

## **Out in the Open: Anna Macey reports on a Court of Appeal case with important points on privacy for personal injury claimants**

### **JX MX (by her mother and litigation friend AX MX) v Dartford and Gravesham NHS Trust**

#### **Introduction**

The Court of Appeal gave judgment, and set down detailed principles, on when anonymity orders should be used in personal injury approvals hearings for children and protected parties.

#### **Facts**

The Claimant suffered very severe injuries at the time of birth, and brought proceedings alleging the Defendant hospital had been negligent, with her mother acting as litigation friend. The case settled, with the Claimant receiving a large lump sum, and substantial periodical payments. At the approval hearing the Claimant's mother requested an anonymity order, providing evidence she was concerned about the loss of privacy, and that people might start looking to her for payments if the compensation became public.

At first instance, Tugendhat J refused to grant the anonymity order, finding on the evidence that there were no specific risks that made this necessary: the Claimant's affairs would be looked after by a professional deputy, and the mother's fears were not objectively well founded. He did order though that the Claimant's address should not be disclosed. The Claimant appealed to the Court of Appeal.

#### **Open Justice**

Moore-Bick LJ gave the only judgment. He began with a lengthy perusal of the many cases confirming the importance of open justice. These long standing principles are now set out in the Civil Procedure Rules, Part 39.2(1) of which provides:

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

In *JIH v News Group Newspapers Ltd*, a case concerned with preventing the publication of personal information, Lord Neuberger MR identified the following general principles:

- An order for anonymity should not be made simply because the parties consent to it;
- The Court should consider carefully whether some restriction on publication is necessary at all, and, if it is, whether adequate protection can be provided by a less extensive order than that which is sought;
- If the application is made on the basis that publication would infringe the rights of the party himself or members of his family under Article 8, it must consider whether there is sufficient general, public interest in publishing a report of the proceedings which identifies the party concerned to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

Moore-Bick LJ confirmed that any departure from open justice needed to be justified strictly on the grounds of necessity, which meant such an order was the minimum consistent with achieving the ultimate purpose of doing justice in the instant case. The Court was clear that it was not appropriate to balance the demands of privacy and freedom of expression.

### **Approval Hearings**

Any proposed settlement for a child or protected party must be approved by the Court, before it is binding on the parties (CPR 21.10).

Previously, in the case of *Scott v Scott*, the House of Lords ruled in cases concerning what were then known as wards of court and lunatics, the Courts were not exercising the same function as when determining disputes, but were instead exercising an administrative function as *parens patriae*, which justified a departure from the principle of open justice.

The rules on exceptions to the principles of open justice are set down in the CPR, rule 39.2(3) of which provides:

A hearing, or any part of it, may be in private, if: -

(d) a private hearing is necessary to protect the interests of any child or protected party; [or]

(g) the court considers this to be necessary, in the interests of justice.

In practice, if a Claimant wanted an anonymity order for an approval hearing they needed to provide specific reasons, and inform the Press Association, who were entitled to attend the hearing, and object. The Judge approving the settlement would make a decision on a case by case basis, with critics arguing this led to an inconsistent approach by the judiciary.

Moore-Bick LJ was concerned that the Courts now have a much broader jurisdiction in relation to children and those that lack capacity, for example in determining disputes between public authorities and private individuals, and much of this jurisdiction is governed by Statute. He reasoned that these changes meant it could no longer be argued that in such cases the Court was not exercising its judicial functions in approving cases.

### **Was an Order necessary?**

Moore-Bick concluded that although approval hearings did not lie outside the scope of the principle of open justice, in the pursuit of justice Courts should be more willing to recognise a need to protect the interests of claimants who are children or protected parties, including their right to privacy.

He reasoned that the Court was essentially dealing with private business and its function was essentially protective, similar to when it exercised *parens patriae* on behalf of the Crown, and fundamentally different from its normal function of resolving disputes between parties to proceedings. Moore-Bick LJ was also influenced by Article 14 of the ECHR, which provides that all the other Convention Rights must be applied without discrimination. Adults with full capacity were free to settle their cases in private, and children and protected parties were entitled to the same respect for their private lives. Anonymising mitigates to some extent the “inevitable discrimination between these different classes of litigants”.

## **Human Rights**

In addition to the common law, this case can also be analysed in terms of arguments about human rights, particularly Articles 8 and 10. Framed in this way, the issue is whether it is necessary to interfere with the rights of the public and the Press under Article 10 in order to protect the rights of the Claimant and their family under Article 8, and vice versa. Moore-Bick concluded: "The approach is the same whether the question be viewed through the lens of the common law or that of the European Convention on Human Rights...".

## **Type of order**

The Press Association argued that in most cases an Order under s39 of the Children and Young Persons Act 1939 will be more appropriate than an anonymity order. This is an Order prohibiting publication of information calculated to lead to the identification of the Claimant, which involves a lesser interference with the principle of open justice than an anonymity order. In a previous case of *MXB v East Sussex Hospitals*, Tugendhat J held such an Order might not provide adequate protection long term, because of the opportunity for informal publication of information on the internet, which might be easily accessible indefinitely. Moore-Bick LJ was also concerned that section 39 ceased to have effect when a child turned 18, and did not apply to protected parties.

He held the minimum necessary to do justice in the case was an anonymity order, by which he meant an order prohibiting the publication of the Claimant's name and address, and that of their litigation friend and family, and a restriction on access by non-parties to documents in the Court records.

## **Principles for lower courts**

Moore-Bick LJ stressed that a decision was necessary in every case to decide whether a derogation from the principle of open justice is necessary to ensure that justice is done. However, he continued that fine distinctions were difficult to justify and not easily understood, and the Courts ought normally to grant an anonymity order without the need for a formal application, unless satisfied that it was unnecessary or inappropriate to do so. A Claimant did not need to identify specific reasons, although if they did that would provide a further reason for derogating from the principle of open justice. He continued that the Press need no longer be formally notified when an anonymity order was being considered, however they ought to be given an opportunity to make submissions before any order was made restricting publication of the reporting of proceedings, such as the circumstances giving rise to the claim or the settlement amount.

Moore-Bick LJ concluded by advising Judges in lower courts considering approval hearings to recognise they were dealing with private business in open Court. He held that the following principles ought to apply:

- (i) The hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;
- (ii) Because the hearing will be held in open court the Press and members of the public will have a right to be present and to observe the proceedings;

- (iii) The Press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if different, the names and addresses of his or her parents) and restricting access by non-parties to documents in the court record other than those which have been anonymised (an “anonymity order”);
- (iv) The judge should invite submissions from the parties and the Press before making an anonymity order;
- (v) Unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;
- (vi) If the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;
- (vii) The judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the Press on request as soon as possible after the hearing.

### **Conclusion**

This case has been welcomed by many representing Claimants, ending an anomaly that meant highly personal medical information was made public. Approval hearings, unlike many hearings involving children and protected parties, are still held in public, with the PIBA and the Claimant accepting a full anonymity order provided sufficient protection for the Claimant and her family. The Press remain free to attend all approval hearings, and to report matters of public interest, such as the settlement amount.

Of course, the above departures from the principles of open justice do not apply to any contested personal injury cases.

**Anna Macey**  
**Kings Chambers**

### **Cases**

*JX MX (by her mother and litigation friend AX MX) v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96

*JX MX (by her mother and litigation friend AX MX) v Dartford and Gravesham NHS* [2013] EWHC 3956 (QB)

*MXB v East Sussex Hospitals NHS Trust* [2012] EWHC 3279 (QB)

*JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42

*Scott v Scott* [1913] AC 417

First published in the Personal Injury Law Journal April 2015 Number 134