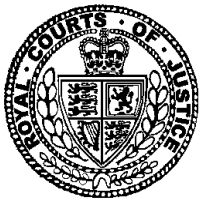

Neutral Citation Number: [2019] EWHC 552 (QB)

Case No: HQ17C00300

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2019

Before:

MR JUSTICE MARTIN SPENCER

- -

Between:

Justyna Zeromska-Smith	**Claimant**
- and -	
United Lincolnshire Hospitals NHS Trust	**Defendant**

- -
- -

Miss Susan Rodway QC (instructed by **Shoosmiths LLP**) for the **Claimant**
Mr Charles Feeny (instructed by **Browne Jacobson LLP**) for the **Defendant**
Hearing dates: 25th and 26th February 2019

- -

Approved Judgment on anonymity

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 MARTIN SPENCER

MR JUSTICE MARTIN SPENCER:

Introduction and Background

1. In this matter in which the Claimant seeks damages for psychiatric injury arising out of the stillbirth of her daughter on 27 May 2013, an application has been made for anonymity on the part of the Claimant. The trial was listed to start on Friday, 22 February 2019 and Miss Rodway QC indicated that she would be making the anonymity application. The application was made on Monday, 25 February 2019 but I "parked" the application to enable the Press Association to be served with the notice. On 26 February, I received submissions in writing from the Press Association and Miss Rodway resumed her application. Having heard argument, I refused the application and these are the reasons for that decision.

2. The brief background facts are that the Claimant, who is Polish, and was born on 26 September 1980, moved to England in July 2004 and soon thereafter met and formed a relationship with Mark Smith. They married on 28 July 2007. They always planned to have a family and moved from London to Lincolnshire where they were able to purchase a large property which could accommodate their family.

3. In about October 2012, the Claimant discovered that she was pregnant and her first booking appointment at the hospital was on 24 October 2012. A 12 week scan on 2 November 2012 gave an estimated date of delivery of 15 May 2013. A further scan on 28 December 2012 revealed that the baby was a girl and the Claimant and her husband were overjoyed. The Claimant had set her heart on having a daughter. They agreed a name for the baby, Megan, decorated and prepared a nursery for the baby and prepared themselves for the baby's birth.

4. A membrane sweep was carried out at 40 weeks' gestation on 15 May 2013 and a second membrane sweep was carried out a week later on 22 May 2013, neither of which precipitated labour. Therefore, the Claimant was admitted to the Defendant's hospital on 26 May 2013 for induction of labour. This was now term +10. At 01:00 in the early hours of 27 May 2013, a CTG trace was started which sadly revealed that there was no heartbeat and in fact the baby had died in utero. The labour had to proceed, it lasted some 18 hours, the baby was delivered by forceps and was stillborn. The Claimant was discharged the following day, 28 May 2013.

5. Liability for the stillbirth of the baby has been admitted by the Defendant and it is further conceded that the Claimant is entitled to damages to represent her loss arising out of the fact that the pregnancy was not brought to a successful conclusion. However, the Claimant also seeks substantial damages for what is claimed to be a pathological grief reaction combined with depression, which has proved intractable.

6. In December 2014, the Claimant fell pregnant again with an estimated date of delivery of 12 September 2015. This time the baby was a boy and the child was delivered by elective caesarean section on 1 September 2015. A further child, also a boy, was delivered on 8 May 2018. It is part of the Claimant's case that she suffers from pathological separation anxiety in relation to both her children, as a result of her psychiatric condition consequent upon the stillbirth of Megan.

The Application for Anonymity

7. In support of the application for anonymity, the solicitor with conduct of the claim on behalf of the claimant, Ms Kiran Deo, has made a statement in which she has stated that the claim, involving substantial damages and a schedule of loss exceeding six million pounds is one which is bound to attract publicity and the interest of the press. Miss Deo goes on to say:

> "10. One of the consequences of the Claimant's illness is that she now suffers from disabling separation anxiety and has to have her two young sons in her sight at all times …
>
> 11. The claim has already had a substantial impact on the Claimant's children and has put a significant amount of added pressure on the Claimant's marriage. There is also a definite risk of suicide. Having to relive and discuss such painful past events and for those events to be shared with the public in such a way that the family can be identified will be very difficult and could easily lead to irreparable damage to the family unit. This risk of interference with private family life, which is self-evident, can be alleviated with the making of an anonymity order.
>
> 12. Part of the Claimant's objective for bringing an action against the Defendant was to try and achieve justice for what has happened and to ensure the Defendant is held accountable for the mistakes that have been made. However, I would respectfully argue that the public interest can be served without the need for disclosure of the Claimant's identity."

8. Supplementing Miss Deo's statement, Miss Rodway QC, who represents the Claimant, has argued that the principle of open justice is satisfied by the Defendant being identified without identification of the Claimant. She submits that the trial includes matters of a deeply personal and private nature concerning the Claimant's mental health, her relationship with her two children, her intimate medical history and her past suicidal ideation which included thoughts of ending her life as well as that of her son. Although she is not a protected party she is described as a "highly vulnerable individual" and the interests of her young children should, it is submitted, be weighed in the balance. It is submitted that publication of the Claimant's identity will serve no useful public purpose but will risk considerable further harm to the Claimant's already precarious mental health and harm to her children and family. Personal privacy is said to be all important to the Claimant such that she changed jobs because her work colleagues were aware of the stillbirth of the Claimant's daughter and she then concealed this background from her new employers and work colleagues. She avoids interaction with strangers.

9. Miss Rodway further submits as follows:

> "iv) In the current climate of swift and widespread dissemination via social media, there is always the risk that some individuals may react in an extreme and negative way to

> parts of the evidence … it is not fanciful to consider her receiving harmful abuse which would have repercussions for the Claimant and her family. There is also the risk, knowing that the Claimant is Polish, this could extend to racial abuse;
>
> v) The publication of the Claimant's identity would necessarily identify her children. Public knowledge of the facts of their mother's mental health issues risks real harm to them. In addition it would provide the opportunity for her children, at a later stage, to discover and read facts of the case concerning them which would be likely to cause them considerable harm and distress;
>
> vi) If the Claimant is awarded damages, the revelation of her identity would also potentially expose her and her family to unwanted attention from strangers, potential unscrupulous attempts to persuade her to invest unwisely or begging letters pleading for financial help;
>
> vii) The principle of open justice can readily be met in the present case without the need to identify the Claimant or her family."

10. When the application was made at the start of the trial, I adjourned the application and ordered that it should be served on the Press Association to give them the chance to consider the application and make any submissions they wanted to in response. On the morning of 25 February 2019, I received written submissions by the Press Association which, whilst acknowledging that the Claimant's Article 8 ECHR rights are engaged in this case, argued that these rights are to be weighed against the Article 10 rights of the press. Having made submissions in relation to the legal principles and previous decisions, which I consider later in this judgment, the Press Association submitted that anonymity orders in cases where the party seeking them is not a protected party should only be made in exceptional circumstances and where necessary in the interest of the administration of justice. They submit that the order sought in this case would represent a departure from the previous jurisprudence and that the granting of anonymity would set an unfortunate precedent. They state:

> "22. As signatories to the Independent Press Standards Organisation Code of Conduct, we submit many of the concerns raised by the application could be met by our responsibilities under that code, particularly those sections of the guidance relating to privacy, children, suicide and intrusion into grief or shock.
>
> 23. It is also submitted that many of the details of the case, especially those of a sensitive nature, would not necessarily need to be made public. Some parts of the evidence could, for example, be heard in private or protected by reporting restrictions."

On that basis, the application is opposed.

The legal background

11. The starting point is the fundamental principle of common law that justice is administered in public and judicial decisions are pronounced publicly. This "open justice" principle is both integral to protecting the rights of the parties and also essential for the maintenance of public confidence in the administration of justice. This principle was emphasised by the House of Lords in *Scott v Scott* [1913] A.C. 417 where Lord Atkinson said:

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

At the time of the decision in *Scott v Scott*, there were two recognised exceptions to the principle of open justice: cases involving wards of court or lunatics and cases involving a secret process where the effect of publicity would be to destroy this subject matter. This was explained by Viscount Haldane L.C. at page 437 where he said:

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

> dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, thus turning, not on convenience, but on necessity."

These last words, referring to the criterion of necessity, are the ones that express the principle in cases which do not fall within one of the established exceptional categories such as wards, lunatics and secret processes.

12. The principles are now reflected in part 39 of the Civil Procedure Rules. Rule 39.2(1) provides:

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

Rule 39.2(3) provides:

> "A hearing, or any part of it, may be in private if … (d) a private hearing is necessary to protect the interests of any child or protected party; or … (g) the court considers this to be necessary in the interests of justice."

CPR Rule 39.2(4) provides:

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

Again, I emphasise the use in CPR 39.2(4) of the word "necessary".

13. In the present case, it is argued on behalf of the Claimant that the principle of open justice is perfectly well satisfied by the name of the Defendant being published but without publication of the Claimant's name. The interests of the press in being able to report the identity of both parties was considered by Lord Rodger of Earlsferry in *In re Guardian News and Media Ltd* [2010] 2 AC 697 at 723:

> "63. What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed … The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could

> threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.
>
> 64. Lord Steyn put the point succinctly in *In re S* [2005] 1 AC 593, 608, para. 34 when he stressed the importance of bearing in mind that
>
> > 'from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.'
>
> Mutatis mutandis, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer.
>
> 65. On the other hand, if newspapers can identify the people concerned, they may be able to give a more vivid and compelling account which will stimulate discussion about the use of freezing orders and their impact on the communities in which the individuals live. Concealing their identities simply casts a shadow over entire communities"

Thus, revelation of the identity of the parties is an important part of the principle of open justice and the principle is generally diminished where a newspaper is allowed to report the identity of only one of the parties.

14. In *JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96, the court was concerned with an application to anonymise the name of the claimant in relation to an application for approval of a compromise for a claim for damages for personal injury brought by a child. Pursuant to CPR 21.10, all settlements or compromises of claims by or against children must be approved by the court if they are to be binding on the parties. Similarly, approval is required for any settlement or compromise of any claim by or against a protected party. In that case, at paragraph 17, the court reiterated the principles to which I have already referred stating:

> "Whenever the court is asked to make an order [restricting publication of a party's name], therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose. The approach is the same whether the question be viewed through the lens of the common law or that of the

> European Convention on Human Rights, in particular articles 6,8 and 10."

The court referred to a series of cases in which Tugendhat J sought to apply the established principles to applications for anonymity orders in the context of applications for the approval of settlements of claims by children and protected parties. In each case, the judge had proceeded on the basis that such orders were to be considered on a case by case basis, regardless of the consent of the defendant, rightly emphasising the need for any derogation from the principle of open justice to be based on necessity.

15. On the appeal, the Personal Injury Bar Association intervened in support of the application for an anonymity order and their counsel, Mr Robert Weir QC, invited the court to hold that normally the identity of the claimant should not be disclosed in reports of approval hearings. He put forward three main justifications for such an approach:

i) The court's function when approving settlements is essentially protective and fundamentally different from its normal function of resolving disputes between the parties to proceedings;

ii) The publication of highly personal information about the claimant's medical condition involves a serious invasion of his and his family's rights to privacy;

iii) Unlike adult litigants at full capacity, who are free to settle their claims in private, the children and protected parties have no choice but to seek the court's approval of their settlements in proceedings open to the public and are thus placed at a significant disadvantage to other litigants in obtaining respect for their private and family lives contrary to article 14 ECHR.

Mr Weir submitted that anonymization of reports for approval hearings would ensure that the discrimination against children and protected parties which is necessary to ensure that their interests are properly protected is no greater than necessary and proportionate to the end sought to be achieved.

16. The court essentially accepted Mr Weir's submissions. In the course of his judgment Moore-Bick LJ said:

> "29. Although, as we have indicated, we do not think that approval hearings lie outside the scope of the principle of open justice, we think there is force in the argument that in the pursuit of justice the court should be more willing to recognise a need to protect the interests of claimants who are children and protected parties, including their right and that of their families to respect for their privacy in relation to such proceedings. Such a willingness is reflected both in the Family Procedure Rules and in the Court of Protection Rules. It might be thought that approval hearings, whether involving children or protected parties, are comparable in nature and deserve to be viewed in a similar light, although it has not been suggested that in general such hearings should be held in private. The function which

> the court discharges at an approval hearing is essentially one of a protective nature, as it was when it exercised the function of parens patriae on behalf of the Crown in relation to wards of court and lunatics. The court is concerned not so much with the direct administration of justice as with ensuring that through the offices of those who act on his or her behalf the claimant receives proper compensation for his or her injuries. The public undoubtedly has an interest in knowing how that function is performed and the principle of open justice has an important part to play in ensuring that it is performed properly, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity.
>
> 30. By virtue of article 14 of the Convention children and protected parties are entitled to the same respect for their private lives as litigants of full age and capacity (who are free to settle their claims with resort to the court), subject only to the need to ensure that their interests are properly protected. In many, if not all, cases of this kind the court will need to consider evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care needs and matters of a similar nature. In our view that is an important matter which the court is bound to take into account when deciding whether anonymity is necessary in order to do justice to such a claimant, notwithstanding the public interest which is served by the principle of open justice. Withholding the name of the claimant mitigates to some extent the inevitable discrimination between these different classes of litigants. In some cases it will be possible to identify a specific risk of dissipation of the sum awarded as damages when the claimant reaches the age of majority (as was the case, for example, in *JXF v York Hospitals*). If such a risk exists it will provide an additional argument in favour of anonymization. Although a fear of intrusive Press interest is sometimes said to provide grounds for relief, we accept Mr Dodd's submission that in general the Press seeks to act responsibly in reporting matters of this kind."

This latter reference reflects submissions made on behalf of the Press which I have referred in paragraph 10 above.

17. The court then went on to decide that in approval applications in relation to protected parties and children, an anonymity order should normally be made and that has become the norm in relation to such applications.

Discussion

18. In my judgment, the reasoning in *JXMX v Dartford and Gravesham NHS Trust* and the practice whereby anonymity orders are routinely made is peculiar to approval hearings in relation to children and protected parties, and Claimants in cases such as

the present can derive no support or comfort from that decision where they are adults of full capacity who bring their claims by choice and in respect of whom any publicity which arises in the reporting of the proceedings stems from that choice rather than from the inability to settle the claim without obtaining the court's approval. In cases such as the present, even where the case involves exploration of intimate details of the Claimant's private and family life, her psychiatric condition and her relationship with her two young children, the full force of the "open justice" principle and the interests of the press in reporting the proceedings, including the names of the parties, should not be derogated from, for the reasons already set out in the judgment of Lord Rodger (see paragraph 13 above). In respectful agreement with the reasoning of Lord Rodger, I do not consider that, in a case such as the present, the principle of "open justice" is adequately satisfied by the name of the Defendant being published, but not the name of the Claimant.

19. Miss Rodway, in making her application, relied on the decision of Nicol J in *ABC v St George's Healthcare Trust* [2015] EWHC 1394 (QB) where an anonymity order was made in relation to a claimant who was not a child or a protected party. However, in my judgment that decision does not assist the Claimant here. Rather, that case illustrates that the general principle is not absolute, and can be departed from where such departure is necessary in circumstances which are truly exceptional. The order was made because of the exceptional circumstances of that particular case and Nicol J explained his reasons for making the order as follows:

> "44. … As is clear from the judgment above, the Claimant's father has been diagnosed with Huntington's Disease. This is a genetic condition. A sufferer's child has a 50% chance of inheriting it. The Claimant has subsequently discovered that she too has Huntington's Disease. It is her case that if she was given the information when she should have been, she would have terminated the baby she was then carrying. She was not. That child was born. It is her daughter. It is usual not to test a child for Huntington's Disease until she is an adult. The daughter does not at present know her mother has Huntington's Disease. The daughter does not know that she has a 50% chance of inheriting itself. I accepted that there could be serious consequences for the daughter if she found out about these matters through a report of the present proceedings. This together with the rights of the Claimant and her daughter not to have their private lives interfered with by the action of the court, appeared to me to justify the restriction on publicity which the Claimant sought."

It seems to me that the harm to the claimant's daughter from finding out that she had a 50% chance of having inherited Huntington's Disease by chance rather than through a managed mechanism whereby she was informed of this at an age which was considered appropriate and in circumstances where she was given appropriate advice and counselling, was a powerful reason for making the anonymity order in that case on a wholly exceptional basis.

20. In the present case, the revelation of the matters personal to this claimant and her family are inherent and intrinsic to a claim of this nature, relating as it is to psychiatric injury suffered by the Claimant from the stillbirth of her daughter. Having chosen to bring these proceedings in order to secure damages arising out of that tragedy, the Claimant cannot avoid the consequences of having made that decision in terms of the

principle of open justice and the consequent publicity potentially associated with such proceedings being heard in open court.

21. Finally, I wish to say something about the timing of any application for anonymity in cases which are not approval hearings for protected parties or children. Here, the application was made at the start of the trial, without any notice having been given to The Press Association in advance. This put the court reporter in an awkward position, and did not allow for full consideration of the issues or properly prepared submissions on behalf of the Press. Mr Feeny, for the Defendant, understandably took a neutral stance, although, when I adjourned the application, he helpfully provided to the court some additional authorities, for which I was very grateful. But, in general, it seems to me that such an application should be made and heard in advance of the trial, and should be served on the Press Association. There are two reasons for this. First, and most obviously, it gives the Press Association a proper opportunity to make representations, whether orally at the application or in writing in advance. Secondly, the outcome of the application may inform any decision taken by a Claimant in relation to settlement. Thus, if a Claimant in a sensitive case such as the present knows that, if the matter goes to trial, her name will be published in the press, she may consider that to be an important factor in deciding whether or not to accept an offer of settlement – in some cases it could tip the balance. For these reasons, an application for anonymity should be made well in advance of the trial and Claimants (and their advisers) should not assume that the application will be entertained at the start of the trial (because of the disruption to the trial which may ensue, if the application needs to be adjourned to enable the Press Association time to prepare submissions), nor that it will be "nodded through" by the judge, where the Defendant takes a neutral stance and there is only a court reporter to represent the interests of the press..

22. In the circumstances, the application for anonymity is refused.