure and the evidence that would be available to it if the case were between the claimant and the source. This is not the fault of the claimant. The object of the proceedings seeking a disclosure order

may be to bring proceedings against the source. In fact that is not the object here. The object here is to discipline the source, if he or she is an employee, and to take steps with a view to preventing a further leak by the same channels in the future.

73. The result of this is that there is a serious risk that, viewed with hindsight, an injustice may be done either to a party, or to persons who are not parties. If a disclosure order is made, that can have the most serious and irremediable effects on a source. It can also have grave professional consequences for the journalist (see Arlidge Eady & Smith on Contempt 3rd ed para 9-39). It may cause either or both of them to the loss of a job and a reputation. But when it has been made, and when the source is identified, it can become apparent that the source does in fact have a defence to the claimant's claim (such as public interest), and is not a wrongdoer. Conversely, if the disclosure order is not made, there is a risk that the claimant may never uncover, for example, a disloyal employee, and other loyal employees may remain under permanent suspicion, with serious effects on their careers.

LIMITS ON THE EXERCISE OF THE JURISDICTION

74. As Lord Woolf CJ added, in para 36, the need for involvement by the third party in the source's wrongdoing is a threshold requirement. The fact that there is involvement of the Defendant enables a court to consider whether it can, or should, make the order. In cases involving freedom of expression, a statutory limit was imposed by s.10 of the Contempt of Court Act 1981, which reads as follows:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

75. The disclosure in issue in this case occurred in November 1999. So, when the matter came before Rougier J in April 2000 that was the law that applied. By the time the MGN case reached the Court of Appeal in October 2000, the Human Rights Act 1998 had come into force. An order that a journalist disclose a source affects the Convention right of freedom of expression. Accordingly, in the MGN case, the Court of Appeal and the House of Lords (Lord Phillips of Worth Matravers MR paras 69-73 and Lord Woolf CJ para 38) re-affirmed previous English decisions referring to, and themselves had regard to, decisions of the European Court of Human Rights. The English cases had already established that s.10 of the 1981 Act and Art 10 of the Convention have a common purpose in seeking to enhance the freedom of the press by protecting journalistic sources. In the MGN case the courts also cited ss.2 and 3 of the Human Rights Act 1998. It also follows, as Mr Millar submits, that s.12 of the Human Rights Act 1998 applies as well.

76. The relevant provisions of the Human Rights Act 1998 read as follows:

> 2.(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any –

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

…

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

3. (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way in which is compatible with the Convention rights.

(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted; …

12. (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) …

(3) ….

(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 - … 'relief' includes any remedy or order (other than in criminal proceedings)".

77. Article 10 provides:

"(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...

(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."

78. One relevant privacy code, which is relied on by the Defendant, is that of the Press Complaints Commission. That provides now by clause 14 (clause 15 as it was in December 1999) that

> "journalists have a moral obligation to protect confidential sources of information."

79. The December 1999 version of the code also contained a provision (clause 3):

> "Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent…. There may be exceptions …where they can be demonstrated to be in the public interest. 1. The public interest includes: (i) Detecting or exposing crime or a serious misdemeanor. (ii) Protecting health and public safety. (iii) Preventing the public from being misled by some statement or action of an individual or organization. There is a public interest in freedom of expression itself. The Commission will therefore have regard to the extent to which material has, or is about to, become available to the public".

80. The current version of the code is not materially different. In para (i) under public interest the words now are "Detecting or exposing crime or serious impropriety".

81. In MGN Lord Woolf CJ set out the approach of the Strasbourg Court by citing from *Goodwin v United Kingdom* (1966) 22 EHRR 123:

> "39. The court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with article 10 of the

> Convention unless it is justified by an overriding requirement in the public interest".

82. Lord Woolf CJ concluded (at para 49) that it is in the 'interests of justice' in the sense in which this phrase is used in s.10 of the 1981 Act, that persons should be entitled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives (that is the approach of Lord Bridge in *X Ltd v Morgan Grampian* [1991] 1 AC 1 at p43-44). This interpretation of s.10 is consistent with the safeguard for the rights of others in Art 10(2). Lord Woolf CJ concluded that paragraph saying:

> "The important protection which both section 10 and article 10 provide for freedom of expression is that they require the court stringently to scrutinise any request for relief which will result in the court interfering with freedom of expression including ordering the disclosure of journalists' sources. Both section 10 and article 10 are one in making it clear that the court has to be sure that a sufficiently strong positive case has been made out in favour of disclosure before disclosure will be ordered".

83. The exercise is not one of discretion (although the court may, separately, also have a discretion). As Sedley LJ said in *Interbrew* at paras 45-48:

> "45. I have no difficulty in concluding that the central exercise is not in any true sense one of discretion. Deciding whether disclosure is necessary for one of the listed purposes is a matter of hard-edged judgment, albeit one of both fact and law, and none the less so for having to respect the principles of proportionality…
>
> 47. For my part, I can see every reason for not holding that the rigorous approach to necessity which the Convention requires in this context is equivalent to, say, a decision as to where the balance of convenience lies on an application for an interlocutory injunction. Discretion is exercised where the court has to make a choice between two or more legitimate courses. On both Strasbourg and domestic authority, by contrast, the question which arises under s.10 is what the legitimate course is: is there a lawful aim? is disclosure necessary to achieve it? will disclosure destroy the essence of the protected right? and if not, does its importance outweigh the public interest in protecting journalists' sources? To each of these questions, once the facts are found, there can in law be only one answer. As Lord Griffiths said in *In re an Inquiry* (above) at 704, "whether a particular measure is necessary, although described as a question of fact for the purpose of s.10, involves the exercise of a judgment upon the established facts". His next remark, that "[i]n the exercise of that judgment different people may come to different conclusions on the same facts", does not reduce the exercise to one of discretion. As Lord Bridge was later to explain in *X v Morgan-Grampian* (above, at 44):

> "Whether the necessity of disclosure in this sense is established is certainly a question of fact rather than an issue calling for the exercise of the judge's discretion, but, like many other questions of fact, such as the question whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgment. In estimating the weight to be attached to the importance of disclosure in the interests of justice on the one hand and that of protection from disclosure in pursuance of the policy which underlies section 10 on the other hand, many factors will be relevant on both sides of the scale."
>
> I have given earlier in this judgment my reasons for thinking that the effect of ss. 2 and 3 of the Human Rights Act 1998 has been to move the evaluation of necessity further towards the status of a question of law, albeit one which is still heavily fact-dependant and value-laden.
>
> 48…. But it must not be forgotten that to establish the factors required by s.10 to override confidentiality is to do no more than restore the jurisdiction initially invoked in order to obtain an order for disclosure. If within this jurisdiction there are distinct grounds, such as unclean hands or delay, for refusing an order, the judge in his discretion can refuse it. The s.10 bar will have been lifted, but other, discretionary, bars may still operate…"

84. In the earlier cases on s.10 there were a number of attempts to define the words 'necessary': see Arlidge Eady and Smith on Contempt 3rd ed para 9-86ff. The rigorous approach to necessity which the Convention requires is set out in the well known phrases which I take from the speech of Lord Bingham of Cornhill in *R v Shayler* [2003] 1 AC 247 at para 23:

> "'Necessary' has been strongly interpreted: it is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable': *Handyside v United Kingdom* (1976) 1 EHRR 737, 754, para 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2): *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, 277-278, para 62".

85. In the MGN case Lord Woolf CJ also drew attention to the consequences of Art 10 applying. Any order for disclosure of sources must not only be necessary for the fulfilment of one of the legitimate aims set out in Art 10, it must also be proportionate to achieving the aim in question. In paras 61 and 62 he said:

> "Any disclosure of a journalist's sources does have a chilling effect on the freedom of the press. The court when considering

> making an order for disclosure in exercise of the *Norwich Pharmacal* jurisdiction must have this well in mind. The position is analogous to the long recognised position of informers under the criminal law. In *D v NSPCC* [1978] AC 171 their Lordships applied the approach of the courts to police informants to those who provided information to the NSPCC. Having referred, at p 218, to *Marks v Beyfus* (1890) 25 QBD 494 Lord Diplock explained the rationale of the rule as being plain, if the identity of informers were too readily liable to be disclosed in a court of law the sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. Ordering journalists to disclose their sources can have similar consequences. The fact is that information which should be placed in the public domain is frequently made available to the press by individuals who would lack the courage to provide the information if they thought there was a risk of their identity being disclosed. The fact that journalists' sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public. It is for this reason that it is well established now that the courts will normally protect journalists' sources from identification. However, the protection is not unqualified. Both section 10 and article 10 recognise this. This leads to the difficult issue at the heart of this appeal, namely whether the disclosure ordered was necessary and not disproportionate. The requirements of necessity and proportionality are here separate concepts which substantially cover the same area. In his submissions Mr Browne relied correctly on the decision of the European Court in *Goodwin v United Kingdom* 22 EHRR 123. I find no difficulty in accepting the approach that the European Court emphasised, in paragraph 40 of its judgment, that: (i) 'As a matter of general principle, the 'necessity' for any restriction of freedom of expression must be convincingly established' and (ii) 'limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court'.
>
> 62. Furthermore, I would also adopt Mr Browne's contention that any restriction on the otherwise unqualified right to freedom of expression must meet two further requirements. First, the exercise of the jurisdiction because of article 10(2) should meet a 'pressing social need' and secondly the restriction should be proportionate to a legitimate aim which is being pursued".

86. In para 66 of his speech, Lord Woolf CJ also stated that no possible exception could be taken to para 101 of the judgment of Laws LJ in the Court of Appeal. This reads:

> "101. It is in my judgment of the first importance to recognise that the potential vice – the "chilling effect" – of court orders requiring the disclosure of press sources is in no way lessened, and certainly not abrogated, simply because the case is one in which the information actually published is of no legitimate, objective public interest. Nor is it to the least degree lessened or abrogated by the fact (where it is so) that the source is a disloyal and greedy individual, prepared for money to betray his employer's confidences. The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. The suggestion (which at one stage was canvassed in the course of argument) that it may be no bad thing to impose a "chilling effect" in some circumstances is in my view a misreading of the principles which are engaged in cases of this kind. In my judgment, the true position is that it is always prima facie (I can do no better than the Latin) contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep press sources confidential should give way. That debate will arise under section 10 in the municipal legislation; it will arise more broadly by reference to article 10 of the Convention, and in the light of the Strasbourg jurisprudence on article 10".

THE INTERESTS OF JUSTICE AND THE RIGHTS OF OTHERS

87. For the hospital it is said at this trial, as it was said at the MGN trial, that if the source is identified, the intention of the Claimant is to dismiss him or her. There can be no dispute since the decision of the House of Lords in the MGN case that this engages the interests of justice. Protecting patient records is a legitimate aim of the hospital, and in principle such a measure may fulfil a pressing social need and be both necessary and proportionate. Whether it is so in this case requires consideration of the facts.

88. Where disclosure is sought from a journalist, he safeguards freedom of expression by seeking to keep his source private. The other right in issue is also a right to privacy, namely the claimant's right which the claimant is ultimately seeking to enforce against the source, once he is discovered. The claimant's right to maintain the privacy of his information is always a right under domestic law, whether or not it is also a Convention right. In some cases, such as the present, even though the claimant is a corporation, there are also in issue the rights of third parties, namely the patients at the hospital.

89. In particular (and as Ian Brady's solicitors urged in December 1999) there is engaged the right under Art 8 to respect for the private life of a patient in respect of medical information. That the hospital does have an interest in protecting the information in patient records, and standing to bring this claim, was established in the Court of Appeal in the MGN case at paras 52 and 53, which read as follows:

> "52. … The extracts published consisted of observations of Brady by different members of the staff at Ashworth that were recorded as part of his medical records. Though they were personal to Brady, I consider that Ashworth had a clear independent interest in retaining their confidentiality. The Department of Health published, on 7th March 1996, Guidance on the Protection and Use of Patient Information. This includes the following guidance under the heading, `Who has a duty of confidence?':
>
> "Everyone working for or with the NHS who records, handles, stores, or otherwise comes across information has a personal common law duty of confidence to patients and to his or her employer." (emphasis mine)
>
> 53. This guidance accurately states the position. Both Ashworth and its patients shared an interest in the confidentiality of patient records".

90. Mr Millar QC submitted in opening that in the light of what Ian Brady had caused to disclosed to the press, and in the judgment of Maurice Kay J, he could have little complaint about what the source disclosed to the Mirror. This did not go so far as to be a submission that there was no right of confidentiality or privacy because the information was in the public domain (the submission that failed in the MGN proceedings). In his closing speech Mr Millar QC added the submission that the effect of Ian Brady's letter of 6th January 2006 is to show that, if he had retained any privacy rights, then he is now no longer concerned to protect them. All that is left, submits Mr Millar QC, are the rights which the hospital has to keep private communications between members of its staff.

91. Given the stance now adopted by Ian Brady towards these proceedings, which he no longer supports, it is necessary to consider the different rights in issue in more detail than was necessary in the MGN action.

92. Patients' medical records are not the only information a hospital might wish to keep from being disclosed. For example, there may be (and there was in this case, as appears above) a leak of information from the first version of the Sines Report about the security of a ward. That information will not be private or personal to a patient, and may or may not engage an individual's rights under Art 8. But the right to prevent disclosure of such information is obviously very important. Similarly, there may be leaks of information about administrative arrangements. Conversely, there may be (and there had been in the case of Ashworth in past years, as discussed below) information showing maladministration, illegality and worse. Privacy can be a cloak for wrongdoing and abuse. It appears that Ian Brady did not consent to the re-feeding or to the taking of blood samples and similar procedures conducted upon him in October 1999.

93. Little, if any, of what is recorded in the PACIS notes can be said to be information confided by Ian Brady to his doctors and nurses. Ian Brady was in the hospital in part to deprive him of his liberty. The staff have a custodial as well as a therapeutic role. The notes record much information which Dr Collins and the nurses obtained or

observed for themselves, without Ian Brady having given any consent, and without the need for his consent (because of the sentence he was serving). Even when he is recorded as speaking to them, he is generally not giving a history (which is what a patient commonly confides to a doctor). He is protesting at an alleged assault by people he regards as prison officers rather than nurses. So it would be straining language to speak of Ian Brady having confided information to a confidant.

94. On the other hand, as Dr Collins explained, the notes are statements made by doctors and nurses to be read by other doctors, by nurses and by others with responsibility for the custody and care of Ian Brady. Those statements were made in confidence and in the course of their employment by the hospital. Ian Brady is the subject of that information. A patient has a right to disclose to the public at large information that he has previously given in confidence to a doctor. He also has certain rights of access to information recorded about him by the doctor or hospital. But he does not have an unrestricted right to seize the records kept by the doctor or hospital and publish them to the world. Nor would he have an unrestricted right to authorise any doctor or nurse to disclose the contents of those records. The hospital, as the body responsible for keeping and controlling those records, and other individuals referred to in them, have rights and responsibilities in respect of the information contained in those records. See *R v Mid Glamorgan Family Health* Services [1995] 1 All ER 357, 363 and *Russo v Nugent Care Society* [2001] EWHC Admin 566, discussed in Pattenden *The Law of Professional Client Confidentiality* OUP, 2003, para 19.03 ff. This would be so in relation to any patient in a hospital. But so far as Ian Brady is concerned, the hospital is his custodian as well as his carer. So he may not have the same rights as a patient who was not in custody might have. The law has developed since 1999, in particular when the Data Protection Act 1998 came into force on 1st March 2000. These developments were partly in response to the judgment of the Strasbourg Court in *Gaskin v UK* (1989) 12 EHRR 36. These developments do not materially affect the law applicable to this case.

95. There is force in Mr Millar's submission that Ian Brady's conduct in disclosing his clinical details in October 1999 is relevant to the extent to which the disclosure by the source should be regarded as an interference (or a grave interference) with his rights. And I accept that, in so far as it relates the future, Ian Brady has given clear consent to his PACIS notes for October 1999 being disclosed to all the world. But I do not accept Mr Millar's submission in its entirety. There is an issue of principle in this case, and it does affect the security of records of all patients, and the perception of such security in the minds of staff and patients other than Ian Brady. Art 8 is engaged. As the Strasbourg Court has said in *von Hannover v Germany* (2004) 16 BHRC 545 at para 57:

> "The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves…"

96. The hospital is not suing on behalf of any patient. It could not do that. But it is suing to safeguard the respect for the private lives of all its patients. It would be unlawful for the court to act in a way which was incompatible with the rights of the patients at Ashworth (1998 Act s.6). Mr Nelson QC also cited *X v Y* [1988] 2 All ER 648 where Rose J as he then was explained the importance of confidentiality of medical records in terms similar to those used by Lord Woolf CJ in the MGN case. At p656c Rose J referred to the statutory duty on the health authority in that case to keep secure information that might identify a patient examined or treated for AIDS.

97. The Art 8 rights of those individuals therefore require consideration. Art 8 provides:

> *"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."

98. Medical records do in principle clearly come within the protection of Art 8. Lord Woolf CJ expressed this in the MGN case at para 63 of his judgment by referring to the judgment of the Strasbourg court in *Z v Finland* (1998) 25 EHRR 371. That case concerned the prosecution of a man for manslaughter and related offences by deliberately subjecting women to the risk of being infected by him with HIV virus. The applicant, Z, had been married to the defendant, and infected by him with HIV. The applicant's doctors were required to give evidence about her medical condition in spite of their, and her, objections to the disclosure of this information (see para 29), and the police seized her medical records consisting of some 30 pages, including laboratory tests and information about her mental state (para 31-32). The police copied these and the Court included them in the case file. Lord Woolf CJ cited paragraphs 94 and 95 of the Court's judgment, which read:

> "94. In determining whether the impugned measures were 'necessary in a democratic society', the court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued.
>
> "95. In this connection, the court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a

> personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community. The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in article 8 of the Convention."

99. In this case there has been some dispute about the evidence given for the hospital as to the extent to which the members of staff were contractually bound by confidentiality clauses. Such clauses are obviously highly desirable, and it will be necessary to consider this issue below. But as a matter of law the obligations of a person who is working at a hospital (in whatever capacity) are not confined to their contractual obligations. As a matter of common law (and statute law in relation to electronic databases: the Data Protection Act 1984 and the Crime and Disorder Act 1998 were in force in 1999) it was unlawful for anyone to disclose information from a patient's medical notes without a justification such as consent or public interest. And in relation to all the confidential information of the hospital there were in 1999 obligations under the law of confidentiality, such as arise in any context where individuals are employed by, or provide services to, an employer or principal.

100. Lord Woolf CJ summarised the position in relation to the hospital's interest in the records as follows:

> "16. The importance of confidentiality of medical records is emphasised when a new member of staff is engaged at Ashworth. The contract of employment contains a clause:
>
> "*Disclosure of information*. You must not whilst you are employed or after your employment ends disclose to any unauthorised person information concerning the authority's business or the patients in its care nor must you make any copy, abstract, summary or précis of the whole or part of a document relating to the authority."
>
> 17. It is part of the agreed facts that leaks to the press have a detrimental effect on security; treatment of patients and staff morale, because they may inhibit proper recording of information about patients; may deter patients from providing information about themselves; may damage the patient-doctor relationship, which rests on trust; may lead to assaults by patients on a patient about whom information is disclosed; may create an atmosphere of distrust amongst staff, which is detrimental to efficient and co-operative work; and give rise to fear of future (and potentially more damaging) leaks.
>
> 18. In the case of patients at Ashworth, it is particularly important that accurate records are kept because otherwise warning signs indicating that a patient is in a condition in which he could be a danger to himself, his fellow patients or

> the staff could be overlooked so inhibiting preventative action being taken….
>
> 63. In applying these tests to the facts of this case to which I have already referred (in paragraphs 16 to 18) it is also important to have in mind the evidence of Dr. James Collins who is the responsible medical officer for Ian Brady. He explains why it is essential for the care and safety of individual patients and the safety of other patients and staff that relevant information is entered in the patients notes and why those entries having been made, their integrity and confidentiality should be preserved. He refers to the fact that psychiatry, more than any other branch of medicine, depends on a trusting relationship between therapists and patients. In addition he draws attention to the fact that the basis of virtually all assessment, diagnosis, treatment and analysis of risk is dependent on information provided by others. He explains that if the staff feel that if there is a possibility of what they report entering the public domain their reporting will be inhibited as they will think that this will place staff or patients at risk. In addition, Mr Brewster (information manager), in his statement, sets out the reasons why it is important that the authority should be able to identify the employee or employees who are responsible for the wrongful disclosure. These include preventing further disclosure and removing the cloud of suspicion that at present hangs generally over the authority's employees who have access to the records which were published."

101. Dr Collins gave evidence in this trial, and subject to two points, Lord Woolf CJ's summary of the position in the MGN case stands as a summary of the evidence which I accept in this case. The two points which require mention are these. Dr Collins thought that the source was probably motivated by money, although he has no evidence of that. Given my finding that that was not the case, his fears have to be interpreted accordingly. The second point relates to the cloud of suspicion that hangs over the hospital's employees. The importance of that point in principle is not to be doubted. I shall consider it further below.

## THE APPROACH TO CONFLICTING RIGHTS

102. As Mr Millar QC submits, where there is in question an interference with the art. 10(1) right (or any Convention right), it is not sufficient that its subject-matter falls within a particular category or was caught by a legal rule formulated in general or absolute terms. The Court has to be satisfied that the interference is necessary having regard to the facts and circumstances prevailing in the specific case before (*Sunday Times v UK* (1979) 2 EHRR 245, para 65). The importance of focusing on the facts of the particular case has been repeatedly emphasized in the pre 1998 Act cases. See Schiemann LJ in *Camelot Group plc v Centaur* Ltd [1999] QB 124, 135C, referring also to Lord Bridge in *X v Morgan Grampian* [1991] 1 AC 1 ("Can I be satisfied that that disclosure of the source of this information is necessary to serve this interest?"),

and the Strasbourg court's judgment in *Goodwin* at para 45 ("on the facts of the present case").

103. The proper approach for a court faced with conflicting Convention rights has been considered by the House of Lords since the decision in the MGN case. In *In re S (A Child)(Identification: Restrictions on Publication)* [2005] 1 AC 593 Lord Steyn said, in para 17:

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

104. I must approach the present case in that way. In order to do that I must consider in more detail the value which the Defendant is seeking to advance in the present case under the phrase freedom of expression.

THE VALUE OF FREEDOM OF EXPRESSION

105. As Lord Steyn said in *R v Home Secretary, ex p Simms* [2002] AC 115, 127:

> "The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value."

106. Some speech attracts a high degree of protection, and some little or none at all. Intimate information about an individual which does not concern the dissemination of ideas, may attract little or no protection. See *von Hannover v Germany* (2004) 16 BHRC 545 at para 59 and *Douglas v Hello!* [2005] EWCA Civ 595, para 87.

107. The types of speech that attract greater protection vary from case to case. In *R v Home Secretary, ex p Simms* [2002] AC 115 the House of Lords was considering the lawfulness of restrictions upon prisoners' access to journalists to discuss their claims to have been wrongly convicted. At p 125 Lord Steyn considered the justification for freedom of expression in such a case. After listing a number of other justifications, he said:

> "It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: …. It is this last interest which is engaged in the present case."

108. Mr Millar QC refers to *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, where Lord Bingham of Cornhill said:

> "The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring".

109. He also referred to *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, at p 200G-H, where Lord Nicholls said:

> "… it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press".

110. This is the justification which was also recognised by the House of Lords in *R v Shayler* [2003] 1 AC 247, where Lord Bingham of Cornhill said at para 21:

> "The fundamental right of free expression has been recognised at common law for very many years: see, among many other statements to similar effect, *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248, 1269b, 1320g; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 178e, 218d, 220c, 226a, 283e; *R v Secretary of State for the Home Department, Ex p Simms*[2000] 2 AC 115, 126e; *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 290-291. The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses

> and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge".

111. Two other points merit consideration. The MGN case proceeded on the basis of Rougier J's finding that the source had been motivated by financial gain. In this case the Defendant denies that, and the hospital do not seek to persuade me to the contrary. I accept his evidence that the source received no payment in this case. But since that is a point mentioned in the MGN judgments, it is useful to have in mind the significance of the point.

112. The second point meriting consideration is that there are issues before me as to the truth of some of Ian Brady's complaints which the Defendant caused to be published in the Mirror (although this did not relate to the information quoted from the PACIS notes). On both these questions Mr Millar QC referred to the judgment of Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 AC 457.

113. At para 63 of *Campbell* Lord Hoffmann said:

> "It is unreasonable to expect that in matters of judgment any more than accuracy of reporting, newspapers will always get it absolutely right. To require them to do so would tend to inhibit the publication of facts which should in the public interest be made known. That was the basis of the decision of this House in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and I think that it is equally applicable to the publication of private personal information in the cases in which the essential part of that information can legitimately be published."

114. In *Reynolds* at p204 Lord Nicholls said:

> "In *Fressoz and Roire v. France*… [(2001) 31 EHRR 28], paragraph 54, the court adverted to the need for accuracy on matters of fact. Article 10 protects the right of journalists to divulge information on issues of general interest provided they are acting in good faith and on 'an accurate factual basis' and supply reliable and precise information in accordance with the ethics of journalism. But a journalist is not required to guarantee the accuracy of his facts. *Bladet Tromso and Stensaas v. Norway*…[(2000) 29 EHRR 125] involved newspaper allegations of fact: cruelty by seal hunters. The Court of Human Rights considered whether the newspaper had a reasonable basis for its factual allegations [paras 66, 72]. Similarly, in *Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843 two newspaper articles reported widespread rumours of brutality by the Reykjavik police. These rumours had some substantiation in fact: a policeman had been convicted recently. The purpose of the articles was to promote an investigation by an independent body. The court held that although the articles were framed in particularly strong terms, they bore on a matter of serious public concern. It was unreasonable to require the

> writer to prove that unspecified members of the Reykjavik police force had committed acts of serious assault resulting in disablement.
>
> None of these three latter cases involved political discussion, but for this purpose no distinction is to be drawn between political discussion and discussion of other matters of public concern: see the *Thorgeirson* case, at pp. 863-4, 865 para. 61, 64".

115. There is also a passage in *Civil Liberties and Human Rights in England and Wales* by Professor David Feldman, OUP, 2nd ed. At p 764 he discusses one of the other justifications of freedom of expression, namely that it contributes to the growth of knowledge and understanding. But what he writes is applicable to the justification relied on by the Defendant. He writes:

> "Assertions of fact… could by definition be either true or false. There would be good reason to allow free expression of the truth, as this would lead to advances in knowledge and material improvements in society, but this does not justify permitting free expression of falsehoods. However, it is not always possible to say whether an assertion is true or false, and many benefits may flow from allowing statements of fact to be asserted so that they may be tested, even if they are ultimately found to be false… This cannot in itself justify the publication of factual claims which are known to be false, but on a rule utilitarian analysis the benefits of a general principle permitting freedom of expression are held to outweigh the disbenefits resulting from particular applications of the rule. It is therefore preferable to permit freedom to express opinions and facts, even if untrue, rather than to adopt a general rule which permits censorship and coercion in relation to expression".

116. On the relevance of a financial motive on the part of the journalist Mr Millar QC also relied on the passage at para 77 of Lord Hoffmann's speech in *Campbell* where he said:

> "We value the freedom of the press but the press is a commercial enterprise and can flourish only by selling newspapers."

117. In the present case Mr Nelson QC submits that there was false information, and there can be no public interest in disclosing falsehoods. He submits that there is no evidence that the records were inaccurate or incomplete as the Mirror article says, and as the Defendant says was one of his concerns. And there is no truth in the allegation of nurses struggling with the tube or mocking Ian Brady (although these allegations do not come from the PACIS notes). It may well be that that is so, and I would not wish to cast any doubt on this, but I am in no position to decide that one way or the other. Mr Millar QC submits that the findings of the Sines Report are not conclusive. In cross-examination he asked questions with a view to casting doubt on those findings which did not uphold Ian Brady's complaint. I did not find this to be of

assistance. I am in no position to form any findings of fact myself as to the treatment of Ian Brady on 29th October 1999. However, I do accept the submission that the findings of Prof Sines are not binding on the Defendant, even though I would not wish to cast any doubt upon them myself. It follows that I cannot find that the value of the freedom of expression invoked by the Defendant is undermined by any falsity.

118. The value of freedom of expression in this context, and the role of the media, is demonstrated by the Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital, January 1999 Cm 4194-II ("the Fallon Report"). The membership of the Inquiry Panel consisted of: HHJ Fallon QC, Professor Robert Bluglass CBE, MD, FRCP, FRCPsych, DPM, Professor Brian Edwards CBE, FHSM, CBIM, Hon FRC Path, and Mr Granville Daniels RMH, RGM. The Report includes an account of the Defendant's role in the events leading to the setting up of that Inquiry, which is described below. In the introductory section headed 'The Problems of the Special Hospitals' the Report includes:

> "1.19.1 All three Special Hospitals have been the subject of damning outside inquiries over the last 20 years. In 1980 Sir John Boynton chaired an Inquiry into Rampton, prompted by a critical television programme…"

119. The Report of Sir Louis Blom-Cooper and others into the hospital (Report of the Committee of Inquiry into Complaints about Asworth Hospital (1992) Cm 2028-I) Ch 1 also records that it followed upon a documentary transmitted by Channel 4 TV which included a number of specific allegations of improper care and ill treatment at Ashworth. The chapter's the sub-title are words of Mr Justice Brandeis alluded to by Lord Bingham of Cornhill in *Shayler*: "Sunlight is the most powerful of disinfectants".

PUBLIC INTEREST

120. In order to decide whether or not there has been wrongdoing by the source I must consider the possibility of a justification for disclosure in the public interest.

121. Mr Nelson QC accepts that in principle there can be lawful disclosure of medical information in the public interest. But he submits that it must be confined within strict limits. It will be rarely if ever that such disclosure can be to the public at large in a newspaper. He cites *X v Y* [1988] 2 All ER 648, *W v Egdell* [1990] 1 Ch 359, and *Lion Laboratories v Evans* [1985] QB 526, 436. He also cites the Codes of Conduct produced in evidence by Dr Fearnley who is now the Medical Director of the hospital. These include 'Protecting and Using Patient Information: A Manual for Caldicott Guardians' published by the NHS Executive in March 1999, the Department of Health Confidentiality NHS Code of Practice dated November 2003, and other similar documents. The 1999 Manual addresses justifications for disclosure under the heading 'Crime and Disorder Act 1998: Protocols'. After referring to statutory provisions and consent by the patient , it addresses cases where "there is an overriding public interest in disclosure" giving guidance as to how such a case is to be approached and recommending that legal advice be sought when in doubt.

122. Mr Nelson QC further submits that the facts of the alleged mismanagement or mistreatment of Ian Brady were available from a source other than the PACIS records,

and for that reason there can be no public interest in disclosure of those records. He cites *Schering Chemicals v Falkman Ltd* [1982] QB 1, 39 and refers to the material that Ian Brady had published through the media in the publications cited above, and in other similar news reports. I do not accept this submission on the facts of this case. What was available in these published reports was Ian Brady's version of events. That is different from the hospital's version of events in the records, and would be different even if the information conveyed by each were the same (which it is not). The fact that a patient says something is the case is not the same as the fact that a hospital says something is the case. This is reason why the public domain argument is not available to the Defendant (see the Court of Appeal judgment in the MGN case para 50).

123. Mr Millar QC relies on the statement of the law by Sedley LJ (with whom Aldous LJ agreed) in *London Regional Transport & Anor v Mayor Of London & Anor* [2001] EWCA Civ 1491 [2003] EMLR 4. He said:

> "55. Whether or not undertakings of confidentiality had been signed, both domestic law and Art. 10(2) would recognise the propriety of suppressing wanton or self-interested disclosure of confidential information; but both correspondingly recognise the legitimacy of disclosure, undertakings notwithstanding, if the public interest in the free flow of information and ideas will be served by it.
>
> 56. The difficulty in the latter case, as Miss Appleby's argument has understandably stressed, is to know by what instrument this balance is to be struck. Is it to be, in Coke's phrase (4 Inst. 41), the golden and straight metwand of the law or the incertain and crooked cord of discretion? The contribution which Art. 10 and the jurisprudence of the European Court of Human Rights can make towards an answer is, in my view, real.
>
> 57. It lies in the methodical concept of proportionality. Proportionality is not a word found in the text of the Convention: it is the tool – the metwand - which the Court has adopted (from 19th-century German jurisprudence) for deciding a variety of Convention issues including, for the purposes of the qualifications to Arts. 8 to 11, what is and is not necessary in a democratic society. It replaces an elastic concept with which political scientists are more at home than lawyers with a structured inquiry: Does the measure meet a recognised and pressing social need? Does it negate the primary right or restrict it more than is necessary? Are the reasons given for it logical? These tests of what is acceptable by way of restriction of basic rights in a democratic society reappear, with variations of phrasing and emphasis, in the jurisprudence of (among others) the Privy Council, the Constitutional Court of South Africa, the Supreme Court of Zimbabwe and the Supreme Court of Canada in its Charter jurisdiction (see *de Freitas v Ministry of Agriculture* [1999] 1 AC 69, 80, PC), the courts of the Republic of Ireland (see *Quinn's Supermarket v A-G* [1972] IR 1) and the

> Court of Justice of the European Communities (see Art. 3b, Treaty on European Union; *Bosman* [1995] ECR I-4921, §110).
>
> 58. It seems to me, with great respect, that this now well established approach furnishes a more certain guide for people and their lawyers than the test of the reasonable recipient's conscience. While the latter has the imprimatur of high authority, I can understand how difficult it is to give useful advice on the basis of it. One recipient may lose sleep a lot more readily than another over whether to make a disclosure, without either of them having to be considered unreasonable. If the test is whether the recipient *ought* to be losing sleep, the imaginary individual will be for practical purposes a judicial stalking-horse and the judgment more nearly an exercise of discretion and correspondingly less predictable. So for my part I find it more helpful today to postulate a recipient who, being reasonable, runs through the proportionality checklist in order to anticipate what a court is likely to decide, and who adjusts his or her conscience and conduct accordingly."

124. Mr Millar QC also relies on the statement by Robert Walker LJ in that case at para 46:

> "No authority has been cited to the court establishing that an apparent breach of a contractual duty of confidence is more serious, and is to be approached differently (as regards injunctive relief) than other apparent breaches. Indeed in many cases (of which *Lion Laboratories* is an example) the defendants include ex-employees who had been in contractual relations with the claimant, and representatives of the press who were not bound by contract, but the court adopts the same approach to both. That is in line with the principles stated in the judgment of Bingham LJ in Spycatcher (para 39 above); and see *Saltman Engineering Co v Campbell Engineering Co* (1948) 65 RPC 203."

125. Even in the case of medical information, disclosure to the public at large can be justified in the public interest. The Court's conclusion in *Z v Finland* illustrates this, in that the Applicant was only partially successful. The result was:

> "114. The Court thus reaches the conclusions that there has been no violation of Article 8 of the Convention (1) with respect to the orders requiring the applicant's medical advisers to give evidence or (2) with regard to the seizure of her medical records and their inclusion in the investigation file. On the other hand, it finds (3) that making the medical data concerned accessible to the public as early as 2002 would, if implemented, give rise to a violation of that Article and (4) that there has been a violation thereof with regard to the publication of the applicant's identity and medical condition in the Court of Appeal's judgment."

126. If the medical data in that case had not been related to HIV, the applicant might not have achieved the success that she did achieve. Where the medical data in a case do not concern such intimate matters, the information is commonly reported in the press and in the law reports without anonymity. The information about Ian Brady in the PACIS notes is undoubtedly medical data. But it is not high in the range of sensitivity. It may very well have been disclosed in full to the public if there had been a prosecution for assault, or a claim by Ian Brady for personal injuries.

127. Following this introduction, I turn to consider whether there was wrongdoing by the source.

128. To decide whether there was wrongdoing by the source it is necessary to decide (i) what he disclosed (ii) in what relation the source stood to the hospital, or what duties the source owed to the hospital and (iii) whether he had a justification for his disclosure.

WHAT THE SOURCE DISCLOSED

129. I turn to consider what the source disclosed. In his evidence the Defendant said that the pages provided to him numbered about twelve, and did not contain all the information that is in the version provided to the court. And what is in the Mirror article is not all the information that was contained in the pages he received. What was disclosed was destroyed by him as soon as he had sent it to the Mirror, which was over 6 years ago. The Defendant's memory is not now clear. He is also confused between what he recalls from November 1999, and what he has learnt since in reading the papers for this case. It was apparent to him at the time that the notes had been edited before they were disclosed to him. He had more than one source at Ashworth at the time with whom he discussed the story.

130. What was provided to him also omitted the title to the document that appears on the version provided to the Court. That reads: "Ashworth Hospital Mersey Care NHS Trust Clinical Notes Report". He explained that that is what is referred to by the Mirror as a diary. He said that he had prepared an article which he sent to the Mirror and did not differ greatly from the one that the Mirror published. At that date he did not have the Sines report, although he was aware of some of the things that Prof Sines had been told.

131. At the time the Defendant received the records he had not heard of PACIS, which he understood to have been introduced recently. He has never been provided with PACIS notes for Ian Brady or for anyone else other than the ones relating to Ian Brady for the period of October 1999. His source informed him that these records were different from the medical records held in paper form. Compared with the version supplied to the court, the version provided by the source had been significantly edited. It did not, for example, include clinical details about the condition of Ian Brady's wrist, which was a topic that interested the Defendant at the time. The reason why he has said that he did not think they were medical notes is because they were a record of observations by staff and did not contain any confidential patient doctor conversations.

132. I accept that the Defendant was endeavouring to tell the truth in so far as he could recall it. He is plainly mistaken in thinking that the records were not medical notes.

But little turns on that. He knew the record was intended to be confidential. The Mirror article says they are confidential.

133. The records were provided to him in written form. They were not in the form of a complete printout, such as has been provided to this court. I have noted certain differences in the text between what the Mirror quoted compared with the print out. There are also a few changes in the order in which sentences are reproduced in the Mirror compared with the printout. These differences could be the result of the editing of the article, so neither party has submitted that the text of the article gives much assistance in deciding the form in which the notes were disclosed. I find that it is at least as probable as not that the source was not a person who had electronic access to the PACIS system, but is someone who had access to one or more of the different paper versions which were made and kept. But Mr Millar QC is correct to say that the form of the Mirror article would also be consistent with the source having cut and pasted the notes from the screen as contemplated in the Walker Report. Dr Collins confirmed what is said in the Walker Report about the production of paper records. He told me that the paper record, which contains everything on PACIS and material from outside agencies, is updated monthly by downloading all entries put on PACIS the previous month. In addition to the paper copies kept routinely on the ward for all patients, there were a number of paper versions made for the purposes of the people investigating Ian Brady's complaints.

134. I accept the Defendant's evidence that the sources disclosed more than is published in the Mirror article, but considerably less than is in the print out provided to the court. I also accept that the source did not disclose information about Ian Brady's wrist. Apart from that, I cannot make any finding as to what information that is to be found in the print out provided to the court, but is not in the Mirror article, was disclosed to the Defendant. It follows that my findings of fact differ from those on which the Court of Appeal proceeded in the MGN action (paras 20 and 63 of that judgment and para 14 of the House of Lords judgment). I find that the source did edit the material and disclosed only a proportion, probably a little over half, and that it is impossible to say whether he abstracted it from the PACIS database directly, or from one of the paper versions which were in existence at that time.

135. I accept that what was disclosed to him is information that appeared to the Defendant be based on observation by the writer, rather than information appearing to have been communicated by Ian Brady to the writer of the notes. Even within such a sensitive category of information as medical records there is a range of sensitivity. While the information disclosed was plainly private or confidential, I find that it was not information that could be described as intimate or highly sensitive.

THE DUTIES OWED BY THE SOURCE

136. The Defendant admitted in his Defence, and repeated in his evidence that:

> "In November 1999 [he] was approached by sources at Ashworth and provided with information …, including a number of pages of Brady's PACIS records containing the extracts [published in the Mirror] covering Brady's first month on hunger strike".

137. "Sources at Ashworth" is a phrase that could include a number of different people. The individuals who might fit that description most obviously include hospital staff and others who go there for the purposes of their work, such as social workers, temporary administrative staff dealing with paper records, and bank staff. It might include inmates, although the restrictions on their ability to communicate make it unlikely that they would be direct sources for a journalist. I have considered whether the phrase would be apt to include those who visited Ian Brady for the purpose of investigating his complaints and preparing the case that was tried by Maurice Kay J. That would include police officers, doctors, solicitors and their assistants. I think that the phrase probably does exclude them, as a matter of ordinary English. Neither party has contended that it does include them. But even if such people are excluded, the potential numbers of those with access to the PACIS records in question are large. Mr Walker was unable to quantify them. In 2000 Mr Brewster (see para 161 below) had assessed them at 200, and when cross-examined on para 3 of the Walker Report he referred to that figure. The document containing the assessment was not in evidence before me, and it is not clear on what basis he arrived at that figure. I shall have to return to consider that evidence below, but on any view the numbers of potential sources are large.

138. It seems to me to be probable, and I so find, that the source was someone who was working at the hospital in the course of his or her employment. Whether or not that person was employed by the hospital is not something I can decide on the evidence available to me. There is very little evidence of who might have had access to what paper records at the time. There is not even a list of those who currently had, or had had, electronic access to the PACIS database, although it might have been expected that that at least is a list that could have been prepared in December 1999. I do not find that the source was an employee of the hospital.

139. For the purposes of deciding whether or not there was wrongdoing, it does not appear to me to matter whether the source was employed by the hospital or not (although that may matter for other issues I have to decide). Whoever the source was, if he or she was a person who had access to the records at Ashworth when he or she was permitted to ------- in the hospital for whatever reason, it is plain that they would have obtained the information subject to obligations owed by them, both to Ian Brady and to the hospital, not to use or disclose the information without authorisation or otherwise than for any purposes for which they were permitted to have access to them.

140. Accordingly I find that the source did owe such a duty both to Ian Brady and to the hospital.

JUSTIFICATION FOR THE DISCLOSURE

141. So I turn to consider whether there was a justification for the disclosure. I accept the evidence of the Defendant that the source did not disclose it for payment and that he did not pay for the information, or solicit its disclosure. There can be a number of different reasons why a source discloses information. These can include the reasons listed in the PCC Code of Conduct under the heading public interest (see para 79 above), or at least what the source thinks may come under one of those heads. A source can also make a disclosure because he has been authorised to do so by someone who he considers has a right to give that authority.

142. I ask myself who benefited from the disclosure. The most obvious candidate is Ian Brady himself. The article is not sympathetic to the position Ian Brady is described as being in. But what the article does do is to give an airing to Ian Brady's complaints (and in one instance a complaint that appears to be incorrectly attributed to him). Ian Brady had gone to some trouble over the preceding weeks to publicise his complaints in the media, and to obtain redress through the police and through Prof Sines' inquiry. It is true that the information disclosed does not itself support the complaints. But there is a suggestion in the Mirror that the hospital's records do not contain everything that they should contain, and as noted above, the accuracy of the record is a point that Ian Brady's solicitor had raised on 9th November 1999, at a time when he was asking for the records to be made available to him (see para 19 above). This is the passage from the Mirror article cited above:

> "Brady claims he was mistreated and is determined to seek 'justice'. *All that was said in the report* was: 'The tube was inserted […] An X-ray confirmed that it was appropriately placed" [emphasis added]

143. The suggestion is that the hospital records should have, but did not, support the allegation of mistreatment. In the form in which the story appears in the Mirror it requires a very close reading to extract that interpretation from it. But I am not construing the meaning of the Mirror article. I am looking to see if it contains evidence of the purpose of the source. And the words "All that was said" are consistent with a criticism. The Defendant was certainly concerned about the possibility of mistreatment, and to investigate and to expose wrongdoing at the hospital (if it was occurring) as he had exposed other wrongdoing at the hospital in the past. By the time the leak occurred in November 1999 Prof Sines was engaged in his inquiry. In the event, while upholding some of Ian Brady's complaints, he did not make the findings that Ian Brady wanted. Ian Brady has expressed his dissatisfaction in his letter of 6th January 2006. I think it probable, and I find, that the source was sympathetic, not necessarily to Ian Brady himself, but to Ian Brady's allegations of mistreatment. I would have had more confidence in that finding if the source had also disclosed the records for 30th September, which are clearly defective in omitting to record the facts about the move which led to Ian Brady's hunger strike, and about which Prof Sines was very critical. But then I do not have any evidence that the source had access to the records for September.

144. Mr Nelson QC submits that, since money was not the motive, the motive must have been either spite against the hospital or a desire to do the Defendant a good turn by providing him with a story. I do not accept this. An attempt to provide support for Ian Brady's allegations seems to me the most probable purpose. Put briefly, Ian Brady was alleging that he had been mistreated, and it was subsequently accepted by the hospital that he was mistreated. Ian Brady had ventilated his complaints in letters to the media, to which the hospital had responded in a manner which gave little by way of confirmation at the time. A reader of Ian Brady's letters as published in the media might have been sceptical as to what he was claiming. The matters which gave rise to Ian Brady's allegations were not recorded by hospital staff in the PACIS notes for 30th September or 29th October. A person aware of and concerned about these matters could have taken the view that Ian Brady's complaints were so serious that the PACIS should be disclosed in the public interest, at least to show that Ian Brady really was

putting his own life at risk following mismanagement at the hospital, and probably to show that the hospital was not recording what it should have been recording (this was Ian Brady's case being made to Prof Sines at the time). There have never been any other leaks of anyone's PACIS notes, before or since, so far as the evidence before me is concerned. It seems to me that the co-incidence in time of the mistreatment issues and the disclosure make the mistreatment the most likely explanation of the disclosure, in particular given the evidence that I accept that there was no money involved.

145. I have also considered whether Ian Brady authorised or encouraged the leak. Like Rougier J, I bear in mind that Ian Brady was communicating with the media, and consider whether, if he did wish to publicise the notes, he might have sent them to the media directly, rather than proceed by an elaborate and secretive route. I find it hard to see how the material would have passed to the Defendant unless through someone who was working at the hospital (although not necessarily an employee). While I have heard no evidence about this, I doubt whether the direct route was open to him. If he had included such a document in one of his letters, there must have been a risk that it would be detected and confiscated. Like Rougier J, I find that Ian Brady was eager to make mischief, and while noting the denials in his solicitor's letter of 6th December 1999, I too treat them with caution. Ian Brady is quite capable of misleading his solicitors.

146. It is not an essential element of the hospital's case in proceedings such as this that they should establish that there has been a breach of a duty owed to the patient. In a case where a hospital is claiming relief in the form of an order for disclosure of patient information, it will generally be easy to infer that there has been a breach of the duty owed to the patient, as well as of the duty owed to the hospital. If a hospital wishes to allege there has been a breach of the duty owed to a patient, then a witness statement from the patient saying that no one had the patient's permission to disclose the information would be material. There is no evidence from Ian Brady, although in his solicitor's letter of 6th December 1999 he was expressing willingness to be joined as a party. The solicitor's letter is not a substitute for evidence from Ian Brady. This is not a criticism of the hospital or of the handling of its case. There may well be good reasons why those responsible would not wish to join Ian Brady as a claimant, or adduce evidence from him. I find that in the present case the evidence does not support an inference that there has, on the balance of probabilities, been a breach of any duty owed to the patient.

147. It is not necessary for me to go so far, but if it were, I would, on balance infer and find that Ian Brady probably did encourage or authorise the leak. In any event, he was only too glad to have the opportunity to use the leak as a stick to beat the hospital with.

148. It follows that as between the source and Ian Brady, I make no finding that the source did any wrong to Ian Brady. But that does not mean there was no wrongdoing. The wrongdoing that the hospital needs to prove here is a wrong against itself, for which it wishes to pursue a remedy. As already discussed, in my judgment, all those permitted to be present at the hospital owed to the hospital a duty not to disclose or use, otherwise than for the purposes of their work, information contained in the PACIS records. This is so whether they were members of staff or not, and whether or not their contracts contained a confidentiality clause. It is plain that no one had permission from the hospital to disclose the information.

149. I therefore turn to consider whether the source had a public interest defence. The test is objective. It is not enough that the source might have intended to act in what he or she thought was the public interest.

150. There can be no doubt that it is a matter of public interest to investigate allegations by a prisoner, or a patient in a secure hospital, that he has been assaulted during a ward transfer, and mistreated by nurses in the medical unit. It is especially so when the prisoner or patient's life is endangered by a refusal to eat.

151. The Defendant gave evidence that he understood the source to be acting in the public interest to give a balanced version of the treatment of Ian Brady. Mr Nelson QC submits that any points to be made on the PACIS notes in support of Ian Brady are points arising out of what they omit, and not what they contain. And since the source edited the notes, what he in fact disclosed would not have demonstrated to the Defendant or the public that the hospital had wrongly omitted to record things that they should have recorded. Moreover, the omissions relate to the events of 30th September and (allegedly) 29th October, whereas the notes disclosed cover the period from 1st October to 30th October. So they are not very strong material to support the purpose of giving a balanced view to the public. However, the Defendant also said, and I accept, that the PACIS notes were intended to help him build a more complete picture of what had happened during the period of Ian Brady's transfer to Lawrence Ward, his hunger strike and his re-feeding, as well as to show that the hospital records were inaccurate and incomplete.

152. Mr Millar QC has been critical of the accuracy of some of the press statements issued by the hospital. He submits that they should have admitted to concern about Ian Brady when they were saying that there was none.

153. Mr Nelson QC also makes the point that Ian Brady had already had published in the media (in the article cited above, and those in numerous other publications) his version of events. As *Fressoz* and *Campbell* illustrate, there can be occasions when publication of additional detail can be justified to provide support for an article or for editorial reasons. But the notes disclosed, so far as I have been able to find, do not contain support for the allegations of wrongdoing. The entries between 1st and 28th October do show that what Ian Brady was doing was serious and was endangering his life. But they do not support a case that they were mistreating him on those days, because he did not advance any such case. Ian Brady was conducting a protest against the hospital and using the media to publicise his campaign. The hospital was entitled not to say more than it did say in its press statements.

154. Mr Millar QC has made criticisms of what he submits is the lack of a public response by the hospital to the publication by the media of Ian Brady's allegations. I do not accept that the hospital is to be criticised on this account. The hospital did call in the police and set up the inquiry which was conducted by Prof Sines. It was appropriate to await the outcome of those enquiries before making a response to Ian Brady's allegations. When Prof Sines upheld Ian Brady's complaints, in so far as he did, the hospital did apologise, but the leak was before the report had been delivered. The fact that Prof Sines did uphold some of Ian Brady's complaints, and that the hospital accepted the report, makes clear that there was a proper basis for concern about the hospital's handling of matters from 30th September onwards. But that does not mean

that any one working at the hospital had a right to disclose what they chose to the public at large.

155. I am not concerned in this action with the question whether the Defendant would have a public interest defence if the claim for compensation against him were being pursued. Those claims are not pursued and that seems to me to be a different issue. The Defendant stated that his main purpose in sending the draft article to the Mirror was to disclose publicly Ian Brady's mistreatment, including aspects not yet publicly disclosed or acknowledged by the hospital. I accept this explanation. The Defendant's position is different from the sources. The Defendant did not have a relationship with the hospital such as those who work there do, and the Defendant did not disclose to the public at large all that the sources disclosed to him. The Defendant had in the past disclosed matters of concern, not only in the press, but also to those in government who had responsibility for such matters. But his role has been that of a journalist and he has a history of acting responsibly.

156. Authorities cited by Mr Nelson QC, such as *X v Y*, make clear the difficulty facing a person claiming to be justified in disclosing medical information to the public at large in the public interest. The force of those authorities is not diminished by the approach to public interest disclosure approved by the Court of Appeal in *London Regional Transport*. The effect of disclosure of medical records on a patient, particularly a psychiatric patient in a secure hospital, and the effect of such disclosure on other interested persons, such those responsible for his care, and other patients, is not something which any individual is likely to be in a position to evaluate. There is clearly a pressing social need for such records to be kept private, subject to limited exceptions, as prescribed by law. Some restriction on informing the public at large will almost always be proportionate. A person wishing to contend that it is not proportionate is likely to have to explain that there were not other persons within the NHS or the police to whom the disclosures could be made, or that such internal or limited disclosures had been made and had not had the appropriate effect. There may be some analogy with the statutory provisions relating to official secrets discussed by Lord Bingham of Cornhill in *Shayler* at paras 25-31. Since the source is not a party to these proceedings, no such case had been advanced. It is not to be expected that the Defendant would know the facts relevant to this. And even if he did, he is unlikely to be in a position to advance such a case without identifying the source in process, which would defeat his purpose in defending these proceedings.

157. In my judgment, on the material before me and the balance of probabilities, there was no public interest justification for the disclosure which was in fact made by the source. And I would reach this conclusion if I assumed (without making any finding) that Ian Brady's complaints were all correct (contrary to the findings of Prof Sines). I conclude that the hospital has established that there was wrongdoing against itself in which the Defendant was involved, so as to pass the *Norwich Pharmacal* threshold test. However, the degree of wrongdoing that I have found is a relevant consideration in relation to other questions. In particular, the facts that the source did not commit a wrong against Ian Brady, and that his or her purpose was to act in the public interest, are considerations that may be relevant to other questions I have to decide.

THE EMPLOYEES OF THE HOSPITAL

158. Amongst the main arguments advanced for making a disclosure order are the need to remove from innocent employees the cloud of suspicion which the leak created and the need to take disciplinary action against any employee who was responsible. The possible involvement of employees in the leak is also relevant for consideration of the risk of future disclosure and the measures that may be taken to prevent future disclosures. Disclosure of the source is sought to deter employees from doing the same again in the future. So I turn to consider the evidence relating to the involvement of an employee, and the alternative measures that may be taken to prevent future disclosures, other than making a disclosure order in this case.

159. The high point of the evidence for the hospital is the evidence of Dr Collins. He states:

> "No one knows the source of the disclosure and how this information was received by Mr Ackroyd. There are many within the hospital who have potential access to the records and properly so. However, whilst the source remains unidentified, a cloud of suspicion lingers, and is felt particularly, it seems to me by ward staff. This is not only unfair, but is also bad for staff morale".

160. This evidence was not challenged in cross-examination. But those representing the Defendant did attempt to find out the practical details of what this evidence entails, with a view to making submissions on the weight to be attributed to it. Enquiries were made on behalf of the Defendant shortly before this trial to establish how many of the current employees of the Claimant at the hospital were employed by Ashworth Hospital Authority in December 1999, and how many of those had access to the PACIS records on Lawrence Ward in December 1999. The answer given, which I accept, is that 1,030 of the claimant's current employees were employed by Ashworth in December 1999, and that it is impossible to locate the exact numbers who had access to the PACIS records. This figure was not to hand, and took much time to produce. It was, of course, not a figure that applied in any of the previous hearings of the MGN, and no corresponding figure available at any previous hearing of this action.

161. Mr Brewster is Head of Information Governance at Mersey NHS Care Trust, and has been since April 2003. He has overall responsibility for Confidentiality, Data Protection, Freedom of Information and Information Governance Management. At that time of the leak he was employed by Ashworth Hospital Authority as an Information Manager. He was responsible for addressing the recommendations of the Walker report into the leak of information published in the Mirror.

162. Mr Brewster prepared a witness statement for the MGN action, dated 18th January 2000, and he gave evidence before me in which he confirmed the truth of that statement and a more recent one dated 30th November 2005. There is no transcript of any oral evidence of his at the MGN trial (as there is for the other witnesses). He thinks he recalls giving evidence orally at that trial. At that trial Ms Roberts was asked about Mr Brewster's assessment that 200 people at the hospital might have had access to the PACIS records of any particular patient, and Mr Brewster told me that that was his evidence. He made a list of people who had access the record, and it totalled just under 200. He looked at the database that gives rights to PACIS users to access the

records of Ian Brady. That is as far as the evidence before me on this went. The list is not available at this trial. And the figure of 200 does not appear in either of his witness statements.

163. Ms Roberts, then Assistant Chief Executive of Ashworth Hospital, gave evidence at the MGN trial. She had first been sent to the hospital in about April 1999, to develop an action plan around the Fallon Report, and been appointed Assistant Chief Executive in November 1999, to take the action required by the Secretary of State in response to the Fallon Report. In March 2000 she became Project Director at the hospital, and left the hospital in July or August 2000. She is now Chief Executive of the Manchester Mental Health and Social Care Trust. She was not involved in the ward transfer of Ian Brady. She conducted her own internal enquiry into the disclosure in the Mirror, liaising with Mr Walker. At the time she signed her statement on 5th April 2000 it appears that she was not aware of Mr Walker's conclusions. Her enquiry had heard evidence from Mr Brewster. The figure of 200 people was given by Mr Brewster to her, and she accepted it.

164. While little turns on it, I think it likely that Mr Brewster did not give oral evidence at the MGN trial, and that he is confusing that trial with the evidence he gave to Ms Robert's enquiry, which he did give orally.

165. At this trial Mr Brewster was asked about the conclusion in para 3 of the Walker Report at para 53 above. Mr Brewster thought that that was not quite right. Mr Brewster also recalled that the PACIS system had been developed from earlier systems and had come into operation some time before 1999. However, subject to that he accepted the Walker Report. The Report was accepted by the Board of Ashworth Hospital Authority. So far as paper printouts of information from PACIS was concerned, Mr Brewster accepted that in November 1999 there might have been a number of statutory bodies with an interest in knowing facts about Ian Brady's case, and that he had no means of knowing who saw the paper records. There was no audit trail for that. When he approved his witness statement for the MGN action on 18th January 2000, (and when he gave evidence to Ms Roberts' internal enquiry) he had not seen the Walker report. At this trial he accepted that, having seen the Walker Report, the witness statement gave too favourable impression of the security of the information which was on, or could be printed out from, the PACIS records. He was unable to explain why his witness statement said that all staff had confidentiality clauses, whereas the Walker report said that some did not. The information in his witness statement came from the Human Resources Department, and was not within his own knowledge.

166. Mr Brewster gave evidence that, prior to the disclosure, staff were given an induction course including a talk on confidentiality, and that confidentiality clauses were included in all contracts of employment with the Ashworth Hospital Authority. He explained how the PACIS system worked and who had access to it, or to the paper copies of information derived from it. The electronic and paper systems that existed in 1999 are in principle the same systems that exists today. He also told me, as I accept, that information security in 1999 was far below the standard now in force. The hospital has done much to implement the recommendations made in that report and by others, such as Mr McCabe.

167. Mr Brewster was recalled to give evidence to explain which staff did not have confidentiality agreements. In his third witness statement (the second in this action and dated 20th January 2006, after he had given evidence before me for the first time), he said that he attached a document which explained the low score given in the Walker Report on this issue. He said that the document explained that there were some temporary staff in the administrative department at the hospital who did not have the appropriate contracts. In fact the document did not establish this, and Mr Brewster remained unable to give a satisfactory explanation as to the true position was with regard to staff contracts in 1999.

168. I conclude that the number of people with access to the information from the PACIS records of Ian Brady was not limited to a figure of about 200, and that it is not possible to establish anything like a comprehensive list of those having access to that information. I find that the situation at the hospital is best described in the words of the Walker Report cited above. This was a highly authoritative external report, written following an investigation which took place after Mr Brewster signed his witness statement which formed the evidence at the MGN trial. This finding is therefore different from the finding by the Court of Appeal in the MGN case (para 21). The finding in that case was that in all about 200 people had access to all the material on the general records held on PACIS.

169. Ms Anderson gave evidence at this trial, as she had at the MGN trial. Ms Anderson gave some evidence which relates to events since the MGN proceedings. She stated that, following the other leaks already referred to (to the photographer and of the Sines Report), and the commencement of the MGN action, there was a marked decrease in the number of leaks concerning the hospital. Her witness statement continues:

> "However, when the Court of Appeal judgment was handed down this changed – immediately and dramatically. We were notified of the decision by our solicitor towards the end of the morning of 16th May 2003. Within a matter of hours I was approached by two national newspaper reporters (The Sun and The Daily Mail) who had been given scurrilous and untrue information regarding a named Ashworth Hospital patient (not Mr Brady) which I was able to refute entirely. No stories appeared."

170. This is the only evidence of leaks in the intervening period of now nearly three years. It does not suggest that leaks are a significant problem. This evidence is confirmed by the Defendant. He states he was offered some information by a source in the hospital in 2002 (about the alleged possession of child pornography by two members of staff), but that the current litigation has had a profound chilling effect on his journalistic work. He states that he has been unable to continue his investigative work at the hospital. He cannot make information available unless he can guarantee the protection of his sources.

171. Mr Paterson also gave evidence at this trial, as he did at the MGN trial. In October 1999 he was the Acting Head of Security at the hospital and later became Director of Security. In October 2003 he retired from the hospital. He gave evidence about the

unsuccessful inquiry into the leak, but could give no evidence as to the state of affairs at the hospital since 2003.

172. I cannot make any finding as to the reasons why the Defendant's sources have not recently made information available to him. What I do conclude is that leaks are not the problem at the hospital that they were.

173. A number of conclusions follow from these. First, on these facts, the cloud of suspicion point carries less weight than it did six years ago, and less weight than it would in a case where the people under suspicion can be identified and numbered. In some leak enquiries the suspects can be reduced to a small number, each of whom is then under the cloud. Where the number of potential suspects is so large that they cannot be identified, then the cloud is so thinly spread that it is not plausible to suppose that any individual will suffer significantly, although I accept that this may still have an effect on morale. Moreover, there is no evidence before me as to the class or number of people, if anyone, who remain under suspicion today. Even in relation to the 200 counted by Mr Brewster for Ms Roberts in 2000, it is not possible to say whether any of them remains an employee of the Claimant. The list is no longer available, and Mr Brewster did not attempt to recreate it for these proceedings. The individuals concerned, or some of them, may be among the 600 or so employees who have left the hospital since then, and they, or many of them, may by now have retired from this type of work, or from all work. The evidence as to the position at the hospital today, or since the hearing in the MGN action, goes no further than that given by Dr Collins, as I have indicated above.

## THE HISTORY OF ASHWORTH AND THE DEFENDANT

174. There is another point of law which Mr Millar QC raises in relation to the tests of proportionality and discretion. It is encompassed in the judgment of the Court of Appeal in this case. At para 69 May LJ, expressing the view of the majority, considered that what has been called the unhappy history of the hospital, and the Defendant's personal role in it, were matters which might be considered at this trial. Mr Millar QC submits that the conduct of the defendant journalist is relevant in proceedings such as this, as it is in other types of case relating to freedom of expression. The conduct of the journalist is a central feature of the judgments in *Reynolds*: see the well known list of matters to be taken into account in relation to the defence of qualified privilege in defamation (which provides a defence in cases where information is published which is or may be false), at p.205:

> "Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some

> have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing".

175. In his judgment in *Campbell* at para 140 Lord Hoffman lists *Fressoz and Roire v France* (2001) 31 EHRR 2 as one of the cases relevant to proportionality in interfering with freedom of expression.

176. Mr Milar QC refers to the judgment of the Strasbourg Court, paras 55 and 56, which include, in relation to proportionality, the following:

> "55.In the instant case, the Court notes that neither Mr Fressoz nor Mr Roire's account of the events nor their good faith has been called into question. Mr Roire, who verified the authenticity of the tax assessments, acted in accordance with the standards governing his profession as a journalist. The extracts from each document were intended to corroborate the terms of the article in question. The publication of the tax assessments was thus relevant not only to the subject matter but also to the credibility of the information supplied.
>
> 56. In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the journalists' conviction and the means deployed to achieve that aim, given the interest a democratic society has in ensuring and preserving freedom of the press. There has therefore been a violation of Article 10 of the Convention".

177. The submission appears to have been a factor in the mind of Sir Peter Pain in *Special Hospitals Services Authority* (1994) 20 BMLR 75, as noted by the editors Arlidge, Eady and Smith on Contempt, 3rd ed, at para 9-102. In my judgment the submission is well founded. The circumstances and conduct of the journalist are potentially relevant to the judgment that has to be made before an order for disclosure of sources can be made.

178. One of the damning reports referred to in the Fallon Report at para 1.19.1 was the Report by Sir Louis Blom-Cooper in 1992. Following this report, all of the approximately 100 male personality disordered patients were placed in a single unit comprising six wards on the North site (known as the Personality Disorder Unit or "PDU"). These included Lawrence Ward. The Fallon Report stated:

> "1.23.3 Even at the time this was recognised to be a bold, perhaps foolhardy step…the men in the PDU at Ashworth are at the severest end of the spectrum of personality disorder. Most, if not all, have extremely disordered personalities and many have a history of very serious violent and sexual offending. They tend to test boundaries between staff and patients to destruction and undermine, sometimes even corrupt their carers and therapists…"

179. The Fallon Report arose out of allegations relating to a former patient at the hospital who was the father of a young girl known as Child A. In 1992 Bradford Social Services had asked for information about him, but received no reply from the hospital. In September 1996 Stephen Daggett, a patient on Lawrence Ward, had absconded. There were press reports, attributed to "a hospital source", that he had been running a pornography racket at the hospital. On his return he went to Rampton. At a debriefing on 8th and 9th October 1996, he produced a document entitled 'My Concerns', in which he made allegations that some patients had undermined the Patient Care Team and pornography, drugs and alcohol were freely available, and that a child had been put at risk of abuse at the hands of paedophiles on the ward, and that a number of staff were corrupt (Fallon Report para 3.1.6).

180. The Defendant had investigated these matters. At the time he had recently started work at The Express newspaper, having previously worked as Crime Correspondent at The Yorkshire Post, and as an investigative journalist there and at other newspapers in Yorkshire. He took an interest in the hospital and had a number of sources there. One of these tipped him off that a young girl, known as Child A, had been taken into the hospital on many occasions and had been left unsupervised with some of the worst paedophiles in the country. The Defendant published an article in The Express on 22nd January 1997, reporting a search at the hospital which had led to the discovery of a suspected bomb, weapons, drugs and child pornography.

181. The Fallon Report at para 3.4.7 records that Stephen Daggett was not satisfied that his allegations were being taken seriously at Rampton, and that when The Express started to show an interest in the story, his mother contacted a journalist, who was the Defendant. The Fallon Report at para 3.4.17 records that on 26th January 1997 the Defendant published an article disclosing the allegations about Child A, that she was allowed to sit on a sex offender's knee, play games with him and wander around the hospital gardens. The hospital wrote letters to the Press Complaints Commission, and to the Express, complaining about the story. At para 3.14.18 the Fallon Report records that the Defendant contacted the hospital. There was conflicting evidence given to the Fallon Inquiry as to what was said to him. One witness from the hospital confirmed that she told him that she had been authorised to give a categorical denial (as she did) that the child was abused. In the Report dated 6th January 1999, the Inquiry found that pornography was widely available on Lawrence Ward, patients were running their own business, hospital policies were ignored and security was grossly inadequate. The Inquiry concluded that the child at the centre of the paedophile allegations was being groomed for paedophile purposes. She was permitted, often unsupervised, to associate with men with appalling criminal records. See the Letter to the Secretary of State reproduced at p iii of the Report.

182. The Defendant therefore has a good record of fulfilling the role of the press to which the House of Lords referred in cases such as *Simms*, *Turkington* and *Shayler*. This record is not confined to this case, but extends to other stories which it is not necessary for me to expand upon in this judgment. It is in the public interest that his sources should not be deterred from communicating with him. This is evidence relating to this journalist in relation to the hospital bringing this case.

183. Whether these proceedings are the reason why the Defendant has received no more stories from his sources at the hospital is not a matter on which I can reach a finding of fact. That state of affairs is also consistent with the hospital having succeeded in getting its affairs in order since the Fallon Report, and in impressing upon all those who work at the hospital of the need to protect patient confidentiality in accordance with the law, their contracts and their professional obligations.

MISCELLANEOUS OTHER POINTS

184. Mr Millar QC submits that the leak of the Sines Report in February 2000 was as serious as the leak the Defendant, that it was not the subject of an investigation or any legal proceedings such as were brought against MGN and now the Defendant, and so I should infer that the order sought in these proceedings is not necessary.

185. I accept that the leak of the Sines Report was as serious as the leak to the Defendant. Dr Collins confirmed that the Sines Report contained much clinical information. Moreover, the Report was part of the confidential NHS complaints procedure. However, I have no heard no evidence from anyone who was involved in the decision not to bring proceedings in respect of that leak. Mr Nelson QC submits that in those circumstances it is not permissible to speculate what the reasons might have been, and so no comparison can be made or conclusions drawn. I accept his submissions.

186. The Defendant has expressed the view that the pursuit of these proceedings against him six years after the disclosure smacks of vindictiveness. I do not accept that. The hospital has a duty to protect its own and its patients' information. I infer that it wants all those who work in the hospital to see that it is serious in enforcing their legal and professional obligations. It is to establish that important principle that the hospital is pursuing these proceedings.

CONCLUSIONS

187. It follows from my findings that I am not able to say whether the hospital were ever in a position to take any action against the individual who disclosed the information, and the position now, given the uncertainty of the numbers and classes of individuals who might have been the source, is that I can reach no finding as to whether or not the source was ever an employee, and if so whether he or she is still in employment at the hospital, or at all. I can form no view as to whether the hospital would suffer damage if it fails to obtain the order it seeks.

188. A further consequence flows from my finding that there was no financial motive, but rather a misguided attempt to act in the public interest. If the motive were financial there would be the obvious risk of repetition, referred to in the MGN case. And the fact that no repetition has occurred so far would be little indication to the contrary. It would be consistent with the source lying low, as found by the Court of Appeal in the

MGN case (at para 38), and that his venality would lead to the sale of further confidential information (para 93). But a source who misguidedly thought he or she was acting in the public interest in the extraordinary circumstances of October 1999 (when Ian Brady had a well founded complaint of mistreatment by the hospital which followed the dreadful history set out in the Fallon report), is not a person who can be said to present a significant risk of further disclosure, at least unless there were to be a repetition of events such as occurred on 30th September and 29th October 1999. No one suggests that that is likely to recur.

189. Moreover, I am in a position to make a further finding, which could not have been made in the MGN action. Since the delivery of the Walker Report in April 2000, and its acceptance by the Board shortly after that, I am confident that, as was Ms Roberts and Mr Brewster task to achieve, steps have been taken to improve the information security arrangements at the hospital, not only up to the time when the MGN proceedings were heard, but in the subsequent years. There is also no evidence of any repetition of the very grave matters that occurred in the hospital prior to 1999, and which were the subject of the Fallon Report.

190. Ms Roberts gave evidence to me, as she had at the MGN trial. In her recent witness statement she explained that after her arrival at the hospital those who were then responsible for it started to pull things together. They had a new management structure. She and they were the new broom, as she put it. The publication in The Mirror came at a really bad time, as they were giving the hospital a new sense of direction. It would have helped enormously to know who the culprit was, in order to identify the way in which systems might respond. I accept this evidence. But the corollary is that now, six years later, the position is different. I have heard no evidence from anyone at the hospital that the position now is as she describes it to have been then. The witnesses from the hospital who are working there today were the current Medical Director Dr Fearnley and Dr Collins. Dr Fearnley gave unchallenged evidence as the importance of confidentiality, which I accept. He expressed concern about the risk of a future disclosure, as did Dr Collins. But they did not give evidence about the current position at the hospital which suggests that the hospital is in still in the difficult position it found itself in during 1999 and 2000.

191. The hospital has established the threshold condition that there has been wrongdoing, of which it is the victim, and in which the Defendant was involved: para 157 above. So I turn to focus on the comparative importance of the specific rights being claimed in this case.

192. For the hospital the main points are the following:

i) The rights and obligations to keep the patients' records from unauthorised disclosure, and so the wrongdoing of which it is the victim, are matters of the highest importance: paras 87 and following.

ii) The leak has had the effects on patient care described by Dr Collins and summarised in para 100 above

iii) The leak has had an effect on staff morale: para 173

iv) There remains a risk of another unauthorised disclosure.

193. For the Defendant, the main points are the following:

i) The expression for which the Defendant invokes freedom in this case is expression of a kind which attracts the highest protection: see paras 105 and following, above.

ii) The wrongdoing of the source, serious though it is, is not as serious as it would be but for the following findings: the disclosure consisted of only part of the notes excluding medical information of high sensitivity, I cannot say that it was made without the consent of Ian Brady, it was similar to information which he had already made available to the public, and the disclosure was motivated by an erroneous belief that it was in the public interest: see paras 134, 135, 144 and 147.

iii) The effect in terms of there being a cloud of suspicion is not at the high end of the scale, and it is now impossible to find out whether there is anyone against whom the hospital could obtain the redress they seek, or even who among those who were employed in 1999 is still employed at the hospital: paras 173 and 190

iv) The Defendant himself limited the amount of information which he made available to the public, and he has a record of investigative journalism which has been authoritatively recognised, so that it would not be in the public interest that his sources should be discouraged from speaking to him where it is appropriate that they do so: para 174 and following.

v) There has been no similar disclosure before or since November 1999, and the risk of future unauthorised disclosure, while it exists, is not now high: para 188.

vi) The necessity for a disclosure order has been diminished by the apparent success of the measures taken since the Fallon Report to impress upon those working at the hospital the need for patient records to be kept confidential and to avoid the serious faults which have occurred in the past: para 189.

194. Considering the facts as I now do in January 2006, in my judgment it has not been convincingly established that there is a today pressing social need that the sources should be identified. An order for disclosure of the Defendant's sources would not be proportionate to the pursuit of the hospital's legitimate aim to seek redress against the source, given the vital public interest in the protection of a journalist's source.

CLOSING REMARKS

195. I am conscious that the decision I have reached is the opposite of that reached by the Courts, up to and including the House of Lords, in the MGN action.

196. The first point to note is that this is not because I have considered that medical records are less private or confidential, or less deserving of protection, than those Courts held. On this point, as on all points of law, I have followed the House of Lords, and nothing in this judgment should be taken as providing any encouragement to those who would disclose medical records.

197. The second point to note is that the facts as I have found them to be today are different from the facts as they had been found to be in the MGN action. This is partly due to the new evidence that I have heard, and partly due to the passage of time since 1999. As Lord Keynes said: "When the facts change, I change my mind". Important facts that have changed are mentioned above. They include that the hospital no longer contends that the source acted for money, with the result that I have had to find afresh what the purpose of the source was, and to re-assess the risk of further disclosures now, in the light of that fact, and in the light of the absence of any similar disclosures since 1999. The extent of the disclosure by the source was more limited than was previously understood to be the case. I have not found that the source was one of a number of people limited to 200, but that it is impossible to say how large the group is. I have not found that the source was probably an employee, although he or she may have been, and even if it was an employee, the numbers who have left the hospital since 1999 represent about a third of those who worked there in 1999. So the likelihood of the hospital being able to obtain the redress it seeks against the source is correspondingly diminished. In addition, the stance of Ian Brady has changed, and I have not found that the disclosure was made without his consent. Finally, unlike the courts in the MGN action, I have heard the evidence of Mr Ackroyd and have concluded that he was a responsible journalist whose purpose was to act in the public interest.