PRESIDENT OF THE FAMILY DIVISION

OPENING UP THE FAMILY COURTS

TRANSPARENCY IN THE FAMILY COURT AND THE COURT OF PROTECTION

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There are many challenges facing the media. Some involve what are ultimately political questions on which it would not be appropriate for a judge to comment. So you will understand if I say nothing about them. Some have to do with the media's ability to access and report court proceedings. Of these wider questions again I propose to say nothing. I confine what I have to say to the specific issue of the media relationship with the family courts and the Court of Protection.

The starting point, of course, is the fundamentally important principle of open justice, the principle that anyone should be able to enter, watch and report the proceedings in the courts. That principle is so clear that it requires neither proof nor elaboration. But – and there is always a but – it is necessarily subject to exceptions. Those exceptions were mapped out just a century ago in 1913 in the classic authority, *Scott v Scott*, which incidentally is the definitive statement of the principle that the Family Division stands in general in this respect in no different position than the other Divisions of the High Court. I can quote the speech of Lord Shaw of Dunfermline:

> "The three exceptions which are acknowledged to the application of the rule prescribing the publicity of courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention – trade secrets – is of the essence of the cause. The first two of these classes depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriae. The affairs are truly private affairs; the transactions are truly transactions intra

> familiam; and it has long been recognised that an appeal for the protection of the court in the cases of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

Today one sees those principles carried forward, in more modern language, in section 12 of the Administration of Justice Act 1960.

You have not come here to listen to a law lecture, so I shall be brief. Section 12 does not prevent all reporting of cases involving children or incapacitated adults. What in essence it prevents is the reporting of the contents of the court papers and what goes on inside the courtroom. Section 12 does not protect the identity of anyone involved in the proceedings, not even the child. The child's privacy is protected by section 97 of the Children Act 1989, which prohibits the publication of "material which is intended, or likely, to identify" the child. The effect of all this is that, just as in the case of experts, there is no statutory protection for the identity of either a local authority or its social workers.

The court has power both to relax and to add to these 'automatic restraints.' In exercising this jurisdiction the court conducts a 'balancing exercise' between the competing interests protected, typically, by Articles 6, 8 and 10 of the Convention. Thus, for example, the court may, by an appropriate injunction, afford anonymity to participants in the process such as an expert, a local authority, or a social worker. But such injunctions will not readily be granted. Anonymity should not be extended to experts, local authorities and social workers unless there are compelling reasons.

So one can see the inevitable tension between the claim of open justice and the need to protect the privacy of those, the children in particular, involved in family proceedings.

The pressing question is whether the balance is being appropriately held. Hence the current debate about transparency.

In relation to this debate there are, as it seems to me, a number of critically important matters. There is nothing new in what follows but the matters to which I wish to refer are so important that they bear constant repetition.

The first matter relates to what it has become conventional to call transparency. There is a pressing need for more transparency, indeed for much more transparency, in the family justice system. There are a number of aspects to this.

One is the right of the public to know, the need for the public to be confronted with, what is being done in its name. Nowhere is this more necessary than in relation to care and adoption cases. Such cases, by definition, involve interference, intrusion, by the state, by local authorities and by the court, into family life. In this context the arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling. The public generally, and not just the professional readers of law reports or similar publications, have a legitimate, indeed a compelling, interest in knowing how the family courts exercise their care jurisdiction.

I have said this many times in the past but it must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which family judges are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. When a family judge makes an adoption order in relation to a twenty-year old mother's baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 or even 70 years, and the baby for what may be upwards of 80 or even 90 years. We must be vigilant to guard against the risks.

This takes me on to the next point. We strive to avoid miscarriages of justice, but human justice is inevitably fallible. The *Oldham* and *Webster* cases stand as terrible warning to everyone involved in the family justice system, the latter as stark illustration of the fact that a miscarriage of justice which comes to light only after the child has been adopted will very probably be irremediable. Specialist family advocates are vital in ensuring that justice is done and that so far as possible miscarriages of justice are prevented. But that is only part of the remedy. We must have the humility to recognise – and to acknowledge – that public debate, and the jealous vigilance of an informed media, have an important role to play in exposing past miscarriages of justice and in preventing possible future miscarriages of justice.

Almost ten years ago in *Re B* I said this:

> "… We cannot afford to proceed on the blinkered assumption that there have been no miscarriages of justice in the family justice system. This is something that has to be

> addressed with honesty and candour if the family justice system is not to suffer further loss of public confidence. Open and public debate in the media is essential."

I remain of that view. The passage of the years has done nothing to diminish the point; if anything quite the contrary.

The compelling need for transparency in the family justice system is demanded as a matter of both principle and pragmatism. So far as concerns principle I can do no better than repeat what Lord Steyn said in *ex parte Simms* in 2000:

> "freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. … It facilitates the exposure of errors in the … administration of justice of the country."

This takes me on to the next point. It is vital that public confidence in the family justice system is maintained or, if eroded, restored. There is a clear and obvious public interest in maintaining the confidence of the public at large in the courts. It is vitally important, if the administration of justice is to be promoted and public confidence in the courts maintained, that justice be administered in public – or at least in a manner which enables its workings to be properly scrutinised – so that the judges and other participants in the process remain visible and amenable to comment and criticism. This principle, as the Strasbourg court has repeatedly reiterated, is protected by both Article 6 and Article 10 of the Convention. It is a principle of particular importance in the context of care and other public law cases.

In relation to the pragmatic realities, I repeat what I said in *Ward* in 2010:

> "… the law has to have regard to current realities and one of those realities, unhappily, is a decreasing confidence in some quarters in the family justice system – something which although it is often linked to strident complaints about so-called 'secret justice' is too much of the time based upon ignorance, misunderstanding, misrepresentation or worse. The maintenance of public confidence in the judicial system is central to the values which underlie both Art 6 and Art 10 and something which, in my judgment, has to be brought into account as a very weighty factor in any application of the balancing exercise."

The family lawyer's reaction to complaints of 'secret justice' tends to be that the charge is unfair, that it confuses a system which is private with one which is secret. This semantic point is, I fear, more attractive to lawyers than to others. It has signally failed to gain acceptance in what Holmes J famously referred to as the "competition of the market". The remedy, even if it is probably doomed to only partial success, is – it must be – more transparency; putting it bluntly, letting the glare of publicity into the family courts. As I went on to say:

> "… where the lack of public confidence is caused even if only in part by misunderstanding or, on occasions, the peddling of falsehoods, then there is surely a resonance, even for the family justice system, in what Brandeis J said so many years ago. I have in mind, of course, not merely what he said in *Whitney v California* in 1927:
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> > "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."
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> I have in mind also his extra-judicial observation that, and I paraphrase, the remedy for such ills is not the enforced silence of judicially conferred anonymity but rather the *disinfectant* power of exposure to forensic sunlight."

In short, the remedy is publicity, "more speech, not enforced silence."

The second matter is this. The workings of the family justice system and, very importantly, the views about the system of the mothers and fathers caught up in it, are matters of public interest which can and should be discussed publicly. Many of the issues litigated in the family justice system require open and public debate in the media. It is important in a free society that parents who feel aggrieved at their experiences of the family justice system should be able to express their views publicly about what they conceive to be failings on the part of individual judges or failings in the judicial system. And the same goes, of course, for criticism of local authorities and others.

This takes me to the third matter. It is not the role of the judge to seek to exercise any kind of editorial control over the manner in which the media reports information which it is entitled to publish. As I explained in *Roddy* in 2003:

> "A judge can assess what is lawful or unlawful, a judge in the Family Division may be called on to assess whether some publication is sufficiently harmful to a child as to warrant

> preventing it. But judges are not arbiters of taste or decency … It is not the function of the judges to legitimise 'responsible' reporting whilst censoring what some are pleased to call 'irresponsible' reporting … the freedom of expression secured by Article 10 is applicable not only to information or ideas that are favourably received, or regarded as inoffensive, but also to those that offend, shock or disturb the state or any section of the community. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. It is not for the court to substitute its own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 entitles journalists to adopt a particular form of presentation intended to ensure a particularly telling effect on the average reader."

As the Strasbourg court has repeatedly said, "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation."

Comment and criticism may be ill-informed and based, it may be, on misunderstanding or misrepresentation of the facts. If such criticism exceeds what is lawful there are other remedies available. The fear of such criticism, however justified that fear may be, and however unjustified the criticism, is, however, not of itself a justification for prior restraint by the family court, even if the criticism is expressed in vigorous, trenchant or outspoken terms. If there is no basis for injuncting a story expressed in the temperate or scholarly language of a legal periodical or the broadsheet press there can be no basis for injuncting the same story simply because it is expressed in the more robust, colourful or intemperate language of the tabloid press or even in language which is crude, insulting and vulgar. A much more robust view must be taken today than previously of what ought rightly to be allowed to pass as permissible criticism. Society is more tolerant today of strong or even offensive language.

It is no part of the function of the family court to prevent the dissemination of material because it is defamatory or because its dissemination involves the commission of a criminal offence. If what is published is defamatory, the remedy is an action for defamation, not an application in the Family Division for an injunction. If a criminal offence has been committed, the appropriate course is the commencement of criminal proceedings. If it is suggested that publication should be restrained as involving a criminal offence, that is a matter for the Law Officers.

An injunction which cannot otherwise be justified is not to be granted by a family court because of the manner or style in which the material is being presented, nor to spare the blushes of those being attacked, however abusive and unjustified those attacks may be. The only justification is if restraint is *necessary* in order to protect the child's or someone else's Article 8 rights, in particular their privacy and anonymity.

The publicist may be an unprincipled charlatan seeking to manipulate public opinion by feeding it tendentious accounts of the proceedings. But freedom of speech is not something to be awarded to those who are thought deserving and denied to those who are thought undeserving. As Lord Oliver of Aylmerton robustly observed in one of the 'Spycatcher' cases in 1987:

> "the liberty of the press is essential to the nature of a free state. The price that we pay is that that liberty may be and sometimes is harnessed to the carriage of liars and charlatans, but that cannot be avoided if the liberty is to be preserved."

The remedy, to repeat, is publicity for the truth which lies concealed behind the unfounded complaints, "more speech, not enforced silence."

All that said, dare I suggest that the media should remember the great C P Scott's famous aphorism that "Comment is free, but facts are sacred." I recently gave a judgment that received coverage in the media. A legal commentator suggested that readers might wish to compare and contrast what I had actually said with how it was reported: "Compare. And contrast … And weep."

I am, as you will probably know, very concerned about the need for more transparency. I repeat what I said earlier this year:

> "I am determined to take steps to improve access to and reporting of family proceedings. I am determined that the new Family Court should not be saddled, as the family courts are at present, with the charge that we are a system of secret and unaccountable justice."

And, as I have made clear on previous occasions, that applies just as much to the issue of transparency in the Court of Protection.

On 12 July 2013 I issued, for comment and discussion, draft Practice Guidance: 'Transparency in the Family Courts and the Court of Protection – Publication of Judgments'. I indicated that I intended to bring about an "immediate and significant change in practice" in relation to the publication of judgments in family courts and the Court of Protection. I said:

> "In both courts there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system. At present too few judgments are made available to the public, which has a legitimate interest in being able to read what is being done by the judges in its name."

I continued:

> "Very similar issues arise in both the Family Court (as it will be from April 2014) and the Court of Protection in relation to the need to protect the personal privacy of children and vulnerable adults. The applicable rules differ, however, and this is something that needs attention. My starting point is that so far as possible the same rules and principles should apply in both the family courts (in due course the Family Court) and the Court of Protection."

I said that I proposed to adopt an incremental approach.

One striking difference in the rules relates to the media's ability to attend hearings. In the family courts the starting point, since the reforms introduced in April 2009, is that accredited journalists have a right to attend most family court hearings (including hearings of cases dealing with what in the Court of Protection would be called personal welfare) unless proper grounds for excluding them can be established on narrowly defined grounds. In the Court of Protection, in contrast, the effect of the rules is that the media always require the permission of the court to be present. Why? I have to say that I am inclined to think that the arguments in favour of aligning practice on this point in the Court of Protection with the practice of the family courts are compelling.

We must be open to the world – much more open that at present – in what we do both in the family courts and in the Court of Protection.

So what are the next steps?

Changes to primary legislation are unlikely in the near future, so the necessary changes must be achieved, as I believe they can be, within the existing framework

The first step will be the introduction, later this year, of the final version of the Practice Guidance: 'Transparency in the Family Courts and the Court of Protection – Publication of Judgments'. This is currently being revised and adjusted to take into account the many comments and suggestions I have received.

The next step is to consider practical steps to enable the media to have access to some at least of the documents used in court. That access by the media to documents is essential if there is to be any meaningful use of their right of access to the court hearing seems to me to be obvious. The questions of course, and the answers are not immediately apparent, are: What documents? In what form (for example, anonymised or redacted)? And subject to what safeguards? Public consultation and debate, including consultation and debate with the media, will be essential, but I am confident that we will be able to make progress, even if initially on a cautious and limited basis.

The third step is to consider appropriate amendments to, as well as the aligning of, the rules governing the family courts and the Court of Protection. Rule changes always take time, which is why I propose in the first instance to proceed with changes that do not require any amendments to the rules.
