IN THE FAMILY COURT CASE NO: ZW23C50425

Neutral Citation Number: [2024] EWFC 414 (B)

Before HH Judith Rowe KC

In the matter of:

XY Twins Inflicted Injury (Naming Perpetrator)

Sian Cox (instructed by SLLP) on behalf of the local authority

Jonathan Sampson KC and Susan Quin (instructed by Lovall Chohan) on behalf of the mother

Joanne Brown KC and Tim Potter (instructed by Creighton & Partners) on behalf of the father

Tim Hussein and Claire Fox (instructed by National Legal Services) on behalf of the children through their guardian

John Thornton (instructed by Patrick Lawrence) on behalf of Emily Waters

David Jockelson of Miles and partners on behalf of Nurse 1

Nurse 2 acting in person

JUDGMENT

ON PUBLICATION

1. At the conclusion of a fact-finding hearing in June and July I determined that the serious injuries sustained by the twins in 2023 were perpetrated by Emily Waters, employed by the twins' parents at the relevant time as a maternity nurse. Save for the issue now dealt with in this judgment, these proceedings have now ended. This judgment should be read with the fact-finding judgment handed down on 27 September 2024 but approved in this final form on 3 February 2025.

2. At the conclusion of the proceedings I directed the publication of my judgment in anonymised form, but with publication delayed until the conclusion of the criminal process whatever that proves to be, whether a decision to take no further action or the conclusion of a criminal trial. All agreed that nothing should be published that might threaten the integrity of that parallel process.

3. The discrete issue for this judgment is whether the anonymised fact-finding judgment should identify Emily Waters as the perpetrator of the children's injuries.

4. All parties save Emily Waters submit that her name should be included in the published judgment.

5. Ms Waters submits first that the court should defer this decision until the conclusion of the criminal process, and, second, that in any event it is neither necessary nor proportionate for Ms Waters to be named in public.

6. In support of the submission that the court should delay a decision, Ms Waters submits that "*a plethora of issues may arise. Examples include (a) an acquittal, (b) an appeal, (c) new evidence coming to light before or during the trial (i.e. expert evidence, the missing phone records, etc) and (d) an application to reopen the fact-finding to which this judgment relates*". In short, she submits, the court should not determine this issue without knowing the end result of the criminal process when the impact of the decision is "*more predictable*".

7. I reject that submission. An acquittal would be irrelevant to my decision in these civil proceedings; the simple fact of an acquittal in criminal proceedings, which not infrequently follows an adverse finding in civil proceedings, does not undermine the civil decision. If there is an appeal against a criminal conviction then the order I have already made would prevent publication of the fact-finding judgment until the appeal is determined as until that determination on appeal, the criminal process would not be concluded. If fresh evidence comes to light during the criminal process leading to an application to re-open the fact-finding then Ms Waters team could apply for a further deferral of publication and the court would determine that application on merit. I note, of course, that should there be a criminal trial Ms Waters' name would almost certainly already be in the public domain in any event. Finally I further reiterate, given the terms of this submission, that there are *no missing phone records*.

Identification: the law

8. There is no published authority on all fours with the facts of this case, and the relevant case-law pre-dates the recent guidance from the President in respect of the publication of documents. I am, nonetheless referred to and guided by both case-law and the guidance which I set out here.

9. In the case of Re S (A Child) [2004] UKHL 47 at para 17, Lord Steyn stated,

> *The interplay between articles 8 and 10 has been illuminated by the opinions of the House of Lords in Campbell v MGN Ltd.…What does emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test…*

10. In Tickle v Herefordshire v others [2022] EWHC 1017, Lieven J heard an application by a journalist for permission to interview without anonymisation a mother who had been involved in care proceedings, and by the local authority for a restriction on naming their employees. Reviewing the applicable case-law she set out the following summary of the relevant principles:

> *36. Firstly, neither Article takes precedence over the other, but the Court must undertake an intense focus" on how the competing rights apply in this particular case: Re S at [17];*
>
> *37. Secondly, the child's interests, whilst neither paramount nor determinative, are a "major factor" and "very important"; Re Webster at [56]. The child's interests should be considered first though they can be outweighed by the cumulative effect of other factors; ZH (Tanzania v Secretary of State for the Home Department [2011] 2 AC 166 at [33].*
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> *38. Thirdly, the Court should not treat it as inevitable that publicity would have an adverse impact on children. In each case the impact must be assessed by reference to the evidence before the Court rather than to any presumption of harm; Clayton v Clayton [2007] 1 FLR 11 at [51]. Although I note Lady Hale in PJS v News Group [2016] UKSC 26 emphasising that children have their own privacy rights independent of those of their parents.*
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> *39. Fourthly, the Court should give weight to a party's right to "tell their own story" so as to vindicate their Article 8 rights, see Tickle v Griffiths above.*

11. In respect of the local authority's application for their employees not to be named, she said the following,

> *42. There are circumstances where the Court has been prepared to grant RROs to restrict the naming of treating healthcare professionals in highly sensitive medical cases concerning children where there has been evidence of potential vilification and harassment of those professionals, see Abbasi v Newcastle Upon Tyne Hospitals NHS Trust [2022] 2 WLR 465. The approach of the President of the Family Division is set out at [97] onwards.*

12. In Abbasi, the application to name health professionals against whom the parents made allegations but no findings had been made was dismissed. The president said at paragraph 96,

> *Why should the law tolerate and support a situation in which conscientious and caring professionals, who have not been found to be at fault in any manner, are at risk of harassment and vilification simply for doing their job? In my view the law should not do so, and it is wrong that the law should require those for whom the*

protection of anonymity is sought in a case such as this to have to establish "compelling reasons" before the court can provide that protection.

13. In Tickle, Lieven J concluded there had been no evidence of the vilification and harassment of social workers and therefore did not grant anonymity.
14. In the Transparency Guidance, *Transparency in the Family Courts Publication of Judgments Practice Guidance* 19 6 24 the President set out, among other matters, the following principles,

    a. *Para 2.4: the court's duty to act in ways consistent with the parties' competing ECHR rights pursuant to s6 HRA 1998 applies to ALL proceedings.*

    b. *Para 3.1: the starting point is the principle of open justice. It is generally in the public interest for judgments to be published, even where they arise from private proceedings, and even where there is no particular public interest in the individual case/ judgment – subject to countervailing Article 8 issues, which may justify some anonymisation but do not necessarily preclude publication entirely.*

    c. *Para 3.6: Judges should always consider publishing a judgment in any case where:*

        i. *(not relevant)*
        ii. *The judge concludes that publication would be in the public interest for a fact specific reason; and*
        iii. *A written judgment already exists in publishable form…*

    d. *Para 3.13: Before deciding to publish a judgment, all parties …should be notified so that they have an opportunity to make representations about publication and anonymisation. The process need not generally be extended or complex, and may be capable or being dealt with at the conclusion of a hearing or by allowing a brief period for short email responses to be made.*

    e. *Para 3.14: A balancing exercise is required between ECHR Articles 6, 8 and 10 (and where applicable, other rights). The required balancing exercise is usefully summarised at paragraph 22 of Re J (A Child) [2013] EWHC 2694 (Fam). In short:*

        i. *This necessitates an "intense focus on the comparative importance of the specific rights being claimed in the individual case….,*
        ii. *It is necessary to measure the nature of the impact…on the child of the proposed publication,*
        iii. *The interests of the child, although not paramount, must be a primary consideration, that is, they must be considered first although they can, of course, be outweighed by the cumulative effect of other considerations…,*
        iv. *The court must conduct a proportionality check to strike the right balance.*

    f. *Para 5.3: In children cases, if the name of a professional or expert witness is not mentioned in a published judgment, s12 Administration of Justice Act 1960 does not operate to prohibit identification of that professional by others (Re B (A Child) v The*

Mother & Os [2004] EWHC 411 (Fam). Any specific prohibition on identification of a professional will need specific justification (and a specific direction). Generally, protection of the identity of professional witnesses will be justified only where it is necessary to protect the Article 8 rights of the child/ family concerned. Anonymisation may be justified on other grounds, depending on the specific facts.

g. *Para 5.5: In summary however, the key principles of anonymisation are:*

   i. *The law in the Family Court is the same as in any other jurisdiction, including the application of the open justice principle.*
   ii. *Anonymisation is only permissible where specifically justified on the facts of the case.*
   iii. *Anonymise/ redact where necessary to protect the identity of the subject child and family members (as a function of the child's Article 8 rights encompassing welfare).*
   iv. *Anonymisation of professionals is only usually justified where its purpose is to ensure the anonymisation of the child/ family. A speculative concern about harassment or criticism is insufficient.*
   v. *Anonymisation is not a zero sum game: removal of one fact or item may obviate the need to redact a more important fact or piece of information, thus facilitating publication of a more informative/ useful version of a judgment.*
   vi. *Avoid prejudicing criminal investigation/ proceedings.*
   vii. *Take particular care in cases involving complaints or descriptions of sexual assault or abuse.*

h. *Para 8.3: if any party wishes to identify himself or herself, or any other party or person, as being a person referred to in any published version of the judgment, their remedy is to seek an order of the court and a suitable modification of the rubric..*

<u>Submissions</u>

<u>The local authority</u>

15. The local authority submits that the factors against publication of Ms Waters' name are that

a. Ms Waters plainly has fragile mental health and publication of her name will inevitably have an impact on her;

b. Publication may well impact on her ability to obtain non-related work in the future if a prospective employer carries out an internet search;

c. The court has already put in place safeguarding measures against Ms Waters working with children again. Imposed by agreement at the end of the last hearing, those measures included,

i. Providing for the fact-finding judgment to be disclosed to all nanny agencies Ms Waters had worked with;
ii. Providing the judgment for inclusion in her DBS record;
iii. Providing the Judgment to the Local Authority Designated Officer in her current local authority area;
iv. Taking Ms Waters' assurance that she will make no further use of her current DBS "clean" record, and that she will provide the informed DBS record to any potential employer;
v. Taking Ms Waters' assurance that she would take down all offers of her services on social media and that she would not advertise such services again;
vi. Taking Ms Waters' assurance that she will not henceforth work with children.

d. The identity of parents and intervenors are not usually published even when findings are made against them.

16. The local authority identifies the following factors in favour of publication:

a. Ms Waters' involvement in the family came about when she acted as a professional in the course of her employment. As such her position is more closely aligned to that of professionals in reported case-law, rather than that of a respondent parent;

b. She is a risk to children who might be in her care in the future. Naming her is the only way to provide the necessary level of protection against that given that hers is an unregulated profession with no organisational safeguarding or oversight;

c. Naming her would not risk identifying the parents or the children (though the parents in fact apply for permission to identify themselves as the parents in the case in any event).

17. The local authority submits that the balance falls firmly in favour of publication.

<u>Submissions: the parents</u>

18. The mother wholly supports publication. She submits that where the only source of information to parents would otherwise be the informed DBS check, given the absence of any regulatory mechanism in her field of work, disclosure is essential to ensure that families in the future are protected from the experience of her children. Ms Waters was employed in a professional capacity and thus the case-law concerning publication of the names of professionals is relevant. And in this serious case, publication would inform the public fully of the court's investigation and decisions concerning the culpable actions of a child-care professional.

19. The bedrock of the mother's case is the complete absence of any overarching safeguarding body in the field in which Ms Waters offered her services, namely as maternity nurse. She contrasts that to the employment of nurses and midwives who are regulated by the

independent regulatory body the Nursing and Midwifery Council. The NMC provides for the education and training of these professionals, for public protection, for regulation, and for the reporting of and investigation into allegations relating to fitness to practise.

20. While the work carried out by Ms Waters, namely the provision of care for newborn vulnerable infants, carries the same issues and potential risks as that of nurses and midwives no such safeguarding framework exists to protect families from the harm that Ms Waters caused in this family. The mother does not, she confirms, seek to "name and shame" but above all she wishes to ensure that no other family experiences what hers has gone through. Publication is in the public interest as it will draw attention to the lacuna that appears to exist in relation to maternity nurses.

21. As the Court of Appeal said in Griffiths v Tickle & Os [2021] EWCA 1882, upholding Lieven J, in private law proceedings, *Corresponding to the right of an individual to impart information about his or her private and family life, without interference by a public authority, is the fundamental right of others to receive such information, without such interference*. That right must, submits the mother, include the right of parents to receive information that is potentially relevant to their safeguarding of their children. There is no way other than publication to ensure that families receive information about the serious risk posed by Ms Waters to children in her care.

22. The mother acknowledges the impact that publication will have on Ms Waters, but cites the words spoken in Tickle v Griffiths & Others: *Publicity for what goes on in court may be embarrassing and painful for those involved and third parties who are indirectly and incidentally effected but in general, "the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public….The open justice principle and the related rights under Articles 6 and 10 are all subject to exceptions, but these are narrow and circumscribed and their application in an individual case requires strict justification. The category of exception that is relevant here is the need to protect private and family life rights, including in particular the rights of children….*

23. The father similarly submits that the public interest in identifying Ms Waters outweighs any countervailing considerations. The parents' determination that other parents are alerted to potential risk from Ms Waters, in this unregulated industry, underpins their position.

24. There is, he submits, a broad public interest in the operation of children's services and the family justice system being transparent and open. It would, submits the father, be difficult for the public reading an anonymised judgment to understand why in a case where the court has determined that Ms Waters, acting as a child-care professional, seriously injured two newborn babies and lied to conceal it, her identity was concealed. The seriousness of the case is a factor in support of rather than against publication, and a compelling reason is needed for anonymity. The public interest weighs heavily, he submits, in the *intense focus on the comparative importance of specific rights*.

25. Ms Waters secured work both through agencies and through recommendations. Parents employing Ms Waters by word of mouth would be unlikely to ask to see a DBS check and

would have no other way to identify the risk she poses to their children. They are all far more likely to conduct a simple internet search for her name.

26. Certainly until the hearing on 9 August 2024, after the trial and days after the draft judgment had been circulated, Ms Waters continued to advertise her services on websites. Her assurances that she will not work with children again must be taken in the context of her continued denial of causing any other than accidental injuries, and the fact that the court has found that she has lied.
27. Publication would not risk identifying the children.

28. The father too acknowledges that there will be a significant impact on Ms Waters on publication, but points to the absence of any medical evidence of the nature and extent of her self-reported poor mental health.

Submissions: Ms Waters

29. The need to raise awareness of the unregulated nature of Ms Waters' field of work can be satisfied by publishing the judgment with a pseudonym or non-identifying initials.

30. Ms Waters had a legitimate expectation that her Article 8 rights would be respected when she accepted the invitation to intervene in these proceedings; the proposed disturbance of those rights now, raised first only in closing submissions, calls into question the legitimacy of the proposed intervention.

31. In any event Ms Waters confirmed to the court at the last hearing that,

    a. She does not intend to work with any children in any capacity in the future;
    b. She will apply for a further DBS check between 23 and 30 August 2024 and will apply for a further check should the findings not yet be noted on the same;
    c. She will not provide any DBS that does not note the findings to any potential employer;
    d. She will take down her LinkedIn and Facebook profiles offering herself for childcare work and any other such profiles that she has forthwith.

    She has taken the promised steps.

32. With the other safeguards in place namely disclosure to the DBS, disclosure to any nanny agency for whom she has worked or considers she may seek work with, and disclosure to the LADO in her local area, publication is not proportionate.

33. The court is reminded of Ms Waters' evidence that her mental state is *dreadful*, that she *wanted to kill herself* and that she mentioned going to hospital and taking diazepam. The impact of publishing her name must not, she submits, be underestimated. It will be deeply distressing and potentially damaging so someone so fragile. The case may create media interest, impacting on Ms Waters' private life through *familial discord, close and extended family, friends and partner, to the real potential of societal demonisation and all that may flow from that*.

Submissions: the other two interveners

34. The only priority for the second and third interveners is to protect other children and that all steps are taken to warn potential parent employers.

35. The court should take into consideration the absence of admission of contrition by Ms Waters, the fact that her services are still being advertised on the internet (a website is cited) and the fact that her assurances, given in any event by a person who lied to hide her actions, are unenforceable.

Submissions: the Children's Guardian

36. The Children's Guardian remains strongly in support of publication as was made clear in the closing submissions in this case.

37. In favour of publication the Guardian points to the following,

    a. Two very vulnerable young children suffered serious injury at the hands of a professional care giver;
    b. There is no regulatory body under which Ms Waters is scrutinised and overseen;
    c. There is nothing to stop Ms Waters seeking similar employment in the future, notwithstanding her assurances which cannot be policed or enforced;
    d. Ms Waters deliberately concealed the truth of what this Court found her to have done;
    e. Every course of action should be taken to try and avert this happening to other families who, like the parents, rely in good faith on word of mouth and professional agencies to find people to care for their children;
    f. If Ms Waters has been recommended by word of mouth then prospective employers are unlikely to ask for DBS checks but they are likely to conduct a simple internet search;
    g. Publication may alert parents to the need to undertake more careful due diligence;
    h. Naming Ms Waters does not risk identifying the children, though in any event the parents support publication and may seek identification of themselves;
    i. The parents should not be restricted in their wish to take steps in respect of the lack of regulation in this area of work;
    j. In any criminal trial Ms Waters would be named. There should be no difference as to whether the name of the perpetrator of serious injuries to children enters the public domain as a result of criminal or family proceedings.

38. As to a concern about the personal impact of publication on Ms Waters, the Guardian points to the following matters:

    a. She would be named in any event if she were a defendant in criminal proceedings;
    b. Speculative concern about harassment or criticism is insufficient (para 5.5.4 Transparency Guidance); and
    c. There is no medical evidence in respect of Ms Waters' mental health.

Decision and reasons

39. The fact-finding judgment should contain the name of Ms Waters.

40. The starting point is open justice. In his guidance the President is clear that in this regard the Family Court is in no different a position than the courts of any other jurisdiction. Ms Waters' name would be published in criminal proceedings, and any difference in approach needs to be justified.

41. The rationale for the anonymisation of cases in family proceedings is the need, as a general rule, to protect the subject children from the harm of identification. It is for this reason, therefore, that the usual practice after a fact-finding hearing is that the perpetrator is not named on publication of the judgment The perpetrator is almost always a parent or family member, friend or person linked to the child so that identification of the perpetrator would risk identification of the children. Publication of Ms Waters' name would not risk identifying the children and therefore the usual justification for anonymity does not apply to Ms Waters.

42. The guidance in the case law is clear that anonymisation of a professional witness is usually justified only to avoid the children being identified. The guidance to the effect that the court will direct anonymity for a professional witness where there is evidence of likely harassment and vilification of the witness on publication also does not apply to Ms Waters. This principle was established to protect *conscientious and caring professionals, who have not been found to be at fault in any manner, and are at risk of harassment and vilification simply for doing their job*. That does not apply to Ms Waters.

43. There is a powerful public interest in access to information in this case, where very young children were seriously injured by a child-care professional in the course of her work – a professional wholly unregulated by any professional body. It would be difficult to explain to the public why the name of the perpetrator was hidden, without a compelling reason.

44. Beyond the question of the public interest, very significant in this case in itself, publication will significantly add to the safeguards against the risk posed to children by Ms Waters. The court has already implemented such safeguards as it is able, however they are far from complete. Ms Waters may move to a different local authority area. She may take work offered through word of mouth, by parents who do not ask to see a DBS check. And the other safeguards relied on by Ms Waters as rendering publication disproportionate rely solely on her honesty and reliability to be effective. In my judgment I found her to be dishonest and unreliable leaving these elements of so-called safeguards fragile. I cannot rely on her say-so that she will not work with children again. The only way that parents unaware of - or careless of - the DBS process can carry out their own checks on Ms Waters is by an internet search. Without publication they would be unaware of the findings against her when deciding whether to allow her to care for their children. Given the serious injuries sustained by the twins in this case and the continued denial by Ms Waters of any responsibility for them other than for some of them as innocent accidents, it is difficult to find a justification for withholding that information from parents who might be looking for a maternity nurse for their newborn babies in the future.

45. Even without any medical evidence of her current mental health and the impact of publication, I acknowledge that publication will have a significant impact on Ms Waters. That is regrettable. There is, however, no category of cases of which I am aware in which the name of a perpetrator which would otherwise to be published would be withheld solely due to the emotional impact of publication. I am not aware either that that consequence would cause a criminal court to direct anonymity. Sadly the impact on Ms Waters of publication of her name falls, in my judgment, into the category of the *price to be paid for open justice*.

46. Finally, this judgment does not deal with the request by the parents for permission to identify themselves as the parents in this judgment as this was not an issue identified at the previous hearing, and I am uncertain whether it is opposed. I will deal with this at the hearing today.

HH Judith Rowe KC

27 September 2024