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Press Conference
held by
The Lord Chief Justice of England and Wales
(Lord Judge)
and
The Master of The Rolls
(Lord Neuberger)
on
Friday 20 May 2011
at
The Royal Courts of Justice
The Strand
London
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STEPHEN WARD (HEAD OF NEWS): Thank you to everybody for coming so early. If I can remind you, everything, including the report, is embargoed until 10.15. The Lord Chief Justice, who is on my far left, will speak first, and the Master of the Rolls will then make a statement. After that we will take questions. The total of that will be approximately half an hour. If you would put up your hand, I will select the speaker. Would you then say who you are and which publication you are from? One more thing I would like to ask, would the still photographers not come any closer than the front row of seats because it is disconcerting for those of us at this side of the camera. If the journalists at the back cannot hear, there is some scope to come and stand at the side if it is easier. Lord Chief Justice?

THE LORD CHIEF JUSTICE: I welcome the Report and I want to say a few things by way of introduction. No one - and in particular no judge -doubts that the open administration of justice is a long-standing, treasured principle of our legal system.
Before 2000 there was in England and Wales no general right to privacy and therefore no right to an injunction to protect or enforce any general claim to privacy. The development of privacy rights since 2000 was an inevitable consequence of the enactment of the Human Rights Act 1998 and the

incorporation of the European Convention of Human Rights, and in particular Article 8 of the Convention, into domestic law. By way of emphasis, that consequence was indeed clearly explained to Parliament before the Human Rights Act was enacted.

Contrary to some commentary, unelected judges in this country did not create privacy rights. They were created by Parliament. Now that they have been created, judges in this country cannot ignore or dispense with them. They must apply the law relating to privacy matters as created by Parliament, including those rights relating to the enforcement of privacy rights by injunctive relief, balancing them with the rights underlined in Article 10 and the principle of freedom of expression. The relationship between Parliament and the court has for generations been predicated on mutual understanding and respect. Judges have never asserted, and they are not now asserting, any authority or jurisdiction over Parliamentary proceedings or debate which are exclusively matters for Parliament. Notwithstanding its distinguished membership, Lord Neuberger's Committee was not vested with any authority to enlarge or reduce any of the principles of open justice and freedom of expression or privacy or confidentiality rights. However, the Report will have a valuable practical effect on the way in which the courts deal with applications for injunctions based on alleged privacy rights.

THE MASTER OF THE ROLLS: Our starting point as a Committee was the maintenance of the fundamental principles of open justice and freedom of speech. Where privacy and confidentiality are involved, a degree of secrecy is often necessary to do justice. But where secrecy is ordered, it should only be to the extent strictly necessary to achieve the interests of justice, and when it is ordered the facts of the case and the reason for the secrecy should be explained as far as possible in an openly available judgment.

We have tried to achieve a procedural system which strikes a fair and proper balance between the principles of open justice and freedom of expression for the public and for the media, and an individual's right of confidentiality and privacy.

I am grateful to all the members of the Committee for the expertise they have contributed and the hard work they have done in compiling the report. I am pleased and impressed by the extent to which the competing interests of the media and claimants have managed to reach agreement on our proposal, which I hope and expect will improve the interests of justice and the rule of law.

ANDY DAVIES (CHANNEL 4 NEWS): Do you have any idea of how many Anonymised Injunctions and Super-Injunctions have been granted since 2000?

THE MASTER OF THE ROLLS: Since 2000, no. I would not like to say precisely how many. We have concentrated on the more recent period and you will see in our report at paragraph 2.27 the recent cases since 2010 (since the Terry case). I think there has been an acceleration of cases in the latter half of this decade and the eighteen cases summarised there are a fair picture of what is going on. It is right to emphasise that in every one of those cases there is an openly available reasoned judgment explaining the circumstances of the case. They are not Super-Injunctions in the sense that we have defined them; they are Anonymised Injunctions. But I appreciate the important thing for the press in many ways is that they are injunctions involving a degree of secrecy.

JOSHUA ROZENBERG: Can you explain the new procedures that you have outlined in the guidelines? Will there be notice to the press as a whole? Do you think that in general the press will be allowed in, albeit not allowed to report what is said if the court so ordered? Will that be confined to the mainstream media, or will you include bloggers and people who tweet? And if the latter, how can you ensure that material is not published on the internet which cannot be published - how will you ensure that material is not published on the internet, even though it cannot be published in the mainstream media? And won't that put the newspapers at a disadvantage?

THE LORD CHIEF JUSTICE: If the witness were being cross-examined, we would have stopped Mr Rozenberg after the first question. The Master of the Rolls will try to remember all of those questions and try to answer them.

THE MASTER OF THE ROLLS: Thank you. One of the new proposals to improve open justice and to improve the press being informed of what is going on is a procedure which involves any member of the media who wanted to be the subject of an injunction - ie. against whom the claimant thinks that he will want an injunction to run - to be informed of the application. Now, obviously this is a sensitive matter because in many cases the precise newspaper or other arm of the media will not necessarily know all of the facts. So it is necessary to have a confidentiality agreement before notice of the injunction application is given. That will enable members of the media to know in advance about applications of this sort and that is a new development that we are recommending.

The second point, hearings. Consistent with the principle of open justice and hearings taking place in public, we as a Committee, and I as the Head of Civil Justice, and the Lord Chief Justice (if I can speak for him) as the Head of the Judiciary, are obviously anxious that hearings take place as much as possible in public. I have said on several occasions in recent cases that hearings in the Court of Appeal should be in public if at all possible on the basis that sensitive information can be referred to by reference to a document referred to by the advocate to the court and which cannot be identified in the media.

Hearings at first instance (ie. when the application is first made to the judge) are more difficult to be heard in public because often they are very rushed. The press has said - let us say a Sunday newspaper has told somebody on a Thursday that the article will be coming out. That person has to rush to his or her lawyers and then the lawyers come to court. It is a fairly fraught occasion and often it is difficult for that hearing to be in public. The judge will consider if it can be. He (or she) should certainly consider whether it should be in public and if it is possible it will be. But often it cannot be. On the return date (that is if the judge grants the injunction the matter has to come back for consideration in more detail), then it is often possible for the hearing to be in public.

The third point - and I think this is the last point I propose to deal with - is the effect of the web. It does add to the difficulties of enforcement. There is no doubt about that. At the moment the law seems to be that even if the information which is the subject matter of the injunction is on the web, or may go on the web, that is by no means the same degree of intrusion under privacy as the story being emblazoned on the front page of a national newspaper, which people trust more and has far greater circulation than those bloggers and tweeters. It is a problem, however, and I can well understand the press's concern that, on the one hand, the print-press is prevented from telling a story when it is available on the web. That is a problem and it is one that we shall have to face and deal with as the matter develops.

MARTIN BENTHAM (EVENING STANDARD): You make very clear that in the issue of Super-Injunctions you expect fewer be granted and that they should never actually end up being permanent. On the issue of Anonymised Injunctions, you make also clear that there has been this drift to having more of them. Do you expect, as a result of your Report, there to be fewer such Anonymised Injunctions in future, or do you think the trend of the law, as it is developed, will still lead to more Anonymised Injunctions? And if that is the case, do you wish that Parliament would get involved in this and give clearer guidance to you about where the boundaries should lie?

THE LORD CHIEF JUSTICE: The number of injunctions will depend on the number of applications for injunctions. That is really the long and the short of it. The principles which will govern whether the injunction is to be reported anonymously are the principles we now have. I do not think that the Report, as I said in what I had to say earlier, I do not think that the Report can change, either by accelerating the number or changing the principles which have to be applied. It may be there will be fewer, it may be that there will be more.

I think we have also slightly got to get away - because this is of great importance to the media - from the idea that all these cases are necessarily cases which involve the media. People seek injunctions to support their privacy in order to protect themselves from blackmail - not, of course, by the media but by somebody else. They seek them to protect their children from possible threats - again, of course not by the media. So we do have to be slightly careful not to assume this is an entirely media issue. It is not. I do not think we can take the matter any further.

The Parliament issue is a much more problematic one. I have no doubt that there will be plenty of questions about this. Parliament has given us this law which we have to try to understand. I am sorry that you will not like this, but most of the time when there is an injunction made which involves the media, you have been present through legal advisers. Often you have not opposed the order - I am not saying you have consented to it - but often you have not opposed it. You have not applied to have it set aside and you have not appealed.

Now, if it is not appealed, the Court of Appeal cannot look at it and say whether it is right or wrong; and if it is not appealed to the Court of Appeal, it certainly cannot go to the Supreme Court for the Supreme Court to consider the issue.

I am not encouraging you to object every time. You will have legal advice. But what is the conclusion that one might draw from this? If you have legal advice and you decide not to oppose it, it may very well be that the advice is that the order made is a perfectly sensible order within the privacy law that we now have. If you do not like that law, that is the part of the law where you go to Parliament and say, "Please let it be changed"; or you appeal so that the Court of Appeal can look at it and see whether the law should be developed; or for that matter whether the Supreme Court should look at it and see whether it should be developed.

But I do start with this premise: Many of these orders are not opposed at the time when they are made, and I wonder why?

STEVE DOUGHTY (DAILY MAIL): Lord Neuberger, are you suggesting that a newspaper may be in contempt of court if it reports a speech in Parliament with a view to circumventing an injunction?

THE MASTER OF THE ROLLS: The law relating to contempt of court when it comes to reporting what is said in Parliament is astonishingly unclear and I would not like to pontificate about what the law is. (a) It does appear to be unclear; and (b) in due course, as a judge, I might be asked to rule on what it is, and therefore I cannot express a view to you. We do deal with it in our Report and explain why it is unclear. It is, I think, very unsatisfactory that it is unclear. People should know where they are and whether they are members of the public, constituents, Members of Parliament or indeed peers. One thing we are very anxious to do is to encourage dialogue between the courts and Parliament - between the judges, the Speaker and the Lord Speaker - to clarify the law and make it sensible. Historically, the courts and Parliament have mutually respected each other's territory and have worked very well together, and I have every expectation, and certainly every hope, that that will continue in relation to this particular topic.

THE LORD CHIEF JUSTICE: Can I follow that up, Mr Doughty? There is no particular secrecy about this; it is not a Super-Injunction or an Anonymous Injunction and you can print anything that I am about to say if you like. Before this Report was circulated and made public to you, the passages in the Report that relate to Parliamentary privilege were sent to the Speaker of the House of Commons and the Lord Speaker in the House of Lords. The result of that is that, probably with the Master of the Rolls, I shall be speaking with the Speaker and the Lord Speaker about how these issues arise.

There is though a point of principle which I think it would be healthy for you in the media to think

about. It is, of course, wonderful for you if a Member of Parliament stands up in Parliament and says something which in effect means that an order of the court on anonymity is breached. But you do need to think, do you not, whether it is a very good idea for our law makers to be in effect flouting a court order just because they disagree with the order, or for that matter because they disagree with the law of privacy which Parliament has created. It is a very serious issue, in my view. There has never been any question in any of these orders - not in any single one of them - of the court challenging the Sovereignty of Parliament. That is not the issue. We are following the law as best we understand it at the level of the judiciary where the issues have been canvassed. But, as the Master of the Rolls has just said, our constitutional arrangements have for centuries worked on the basis of mutual respect and comity. It is very interesting, as the Report makes clear in paragraphs 5.3 and 5.4, to see how Parliament has looked at this issue. In 5.3 there is a quotation from the 1999 Joint Committee on Parliamentary Privilege (and I quote from the Committee's own Report). The sub judice rules need "*to strike a balance between two sets of principles. On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matter it pleases*". That is Parliament's view. If I may say so, with respect, I entirely agree with it.

If you look at paragraph 5.3 there is another much longer quotation. If I started to read that out there would be no more time for questions.

The point I am trying to make is that this is not an issue which, so far as I am concerned, has created a conflict between the courts and Parliament.

ALISTAIR BUNKALL (SKY NEWS): As you said, the relationship between the courts and Parliament is based on mutual respect, but also in the summary you do point out that the Human Rights Act inevitably led to the degree of privacy. It seems slightly defensive of the judiciary. In your opinion is it now time for Parliament to debate privacy again to help out the judiciary? And what is your view on Lord Stoneham's question on behalf of Lord Oakeshott in the House of Lords yesterday? Do you think that is a breach of the trust?

THE LORD CHIEF JUSTICE: I have made my comments about that while answering the last question to Mr Doughty. Judges actually do not engage in the question of whether the law should be reformed in this context. We apply the law that we have. You have an interest; the public has an interest. If you think the law is wrong or the law needs reform, then, as I say, subject to coming to the court and trying to persuade the higher courts about where the law should be, the remedy has to be in Parliament. I am certainly not going to sit here and say, in answer to a question from anybody: I want Parliament to get a grip of this. That is for Parliament to say. Parliament will observe all your concerns. Parliament will observe what is happening and Parliament will decide. It will take quite an effort for Parliament to get a grip of this. There has been effort after effort. I think 1971 was the first, but time and time again the issue has come before Parliament and Parliament has not legislated. The legislation has simply been in the context of the incorporation of the European Convention and Article 8 and Article 10.

THE MASTER OF THE ROLLS: If I might make a point, the basic proposition is that Parliament makes the law across the board and the courts decide how it is to be applied in individual cases. The difficulty is this. Once you accept, as I think most people would accept, that there should be some sort of law of privacy - if we look at certain cases, it seems obvious - Parliament can set the general parameters and the court then has to apply those parameters. The difficulty is that there can be large difference of opinion as to where the parameters should be drawn.

There is also the point that at the moment at any rate - so long as we are signed up to the Convention on Human Rights - we do have to have regard to what the Strasbourg Court decides because, first of all, that is what the Human Rights Act says. Secondly, if we do not have regard to what the Strasbourg says

and we decide that somebody does not have a claim, when the Strasbourg Court says they have, in this country they lose in the English Courts because we say they do not have a claim. They then go to Strasbourg and they win. It is the taxpayer, through the government, that has to pay the costs and the damages that they recover in Strasbourg. So there is that dimension as well.

OWEN BOWCOTT (GUARDIAN): In your summary you say there is justifiable concern that Super-Injunctions in the past have been granted far too readily. Would you go as far as to say the process has been abused in the past, or injunctions have been awarded inappropriately? And are you confident that sufficient changes have taken place?

THE MASTER OF THE ROLLS: It is a difficult area and to describe oneself as "happy" would be a hostage to fortune. I think that there is no doubt, as you rightly identify, our Report does say that Super-Injunctions in the technical sense have been granted far too often and at the beginning of 2010 in the Terry case a line was drawn in the sand. Since then there have only been two Super-Injunctions granted, as far as we know. One has been overturned by the Court of Appeal; and the other lasted for only a short period. I say as far as we know - and I had an earlier question about the number of injunctions granted - we are concerned about the fact that there is no record keeping so that we can give a firm answer and the press can find out how many injunctions are granted. One of our recommendations, which I understand that the Ministry of Justice is keen to take up, is our proposal that there is a record kept of the Super-Injunctions and other Anonymised Injunctions when they are granted.

FRANCES GIBB (TIMES): On the point of the parameters within which the courts operate, I see that you say that the new guidance will emphasise the importance to courts to comply with section 12 of the Human Rights Act, which requires them to pay heed to freedom of expression. Do you think that the courts have not been paying sufficient regard to that and do you think, if they do, we will see fewer injunctions granted?

THE MASTER OF THE ROLLS: As has been emphasised by the Lord Chief Justice in the introduction - I cannot comment on individual cases - I think the earlier question identified the fact, as we said in our Report, that injunctions had until early 2010 been granted perhaps a bit too readily. I would hope that we are now in a position where injunctions are granted as frequently as they ought to be and no more frequently - and indeed no less frequently. It may be that the effect of our Report and the implementation of its recommendations will lead to a sea change. As the Lord Chief Justice said in answer to an earlier question, that is really something that we will have to wait and see. But certainly I hope that one of the main effects of the Report is to re-emphasise the point that you, Frances, yourself emphasised, which is the importance of freedom of expression, the importance of the media being able to report anything that can properly be reported, and the importance of hearings taking place as far as possible in public.

STEPHEN WARD: We probably have time for one, maybe two, more?

CLIVE COLEMAN (BBC): Can I just ask you about what perhaps can be described as the elephant in the room, which is the internet? You have talked about the fact that it is a problem that there is a disparity between the mainstream media, which regard themselves as being bound by injunctions, although inevitably, particularly in relation to the print-media, the feeling that they have not pushed the envelope because of this vast, unregulated frontier of the internet, where people do not feel that they are bound by that. Flash forward three or four years. Things are changing so rapidly, is this not a sticking plaster on that situation in that the newspapers are going to feel bound - when rich and powerful people go to court on the strength of their Article 8 rights and gain injunctions, newspapers are going to want to print those stories and that pressure is just going to build and build and build, and if the newspapers feel that they are being treated like second class citizens, it is going to explode at some point.

THE LORD CHIEF JUSTICE: I have something to say about that before the Master of the Rolls does. Why are we assuming - I am asking a broad social question - why are we assuming that the world of communications developing as rapidly as it is can never be brought under control by other technological developments? Why are we assuming that? We have to find ways, do we not, to prevent the misuse of modern technology? We found ways to stop the circulation of pornographic pictures involving children - or at any rate to hunt down the people who purvey the material, and to prosecute them for criminal offences. Are we really going to say that somebody who has a true claim for privacy, perfectly well made, which the newspapers and media cannot report, has to be at the mercy of somebody using modern technology? At the moment that may seem to be the case, but I am not giving up on the possibility that people who in effect peddle lies about others by using modern technology may one day be brought under control, maybe through damages - very substantial damages - maybe even through injunctions to prevent the peddling of lies. My starting premise is: what effort have we been making as a society to think about trying to control the way in which modern communication is proliferating?

Then there is a separate point. "Rich and powerful" sounds very dramatic. The problem with media injunctions - injunctions affecting the media - is that people are rich and powerful because they are celebrities who have money. That is the public interest in them. Mr and Mrs Bloggs down the road may have the most interesting of sexual lives, but who is interested in that? It is not because they are rich and powerful, it is because they are not celebrities. They do not need to come to court because they will get on with it in the way they wish to. So we need to be just a little careful about using "rich and powerful" in this emotive way.

Finally, I do think - I am repeating, but I want to emphasise it - there is a difference between a report in a reputable newspaper - everybody knows about defamation; some people even know about the Press Complaints Commission; and some people even know that most newspaper editors do not like to go foul of the Press Complaints Commission, notwithstanding some of the articles to the contrary. But they know about defamation; everybody knows that if you get it wrong, the damages will be very substantial. They also know that modern technology is totally out of control. Anybody can put anything on it. I suspect that they would pay much more attention to an article in a newspaper or on the media than they would to anything that anybody can put out on modern technology. I think there is a significant difference. So there are a number of different facets to the way in which we deal with modern technology, but one of them is how to deal with it.

That then leads to questions which go to the very heard of this problem in relation to twittering out of court. How do we as judges ensure that X is a true media representative? We know who you are; we are familiar with you. But somebody comes along and says, "I am from the Argyle and Orkney Express". How do we know? Do we really expect to have cards issued? Can you imagine the bureaucracy? I think it would be unacceptable to the media. Personally, I think it would be unacceptable to the judges. So the media's position is not all that easy either. That is the end of a long series of observations in answer to a relatively short question. The Master of the Rolls will finish off.

THE MASTER OF THE ROLLS: First of all, I entirely agree with what the Lord Chief Justice has said. Secondly, when it comes to granting injunctions one has to be practical. If the news is out there to an extent that stopping a newspaper from publishing it would be pointless, then, of course, there would be no injunction. But so long as there is a serious argument for saying that for the reasons that the Lord Chief Justice has given, it would be a much greater invasion of their privacy to have a news story over a national newspaper as opposed to on the blog, then the argument for privacy and an injunction would be strong, provided it was otherwise justified. I think that a point could come, if the sort of measures which the Lord Chief Justice has identified were not workable, and if and when the web became a more reliable source of information in this sort of area, then one might decide that an injunction was not appropriate or grantable. But it is a question of degree. But for my part I am very conscious of the fact

that the print-media and the broadcast media must feel that it is quite unfair that in practice it is only too easy to stop them -- if you have the money, as you would say -- it is only too easy to stop them reporting the story, whereas it is much more difficult to stop the story being reported on the web. I see that. I have to say that on one or two of the injunctions I have upheld, I have subsequently looked on the web to see what sort of reports are being made of it, and they are often very inaccurate indeed and although only one person actually made the claim, about fifteen different people are identified as possible claimants. So it is not a reliable place at the moment and that illustrates what the Lord Chief Justice has said.

STEPHEN WARD: One more question.

ADAM FLEMING (BBC NEWS): Back to your point earlier on about MPs. When you say that some parliamentarians have behaved badly and incorrectly in --

THE LORD CHIEF JUSTICE: I have said what I have said, and I have asked you to ponder it.

STEPHEN WARD: We will take one last question.

JODIE GINSBERG (REUTERS): Do these guidelines make it any easier for those who do not have deep pockets to bring injunctions? You mentioned cases that are not necessarily related to media, but related to blackmail and protection of children. Does it make that any easier, in which case how do those without deep pockets ensure that their privacy is protected?

THE MASTER OF THE ROLLS: That is a very good question which goes far wider than the sort of issue that we are concerned with here. Access to justice is as fundamental an aspect of a modern democratic society as open justice and one of the problems of our present system is that litigation and access to the courts is expensive and if you do not have much money, or you have no money, you need legal aid; and one of the problems we are facing -- and it looks as though it will become worse -- is availability of legal aid. Where children are involved, I would find it hard to believe that legal aid would not be available. But where some other claims are involved, it may well be that it would not be available. But that is not a problem that is specific to this area; it is a problem which applies across the board. But you are right to identify it, if I may say so.

MARTIN BENTHAM (EVENING STANDARD): Sorry, could I just ask the Lord Chief Justice one separate question altogether, which is to ask: would you be concerned if the discount for a guilty plea went up to 50% from 33% that that would undermine the public --

THE LORD CHIEF JUSTICE: You did not even wait for somebody to say "Yes" to answer your question. I am not going to comment on that. This meeting is about these issues. I will have something to say about that at some appropriate future time. I am told by Stephen that he is lining me up to have a press conference at some stage which will be open season.

MARTIN BENTHAM: Next week?

STEPHEN WARD: Later this year. Thank you very much.