



JUDICIARY OF
ENGLAND AND WALES

Lord Justice Wall

Opening up the Family Courts: a personal view

**Association of Lawyers annual lecture in memory of Allan Levy QC and
David Hershman given in Birmingham**

29 June 2006

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It is, of course, a great pleasure, as well as a privilege, for me to be invited to give the Hershman / Levy Memorial lecture. Like most people in this audience, I knew them both. When Allan and I were impecunious juniors, we taught law at evening classes in a dismal college off the Holloway Road in London to bank employees who had to pass a basic examination in order to obtain promotion. We were paid, I recall, £4 per hour, only a little below what I understand to be the rate currently paid to members of the ALC undertaking public law children's work.

Allan and David were, of course, very different people. To me, Allan's particular value to family law lay in his ability as an author and broadcaster. It was always reassuring to hear Allan fielding the latest controversy, and giving it his measured, sensible and clear response. David, on any view, was a star. I saw David – like his co-editor and close friend Andrew McFarlane - as a future colleague and as a man with an enormous amount still to give to the world.

Both their deaths were premature, but invidious as the thought is, David's must, I think, be perceived as particularly poignant, both because he was so young, and because he left a widow and young children. His name will, of course, live on through that invaluable (if infuriating) book Hershman & McFarlane on Children Law & Practice, and I can think of no better way of honouring their memory than by debating in public important issues of family law. I am therefore very pleased that both their names will be annually joined and remembered in this lecture, and I offer what I am about to say as my personal contribution to that debate.

For me, the lecture also represents a welcome opportunity to come out of London, something I do only rarely nowadays. This enables me not only to renew friendships but to learn what is really happening in the practice of Family Law as opposed to what officials in London tell me is happening.

Liz Goldthorpe did her best to put me off. When I asked for a title, she sent me a paper by Alistair MacDonald entitled Songs of Experience – Child Law in the 21st Century apparently delivered to St Philips Chambers in Birmingham on 28 April 2006. It was terrifyingly erudite – something which any of you who have appeared in front of me will know I never was or will ever be. I tried, unsuccessfully, to persuade Liz that I could never give a paper like that – or, to put it more accurately, I did, of course, so persuade her, but she refused to accept that argument as a good reason to let me off. She even refused to give me a title to address – but perhaps that was just as well.

There is, of course, a great deal happening in family law at the moment. There always is. There is, accordingly, much to talk about. When I was a first instance judge. I regularly got downhearted about my work, feeling that I was not achieving anything and hitting my head against a series of brick walls. In those days, I cherished my opportunities to talk to members of the ALC, whose work I admired greatly. They told me to count my blessings, and patiently explained to me what life was really like for lawyers trying to promote the interests of disadvantaged children within a public law system whose paymasters steadfastly refused to acknowledge that it needed to be properly resourced; and, perhaps even worse, obstinately refused to recognise the obvious fact that cases involving children involve a particular skill and expertise, so that the better the lawyers in any given case, the more likely it was to be resolved by agreement; or, if it had to be fought, the more efficiently and sensitively it was presented, the easier it was for the tribunal hearing it to resolve, and, of course, the less it cost both in emotional and financial terms.

I remain permanently dispirited about much of what is (and what is not) going on in the family justice system, although since family cases now represent only about half my workload, I feel both out of touch and, to an extent, disempowered.

I was disappointed, for example, that the government did not introduce the Family Law Act 1996, even though it had been badly mauled in its passage through Parliament. I remain dismayed by the government's refusal to allow CAFCASS to grow into and develop the aspirations we all have for its proper role in the family justice system. I am concerned that the outcome of the child care review will be a further diminution in the protection afforded to vulnerable children. And despite admirable reforms of the manner in which proceedings for ancillary relief are now conducted - reforms, it must be said driven by the profession and the judiciary - I remain disappointed that our discussions on this topic always seem to be hi-jacked by the affairs of the rich and super rich, which seem to me in most instances to have little connection with real life - certainly as you experience it in practice.

On the positive side, I welcome the belated but highly significant creation of the Family Justice Council. I welcome the Civil Partnership Act and the Gender Recognition Act, and the proposals of the Law Commission to give unmarried cohabitants sensible access to the courts when their relationship breaks down and they need to sort out their financial affairs.

I could, of course, develop all these themes. They are, however, well-trodden ground. I could also talk about the work of the Family Procedure Rules Committee, on which I sit, and which is not half as uninteresting as it sounds, since we are re-writing all the Family Proceedings Rules and aim, in due course, to produce a discreet body of rules for every aspect of family law, the equivalent to the CPR, written in user friendly and clear English. Our officials have introduced us to a wonderful concept which they call a Henry VIII power. This does not permit us to decapitate the Minister, but, if we exercise it legitimately, does enable us to change some important rules without the need to resort to primary or secondary legislation.

I could also, of course, talk about the Children and Adoption Act, as it now is (Royal Assent was given on 21 June 2006) with its misunderstood attempts to tackle the problem of intractable contact disputes and to inform parents about the difficulties of post separation parenting. The question which will now arise is, of course: if and when it is implemented, will there be the resources for the necessary educative programmes on which we will want to send violent or intransigent parents? Without them, the Act will be a dead letter.

There is, therefore, as Liz encouragingly reminded me, no shortage of topics. I have, however, decided that I would today like to share my developing thoughts with you on the topic which will (I anticipate), in the coming months, occupy much of our time, and is to be the subject of a much delayed government consultation. It is, of course, the question of public access to and the reporting of proceedings relating to children currently heard in private.

As I hope to be able to demonstrate, I address this topic with a consistent track record, if nothing else. However, my mind has become particularly focused on it recently by our work on the FPRC and by two cases. The first, *Re H (Freeing Orders: Publicity)* has only just been reported at [2006] 1 FLR 85. The second, *C v C*, or, significantly as it will be called, *Clayton v Clayton* was only handed down in the Court of Appeal on Tuesday of this week, so you can, for once, be forgiven for not knowing about it.

As far as recent rule changes in this area are concerned, we need, I think to raise a glass to Munby J, who was undoubtedly responsible for section 62 of the Children Act 2004, which amends section 97 of the Children Act 1989. In *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142 at 190, he told Members of Parliament that they were in contempt of court every time their constituents attended a surgery to consult them about litigation involving their children - especially if, in the process, the constituent disclosed confidential documents about the proceedings to the unwitting MP. Nothing, of course, arouses the legislative instincts of MPs more than a suggestion they may be doing something unlawful in public, and the result, before you could say, "Parliamentary draughtsman" was section 62 of the Children Act 2004 which effectively - and, it has to be said, sensibly - decriminalises contempt in a number of situations, notably, of course, where the litigant seeks advice from his MP, the CAB or a McKenzie friend. We have now embodied section 62 in the FPR.

On 27 June 2006, the Court of Appeal handed down an important decision, significantly, as I say, to be called *Clayton v Clayton*, and not *Re C (a child)* [2006]

EWCA Civ 878 in which the leading judgment was given by the President. I also gave a judgment and Arden LJ agreed.

In order to explain the judgments in Clayton v Clayton, I had better, I think, remind you of the relevant parts of section 97 of the Children Act 1989 which, in their current form, read as follows: -

(2) No person shall publish [to the public at large or any section of the public] any material which is intended, or likely, to identify—

(a) any child as being involved in any proceedings before [the High Court, a county court or] a magistrates' court in which any power under this Act [or the Adoption and Children Act 2002] may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he did not know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.

(4) The court or the [Lord Chancellor] may, if satisfied that the welfare of the child requires it [and, in the case of the Lord Chancellor, if the Lord Chief Justice agrees], by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.

(5) For the purposes of this section—

“publish” includes—

[(a) include a programme service (within the meaning of the Broadcasting Act 1990);] or

(b) cause to be published; and

“material” includes any picture or representation.

(6) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.

In purely legal language, what Clayton decides is that the privacy / anonymity afforded to children under section 97(2) of the Children Act 1989 comes to an end once the proceedings themselves have been finally resolved. In proceedings under Part IV of the Act, this means when a final care order has been made, or when care proceedings have been dismissed. In private law proceedings, there is less of what it is now fashionable to call such a “brightline”. No private law order is ever “final”; there is always the jurisdiction to re-open it. However, if a residence order is made which is designed to last throughout the minority of a child, I think it can reasonably be asserted that the particular proceedings relating to that child have come to an end.

It is not the function of this lecture to explain why we reached the view that section 97 did not apply post proceedings. For that, I hope you will, in due course, read our judgments in the Law Reports. Suffice it to say, for present purposes, that both leading counsel for Mr. Clayton (Mr. James Price QC) and Mr. Brian Jubb (the advocate to the court, instructed by CAF/CASS Legal) were in agreement that section 97(2) was written in the present tense and referred to the child “as being involved” in proceedings, not “as having been involved”. Counsel were therefore agreed on their construction of the statute, and we agreed with them.

In order to put our decision in context, however, and for the purposes of this paper, I need to tell you the facts. They were that the parties had a daughter, born on 28 December 1998, a little over a year before they separated. After the separation, they agreed what was effectively a shared care arrangement in relation to her. However, in September 2002, Mrs Clayton commenced proceedings for contact and residence orders in respect of the child. During those proceedings, but before they could be resolved at a hearing, Mr. Clayton abducted the child, removing her from the jurisdiction to Portugal without the knowledge or consent of Mrs Clayton. He travelled and lived there in a camper van and, of course, he concealed his whereabouts and the whereabouts of the child.

The case attracted considerable publicity including regional and national television coverage and Mrs. Clayton on the advice of the police made a public appeal for information concerning the whereabouts of Mr. Clayton and the child. After an absence of some 5½ weeks, Mr. Clayton was arrested and imprisoned in Portugal where he remained for some 2 months. On his return to England he was remanded in custody, prosecuted, and subsequently sentenced to a term of 9 months imprisonment on a plea of guilty to child abduction. He was released after serving 6 months of that sentence in December 2003. A half hour BBC documentary covering the events called “Simon says” was broadcast in January 2004.

Some 4 months after his release from prison, Mr. Clayton was able to resume contact with the child by an order of the court in the Children Act proceedings. However, in November 2004, Mrs Clayton received a copy of an e-mail sent by Mr. Clayton to a BBC reporter on 15 October 2004 indicating his intention to do two particular things. Firstly, and based on the experience of his own case and in the proceedings to date, he wanted to publicise and discuss delays in obtaining Legal Aid and the whole child proceedings process, including criticisms of the services provided by CAF/CASS. Secondly, he wanted to revisit Portugal in the near future to make a video diary. He proposed to retrace his steps with his daughter during their time together in Portugal, which, of course, ended in his imprisonment. For the purpose of the video diary, he requested the loan of a camera with a view to supplying any “good footage” to the media.

At the time that Email was received, the Children Act proceedings were standing adjourned part-heard from 6 October 2004, with the hearing due to resume on 10

November 2004 in the Merthyr Tydfil County Court. However, when Mrs. Clayton applied for an injunction against Mr. Clayton in terms which I shall set out in a moment, her application was directed to be heard before Hedley J, who was then sitting at Chester. Mr. Clayton did not attend the hearing, explaining by letter to the judge that he felt obliged to prepare for the resumed hearing of the Children Act proceedings on the next day. However, on the basis of Mrs Clayton's counsel's submissions that the e-mail indicated that Mr. Clayton was contemplating publication of the details of his case and of information in respect of C's upbringing and care while the proceedings were still current, and that his likely disclosures would include matters live before the County Court in dealing with the residence and contact applications, Hedley J made a order wide ranging order restraining Mr. Clayton until C's 18th birthday or until further notice:

“[2]... from discussing or otherwise communicating (otherwise than for ordinary domestic and social purposes) any matter relating to the education, maintenance, financial circumstances or family circumstances (including any proceedings before any court) of ... [C]... (“the child”) other than with:

- (a) any legal adviser whom he may consult or instruct;
- (b) the other parties;
- (c) the medical and educational advisers of the child;
- (d) any person to whom information is communicated for the purpose of enabling the person to exercise any function in relation to the child which is authorised by Statute or by a court of competent jurisdiction; and
- (e) any other person the court may permit;”

The order went on to state:

“[3] Nothing in this Order shall of itself prevent ... [Mr. Clayton].. from:

- (f) discussing, communicating or publishing any matter relating to any part of the proceedings before any court other than a court sitting in private; and

- (g) discussing or communicating or publishing (“disclosing”) anything which at the date of the disclosure by that person has been disclosed (whether inside or outside the jurisdiction of the court) in any newspaper or other publication or through the internet or any other broadcast or electronic medium to such an extent the information is in the public domain (other than in a case where the only disclosure was made by that person).”

The judge gave Mr. Clayton and or any person affected by the order liberty to apply on 48 hours’ notice. Mr. Clayton did not so apply. However, at a subsequent hearing before Hedley J in August 2005, the parties came to terms. Mr. Clayton was in person, Mrs Clayton was represented by Mr Anthony Kirk QC, and the child was separately represented by counsel through NYAS, who acted as her Guardian. Agreement was reached for the disposal of the Children Act proceedings without the necessity for a hearing.

After lengthy negotiations, in respect of which Mr. Clayton paid a warm and unsolicited tribute to Anthony Kirk for the way in which such negotiations had been facilitated, both parents effectively consented to the discharge of all previous orders and the subsequent withdrawal of all applications for orders under the Children Act on the basis of the concept of a “shared care” arrangement which acknowledged the importance to the child of a number of matters set out in a schedule to the order.

Hedley J was approving of the approach adopted by Mr. and Mrs. Clayton to the extent that he adjourned the case into open court for judgment in an anonymised form, so that publicity could be given to that approach and the terms of the “shared care” arrangements, and in the hope that it might recommend itself to others as a basis for discussion and negotiation. For this purpose he incorporated into his judgment the shared care arrangements in an anonymised form. Despite all this effort on the judge’s part, I am not aware that his judgment has, to date, been reported.

However, the parties were not agreed on the question of the continuation or discharge of the injunction earlier granted in the terms I have set out and, indeed, prior to the hearing, Mr. Clayton had given notice of an application to discharge it. He wanted the injunction lifted in its totality; the child’s guardian wanted it to continue in its totality, whilst Mrs Clayton was agreeable to some publicity for the order provided that the child was not identified.

In the event, Hedley J continued the judgment in its original form, and Mr. Clayton appealed. Fortunately, for the hearing before the Court of Appeal, he obtained public

funding and was represented by leading and junior counsel. Mr. James Price QC and Mr. Adam Wolanski. Mrs. Clayton was not represented, but sent in a statement with a number of documents attached to it.

The application for permission to appeal initially came to me sitting alone. I gave permission, and invited CAFCASS Legal to instruct an advocate to the court. As I have already stated, we had the benefit of helpful submissions from Mr. Brian Jubb of counsel.

So, why did Mr. Clayton want the injunction discharged? His counsel produced a shopping list of what he wanted to do, which I incorporated into my judgment. It contained 8 items, the first seven of which seemed to me innocuous, and which I set out in my judgment:

1. He wants to publicise the agreement about shared parenting and its benefits, and to encourage others to go down the same route, something which, in my judgment given on 8 December 2005 I described as 'an entirely laudable goal'. He has been asked to assist journalists making useful programmes about mediating solutions.
2. He wants to communicate to the community in which he lives, in which the story is well-known, how matters have ended. He is prevented from explaining to people what has been the outcome.
3. He is regularly contacted by the media as a moderate and well-informed spokesperson on the family justice debate; he is unable to explain how matters concluded, and worries, given the background, that there is whispering that something new and discreditable has happened, meriting a blanket injunction.
4. He campaigns for better, and more open, family justice and for several organisations hoping to bring about change to the family law. He cannot refer to his own experiences in the family justice system. For example, he would wish to take vigorous issue with the President's opinion published in the Times of 31st January 2006 that a 50-50 contact regime for a child is 'simply not practicable', and can only cogently do so by reference to his own experience.
5. In particular he campaigns for equal sharing of tax credits and child benefit (and other benefits) where there is shared parenting. The media are rightly interested in this; it is an issue which, according to HM Revenue and Customs, generates a greater workload than any other. Basic tax credit and working tax credit and child care allowances can be a very significant proportion of the total income of people on lower incomes. He is a potentially excellent spokesperson for this, because he has a particularly clear cut case

for a share in these credits, having a fully shared care solution sanctioned by the High Court.

6. In short, the injunction prevents him being as politically active as he would wish, because he believes that the most effective lobbying, comments, or campaigning involve discussion of the human aspects of individual cases, specifically his own, both positive (the outcome) and negative (the delay, and what he sees as a systemic tendency for parties to fight for court orders, instead of drawing up their own solutions).
7. He uses the internet a lot, putting holiday snaps and so forth on the net, and E-mailing people about his daughter.

I had no difficulty with any of this. The identified activities seemed to me all perfectly legitimate, and were not caught by CA 1989, section 97 as we construed it, since the substantive proceedings between himself and the child's mother had long been concluded. I could therefore see no harm to the child in Mr. Clayton being able publicly to identify himself and the child as being the beneficiaries of a shared care arrangement. I could equally see little mischief in Mr. Clayton identifying himself in his campaigning role (items 4 to 6). Item 7, putting holiday photographs on his web-site was no less than many parents did as part of normal family life. None of these items, therefore, seems to me to fall foul of CA 1989, section 97 as construed by Mr. Price and Mr. Jubb.

The President and I therefore took the view that if Mr. Clayton's shopping list had ended with item 7, we would have had little quarrel with it. But it did not. It continued with item 8 which referred back to the Email to the BBC reporter which had triggered the initial injunction application. Under paragraph 8, Mr. Clayton identified three more things he wanted to do. Firstly, he wanted to talk about the severe delays which had occurred in dealing with what he described as a simple case. Secondly, he wanted to talk about what he identified as CAFCASS's lack of resources and expertise, whilst at the same time pointing out that it had a primary role as the only supplier of support and advice, and of reports to the court. Mr. Clayton had made several complaints about CAFCASS to the judge, and wanted to speak about concrete complaints. There was a passage in the E mail, relied on in the skeleton argument in support of the grant of the injunction, for the November 2004 hearing, in which Mr. Clayton had said: "I could tell you something in person also about the way CAFCASS are handling matters that is bad for (the child) as well, that I cannot write", although counsel said that Mr. Clayton could no longer recall what he had in mind in this passage.

It was, however, the third matter which was, in our judgment, the most significant. Mr. Price described it in these terms: -

A matter that may possibly be newsworthy, and might be the subject of a television film: taking (the child) back to Portugal, where she witnessed Mr. Clayton's arrest, and gradually over the years explain things to her. Mr. Clayton wishes to write that story one day, not to be negative about the

mother, but about the system. Mr. Clayton has deep-rooted grievances about how his arrest, imprisonment in Portugal, and legal proceedings were handled. He also wishes to write a book about his travels with C: there were 6 other trips including to North Africa.

This section of Mr. Price's argument concluded with a section entitled: What Mr. Clayton did not want to discuss or communicate:

9. He does not wish to say anything damaging or sensitive about C. He deals with the media only occasionally and responsibly. He has been careful not to publicise aspects of the proceedings in private, or to denigrate or criticise C's mother, which he does not think is in C's interests. He simply wishes to debate the shortcomings of the family justice system. Between December 2003 and the grant of the injunction, he gave at least 15 interviews to broadcast media about issues very high in public awareness, as a result of the activities of Fathers 4 Justice; he said nothing contentious or in breach of any confidence. See also the draft press release which he suggested for distribution at the conclusion of the case, which appears entirely unobjectionable.

In a recent E-mail to the child's mother, Mr. Clayton suggested, unprompted, the following addition to the 1st schedule to the 11th August 2005 order:

"We both agree to place trust in each other, rather than a court order, to behave with appropriate parental responsibility, and in accordance with the Welfare Checklist, in respect of any mention there may be of [our daughter] in any public domain. We both agree that we shall endeavour, if ever speaking publicly, to act in a way to minimise interest in her, respect her privacy, and not speak negatively of either party in terms of past actions or behaviour, as that may be hurtful for [her]. We shall endeavour, wherever possible, by discussion and negotiation, to present a united front in any public matters as that is in [her] best interests."

As I have already made clear, the construction which the President and I gave to section 97 is not the theme of this lecture. We were, however, I should stress, at pains to point out that our judgments did not affect either section 12 of the AJA 1960, or section 33 of the CYPA 1933, which affords anonymity to children in criminal proceedings. We also made it clear that parental freedom to talk about their children after the conclusion of the proceedings relating to them was not a free for all. In particular, where an issue which directly related to the child's welfare arose, and one in which the child's ECHR Article 8 rights were engaged, the court would conduct a critical balance of the parent's Article 10 right to free expression against the need to safeguard the child's welfare and the child's rights under Article 8. If welfare, which in this context was paramount, required the court's intervention, the court retained the power to intervene.

This distinction was neatly encapsulated in the case itself by the need to protect the child against participation in the self-exculpatory film which Mr. Clayton wished to make about his earlier abduction of her. Participation in such a film, we thought, was

flatly contrary to the child's interests.

I summarised my conclusion in the following way when I said: -

There is, I think, little mischief, and possibly some benefit, in the Appellant being able to tell the world – or any part of it that is prepared to listen – that he and his former wife have reached an amicable arrangement over the child's care, and that such arrangements are preferable to achieving less satisfactory results by litigation. Equally, items 2 to 7 on the shopping list presented by Mr. Price seem to me unexceptionable. If, for example, the Appellant wishes to put photographs of himself and the child on his website, in order to impart the information that they have had a very happy holiday together, this, to my mind, is not different in substance from the activities of many families which operate a "blog" and exchange information and news about the progress of themselves and their children on a web-site. Against such activities there seems to me to be little point in having a blanket injunction which then exempts social and domestic purposes.

However, the Appellant's involvement of the child in a self-serving film designed to exculpate him in relation to his criminal activity in abducting E in 2001 seems to me to be in a wholly different category. In my judgment, despite the skill with which Mr. Price sought to introduce it, this aspect of the Appellant's behaviour is properly justiciable under CA 1989, section 8, alternatively by way of a *Re Z* injunction.

(I interpolate: this is a reference to the decision of the Court of Appeal in *Re Z (A Minor) (Identification; Restrictions on Publication)* [1997 Fam. 1 in which the Court of Appeal upheld Cazalet J's decision not to allow a mother to make a film about her daughter's educational needs and a particular method of addressing them, which she argued would be in the child's interests and in the wider public interest. The case bears several resemblances to *Clayton v Clayton*

My judgment continued:

I do not accept the argument that the involvement of the child in a film is unobjectionable on the grounds that it not about the case, or the child's mother, but about the system. It may well be that a book about the abduction (the essential facts of which are in the public domain) would not engage CA 1989, section 1, would, in any event, fall on what I might call the "freedom of expression" side of the line and would not thus become the subject matter of an injunction: - see, for example, *Re X (A minor) (Wardship: Jurisdiction)* [1975] Fam. 47.

(I interpolate again: this is the case in which Latey J prohibited the publication of a book about a ward of court's father, on the ground that the published material was likely to harm the child. The Court of Appeal reversed his decision)

My judgment continued:

But involving the child in a film about the abduction; and "taking her back to Portugal" for that purpose seem to me matters which plainly relate to her upbringing. They are equally plainly matters within both the court's protective and its statutory jurisdiction. The child's welfare is plainly engaged and is paramount; the Appellant's ECHR Article 10 rights are manifestly outweighed, and the judge was fully entitled to grant relief to the child's mother to prevent it happening.

The President made it clear (as did I) that Clayton v Clayton was not about public access to family proceedings. It is, however, I think, a further step on the road towards transparency, and thus prompts a wider discussion. Access to the Family Courts, therefore, is the real theme of this lecture, and I think I need to make it clear where I stand on this. I emphasise that what follow are my personal views.

In summary, I am in favour of giving the media – and in practice this means the Press - access to family proceedings, provided that there are clear ground rules about what they can and cannot report. In practice this means the extent to which, if at all, they are to be at liberty when reporting the proceedings, to identify the parties, and, in particular, the children concerned.

Unlike the Constitutional Affairs Select Committee, both in Fourth Report (Family Justice – the operation of the family courts (HC 116-1) and in its most recent report entitled Family Justice: the operations of the family courts revisited (6 June 2006, HC 1086) I do not favour, indeed I am opposed to, the admission of the public into family courts, even given the qualification which the Select Committee envisages, namely that there would be a judicial discretion to exclude the public in certain circumstances. I will explain how and why I reach these conclusions later.

I start my analysis with a lecture I gave in Oxford as long ago as 1994, shortly after my appointment as a judge. It was entitled Publicity in Children Cases – a Personal View, and was subsequently published at [1995] 25 Fam Law 136. In it, I advanced what I perceived to be the three most compelling reasons for promoting open justice in the family jurisdiction. These were: -

- (1) to enable informed and proper public scrutiny of the administration of (family) justice;

- (2) to facilitate informed public knowledge, understanding and discussion of the important social, medical and ethical issues which are litigated in the family justice system;
- (3) to facilitate the dissemination of information useful to other professions and organisations in the multi-disciplinary working of family law.

I noticed on re-reading the paper for the purposes of preparing this lecture, that in 1994, I saw “no difficulty in promulgating a rule” that the evidence in family proceedings could continue to be heard in private, whilst the judgment or decision of the court should always be given in public unless the judge, for reasons to be explained in public, decided otherwise.

Throughout my eleven years as a Family Division Judge, I attempted to practice what I had preached. I regularly gave judgments in open court. I think I can honestly say that I published every decision which I thought had even the remotest interest to the public or to the profession. Indeed, it reached the point on the Northern Circuit where a joke at my expense ran along the following lines: bright eyed and bushy tailed young solicitor / barrister bounces into the chambers of a judge / district judge and announces: “I wish to rely on an unreported decision of Mr. Justice Wall”. The district judge / judge looks up wearily from his papers and says: “I didn’t think there were any unreported decisions of Mr. Justice Wall”.

I tell the story only to make the point that over the last 11 years I have attempted to be open about the work I do. Every judgment that was published was made available to the Press, which did not appear to be even remotely interested, despite some of the cases, on their facts, being quite extraordinary. Thus should a father suffering from Huntington’s disease have contact with children who, wholly unbeknown to them, he had been on the point of murdering by setting fire to the van in which he had told them he was taking them on holiday? Should the Down Syndrome child of an orthodox Jewish couple be fostered by Catholics, and baptised? Should the male child of a mixed Muslim / Christian marriage be circumcised against the wishes of his Christian mother? These are just three examples amongst many of what I thought were important issues which needed to be discussed in public.

You must, accordingly, understand that I have an element of cynicism about the Press campaigning for “transparency” in family law. That cynicism derives from many years of trying, without any success at all, to encourage responsible press interest in the issues which regularly come before the family courts.

My thoughts were, however, concentrated, more recently, by a judgment which I gave in

the case to which I referred earlier, namely *Re H (Freeing Orders: Publicity)* [2005] EWCA Civ 1325, only recently reported at [2006] 1 FLR 815. In that case, the Press had published a highly tendentious, and illicitly obtained account of both care proceedings and the subsequent application to free the children concerned for adoption. The message from the newspaper was that local authorities, aided and abetted by a secretive judiciary, were implementing a covert policy of social engineering by removing children from the care of their worthy and God-fearing parents on the specious ground that the parents concerned were not sufficiently intelligent to care for them.

Nothing, of course, could be further from the truth, as an objective and fair minded reading of the judgments in question made clear. Ironically, the parents' appeal was not based on the judgments, but on their dissatisfaction with the manner in which they had been described in the newspaper, and resented being described in the media as insufficiently intelligent to bring up their children. Thorpe LJ, who gave the leading judgment in the case (to the effect that press misreporting did not provide grounds for permission to appeal and that the parents had not made out a case for permission) expressed his agreement with me when I said: -

26. this case provides a strong argument for those who, like myself, take the view that the decisions of circuit and Family Division judges hearing care and adoption proceedings should, as a matter of routine, be given in an anonymised form and in open court. No fair minded outsider reading the judgments of HHJ Hayward-Smith QC and Pauffley J could possibly conclude that either decision represented a miscarriage of justice

27. This case is not about social engineering or about the State intervening in an improper and heavy-handed fashion in normal family life to remove children from honest and law-abiding parents whom it deems insufficiently intelligent to care for them. Like all care cases, it is about children suffering, or being likely to suffer, significant harm due to the care or lack of it given to them by their parents.....

Having reviewed the decisions in the courts below, I commented: -

31. Cases involving children are currently heard in private in order to protect the anonymity of the children concerned. However, the exclusion of the public from family courts and the lack of knowledge about what happens in them, easily lead to the accusation of "secret justice". Moreover, judges communicate in carefully reasoned judgments, not sound-bites. Thus, even when a judgment is published, it is likely to be read in its entirety only by lawyers.....

Having suggested that in appropriate cases, judges should also prepare short, anonymised summaries of their reasons for public distribution, I said:

33. What is manifestly unacceptable is the unauthorised and selective leakage of one party's case, or selective and tendentious reporting in breach of the rules relating to the confidentiality of the proceedings. This, in my experience, inevitably leads to unbalanced mis-reporting of the difficult and sensitive issues with which the courts have to grapple. In my judgment, therefore, the best way to tackle the problem is by greater openness in the decision-making process along the lines that I have described.

I apologise for the length of these citations. I hope, however, if nothing else, that they demonstrate a consistency of thought on my part over the last twelve years.

As I say in Clayton, It is, in my judgment, unacceptable that conscientious judges and magistrates up and down the country, doing their best, with inadequate resources and under heavy pressure of work to make difficult decisions in the best interests of children, should be accused of administering "secret" justice. Let it always be remembered that it was Parliament, not the courts, which imposed the restrictions contained in CA 1989, section 97 and AJA 1960 section 12. The judicial task is to interpret and apply those statutes.

I therefore echo a paragraph of Munby J's judgment in *Re B* ([2004] 2 FLR 142 at 190, paragraph [133]) in which he said: -

[133] One of the disadvantages of the 'curtain of privacy' to which Balcombe LJ referred—what some campaigners would prefer to characterise as the cloak of secrecy surrounding the family courts—has become apparent. Those who without justification attack the family justice system can all too easily do so by feeding the media tendentious accounts of proceedings whilst hypocritically sheltering behind the very privacy of the proceedings which, although they affect to condemn, they in fact turn to their own advantage. It is all too easy to attack the system when the system itself prevents anyone correcting the misrepresentations being fed to the media.

So, what is to be done? As I have already said, the views I am about to express are my own. This is not a topic I have discussed with my colleagues, save in so far as they have emerged in judgments with which they have expressed agreement.

In the Court of Appeal, everything is in open court, and since the decision in *Pelling v Bruce-Williams* [2004] 2 FLR 823 our practice has been not to impose reporting

restrictions in children's cases unless the parties specifically request it, and provide good reasons for it. Thus in the recent case of *Harb v King Fahd Bin Abul Aziz* [2005] 2 FLR 1108, we reversed a decision of the then President, Dame Elizabeth Butler-Sloss, who had directed that the hearing to decide whether or not the King, as a Head of State, was entitled to state immunity should be heard in private under a fictitious title. Furthermore, we refused the King's request for Mrs. Harb's permission application to be heard in camera. We directed a hearing in open court, and the application was both so heard and, of course, reported.

Of course, in the Court of Appeal we rarely if ever hear oral evidence (except when it is given by counsel): cases are argued on the papers, and usually involve either a point of law or the manner in which a particular judicial discretion has been exercised.

Speaking entirely for myself, however, I would have no difficulty from a judicial standpoint in hearing some first instance family proceedings in open court, notably those raising issues of public importance. Indeed, this already happens, for example in the PVS cases, or in medical cases where the question is whether or not it is lawful or unlawful to provide or withhold particular treatment for a child – see, as an example, the various cases involving Charlotte Wyatt and the Portsmouth NHS Trust.

Hearing evidence in open court would, however, I think need the full consent of both sides. The only time I heard a high profile case in open court, as I recall, was in the case of *Evans v Amicus Healthcare* [2005] Fam. 1 in which, as I am sure you will remember, Ms Evans wished to retrieve and use frozen embryos created by her and her former partner in order to become pregnant. That case involved both Ms Evans and her ex-partner giving quite detailed evidence of intimate conversations between them about their relationship. With the parties' agreement, I heard that case in open court, and without robes. Nobody, it has to be said, appeared inhibited or even commented on the absence of wigs and gowns.

The case lasted five days, and I was mildly amused by the fact that the press benches were crowded each morning at 10.30, but rapidly emptied when a witness said something quotable or newsworthy. They were also, I noted, wholly deserted during the legal argument.

At the end of the case, I prepared a press release which sought to explain my over long judgment in simple terms, and I was pleased to note that virtually all the media reporting of the case followed my draft.

Evans v Amicus Healthcare was, of course, an unusual case, but my simple and fundamental point is that if the family justice system is to shake off the canard of "secret justice", there is only one way to do it; and that is to admit the press into the courtroom.

In my judgment, this is what we should do. But plainly, we need to have clear rules about what the press can, and cannot report, and in particular we need to have clear rules about anonymity and confidentiality.

The balance which has to be struck, it seems to me, is clear. On the one side, there is the undoubted need to protect family privacy and to encourage frankness. On the other is the need to have a system which is understood by, and accountable to, the public. Speaking for myself, I see no reason why the tension between the need for a media presence and the need to respect privacy and confidentiality cannot be satisfactorily resolved. We may need a new Statute, or we may be able to do it by Practice Direction. However, we undoubtedly need to engage in a dialogue with the media about it.

I was impressed by the recent BBC radio broadcasts dealing with the work of the Wells Street FPC. None of the parties who spoke about their cases was identified, but the issues they had brought to the court, their attitudes to them and the obvious fact that the court was grappling with them sensibly and sensitively did much, in my view, to dispel the “secret justice” gibe.

I am not in favour of family proceedings being either televised or broadcast. I see no benefit in that process, only dangers. Selected highlights from the OJ Simpson trial, instant re-plays, analysis of and commentary upon extracts from the evidence did much, in my judgment to damage the image of American criminal justice and turn the court into a media scrum – see, by contrast the dignified way in which Mantell J (as he then was) and his jury tried Mrs. West: or how Thayne Forbes J and his jury tried Dr. Shipman.

The public needs to be informed and to be fully and properly informed. There is, however, as the late Lord Donaldson memorably remarked a line to be drawn between the public interest and the public’s curiosity. It is to guard against the latter that I am opposed to allowing members of the public into family proceedings. Should your neighbours or perhaps your former colleagues or lovers be allowed to come and listen to your disputes with your new partner or other intimate issues? In cases involving domestic violence, should the opportunity be given for the victim to be intimidated by the presence of the perpetrator’s friends who may well be criminals? In a case in which criminal conduct such as drug dealing is involved, should those engaged in the activity but unconnected with the proceedings be entitled to be present?

I thought it interesting that in the second of the recent Radio 4 broadcasts about Wells Street, Nicholas Crichton asked the presenter of the programme whether, if she and her family had the sort of problems with which the court was dealing day in and day out (and which she had been observing) she would really want her neighbours, residents on the same estate and members of the public generally sitting in and listening? Her clearly honest answer was that of course she would not.

There seem to be, therefore, two principal and, I think, compelling arguments against admitting the public to family proceedings involving children or, for that matter, family financial disputes. The first is that the presence of the public would inhibit the parties and their witnesses. The second is that their presence serves no purpose in the public interest.

I propose to give two simple examples, the first from my own experience, and no doubt somewhat unusual. It is, as you may or may not know, the tradition on circuit that the High Sheriff comes in to sit with the judge for a morning or a day. I used to discourage High Sheriffs from doing so in family cases, as I thought that their presence, particularly if they arrived in uniform, would be likely to intimidate. In one area of the country, which I will not identify, the High Sheriff came to sit in with me on what was turned out to be the disputed financial consequences of his neighbour's divorce. I did not think he should be there. It would have been a gross breach of his neighbour's right to privacy for the High Sheriff, as a member of the public, to have learned of his neighbour's financial affairs.

Secondly, and hypothetically, I can do no better than to repeat Nicholas Crichton's question to the BBC programme presenter. What about either care or private law proceedings involving a particular family with school aged children living on a particular estate, or in a particular village, perhaps raising allegations that one of the parents has sexually abused or otherwise seriously harmed a child in the family? Should residents on the estate or in the village be allowed in to listen? It is, in my view, idle to suppose that such people will conscientiously obey the provisions of section 12 of the Administration of Justice Act 1960 and not talk about the case when they get home. And if they tell their children, as they are likely to, how are those children going to be prevented from repeating (and in all probability misrepresenting) salacious evidence to their peers, leaving aside the possibilities of using the material to bully or torment other children in the family concerned, or their friends.

I do not, however, go as far as Nicholas appeared to go in that programme. I do not necessarily agree that the presence of a journalist in court would inhibit the parties in giving their evidence, particularly if it was known that they could not be identified without the consent of all those engaged in the proceedings.

In a letter written to Alan Beith, MP, the Chairman of the CASC, after he had given evidence, the President, in a wide ranging review of the subject, made a number of what I regard as telling points against the indiscriminate admission of the public to family proceedings. I select one paragraph only from his letter, which reads: -

3. There is a strong feeling among the judges that, quite apart from proper welfare concerns for the child, a rule or presumption of a public right to access, with the discretion to the judge to consider exclusion of any particular member(s) of the public would be burdensome, difficult to police,

and likely to add to the length of the proceedings. In particular, it would raise considerable difficulties in identifying and challenging "undesirables" as well as giving rise to inhibition (and on occasion intimidation) of parties and witnesses, with consequent adverse effects on the outcome of the hearing. Those legitimate concerns explain why I favour the proposal to restrict access to those with a genuine interest in the case, for example, lay advocates to assist parents with learning difficulties and members of the family or others who will support the parties through the hearing and in dealing with the outcome of the hearing.

I respectfully agree with that analysis. I am, furthermore, not impressed with the argument that criminal proceedings are held in open court and that members of the public are entitled to attend those proceedings without any form of vetting. Criminal proceedings focus on criminal acts for which, if convicted, the Defendant will be punished. The liberty of the subject is self-evidently engaged. The actions of public authorities directly related to matters such as arrest, detention and the collection of evidence must all be open to public scrutiny except in those rare cases in which the public interests requires the case to be heard in camera.

In my view, the case for admitting members of the public to family proceedings heard in private is simply not made out. But the case for admitting the Press, in my judgment, is very powerful – with the provisos I have indicated, and, as I have already stated, I do not myself buy the argument that the presences of a journalist – or even more than one – would inhibit the parties.

In my judgment, what matters in the reporting of family proceedings is not the identity of the litigants, but what the case is about. If a family judge is hearing care proceedings, the circumstances in which care orders are made or refused, the evidence required for such orders, the quality and nature of that evidence and the manner in which it is investigated and analysed – these are what matters, not that the child in questions happens to be the son or daughter of a particular person. If the press can report the issues and the process it does not seem to me to matter that they are unable to identify the parties.

The Wells Street programmes provided a good example of this. It was not difficult to engage with the issues in the cases described – for example the problems posed by an alcoholic or drug abusing parent, or a parent refusing without good reason to promote contact, and so on.

But press reporting must, in my view, be responsible. Once again, I see this as an issue which the family judiciary need to discuss with the press, so that a modus vivendi is achieved. The sensationalism of which the judiciary frequently complains seems to me at least in part to derive from the absence of full and proper information. But we should not expect too much. In the recent case of *J v C*, the Court of Appeal held that a female

to male trans-sexual who had gone through a ceremony of marriage with a woman whilst he was himself still a woman could not be the parent of a child born to the former by AID. We prepared a careful press release for the judgment, which was, so far as I could judge, soberly reported. I was relieved by that, because when the case had been before the courts on Mr. J's application for ancillary relief (an application dismissed both by the judge and the Court of Appeal) the level of the discussion of the case was set by a tabloid headline describing the relationship of the parties over a number of years in the immortal words: "I was good bonk, says woman husband". We may try to raise the level of the debate, but we must recognise that we may not succeed.

The underlying point here is, of course, a serious one. It is of the essence of a free press that the judiciary cannot dictate to the media what it should and should not report. I accept Dr. Pelling's argument that it is not a satisfactory solution to the problem for the judges to decide which of their cases will be published or otherwise placed in the public domain. Within the constraints, where appropriate, of a necessary respect for the privacy of the child and the litigant, the Press must be free to report what it thinks appropriate to report, provided always that its reporting is accurate. If the judiciary wishes to minimise tendentious, inaccurate or sensationalist reporting, it must, in my judgment, meet the press half way and ensure that when it wishes an issue to be reported, it is made available to the press in a way in which the press can properly use it.

As I have said on a number of occasions, judges communicate through judgments, not sound-bites. But judges cannot reasonable expect journalists or other members of the public to read a lengthy judgment, unless it happens to relate specifically to the affairs of the member of the public concerned. We have, in the Court of Appeal thus designed a system in which we issue press releases in important cases. We did this in Clayton v Clayton. If you hand a 100 paragraph judgment down at 10.30, you cannot reasonably expect a journalist who has to have something on the wires by 11.00 to have read it, absorbed it and made an accurate précis of its finer points in 30 minutes.

In essence, therefore, I am saying that in letting the press into our courts, we must accommodate them, and they must accommodate us. There needs to be a series of firm ground rules, and a dialogue.

When I sat as a Recorder in crime, the only people in the public gallery were usually associates of the accused. In many cases there was nobody there. I doubt very much if the Press would use the freedom to attend family proceedings very much. I recall that it came as something of a surprise to most of them when they were told that they were already entitled to sit in on proceedings in the FPC. But of course the fact that the right would not be used is not the point. The important point is that the process would be open: the work of the family courts could be scrutinised and subjected to informed debate and criticism. In my view it is the ignorance of what goes on in the family courts which fuels the canard of secret justice.

To sum up: I am persuaded that the time has come to open up the family courts to the Press. Judgments should routinely be given in open court in anonymised form. Judges should prepare and use press releases in controversial cases, so that the public can understand the reasons for the decisions they have reached. There should be an ongoing dialogue with the press and the media generally about family justice and how it is administered. We, the judiciary and the practitioners have nothing to fear from public scrutiny: indeed, we should welcome it.

I have no wish to be portentous, but I think we would all agree that the three pillars of the freedom most of us enjoy in this country are (1) the existence of regular free and fair elections at both national and local level; (2) an independent judiciary; and (3) a free press. As a judge, I regularly count my blessings, as the ALC advised me to do when I sat at first instance. Unlike my judicial colleagues in other parts of the world, I do not fear the knock on the door in the middle of the night, the arbitrary arrest or being taken out of my chambers and being shot. The government is a regular litigant in the Court of Appeal. If it has the better case, it wins: if it has the worse case, or is wrong, it loses, irrespective of the identity of the Minister or the political party to which he or she belongs.

But with the freedom from political interference which I have the good fortune to enjoy comes, I think, a recognition that it is no longer good enough for family judges to say that they should be the sole arbiters of what issues should and should not be in the public domain in the field of family justice. We are public servants, and we serve the public. We have a responsibility to ensure that our decisions are understood by the public. It is, after all, in everybody's interests that the work of the family justice system is transparent, and fully understood. The only way we can do that, in my view, is by making it public. And making it public means, in practice, giving the press access to it. It is for this reason that I have already emphasised the importance of press releases.

The Children Act 2004, the changes in the rules, the interpretation of section 97 provided by Clayton: these are all small steps on the road to what must be a much wider objective. We need to re-think. The skies will not fall if we do. Opening up family justice will, in my judgment, help to gain it the respect it deserves and – who knows – might even encourage the politicians to begin to resource it properly.

In the last case David Hershman did in front of me, *Re EC (Disclosure of Material)* [1996] 2 FLR 123, he failed to persuade me that I should permit his local authority to disclose to the police admissions made by the father in the case, that he had fatally injured his child. One of his arguments was the need for the free flow of information between the family and criminal justice agencies. Of course, he won in the Court of Appeal.

I would have welcomed the voices of both Allan and David in the discussion which I

hope will follow the delivery of this paper. Arbitrary forces over which we have no control have, prematurely, deprived us of their ongoing contribution. The best way of honouring their memory, I think is to carry on the debate in their names.

Thank you very much.