George Johnson Law Prize 2013

(b) How should the courts balance the principle of open justice with privacy and confidentiality concerns?

"*The principle of open justice is a fundamental constitutional principle, although it is not an absolute principle...Derogations from open justice can only properly be made where, and to the extent that, they are strictly necessary in order to secure the proper administration of justice."*[1]

Open Justice has, at least in Britain, been something of a hot topic for a number of years now. There have been a number of fairly high profile cases where wealthy individuals or powerful companies[2] have sought assistance from the courts in keeping their activities secret. In addition, new terms have entered the Legal Language, 'Super Injunction', being a Court Order which prohibits not just the publishing of a story, such as a premiership footballer's affair, but also the fact that he has been party to a set of legal proceedings.

Following on from this, there have been debates in the House of Commons where Members of Parliament have felt so outraged at the way in which the courts have handled some matters, they have used Parliamentary Privilege to allow them to break injunctions and name the parties to legal proceedings which the Super Injunctions had forbade.

It has not always been one sided though, and many courts have acted to make access to court proceedings easier, whether this be by having proceedings streamed live on a website such as the Supreme Court of England and Wales now does on a regular basis[3], or which

[1] Report of the Committee on Super Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice, iv

[2] Eg *Terry v Persons Unknown* [2010] 1 FCR 659 (John Terry) and *RJW & SJW v Guardian Newspapers & Person or Persons Unknown* (Claim no. HQ09) (Trafigura)

[3] http://news.sky.com/info/supreme-court

the Leveson Enquiry did for most of the hearing[4]. In addition, journalists or members of the public may now use Twitter to share court proceedings live with the rest of the world.[5] In fact, the Supreme Court now has its own Twitter account [6] which is used to share links to the court's judgments.

But why does this matter? Aside from those cases where the state takes an active role, such as in criminal cases or public law cases, most pieces of litigation concern two (or more) private parties settling their disputes. Surely they are entitled to do so in a private manner without the rest of the world peering over their shoulders?

In simple terms, they are. Providing all the parties can agree on a way of settling their differences, there will generally be no need to resort to the court process.[7] However, once someone embarks on the court process, they should do so in the certain knowledge that they are invoking a publically funded body to intervene in their dispute and, what the public spends money on, it has a right to oversee.

That said, the reasons for open Justice go far beyond mere pecuniary concerns. As his Honour Wayne Martin, Chief Justice of Western Australia stated;

"There are at least three aspects of the public interest that are of profound importance that are served by the principle of open justice."[8]

He then went on to identify these as;

1. Accountability "The judicial system and the courts exist to serve the public and the community. They give effect to the community interest in the rule of law, including the enforcement of law and order in the community."

2. Public Confidence. Here Chief Justice Martin quotes the American case of Baker v Carr[9] which stated "The Court's authority-possessed of neither the purse nor the sword-ultimately rests on sustained public confidence in its moral sanction." Before going on to add "No reasonable person could be expected to have confidence in a system or process which he or she cannot see in operation."

[4] http://www.levesoninquiry.org.uk/
[5] http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/courtreporting
[6] @UKSupremeCourt
[7] Notable exceptions include settlements for minor beneficiaries etc
[8] Access to Justice -The Media, the Courts and the Public Record by The Hon Wayne Martin Chief Justice of Western Australia at p. 3
[9] Baker v Carr 369 US. 186 (1962) at 267

The judge then goes on to make the comparison between the proceedings of the legislature and the proceedings of the judiciary, both of which are, in those jurisdictions which model themselves on the "English tradition" held in public so that their workings may be observed by those who give them their power and feel their effect.

Finally;

3. The preservation of the Independence of the Judiciary. The importance of this point cannot be overstated, that the Courts should treat all who come before them as equals. Judgments should not be based either on fear or on favour. It is crucial that judges are free to decide each case on its merits within the applicable scope of the law. Open justice not only offers the means for the public to scrutinize the goings on in court, but also offers a spur to continued improvement in the court process. This is the background to open justice, it has formed a crucial, if occasionally wounded[10] backbone to English law since time immemorial and continues to be discussed and developed to this day. Following the Report of the Committee on Super Injunctions[11], this area of English law is continuing to develop apace. That said, there are a number of crucial questions that must be addressed if we are to have a fair, effective and comprehensive system;

The statutory position as regards open justice in this jurisdiction is much the same as it is in England and Wales. Therefore whilst here in the Island we have not had as many cases dealing with the same breadth of issues on this topic as the English courts have, particularly with regard to issues such as the so called 'super injunctions' and 'hyper injunctions', under the rule laid down in R v Frankland[12],

> "Decisions of English courts, particularly decisions of the House of Lords and the Court of Appeal in England, are not binding on Manx courts, but they are of high persuasive authority, as was correctly pointed out by Glidewell, J.A. in giving the judgment of the Staff of Government Division (Criminal Jurisdiction). Such decisions should generally be followed unless there is some provision to the contrary in a Manx statute or there is some clear decision of a Manx court to the contrary, or,

[10] Ie those proceedings heard before the Courts Star Chamber and Castle Chamber during the reigns of James I and Charles I. In particular the cases of John Lilburne
[11] Report of the Committee on Super Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice
[12] R v Frankland [1978-80]

exceptionally, there is some local condition which would give good reason for not following the particular English decision."

there is no reason not to draw on judgments in England and other common law jurisdictions to enrich Manx common law.

That said, there are Manx cases dealing with the issue of open justice. The current leading authority being the case of Taylor & Neale[13] where His Honour Deemster Doyle summed up the Manx position as "The overriding requirement in this jurisdiction should be for open justice and transparency. We do not want judgments styled like alphabet soup". During his judgment, Deemster Doyle also drew on authorities from further afield[14], confirming that the law on this subject in other jurisdictions such as England is compatible with Manx law.

It is difficult to argue with the idea that there will be times when it will be necessary to redact a judgment or to restrict public access to a hearing. One of the most obvious example of this is matters regarding children and young people. In this jurisdiction, all such cases, whether they be criminal cases where the defendant is a juvenile, or family law cases dealing with care, adoption or contact, are held in private. In addition, in criminal cases with an adult defendant and a young victim, the name of the victim will not be made public knowledge.[15]

This reflects the careful balancing act which must be accomplished. On the one hand, there is a clear and present public interest in all of types of cases raised above. In many cases this goes beyond the general rule that the courts are a public body and therefore the public should have oversight of them. Children and young people are some of the most vulnerable members of our society, we recognise this by according them special privileges should they be arrested or detained,(see UN Convention on the Rights of the Child) and in our sentencing of juvenile offenders. Further, in adoption cases, one of the parties is the state, which can inevitably bring a great deal of power to bear on what is an incredibly important and emotive issue. Considering this, and in view of the allegations which have in the past been made about uncaring or overzealous care agencies[16] increased public scrutiny of the

[13] Taylor and Neale v The Attorney General 17 June 2011 CIVIL - CHANCERY PROCEDURE

[14] Including, but not limited to; *Application of Guardian News & Media Limited* [2010] UKSC, *JIH v News Group Newspapers Limited* [2011] EWCA Civ 42, *Ntuli v Donald* [2010] EWCA Civ 1276, *CTB v News Group Newspapers Limited and Imogen Thomas* [2011] EWHC 1232 (QB)

[15] Notable exceptions being where the child victim has died, such as the murder of Jamie Bulger or Hollie Wells and Jessica Chapman.

[16] For instance, the Satanic Ritual Abuse cases in Rochdale in 1991, covered in the BBC Documentary 'When Satan Came to town.' http://news.bbc.co.uk/1/hi/programmes/real_story/4595158.stm This matter was originally subject to an Injunction preventing those involved from discussing their ordeal, this was successfully

way that the courts make decisions regarding young people could help the general public to have a better understanding of the way in which these systems work. Further, as publicity is generally an incentive to better performance, greater publication of matters involving children and young people could have great potential benefits.

This reflects the difficulty in balancing issues of open justice against the functionality of doing justice. The reason that we do not publish details relating to children is because of the damage which such publicity could cause to those children, both as they develop and once they become adults. This is the key point then, we deviate away from open justice only where such special circumstances exist which mean that to operate as normal would cause such detriment as to make doing justice impossible

This derogation from open justice is much the same in England and Wales as it is in the Isle of Man, however the situations are quite different. The Island is a much smaller jurisdiction, formed largely of close-knit communities. We must therefore ask ourselves whether, in the absence of publication, does rumour abound? The issue as to whether the Island should revisit this point is somewhat beyond the scope of this essay, as it would require a great deal of research to ascertain whether the facts regarding these cases are actually general public knowledge, irrespective of the fact that the hearing may have been held in chambers. If it is the case that matters become public knowledge irrespective of the attempts made by the judiciary and the legal profession to prevent this, or if malicious rumour guided by a lack of understanding of the court process causes more damage than the facts themselves would, then it may be time for the Island to look again at how we hear these types of cases. It is already good law in this jurisdiction that the court will not make useless orders, and will not order secrecy where the facts are already in the public domain. (see Deemster Doyle in *Taylor & Neale*[17]).

The Press and Open Justice

As Chief Justice Martin stated, open justice cannot simply be achieved by ensuring that the doors to the courtroom remain unlocked. Many major cases now take days, if not weeks to

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challenged by the BBC and overturned.
http://www.guardian.co.uk/society/2006/jan/12/childrensservices.uknews

[17] Ibid

hear, for example R v Lewin & Otrs[18]. This case concerned offences under the representation of the People Act, allegations that individuals had conspired to attempt to rig a vote for the election of a Member of the House of Keys. This is clearly a matter of grave public importance as it cuts right to the heart of the democratic process, and allegations were made during the hearing that various influential groups had sought to sway Manx politics[19]. That said, it would be physically impossible for every person who was interested in this case to sit in the courtroom to view the proceedings, nor is it practical to expect members of the public to give up weeks of their time to watch the trial in detail.

This then, is where the role of the press comes in. It is their job to observe ongoing cases and report the salient facts back to the rest of the population. It is by this mechanism that those who have paid for the justice system gain the ability to oversee what is happening in their courts. This means then, that if open justice is to function properly, then the press must be assisted in their ability to understand and accurately report on the cases in progress. Until and unless a member of the public finds themselves involved, in whatever regard, in a court case, the closest they are likely to come is what they see and hear from the news media.

It is therefore imperative then that the media are given the best possible access to the facts; if reporters are unable to understand the case then it is more likely that their reports will not be as factually accurate as if they were in full possession of all the relevant information. If the reports are not accurate, then they are not serving the principles of open justice and are more likely to mislead than inform.[20] One of the major bars to this is access to court documents. Here in the Isle of Man we are fortunate in that the Judgments online website carries a great many of the judgments of the courts, making them available to anyone for free. This is exactly the type of measure which progressive courts are adopting in order to further public understanding of what the courts are doing and why.

That said, and whilst it is exceedingly helpful for understanding a case, simply knowing the judgment of the court is insufficient, as it does not contain the unabridged evidence or the legal argument. In order then to fully understand a case, three further things are necessary;

[18] R v Lewin & Otrs 11 May 2012 General Gaol Delivery
[19] For instance, see see Nigel Hamal QC's references during the hearing to the "Dandara Party"
[20] Simply granting access to court information may not be sufficient to guarantee accurate reporting of the facts of a case, different media groups may well have a bias which they choose to portray irrespective of the facts, however this should not prevent the courts from seeking to make gathering accurate information as easy as is practicably possible.

access to the transcript, in order to double check what was set in court, and the ability to read the pleadings and the witness statements.

Under the Overriding Objective[21], all Advocates are under a duty to assist the court in dealing with matters expeditiously and efficiently. There are now more matters dealt with administratively in the civil courts than there were a decade back under the Fixed Court, in addition, it is now normal practice in the Civil Division to have a witness' statement admitted as their evidence in chief. The effect of this has been to speed up matters and to take up less court time without the need for appearances by the advocates. That said, it has now made it more difficult to chart the progress of a case, or to understand exactly what is happening at a hearing, without access to the documents which have been filed. This position is exacerbated in many cases by the voluminous skeleton arguments which some advocates are relying on. If the court is to receive and rely on effectively amount to written submissions, then an observer in the public gallery is denied the opportunity to listen to what is being argued and to understand the entirety of the points which the advocates are trying to make. It is therefore imperative, both for the general public and the press to be able to access all pertinent documents, failure to do so has the effect of conducting portions of the case in private. There is small difference between a hearing in chambers where the public may not listen to what is argued, and a hearing in public which relies largely on documents which the public may not see.

Trafigura

As discussed above, in order to gain a fuller understanding of just how serious the threat to open justice can be, it is necessary to look beyond the Isle of Man to other common law jurisdictions. The most troubling case to come to light in recent years dealing with this area of the law has been that of Trafigura.[22] This case involved noxious waste which was allegedly dumped by the applicant-Trafigura in Abidjan. Trafigura commissioned a report into this incident (The Minton Report[23]) which was then leaked to the Guardian newspaper. In an attempt to restrain the publication of the leaked report, Trafigura sought, and obtained, an

[21] Rules of the High Court of Justice 2009, Rule 1.2.
[22] See *RJW & SJW v Guardian Newspapers* above
[23] http://image.guardian.co.uk/sys-files/Guardian/documents/2009/10/16/mintonreport.pdf

injunction preventing the publication of the report.[24] On top of this, the order prohibited the disclosure of the applicant, this type of order is now known as a super injunction.

There are reasons why a court may need to deviate from the principle of open justice, in particular, where publication will prevent justice from being done. In the case of Trafigura, which describes itself on the front page of its website as "a leading international commodities trading and logistics company"[25], it is difficult to see why the disclosure of the mere fact that it had obtained a court order against The Guardian and other parties would have meant that justice could not be done. That said, there is something to be said for erring on the side of caution, the Judge at first instance may well have felt that immediate secrecy was justifiable in that it could be overturned at the return date, and that it was better to lean this way, than regret later that publication of the applicant's identity could not be undone. Unfortunately, a desire for caution or an over-reliance on what may be accomplished at the return date does not, cross undertakings for damages aside, undo the fact that a court has ordered a party gagged and has conducted itself in secret proceedings. It seems therefore, that the Judge in this case may not have achieved the right balance when hearing this application. However, this was simply the tip of the iceberg.

Once the news media was prevented from publishing the report, Paul Farrelly, a Member of Parliament asked a question in the House of Commons[26]. This lead Trafigura, and its legal counsel, to take a further step, obtaining a so-called 'hyper injunction'. This was a court order that the respondents must not publish the proceedings of the House of Commons which dealt with the Trafigura report.

As the Committee on Super Injunctions stated in their report[27], there are various absolute and qualified privileges for those reporting Parliamentary Proceedings, and it was therefore the case that the Judge erred in law by making this order. It is also a gross breach of the open democratic principles upon which the English system of democracy and the rule of law is based. The idea that a party to a private piece of litigation should, in one fell swoop, be able to gag newspapers from reporting on Parliamentary proceedings flies contrary to those principles necessary for a free and democratic society.

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[24] Ibid

[25] http://www.trafigura.com/

[26] " To ask the Secretary of State for Justice, what assessment he has made of the effectiveness of legislation to protect (a) whistleblowers and (b) press freedom following the injunctions obtained in the High Court by (i) Barclays and Freshfields solicitors on 19 March 2009 on the publication of internal Barclays reports documenting alleged tax avoidance schemes and (ii) Trafigura and Carter-Ruck solicitors on 11 September 2009 on the publication of the Minton report on the alleged dumping of toxic waste in Côte d'Ivoire, commissioned by Trafigura"- http://www.guardian.co.uk/media/2009/oct/13/guardian-gagged-parliamentary-question

[27] Parliamentary Papers Act 1840

If it could be said that the Trafigura case was the greatest derogation from Open Justice in recent times then at least we might know the scale of the issue, unfortunately this is impossible to say. The nature of 'super injunctions' is that they prevent interested parties from knowing of their existence, so it is impossible to say how many succeed, i.e. they successfully prevent publication, and on what breadth of issues. The Committee on Super Injunctions recognised this point when in their report, they stated that a program of data collection should be introduced for these anonymised orders, with a report published annually so that there can at least be some public oversight of how common these types of orders are.

It is comparatively easy to look at cases such as Trafigura and blame the Judge presiding over the case for the lack of openness exhibited, but that is not the complete picture. At all times, an Advocate's duty is to the court and to the administration of justice, a part of which is the principle of open justice. It therefore follows that when considering whether to ask for an anonymised judgment, an advocate should actually consider whether it is in the interests of justice to do so. There will be many cases where a client will want to keep the case out of the public eye, and they may often have many and varied reasons why this is necessary. It is the job of the advocate to asses these claims and determine whether it is in the interests of justice to make such an application. In the case of Taylor and Neale, Deemster Doyle stated that one of the reasons that he was not minded to make an order that the judgments be anonymised was because the cat was already out of the bag[28], it is not in the interests of justice to seek useless orders.

Another key duty which the Advocate owes is to assist the court. In the Trafigura case, it is arguable that the order sought by the Applicant's counsel was not legally available due to the privileges which exist to protect those reporting parliamentary proceedings. If this is the case, then it seems that the Applicant's counsel were not fulfilling their obligation to assist the court. In Howell v DHSS[29], His Honour Deemster Doyle referred to the "new culture to civil litigation in this country under the 2009 Rules". This reflects the changes in the ways in which Advocates are expected to behave towards one-another and towards the court. It may be that it is time for a new culture of openness as well. Advocates are already under a duty to assist the court with the administration of justice, but it may be that more emphasis could be placed upon the openness which the general public have a right to expect from the

[29] *Howell v DHSS* 6th October 2009 Civil

courts and from the legal profession in general. This is always going to be a difficult balancing act for both for the courts and for counsel.

For the Deemster, it is the decision as to whether justice cannot be done if the court remains open, and for the Advocates, it is the balance between keeping a clients confidences, and their duties to the Court and therefore to open justice. These will often be difficult decisions, made in hearings where speed is of the essence, advocates will be pressured by their clients to try to keep the results of the hearing sealed, Deemsters wills have to decide which risk to take, that of letting the cat out of the bag, or that of making our court procedures more secretive and impenetrable. That said, it is a decision worth making. A greater degree of openness offers great benefits in furthering the public's understanding of the court process, greater public oversight and a spur to continued improvement, and it is worth remembering the words of Elie Wiesel;

"Silence encourages the tormentor, never the tormented"[30]

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[30] Elie Wiesel, The Night Trilogy: Night/Dawn/The Accident