



MASTER OF
THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

OPEN JUSTICE UNBOUND?

JUDICIAL STUDIES BOARD ANNUAL LECTURE 2011

16 MARCH 2011

(1) Introduction

1. We live in a country which is committed to the rule of law. Central to that commitment is that justice is done in public - that what goes on in court and what the courts decide is open to scrutiny¹. This is not a new fundamental principle. In 1829, for instance, Bayley J in *Daubney v Cooper* said this,

‘ . . . we are all of the opinion, that it is one of the essential qualities of a Court of Justice that its proceedings should be in public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, - provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed – have the right to be present for the purpose of hearing what is going on.’²

2. Of course, it goes back further than that: as one 20th century commentator put it,

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

² (1829) 109 E.R. 438; 10 B & C 237 at 240.

“[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.³”

Time immemorial means, of course, older than 6 July 1189, the date of King Richard the First's accession to the throne⁴, although the date is not so much a tribute to him, as to his father, King Henry the Second, whom he succeeded. So it is a common law principle which stretches back into the common law's earliest period.

3. The importance of open justice as a fundamental principle has not only secured its place in our legal system. It has also secured its place in the legal systems of all those countries which are signatories to the European Convention on Human Rights. Article 6 of the Convention was specifically drafted⁵ to replicate the House of Lords' ringing affirmation of open justice in the seminal early twentieth century decision of the House of Lords in *Scott v Scott*⁶. In that case, Lord Shaw described how open justice was '*a sound and very sacred part of the constitution of the country and the administration of justice. . .*'⁷The principle is equally embedded into the framework of all common law systems; not least the United States, where, in 1791, it was enshrined as a constitutional right by the 6th amendment⁸. It is as important as it is well-travelled and long-lived.

4. The importance of open justice arises from the role it plays in supporting the rule of law. Public scrutiny of the courts is an essential means by which we ensure that judges do justice

³ Jenks, *The Book of English Law*, at 73-74 (6th ed.1967, cited in *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 at 567; and see Spigelman, *The Principle of Open Justice: A Comparative Perspective*, (Media Law Resource Centre Conference) (London, 20 September 2005) (http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman200905)

⁴ Statute of Westminster 1275

⁵ European Commission of Human Rights, Preparatory work of Article 6 of the European Convention on Human Rights (Council of Europe, Strasbourg, 08 October 1956 (DH (56) 1) at 22 – 23.

⁶ [1913] A.C. 417

⁷ [1913] A.C. 417 at 473; cf. *Attorney General v Leveller Magazine* [1979] A.C. 440 at 449 – 450.

⁸ *Gannett Co., Inc. v. DePasquale* 443 U.S. 368 at 385, albeit a right of the parties not of the public.

according to law, and thereby secure public confidence in the courts and the law. This evening, I would like to focus on three discrete and currently relevant aspects of this constitutional principle.

5. First, I want to talk about the nature of public judgments: if justice is seen to be done it must be understandable. Judgments must be open not only in the sense of being available to the public, but, so far as possible given the technical and complex nature of much of our law, they must also be clear and easily interpretable by lawyers. And also to non-lawyers. In an age when it seems more likely than ever that citizens will have to represent themselves, this is becoming increasingly important. Secondly, I want to talk about modern applications, and possible developments, of the principle. In particular I would like to examine increasing the relevance and accessibility of the justice system to the public. Finally, I want to talk about some recent developments in the application of the principle; in particular, super injunctions and closed proceedings.

(2) Open Justice and Public Judgments

6. As the Romans had it, *ignorantia juris haud excusat*, ignorance of the law is no excuse, and that is true both of our criminal law and our civil law. But if ignorance of the law is ruled out as an excuse, legislators, judges and lawyers owe a concomitant duty to ensure that the law is not so impenetrable or abstruse that even other lawyers and judges are unable to penetrate it. It is for this reason that legislation should be drafted clearly; and why, in recent years, there has been such a sustained and justified outcry at the inexorable volume, the tedious length, and the inept drafting of many of the Acts of Parliament that have found their way onto the statute book.

7. But clarity is not just important where legislation is concerned. If the law is to be properly accessible, then the courts are under the same duty of accessibility as is placed on the legislature - above all in a common law system, where, albeit within bounds, the judiciary make and develop the law, as well as interpret it. Oscar Wilde said that truth, is 'rarely pure and never simple'⁹, and the same may be said of the law. But that is no excuse for judges producing judgments that are readable by few, and comprehensible by fewer still. Indeed, the increasing complexity of the law imposes a greater obligation than ever on judges to make themselves clear.
8. We can, of course, all think of particularly bad judgments: over-long, meandering, thick with digressions, obiter dicta, and needlessly complex. Not all have the precision of Lord Atkin's judgment in *Donoghue v Stevenson*¹⁰. We might all benefit from reminding ourselves of the clarity with which he identified the issue and set out the principle. First, a crisp statement of the issue, then a tightly drafted consideration of the case law, and, finally, an equally crisp and clear statement of the law:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."¹¹

⁹ Wilde, *The Importance of Being Earnest*, Act 1

¹⁰ [1932] A.C. 562

¹¹ [1932] A.C. 562. at 580.

The alleged snail may well have been in a 'dark opaque glass'¹² but there was nothing dark or opaque about Lord Atkin's opinion, nor was it too long or discursive: a very model of a modern major judgment.

9. Judges are faced with choices as to which there is seldom a universally applicable answer. Should my judgment be short and to the point, or long and complete? Should I confine my reasoning to the facts of this case, or try and give guidance for the future? Should I try and reach a fair result in this case or keep the law clear and certain? Let me address those questions.
10. Short or long? On the face of it, the answer is obvious: judgments should be as short as possible. But if a judgment is too abbreviated, the judge will risk not considering the issues and previous authorities properly. And one of the main points of a judgment is to explain the decision to the parties, especially the loser, to their lawyers and to any appellate court, and more generally to future potential litigants, to their lawyers, as well as to academics. And particularly in our common law precedent-based system, judges often should refer to and consider past decisions. So the shorter the better, but, as with anything, you can have too much of a good thing.
11. A prime example of brevity can be found in many judgments of one of my particularly formidable predecessors, Sir George Jessel. A good instance of his style can be found in a decision he gave in 1879, *Henty v Schroder*¹³. An order for specific performance of an agreement for the purchase of an estate had been made, at the suit of the plaintiff contracting vendor. However, the defendant purchasers failed to complete. The vendor then

¹² *Donoghue v. Stevenson*, 1932 SC (HL) 31; see further <http://www.scottishlawreports.org.uk/resources/dvs/donoghue-v-stevenson.html>

¹³ (1879) 12 Ch.D 666

applied to have the agreement rescinded, and an assessment of damages, relying on three previous judgments. Sir George took less than eight lines in the law reports to analyse the law and reach his conclusion:

“[He] considered that the Plaintiffs could not at the same time obtain an order to have the agreement rescinded and claim damages against the Defendant for the breach of the agreement. His Lordship declined to make an order in the form [approved in the three previous judgments]; and only considered that the agreement should be rescinded; that all other proceedings in the action should be stayed; and that the Defendant should pay the Plaintiff’s costs.¹⁴”

12. Sir George Jessel was a titan of the law, and not without confidence. It is said that when his colleague in the Court of Appeal, James LJ, asked him whether it was true that he had said “I may be wrong, but I am never in doubt”, he replied “very true, except I never said ‘I may be wrong’”. Perhaps that explains the concision of his judgment; his ability to despatch three prior precedents without any consideration; and his ability to set out a principle which every Chancery Judge and practitioner accepted for the next one hundred years. And perhaps all that explains why, unfortunately, his decision was utterly wrong. But it took the House of Lords to say so a century later, in *Johnson v Agnew*¹⁵, a full century later.

13. Although the judgment in *Henty* is immediately accessible to anyone reading it, it was given without careful analysis of the law and without due consideration of the authorities. Perhaps if Jessel MR had given the point more consideration and had set out his reasons properly, he would have seen the error of his ways, and, if that is too much to ask, then perhaps a considered judgment, setting out his reasons for holding as he did would have resulted in his error coming to light earlier than 1980.

¹⁴ (1879) 12 Ch.D 666 at 667.

¹⁵ [1980] A.C. 367.

14. Brevity is important, but clarity is more important, and, as the law, reflecting society as well as legislation, becomes ever more complicated, the duty of judges to communicate the law through their judgments as clearly as possible becomes ever more important.
15. Confined reasons or general guidance? Particularly if a case comes to the Court of Appeal or, even more, to the Supreme Court (which only takes cases of general public importance), it can be said that the public has a right to expect general guidance to be given. In some cases, the courts cannot duck a general principle, as often happens when they are called on to interpret a statute. In other cases, because it is the function of the courts to develop the common law, it is necessary to address a very wide-ranging point, as in *Donoghue* itself. However, the courts are inevitably hampered by being limited to the facts of the particular case. They cannot envisage every eventuality, and they do not have the same access to information, statistics, interested parties, organisations and pressure groups as the legislature. So generalising can be dangerous.
16. There is no doubt but that, in some areas, there is much to be said for letting the law develop on a case-by-case basis, even though it risks leaving potential litigants in a state of uncertainty.. Indeed, it is interesting to note that, in recent times, the House of Lords seems to be keen on the idea that the extent of the scope of duty of care, the very topic which *Donoghue* was concerned with, should be developed on a case-by-case basis, as stated by Lord Bridge in *Caparo Plc v Dickman*¹⁶. That may be because the House took the law too far in *Anns v London Borough of Merton*¹⁷, from which it famously retracted by the Privy Council ¹⁸ and then the House of Lords in *Caparo*.

¹⁶ [1990] 2 AC 605, 618

¹⁷ [1978] A.C. 728.

¹⁸ *Yuen Kun Yeu v Attorney-General for Hong Kong* [1988] A.C. 175.

17. An example of the dangers of using a case to lay down general principles is to be found in a Court of Appeal case decided 35 years ago. In *Re Hastings Bass*¹⁹, a principle was set up that was only laid to rest (subject to the Supreme Court) last week by the Court of Appeal in a magisterial judgment in a case called *Pitt v Holt*²⁰. It might be thought that *Pitt*'s 239 paragraphs would offend the principle that judgments should be readily accessible. In some cases such a criticism would have real force. In this case though such length was a necessary curative. For the last twenty years, following on from the case of *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587, as Lloyd LJ put it in *Pitt*

'a principle, described as the rule in *Hastings-Bass*, has been developed . . . [that principle] is that the exercise of a discretionary dispositive power by trustees may be declared void and set aside, even many years after the event, on the basis that the trustees failed to take into account relevant matters when exercising the power²¹'.

18. In the course of his judgment in *Hastings-Bass*, Buckley LJ summarised part of his reasoning by reference to some general propositions, no doubt with a view to laying down principles to assist lawyers and other advising trustees and beneficiaries. One of those general principles has formed the cornerstone of an entire edifice of the law²², but it was a cornerstone placed on sand. In the context of the case before him, Buckley LJ's summary seemed unexceptionable, but, as the Court of Appeal has held in *Pitt*, it was far too broadly, and therefore erroneously, expressed.

19. It may yet be the case that the Supreme Court will be asked to consider whether the rule is indeed a rule, depending on whether an appeal is brought from the Court of Appeal's decision in *Pitt*. But the point for today's purpose is straightforward. Too broad an

¹⁹ [1975] Ch 25.

²⁰ [2011] EWCA Civ 197.

²¹ [2011] EWCA Civ 197 at [3].

²² See [1975] Ch 41F-H.

expression of a principle in a judgment led the law down an erroneous byway for over a third of a century – and deprived the Revenue of a great deal of money on the way.

20. To characterise an issue as: “Justice or the law?” might seem a solecism, and I suppose it is. Justice in a particular case is a decision according to the law. But the question poses in useful shorthand the question how far a judge should go to refashion the law to produce what most people would regard as a fair result in a particular case. Professor Dworkin famously compared the role of a common law judge with that of a script-writer engaged to write an episode of a well-established soap opera: he is fixed with the story so far, but is otherwise free to develop it as he thinks fit.
21. Just as the script writer has to think of not merely what seems to him to be a good story, but also how to keep the audience satisfied, so must a judge think not merely of the case and the parties in front of him, but also of the countless potential litigants and their advisers, who will read his judgment, and seek to rely on it. Certainty and simplicity are, in that connection, I would suggest, more important than getting a fair answer in a particular case. That is, of course, not a new idea: it is what is embodied in the dictum that hard cases make bad law, because, as somebody once put it, bad law makes hard cases.
22. Sometimes, however, one does get a difficult case where principle is made to yield to justice. A well-known example is *White v Jones*²³, where, by a bare majority of 3 to 2, the House of Lords held that someone who would have been a beneficiary under a will, which was not properly executed due to the negligence of the deceased’s solicitor could claim damages from the negligent solicitor. The fairness of this conclusion to the average person may seem clear, not least because otherwise the negligent solicitor gets away with it and the intended

²³ [1995] 2 A.C. 207.

beneficiary is out of pocket. However, the extent to which the decision conflicts with principle is clear from the masterly dissenting opinion of Lord Mustill, and, some might say, from the rather tortured reasoning of the leading majority opinion of Lord Goff.

23. I am something of an agnostic about the actual decision in *White*, but I think it would have done the common law and its reputation much more favour if the House had based its conclusion on the simple proposition that there are exceptions to every principle, rather than unconvincingly seeking to suggest that the decision accorded with established principles. After all, the common law is ultimately based on pragmatism, so one should not be surprised if there are exceptions to most of the rules it has developed. Nonetheless, we judges should avoid tailored exceptions to, or dubious extensions of, established principles, simply in order to achieve what may be regarded as a fair result in the particular case.

24. And that leads to my final specific point on clarity in judgment writing – the vexed question of the desirability of a single composite judgment in appellate courts. The desire to write your own judgment, particularly in an interesting and important case, can be quite considerable. The wish is reinforced where, as often happens, you think you can write an even better judgment than the one your colleague has produced. Virtually every appellate judge has been guilty of what might be called a vanity judgment: I certainly have.

25. In some types of case, it is important to have a single judgment giving clear guidance, thereby avoiding any possibility of arguments as to whether two slightly differently expressed judgments meant the same thing. I was recently involved in a case in the Supreme Court²⁴, where we were anxious to ensure that judges in the County Courts had clear guidance as to how to apply Article 8 of the European Convention to residential possession

²⁴ *Pinnock v Manchester City Council* [2010] UKSC 45, [2010] 3 WLR 1441.

actions. Lord Phillips PSC was anxious that there was only one judgment, given the importance of clear guidance in such a case. Although it went out in my name, the contributions to the judgment of the other eight members of the court were substantial, in some case very substantial. It was hard work, involving a number of meetings and a great deal of email communication, but the result was much better than my original draft. Whether it achieved its aim only other people and time can tell.

26. I am very far from suggesting that we should entirely move away from multiple judgments.

Sometimes the different judicial perspectives, even though the judges may agree on the actual outcome, render a single judgment impossible or would result in the unsatisfactory compromise product that we sometimes see emanating from Luxembourg or Strasbourg – very limited in effect, banal, opaque, or internally inconsistent. Sometimes, a short concurring judgment, more “punchy” than the fuller leading judgment, helps identify the main points and the main thrust of the reasoning of the court. Sometimes, a second concurring judgment adds an extra dimension to the first, often because the two judges come at the issue from different angles or with different experiences or expertises. Sometimes, where the law is being taken forward or expanded, it is positively useful to have judgments with different emphases, or adopting slightly different approaches. That is how the common law develops.

27. In conclusion on this aspect, I would have thought then that one of the things which the

Judicial Studies Board, the soon-to-be Judicial College, should consider as a topic is the skill of judgment writing. In saying this, I intentionally express myself in somewhat tentative language. Judgment writing is a very individualistic exercise, which is governed by the style and approach of the judge and the issues and character of the case. Unlike a summing up, one cannot have standard passages which can be lifted from a bench book. Accordingly,

there may be a limited amount one could usefully teach on the topic. Some might go so far as to say that anyone who needs to be taught how to write a judgment is unfit to be a judge.

28. I accept that there is some force in all these points, but, in the end, I do not agree with the conclusion. Advocacy is taught, and that is every bit as much a personal, case-based art. And there is always something which even an experienced judge can learn about judgment-writing, as anyone who has sat in the Court of Appeal can testify. When I receive a colleague's draft judgment, I often not only consider the reasoning and conclusion of the draft, but also realise that the approach, style or structure is different from that which I would have adopted, and, at least sometimes, I really think I learn from it.

(3) Open Justice in the Future

29. Clarity and accessibility in judgments is one way in which we can continue to secure open justice in the 21st Century. But there are other measures we could adopt to ensure our courts remain properly accessible. I started this lecture with Bayley J's thoughts as to the practical and principled limitations on public access to the courts. The practical limitations are twofold – lack of space in court, and disruption to the proceedings. The principled limitation is that there may be a good reason owing to the nature of the case that the public are denied access. For the moment I concentrate on the practical limitations.

30. The fact that the court may be too small to accommodate all those who wish to attend the hearing is recognised by the CPR, which do not place a positive obligation to provide sufficient access to the court room to all those who wish to observe proceedings²⁵. Newly built court rooms are mostly smaller than the old ones. But it is only on rare occasions that our courts are full of members of the public. The days of courts regularly being filled to the

²⁵ CPR 39.2(2).

rafters by interested members of the public, as Dickens depicted during Charles Darnay's trial in *A Tale of Two Cities*, are long gone. The combination of limited space and limited interest amongst the public suggests that the justice system may need to adapt in order to ensure that it truly remains open to the public.

31. Public awareness of what happens in our courts serves to bolster public confidence in the administration of justice., Providing fair trials in the public eye bolsters public confidence in the administration of justice, and hence in our democratic form of government It is therefore a matter of concern if members of the public rarely come into our courts to observe what goes on in them. Stating that our courts, as a general principle, are open to all is one thing. But it must be a reality.
32. The decrease in members of the public coming to visit the courts since Dickens's day is attributable, at least to a substantial extent, to generic factors. The vast quantity of entertainment now available at home, and the opportunities of travelling whether in the UK or abroad, mean that there are many more distractions available than 150 years ago. The increased tempo of life has, I think, resulted in a shorter attention span, a greater desire for instant gratification, which the court process cannot satisfy – and, ironically, over the same period, court hearings have generally become much slower and longer.
33. So there is a limited amount we can do to seek engage the public, and, anyway, we should be careful of taking any such steps. It is not the function of the courts or the judges to adjust their procedures or working practices with a view to stimulating public interest, let alone to curry favour with the public. But we have to be open to the public, and, I would suggest, we have to do everything reasonably practical to enable the public to have access so as to see what is going on in court, provided that it does not interfere with the trial process.

34. The Supreme Court televises its hearings in its impressively renovated building. As yet, though, there appears to have been little appetite for broadcasters to televise its hearings. I can see that there may not, from a commercial perspective, be an interest to do so. But from a public interest perspective might there not be an argument now for its hearings, and some hearings of the Court of Appeal, being televised on some equivalent of the Parliament Channel, or via the BBC iPlayer. Brazil's Federal Supreme Tribunal now has its own TV channel. The channel, TV Justiça, does not only show recordings of its sessions, but it also shows a whole host of educational programmes about the justice system.

35. If we wish to increase public confidence in the justice system, transparency and engagement, there is undoubtedly something to be said for televising some hearings, provided that there were proper safeguards to ensure that this increased access did not undermine the proper administration of justice. Such an idea would have to be looked at very carefully, and it would not be sensible for me to try and make any firm suggestions. But, if broadcasting of court proceedings does go ahead, I think it would be right to make two points, even at this tentative stage. First, the judge or judges hearing the case concerned would have to have full rights of veto over what could be broadcast; secondly, I would be very chary indeed about the notion of witness actions or criminal trials being broadcast – in each case for obvious reasons.

36. It is not merely the television age we have entered. I welcome the Lord Chief Justice's Interim Guidance on Tweeting in Courts. Without wanting to prejudge the contents of the Final Guidance, it seems to me that, subject again to proper safeguards, the advent of court tweeting should be accepted, provided of course that the tweeting does not interfere with the hearing. Why force a journalist or a member of the public to rush out of court in order to telephone or text the contents of his notes written in court, when he can tweet as

unobtrusively as he can write? It seems to me, in principle, that tweeting is an excellent way to inform and engage interested members of the public, as well as the legal profession. Whatever on the outcome of the consultation, I doubt however that we will see the development of tweeting from the bench.

37. The media have always played a fundamental role in reporting what goes on in the courts, and, with the fall-off in public attendance in the courts, and the increased role of the broadcast media, the importance of accurate press reporting, to open justice is even more important than it was in Dickens's time.. One of the most fertile grounds for inaccurate reporting is the Human Rights Act 1998; reporting which may tempt some into thinking that it is hardly worth maintaining the State's inability to deny you a fair trial, to kill or torture you, and to preclude you enjoying freedom of expression.

38. There are many examples of inaccurate reporting; I shall limit myself to two In May 2006, The Sun reported that 'Serial killer, Dennis Nilsen, 60, received hardcore gay porn in jail thanks to human rights laws.' He had indeed issued proceedings based on human rights seeking the provision of such pornography. But, as the Joint Committee on Human Rights, in its 2006 report pointed out, the claim was thrown out at the permission stage²⁶; that is to say immediately. If Mr Nilsen ended up being provided with what he wanted, and I don't know whether he did or not, it had absolutely nothing to do with human rights laws.

39. My second example relates to the reporting of the issue of the attempted deportation of Learco Chindamo, who killed Philip Lawrence from the UK. He could not be deported, and, for some parts of the press, this was entirely the fault of Article 8 of the European

²⁶ At 24 (<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/278.pdf>)

Convention²⁷. Although the Tribunal which made the initial deportation ruling mentioned Article 8, the reason why he could not be deported had however nothing whatsoever to do with Article 8, but was based on the *Immigration (European Economic Area) Regulations 2006*²⁸. (So I suppose it was the fault of Brussels or Luxemburg, but not Strasbourg.)

40. These are just two examples, and the Joint Committee 2006 Report outlines a number of other myths and misconceptions. These myths are attributable to two different tendencies. The first is simply outright misreporting. The story said one thing, when the truth was the opposite. The second is a more subtle form of misreporting: the Human Rights Act is brought in to take the blame for a decision to which it might have played a part – and the part the critics suggested it did play, but which in truth it did not.

41. It is a sign of a healthy democracy that there are different views within society and that the outcome of individual cases, and the balance struck between individual rights, can be vigorously debated. But such debates must be based on fact not misconception, deliberate or otherwise. Persuasion should be based on truth rather than propaganda. It is one thing to disagree with a judgment, to disagree with a law and to campaign to change the law, but it is another thing to misstate what was said in a judgment, or to misstate the law.

42. I think that a more active approach might usefully be taken by those of us who are concerned with the administration of justice to ensure that judgments are publicised and properly reported. We should perhaps build on the Supreme Court's practice of issuing short, easily accessible judgment summaries with judgments; we should foster the already developing

²⁷ <http://www.telegraph.co.uk/news/uknews/1561081/Learco-Chindamo-The-deportation-debate.html>;
<http://www.thesun.co.uk/sol/homepage/news/3059360/Killer-Learco-Chindamo-freed-on-licence-from-jail.html>;
<http://www.dailymail.co.uk/news/article-1332790/Widows-anguish-Philip-Lawrences-killer-Learco-Chindamo-arrested-robbery.html>.

²⁸ http://old.judiciary.gov.uk/docs/judgments_guidance/chindamo_21082007.pdf

community of active informed court reporting on the internet through blogs, and tweeting; we should support the responsible legal journalists; we should initiate, support, encourage and assist public legal education. The great strength of our society is that it is built on the competing voices of free speech. Justice to be truly open must join its voice to the chorus; and must ensure that inaccurate or misleading reporting cannot gain traction.

43. It is this point though which brings me to the final part of this lecture. How far does principle allow us to go in the direction of openness?

(4) Recent Developments in cases on open justice

44. There have been two recent developments which have called into question the boundaries of open justice. They concern Bayley J's second limiting factor: the existence of specific reasons of principle why the public should properly be excluded. The first is the development of the so-called super injunction. The second is the development of closed proceedings where national security issues arise.

45. A super injunction is simply an interim injunction whose purpose is to restrain a person from publishing information which the claimant contends is private or confidential in nature. Traditionally, the most common example of such an injunction was to protect commercial secrets. What makes an injunction a super injunction is that it also restrains publication of the fact that the injunction has been sought and made and the very fact that proceedings are ongoing²⁹. Such injunctions can obviously only be granted where there is information which is capable of being legally protected. Super injunctions like any other

²⁹ *Grey v UVW* at [19]; *Nutuli v Donald* [2010] EWCA Civ 1276 at [43]ff.

injunction can only be granted in support of substantive legal rights. They do not determine those rights. They simply exist, as all interim injunctions do, to ensure that the proper administration of justice is not frustrated pending trial and final judgment.

46. For instance, if a claimant is entitled to an injunction restraining publication of a story that he (and it almost always is “he”) has had a sexual relationship with a third party, then it would be literally absurd if open justice prevented him from stopping the press reporting that he had obtained an injunction restraining publication of a story that he had had such a relationship. Thus, once one accepts that the court has power to grant an injunction restraining a breach of privacy, it has to follow that the court has the ancillary power to restrain publication of details of the injunction proceedings, application, hearing, proceedings or order.

47. The concern over super injunctions is that they have, as Professor Zuckerman has put it, developed into a form of entirely secret form of procedure. As he put it, ‘*English administration of justice has not (previously) allowed*, that is

‘for the entire legal process to be conducted out of the public view and for its very existence to be kept permanently secret under pain of contempt.’³⁰

English law has not known of such a procedure – of secret justice – since 5 July 1641, when the Long Parliament abolished the Court of Star Chamber³¹.

48. This concern is reflected in the proposition recently spelled out by the Vice-President of the Court of Appeal, Lord Justice Maurice Kay, “that the principle of open justice requires that

³⁰ Zuckerman, *Super Injunctions – Curiosity-Suppressant Orders Undermine the Rule of Law*, C.J.Q. Vol. 29 (2010) at 134.

³¹ An act for the regulating of the privy council, and for taking away the court commonly called the star-chamber (5 July 1641).

any restrictions are the least that can be imposed consistent with the protection to which [the claimant] is entitled”³². And, even more recently in *JIH v News Group Newspapers Ltd*³³, the Vice-President, Lady Justice Smith and I set out ten important items of principle and practice, based on those identified by Tugendhat J, with a view to minimising the inroads made on open justice when there is a need for some sort of reporting restrictions, whether it is the grant of anonymity to parties, limiting or excluding the reporting of the subject-matter of the case or other limitations.

49. The case involved the grant of an injunction restraining the publication of alleged sexual activity of an international sportsman. The issue was whether we should let the name of the sportsman be published, in which case we would have had to ban publication of details of the story, or grant the sportsman anonymity, in which case the basic nature of the story could be published. Partly because, in the light of the history, naming the sportsman might well have enabled people to work out the nature of the story, we decided to grant him anonymity. But this was also arguably justified by the point that the public interest is better served by knowing about the type of case which is coming before the courts, and the types of case in which reporting restrictions are being granted, than by knowing which famous sportsman is seeking an injunction for wholly unspecified relief. In this connection, there may well be a difference between what is in the public interest to know and what the public want to know - or perhaps what some newspapers want the public to want to know.

50. The judicial concern to maximise openness of justice was reinforced by the judgment of the Lord Chief Justice in *A v Independent News & Media Ltd*³⁴, where he affirmed in clear terms the right of the media to attend a case before the Court of Protection, albeit that, in order to

³² *Ntuli v Donald* [2010] EWCA Civ 1276 at [54]

³³ [2011] EWCA Civ 42 at [21]

³⁴ [2010] EWCA Civ 343

protect the interests of the disabled person concerned, the media could only report on what was said in court to the extent permitted by the judge hearing the case. I am currently chairing a committee on super injunctions, and it includes judges, barristers, and solicitors representing both the press and claimants. I very much hope that we will be able to publish our report before the end of April, and that it will allay many of the understandable concerns about secret justice.

51. That concern also arises in respect of the development of closed proceedings into the justice system and the use of special advocates. Closed proceedings are those to which not merely the public has no access, but also to which one of the parties has no access. That party will have his own advocates, but they cannot attend the closed proceedings or see the closed evidence, as they cannot have secrets from their client. Special advocates are not instructed by the party concerned, and normally have no contact with him, so they can attend the closed hearing, see the closed evidence, and make such representations as they think appropriate on his behalf. Their purpose is to ensure a degree of procedural justice, or at least to minimise the injustice, to that party.

52. Closed proceedings were first introduced as a result of reforms made to the immigration system in 1973. Those reforms introduced a system of statutory appeals in deportation cases, except where national security was in issue. In those cases a right of appeal from the deportation decision lay to a special Home Office Advisory Panel. That panel had access to all the evidence, including the national security evidence. The appellant however did not. The Panel made recommendations to the Home Secretary, who could accept or reject them. A challenge to the Home Secretary's decision could then be made by way of judicial review. The court however had no jurisdiction to examine the national security evidence

53. This system was challenged in a case which was ultimately resolved by the Strasbourg Court in *Chahal v United Kingdom*³⁵. As a consequence of its decision and one of the Luxembourg Court³⁶, the system was reformed. Those reforms saw the creation of Special Immigration Appeals Commission Act 1997 created both the Special Immigration Appeals Commission (SIAC) in 1997 and the special advocate system, which operated in proceedings before SIAC.
54. Since then statute has provided for closed proceedings, and the use of special advocates, in six different types of cases; most specifically in respect of court review of control orders³⁷. The creation of closed proceedings, notwithstanding the use of special advocates, is a clear derogation from the principle of open justice. Not only is one party absent from one part of the proceedings, but equally the public are barred from having access to it. They are statutory derogations from the principle of open justice. And pending the decision of the Supreme Court, the position is that at common law there is no jurisdiction to create such a procedure, following the *Al-Rawi*³⁸ decision to which I was a party in the Court of Appeal, and in respect of which the Supreme Court has heard argument on appeal.
55. One of the functions of open justice is to guard against repression. Carrying out justice in the light of day ensures that courts do not become, as they did in the case of the Star Chamber, political courts or courts where *lettres d'cachet* are given the imprimatur of justice. However,

³⁵ (1996) 23 EHRR 413 at [130]; JUSTICE, *Secret Evidence* (June (2009) (Justice (2009)) at [81].

³⁶ *R v Secretary of State for the Home Department ex parte Shingara and Radiom* (1996) 23 EHRR 413 at [143]; [1997] 1 ECR I-3343.

³⁷ Terrorism Act 2000, Section 5, Schedule 3 and paragraph 5(4), Schedule 5(4); and see Proscribed Organisations Appeal Commission Rules (SI 1286 of 2007); The Race Relations Act 1976, as amended by the Race Relations Amendment Act 2000, Section 67A(2); and see Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 1861 of 2004); Anti-Terrorism, Crime and Security Act 2001, section 64, 70 and Schedule 6; and see the Pathogens Access Appeals Commission (Procedure) Rules 2002 (SI 1845 of 2002); Planning and Compulsory Purchase Act 2004, which amended the Town and Country Planning Act 1990, section 321; Criminal Justice Act 2003, see *Roberts v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 at, for instance, [83]; Prevention of Terrorism Act 2005 sections 2 and 10 of the 2005 Act and CPR 76; Counter-Terrorism Act 2008 section 68 and CPR 79.

³⁸ *Al-Rawi v Security Services* [2010] EWCA Civ 482.

as we emphasised in *Al-Rawi*³⁹, it is obviously open to the Parliament, if and when it thinks fit, to legislate for an appropriate closed procedure in cases in which it believes it to be appropriate and necessary. The Strasbourg court has decided that, subject to the measure being reasonably necessary and the procedure adopted being appropriate, no problem under Article 6 will arise.

56. The development of both closed proceedings and the debate regarding super injunctions highlights a number of things. First, the disquiet about both demonstrates how deeply ingrained is our commitment, as a society, to open justice. It underlines Lord Shaw's point that open justice is a sacred part of our constitution and our administration of justice. But it also shows something else. It highlights how, in certain, narrowly defined circumstances, the general principle can, indeed must, be set aside and how in some circumstances both Parliament and the courts have done so.

57. It can be set aside because open justice is subject to a higher principle: that being, as Lord Haldane LC put it in *Scott v Scott*, the '*yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done*⁴⁰' Where publicity, through the unqualified adherence to the general principle of open justice would '*frustrate or render impracticable the administration of justice . . .*⁴¹ then publicity must yield. As mentioned, an injunction protecting information pending trial would be pointless if the very information to be protected had to be disclosed publicly in order to obtain the injunction, and national security might be endangered if certain information had to be disclosed in open court. Open justice must however yield no more than strictly necessary to secure the achievement of the proper administration of justice. Where it goes beyond what is strictly necessary then we run

³⁹ Ibid, para 70(c)

⁴⁰ [1913] A.C. 417 at 437.

⁴¹ *A-G v Leveller Magazine Ltd* [1979] A.C. 440 at 450.

the risk that the courts are no longer open to proper scrutiny, that their role in supporting democracy and the rule of law is undermined.

(5) Conclusion

58. This evening I have touched on a number of aspects of the principle of open justice. It is a cardinal principle of our justice system. It underpins the rule of law and our liberal democracy. It is a principle which requires the courts to engage with the public.

59. It is not however an absolute principle. It has limits and allows of derogations. In particular it is limited by the need to ensure that it does not undermine the proper administration of justice. An absolutist stance would undermine our justice system. In approaching our commitment to open justice it seems then to me that we need to ask ourselves one question: to what extent does our commitment to it secure the rule of law?

60. The role of judges and the courts in administering open justice was well described by one of my predecessors, Lord Donaldson. ‘The judges’, he said, ‘administer justice in the Queen’s name on behalf of the whole community. No one is more entitled than a member of the general public to see for himself that justice is done. Nevertheless it is well settled that occasions can arise when it becomes the duty of the court to close its doors.⁴² If those doors are too often closed we undermine justice. If they are not closed when it is appropriate to do so we equally undermine justice. Amidst this clash of arms, it is justice, the rule of law, which must be our guide.

Please note that speeches published on this website reflect the individual judicial office-holder’s personal views, unless otherwise stated. If you have any queries please contact the Judicial Communications Office.

⁴² *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] Q.B. 227 at 235.

