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*(subject to editorial corrections – authorised for dissemination 30/01/13)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

BETWEEN:

ZY

Plaintiff:

and

PAUL HIGGINS

and

NORTHERN IRELAND COURTS AND TRIBUNALS SERVICE

Defendants:

_____

McCLOSKEY J

[1] The central question to be determined in this action is whether the Plaintiff's right to life under Article 2 ECHR, protected in domestic law by the Human Rights Act 1998, qualifies him for the remedy of an injunction restraining publication of any information which might disclose his identity. The injunction sought would be of the permanent kind, to be contrasted with the extant interim injunction. The first named Defendant is a journalist by profession who earns his living as a Court Reporter. The second named Defendant is the public authority responsible for the organisation and administration of Courts and Tribunals in Northern Ireland. It is a party to these proceedings as a result of the central involvement in the litigation matrix of a Crown Court Judge's order in the circumstances explained more fully *infra*.

Litigation Framework

[2] I preface the following outline with the observation that much of the evidence received by the Court was uncontentious.

[3] The Plaintiff is a male person aged between 20 and 30 years. The proceedings which he brings have their origins in his prosecution and conviction in the Crown Court. He has had two relevant interactions with the police. The first occurred in August 2010 at his home, stimulated by a complaint that a young teenage girl had engaged in online contact of a sexual nature, via Facebook, with a person residing there. Although computers, mobile phones and memory sticks were seized by the police, no arrest or prosecution materialised.

[4] On 2nd September 2011 the Plaintiff was arrested by the police. The impetus for this was a fresh complaint made by a female person of an attempt to blackmail her in relation to an indecent video recording made when she was aged 15 years. The prosecution of the Plaintiff for the offences of blackmail, engaging in sexual activity with a minor and possessing indecent images of children ensued. In due course he was committed for trial on a total of 17 such offences. On 19th December 2011, at his first remand hearing, Belfast Magistrates' Court ordered that:

> "… no details pertaining to the identification of the Defendant be published in any publication of any sort or released to the media."

I shall describe this as "*the anonymity order*". It is evident from the text of this Order, together with certain medical evidence [*infra*], that it was clearly designed to protect the Plaintiff's right to life under Article 2 ECHR. The Order was subsequently renewed. The net effect was that during a period of approximately one year, until the conclusion of his trial, there was no publication of the Plaintiff's identity. Although reporting of the criminal proceedings could have taken place, within the constraints of the anonymity order, the Court was informed that there were no press reports of any kind. I observe that this cautious restraint is a reflection of the highly responsible and professional nature of the reporting of Court proceedings in Northern Ireland which has been an established feature for many years.

[5] Ultimately, the Plaintiff pleaded guilty to the charges and he was sentenced at Belfast Crown Court on 7th December 2012. Although he believes [per his affidavit] that he had been photographed by press agents outside the Court building on at least one previous occasion, there is no suggestion that any photograph was published. He was sentenced to 21 months' imprisonment, divided equally between custody and licenced release. The Crown Court Judge dealt separately and specifically with the anonymity order. Representations were made by counsel for the Plaintiff and, in circumstances which are not entirely clear, other counsel who appears to have received some kind of *ad hoc* instructions on behalf of the first

Defendant. The Judge clearly gave this matter careful attention. In a reserved ruling, the outcome was an order effectively revoking the anonymity order. The terms of the Order were:

> "The Court ordered that no details pertaining to the Defendant's address or local town area be published in any publication of any sort or released to the media."

Thus the sentencing Judge revoked the anonymity order and substituted a new Order which, while imposing certain reporting restrictions, permitted publication of the Plaintiff's identity. [In passing, the reference to section 4 of the Contempt of Court Act 1981 in the Order is seems *per incuriam*.]

[6] The Crown Court Judge's revocation of the anonymity order and its substitution by a substantially less restrictive measure were the impetus for an application to this Court for emergency interim injunctive relief, made on the same date. While this application was made on notice to the first Defendant, it proceeded *ex parte*. The first Defendant is to be commended for his willingness to engage in no form of publication during the window of opportunity in which he could lawfully have done so. At this stage, the Plaintiff was proceeding against the first Defendant only. On 7th December 2012, this Court made the following Order:

> "The [first] Defendant is prohibited from by himself or by any other person or otherwise howsoever from publishing in any manner whatsoever (other than to legal advisers instructed in relation to the proceedings for the purpose of obtaining legal advice in relation to these proceedings), any information disclosing or concerning in any way the identity of the Plaintiff or which could conceivably lead to his identification."

The Court further ordered that the Plaintiff be permitted to litigate in anonymised form, by the use of a cipher (see Re A Police Officer's Application [2012] NIQB 3 and XY – v – Facebook Ireland [2012] NIQB 96). Fast track litigation measures were then applied, with the result that the substantive trial proceeded less than 2 months following the grant of the interim injunction, with the formulation of pleadings and the assembling of the parties' evidence occurring in the interim.

[7] The joinder of Northern Ireland Court Service as a second Defendant occurred at a late stage. This step reflected the fact that the measure generating the Plaintiff's complaint of infringement of his right to life was an Order made by a Crown Court Judge. While it is possible that the Plaintiff could have challenged this Order by appealing to the Court of Appeal, this is not entirely clear. I refer to sections 8 and 30 of the Criminal Appeal (NI) Act 1980. In passing, I am aware that leave to appeal to the Court of Appeal has recently been given in a case raising a comparable issue, involving the reporting restriction powers contained in section 1

of the Sexual Offences (Amendment) Act 1992 and/or Article 22 of the Criminal Justice (NI) Order 1998 [R v McGreechan]. What **is** clear is that the second Defendant is a public authority and section 7 of the Human Rights Act 1998, in my view, plainly entitles the Plaintiff to challenge the Order of the Crown Court Judge in this court by the medium of a human rights claim under this statute. Permission to join the second Defendant was granted accordingly. In the event, the second Defendant, understandably and sensibly, elected to take no active part in the proceedings.

[8] It is averred in the Statement of Claim that the Plaintiff's case is based on "*medical evidence suggestive of a serious and immediate risk of suicide*". While the two Convention rights pleaded are Article 2 and Article 8, there was no reliance on the latter at the trial. Ultimately, the Plaintiff sought slightly differing forms of injunctive relief against the two Defendants. While the further remedy of damages was also pleaded in the Writ, this was not actively pursued. The Plaintiff further requests the perpetuation of the anonymity granted to him in these proceedings. The cause of action invoked by the Plaintiff against the first Defendant is the tort of breach of confidence. The Plaintiff's case, in substance, is that the information in question, namely knowledge of his identity, attracts the protection of the common law duty of confidence. I shall consider the governing principles and their impact at a later stage of this judgment. As regards the second Defendant, the Plaintiff's case is that the Order of the Crown Court judge revoking the earlier anonymity order was an act incompatible with his right to life under Article 2 ECHR, contrary to section 6 of the Human Rights Act.

[9] The essence of the first Defendant's case is captured in the following passage in his Defence:

> "The Defendant will rely, if necessary, on Article 10 [ECHR]. The Defendant denies that the Plaintiff had or has a reasonable expectation of privacy or of confidence in respect of the information he seeks to prohibit from being published. The Plaintiff is a convicted sex offender and his criminal proceedings concerned very serious criminal matters of significant public interest and public importance. The offences included serious and multiple charges of making indecent images of a child, engaging in a sexual activity with a child and blackmail. The Defendant says that it was, at the material time, and is in the public interest that journalists and the public are able to communicate and receive information and ideas in the exercise of the right of freedom of expression subject only to such restriction and limitation as are prescribed by law and as are necessary and proportionate to maintain the balance between their rights and the rights of others."

Accordingly, as regards Convention rights, the battle lines are drawn by the invocation of Article 2 ECHR by the Plaintiff and reliance on Article 10 ECHR by the first Defendant. The further ingredient in the human rights equation is section 12 of the Human Rights Act. This applies to the present matrix since, per section 12(1), if the Court grants the relief sought by the Plaintiff this "*might affect the exercise of the Convention right to freedom of expression*", as it would curtail the permissible reporting of the criminal proceedings. Accordingly, per section 12(4):

> "The Court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings to relate to material which the Respondent claims, or which appears to the Court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –
>
> (a) the extent to which –
>
> (i) The material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published
>
> (b) any relevant privacy code."

I shall consider the impact of this provision in the present litigation context presently.

The Evidence

[10] In embarking upon a summary of the evidence, I make two preliminary observations. The first is that this was a trial by affidavit. The Court considered affidavits sworn by the Plaintiff, the Plaintiff's solicitor and the first Defendant. No party served notice of cross examination. Secondly, the evidence will be summarised in a manner which protects the identities of the Plaintiff and the injured party. As regards the Plaintiff, this is essential for as long as the interim injunction and the litigation anonymity order remain in force.

[11] There are three contributors to the medical evidence available to the Court. I shall deal with this evidence in chronological sequence, beginning with the Plaintiff's medical records. These commence with a referral letter compiled by his General Medical Practitioner, dated 25th August 2010, stating the following:

> "Adjustment reaction – unsuccessful suicide attempt on 23rd August – precipitated by PSNI confiscating his computers [alleged child pornography] …..

> Family are closely supervising him. Thank you for urgent appointment."

It is clear from the records that this was a referral to psychiatric services. This entry coincides with his first involvement with the police [*supra*]. In September 2010, the Plaintiff's interaction with the "Lifeline" organisation was documented. Over one year later, on 16th December 2011, the following record was made:

> "Mood swings. Patient feeling up and down since August 2010, tried to hang himself/jump off a cliff – precipitated by PSNI investigation. Seen [sic] counsellor ….
>
> Mood varies a lot, at present low …….
>
> Thoughts of self-harm – suicidal thoughts, no plans. But feeling more nervous because of Court case coming up. Tearful. Patient worried about exposure to media. Has Lifeline numbers …….
>
> Will continue counselling …….. Patient might be at danger to [sic] suicide if the case was made public……."

An ensuing doctor's letter, which takes the form of a short report, stated:

> "[ZY] has been seen four times now, he has been referred to psychiatry and also to Primary Mental Health Team and was seen for assessment by CPN recently …
>
> [He] has been affected by this situation, his mental state is stable at present but fragile, **he will be at severe risk of suicide if the case was to be made public. He has stated several times that he will not be able to cope with any media exposure.** His mental state remains low and can deteriorate very quickly at any time. **It is my opinion that he will remain at risk of harming himself all through this trial but this risk will be immense if this case was to be made public.** He has been started on antidepressants, he is also getting counselling and he will also get help from the Primary Mental Health Team."
>
> [My emphasis]

The generation of this report can be readily linked to the Plaintiff's first remand hearing in December 2011 and the first of the anonymity Orders made by the Magistrates' Court at that time.

[12] In April 2012, the Plaintiff was assessed by a consultant psychiatrist whose brief, in the language of the ensuing report, was:

> "To determine if there is a real risk to [ZY's] life by his own hand if details of a number of offences with which he has been charged were to be made public."

The Plaintiff gave a history that during his initial contact with the police in 2010 (*supra*) his mind "*exploded*", he was stunned and he felt numb. He described in some detail the preparation of notes to his parents, certain family members and girlfriend and the suicide mechanisms which he then contemplated. He planned to take his life by a certain time and made specified preparations. He walked a long distance to an area where there is a waterfall, with the intention of throwing himself onto rocks. He did not, however, execute his plan. Armed with a cable, he then found a tree and made a noose around his neck. His self-hanging attempts were frustrated by the height of the branches. He also thought of other suicide options. Subsequently, he attended weekly sessions with a "Lifeline" counsellor for several months. The thought of impending court appearances made him terrified. The consultant psychiatrist opined as follows:

> "In my opinion should details of the offences with which [ZY] has been charged be made public, I consider it highly likely that he that he would become a high suicidal risk."

The consultant elaborated on his reasons for this assessment. He added that the Plaintiff "*could not cope mentally with any media exposure*". He noted a family history of attempted suicide and concluded:

> "There is little doubt that publicity would be sufficient to push him metaphorically 'over the edge'".

[13] A second consultant psychiatrist has prepared two reports relating to the Plaintiff. Each of them is of recent vintage. The first was prepared in November 2012 for the purpose of deployment at the Plaintiff's imminent sentencing hearing. The consultant reported:

> "There was no objective evidence of features of active depressive illness and the clinical picture presented was predominantly of anxiety, consistent with a psychological reaction to a stressful situation …..

> [He] has continued to find coping with the repercussions of his offending behaviour subjectively distressing **and deterioration in** [his] **mental wellbeing and further suicidal ideation in the context of the stressors he will inevitably experience in the event of an immediate custodial sentence cannot be discounted.**"
>
> [Emphasis added]

The author did not dilate on this statement, confining the remainder of his report to a consideration of the risk of the Plaintiff reoffending. Following this report, the Plaintiff was sentenced, the anonymity order was revoked by the Crown Court and the extant interim injunction was subsequently made by this Court.

[14] The same consultant reassessed the Plaintiff one month later, shortly after the initiation of these proceedings and after the interim injunction had been made. His commission was:

> "…..to comment on [the Plaintiff's] present mental state and specifically on the manner in which a lifting of reporting restrictions in the case is liable to have on his current mental state…. [sic]".

Referring to the prison medical records, the author noted that upon the Plaintiff's committal to prison on 7th December 2012, following sentencing, he gave:

> "…… a prior history of treatment of psychologically distressing symptomatology with medication with anxiolytic, impulse lowering, mood stabilising and anti-depressant effects following an episode of deliberate self-harm within the last two years."

When examined by a prison psychiatric nurse the following day, the Plaintiff:

> "…. stated that he had urges to self-harm or suicidal ideation at the time of our interview …."

He was made subject to an enhanced supervision regime in consequence. Following the grant of interim injunctive relief by this Court, it was noted that:

> "…. He is not assertive that he will take his own life but he believes that he is going to suffer feelings of wanting to take his own life if possible adverse publicity has a direct... [sic]… on his perception of himself …."

Describing his reaction to the revocation of the anonymity order, the Plaintiff informed the consultant:

> "I began to think of ending my own life……. I've been looking for ways to kill myself".

The consultant found no evidence of depression or mental disorder or any impending mental illness and no reason to initiate any psychiatric treatment. He diagnosed, by reference to the ICD-10 International Classification, an acute stress reaction. Referring to research concerning suicide indicators in convicted prisoners, the consultant opined that the Plaintiff: "*…. presently fulfils a number of the aforementioned negative prognostic indicators*", which he specified. He concluded:

> "In my opinion it is not inevitable that [the Plaintiff] will engage in an episode of completed suicide should the Court decide that his name and personal details should be released to the media …
>
> However, having regard to the existence of the aforementioned negative prognostic factors the risk of such an eventuality cannot be entirely discounted. In addition there are limitations to the extent to which external safety considerations – such as the [Supporting Prisoners At Risk] procedures - can be effective ….."

[15] The Plaintiff swore his only affidavit four days following this psychiatric assessment. One of the main themes of this affidavit is his professed concern, avowedly profound in nature, about the adverse impact on the lives, standing and reputation of his parents which would follow from public disclosure of his identity. He describes his distraught reaction to the extinguishment of the anonymity order. He further avers:

> "At the point at which I was sentenced I could see a future after my 10 ½ months sentence was served. In my mind at least the long drawn out Court process was over. I felt able to cope even with prison as I had prepared for this with the help of my parents. This outlook, however, changed, as soon as the Judge ruled my name could be published. I did not want to go on and could not see a future knowing I had put my parents at risk."

The trial of this action proceeded approximately one month after the swearing of this affidavit. I observe that all of the evidence is fresh.

[16] In the course of two affidavits, the first Defendant describes himself as a self-employed freelance journalist who earns a living as a court reporter, under contract

to certain news media organisations. His habitual place of work is Laganside Courthouse in Belfast. He deposes to the opinion of "*members of the media*" that offences of the kind of which the Plaintiff was convicted are "*of huge public interest*". He puts forward a series of public benefits which, he suggests, are generated by the reporting of prosecutions of this kind. He describes the media as "*public watchdog of the administration of justice*" and avers that reporting enhances public confidence in and understanding of the criminal justice system, while deterring further offences. He further avers:

> "It is our belief that the naming of Defendants in criminal proceedings is central to …. punishment and rehabilitation …"

The first Defendant also avers that the Court report drafted by him following the Crown Court sentencing hearing has now lost its currency and commercial value, with a resulting financial loss to him estimated at around £300.

The Parties' Arguments

[17] The arguments canvassed by the parties had a particular focus on the Article 2 ECHR jurisprudence, both European and domestic, including the following decisions in particular:

- ***Osman – v – United Kingdom*** [2000] 29 EHRR 245
- ***Edwards – v – United Kingdom*** [2002] 35 EHRR 487
- ***Honeryildiz – v – Turkey*** [2005] 41 EHRR 20
- ***In Re Officer L and Others*** [2007] UKHL 36
- ***Van Colle – v – Chief Constable of Hertfordshire Police*** [2009] 1 AC 225
- ***Renolde – v – France*** [2009] 48 EHRR 42
- ***Re C and Others*** [2012] NICA 47
- ***Venables and Thompson - v – News Group Newspapers and Others*** [2001]
- ***Rabone – v – Pennine Care NHS Foundation Trust*** [2012] UKSC 2

I note, *en passant*, that the decision of the House of Lords in ***Van Colle*** was recently affirmed by the European Court of Human Rights: see [2012] ECHR 1928. In the submissions on behalf of the first Defendant, there was a particular emphasis on Article 10 ECHR, section 12 of the Human Rights Act and the common law principle of open justice.

Conclusions

[18] I emphasise at the outset that this litigation has nothing to do with the reporting restrictions powers conferred on Courts by either section 4 of the Contempt of Court Act 1981 or section 1 of the Sexual Offences (Amendment) Act 1992 or Article 22 of the Criminal Justice (Children) (NI) Order 1998. In passing, it is clear from the evidence in the present case (and in other cases) that the pro-forma orders of Courts in the criminal justice system are, habitually, incorrectly phrased. The anonymity/reporting restrictions orders made in the course of the Plaintiff's prosecution should have specified section 6 of the Human Rights Act 1998 and Article 2 ECHR (rather than "*Article 2 of Human Rights Act 2000*"). Similarly, the Order made by the Crown Court on 7th December 2012 was clearly **not** (as it states) a "reporting restrictions" Order under section 4(2) of the Contempt of Court Act 1981. In an era in which the principle of open justice and the workings of the criminal justice system are matters of ever increasing public interest, these erroneous practices could be profitably corrected. I add the observation that the *vires* of the successive orders of the Magistrates' and Crown Courts was not questioned. They are, of course, presumptively lawful, by dint of the *omnia praesumuntur* principle.

[19] The Plaintiff's case against the second Defendant is a pure human rights claim, based on Article 2 ECHR, engaging the duty of the Court as a public authority under section 6 of the Human Rights Act and brought under section 7, pursuing a remedy under section 8. The fundamental distinction between the two Defendants is that the second Defendant is a public authority, whereas the first Defendant is not. This is reflected in the cause of action invoked by the Plaintiff against the first Defendant, namely the tort of misuse of confidential information. The contours of this tort are well established. It has three elements:

(a) The information must have the requisite quality of confidence.

(b) It must have been imparted in circumstances importing an obligation of confidence.

(c) There must be an unauthorised use of the information to the detriment of the party communicating it.

Per Megarry J in Coco – v – Clark [1969] RPC 41, at page 47. In Attorney General - v – Guardian Newspapers (No 2) [1990] 1 AC 109, Lord Goff stated, at page 281:

> "I start with the broad principle (which I do not in any way intend to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would

> be just in all the circumstances that he should be precluded from disclosing the information to others …"

Having acknowledged that a transaction or relationship between the parties is not a pre-requisite to the duty of confidence coming into existence, His Lordship continued [at page 282], identifying three "*limiting principles*":

> "… the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential), then, as a general rule, the principle of confidentiality can have no application to it. The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure ……..
>
> It is this limiting principle which may require a Court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure."

In Venables and Thompson (*supra*), the Plaintiffs successfully invoked this tort in securing a permanent injunction protecting various items of information, including their new identities following future release into the community.

[20] The arguments on behalf of the first Defendant stressed, *inter alia*, the private law nature of the Plaintiff's case against him. In Venables and Thompson, the learned President highlighted that the proceedings were private in nature and, while observing that the Court is a public authority under the scheme of the Human Rights Act, continued, in paragraph [23] -

> "That obligation on the Court does not seem to me to encompass the creation of a freestanding cause of action based directly upon the Articles of the Convention …….

> The duty on the Court, in my view, is to act compatibly with Convention rights in adjudicating upon existing common law causes of action and that includes a positive as well as a negative obligation."

Relying on this passage, as well as section 12(4) of the Human Rights Act, the submissions advanced on behalf of the first Defendant emphasised the impact of Article 10 ECHR in this litigation matrix.

[21] At this juncture, I turn my attention to the Plaintiff's case against the second Defendant, which stands in the shoes of the Crown Court Judge. I begin with the observation that many of the decided cases, ***Osman*** being a paradigm example, have been brought in a framework that is backward looking. They involve a retrospective examination of the conduct – the alleged acts and omissions – of certain public authorities, typically the police. In unsophisticated terms, these cases require the Court to determine, retrospectively, whether enough was reasonably done by the agency concerned to prevent a person's death. Much of the Article 2 jurisprudence exhibits this characteristic. The present case is, however, of a different *genre*.

[22] At this stage in the evolution of the Article 2 jurisprudence, there is a relative abundance of decided cases. Having regard to the doctrine of precedent and section 2(1) of the Human Rights Act, precedence must be accorded to the leading decisions of the House of Lords, the Supreme Court and the European Court of Human Rights. At these levels, there is a clearly identifiable consistent line of authority. The overarching test, repeatedly stated and affirmed, is whether the public authority concerned knows, or ought to know, of a real and immediate risk to the life of the person concerned. In Re W's Application [2005] NIJB 253, Weatherup J stated, in paragraph [17]:

> "A real risk is one that is objectively verified and an immediate risk is one that is present and continuing."

This formula was approved by the House of Lords in ***Re Officer L***, where Lord Carswell stated, in paragraph [20]:

> "It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high …
>
> In my opinion the standard is constant and not variably with the type of act in contemplation and is not easily reached. Moreover, the requirement that the fear has to be real means that it must be objectively well founded."

Lord Carswell also reflected on the principle of proportionality, whereby preventive measures should not subject public authorities to excessive burdens: see paragraph [21]. Rather:

> "The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available."

In ***Van Colle***, the House of Lords, finding unanimously in favour of the Chief Constable, espoused the opinion of Lord Carswell in ***Re Officer L***, approving the submission that the ***Osman*** test is clear and calls for no judicial exegesis. In its judgment in the same case, the European Court rehearsed fully and without qualification the test in ***Osman*** paragraph [115]: see paragraph [88].

[23] The opinion Lord Dyson in Rabone (*supra*) contains a valuable review of the relevant Article 2 jurisprudence and the evolution of the positive, or "operational", duty. As he noted, death by suicide falls within the embrace of this protection: see Keenan – v – United Kingdom [2001] 33 EHRR 913 and Edwards – v – United Kingdom [2001] 36 EHRR 487. These decisions also illustrate that the duty is designed, *inter alia*, to protect those detained by the State. The reach of the duty has been extended to encompass "*dangers for which in some way the State is responsible*": see paragraph [16]. The decisions reviewed by Lord Dyson include Mammadov – v – Azerbaijan [Application number 4762/05], decided in 2009, which, in common with the present case, involved a threat of suicide known to a state agency, the police. Lord Dyson continues:

> "[22] …… the operational duty will be held to exist where there has been an assumption of responsibility by the State for the individual's welfare and safety …… the paradigm example …… is where the State has detained an individual, whether in prison, in a psychiatric hospital, in an immigration detention centre or otherwise. The operational obligations apply to all detainees, but are particularly stringent in relation to those who are especially vulnerable by reason of their physical or mental condition ……"

His Lordship noted that the European Court has "…… *repeatedly emphasised the vulnerability of the victim as a relevant consideration …… even where there has been no assumption of control by the State ……..*": see paragraph [23]. Lord Dyson also highlighted the incremental development of this facet of Article 2, observing in paragraph [25]:

> "Strasbourg proceeds on a case by case basis. The jurisprudence of the operational duty is young. Its boundaries are still being explored by the ECtHR as new circumstances are presented to it for consideration. **But it seems to me that the Court has been tending to expand the categories of circumstances in which the operational duty will be found to exist.**"
>
> [Emphasis added.]

[24] The recent decision of the Northern Ireland Court of Appeal in Re C and Others belongs to the minority category of decided cases in which the Court is required to determine the existence of the positive protective duty enshrined in Article 2 prospectively, rather than retrospectively. In his judgment, Girvan LJ contrasted a real risk to a person's life with a risk that is merely fanciful or remote. He expressed the view that a risk neither fanciful nor trivial constitutes a real risk in this context: see paragraphs [38] – [41]. In considering this reflection, I remind myself of the words of Lord Hope in ***Van Colle***, paragraph [66]:

> "We are fortunate that, in the case of this vitally important Convention right, the Strasbourg Court has expressed itself in such clear terms. It has provided us with an objective test which requires no further explanation. The question in each case will be whether on the facts it has been satisfied ….
>
> [67] The **Osman** test tells us that the facts must be examined objectively at the time of the existence of the threat and that the positive obligation is breached only if the authorities knew or ought to have known at that time that it was a threat to life which was both real and immediate."

I observe that one of the clearest principles emblazoned in the jurisprudence belonging to this sphere is that every case will be unavoidably fact sensitive. I consider that comparisons of the facts of different cases are unlikely to be useful analytical tools and could lead courts into error. In this context, I refer to the observations of Baroness Hale in Rabone, paragraph [94]. The task of the Court is to identify the principles governing the trigger for the so-called "operational" duty and, in the light of those principles, to decide whether it has been breached in the particular circumstances. As Baroness Hale observed pithily, in an observation fully applicable to the present case:

> "[95] This is no easy task."

[25] In the present case, the main glare of the spotlight is, inevitably, on the medical evidence. This takes the form of written reports and contemporaneous records. It has not been challenged by the Defendant. This is not a case of conflicting medical evidence. This does not, of course, relieve the Court of its obligation to analyse and construe the reports emanating from the three practitioners concerned carefully and critically. In this exercise, the Court is bound to acknowledge the professional expertise of the authors of the reports, an attribute which the Court does not possess, while simultaneously avoiding the error of excessive diffidence or slavish surrender. In this context, I refer to Lord Bingham's wise words in The Business of Judging, Chapter 1 (generally) and the following passage in particular [at p 19]:

> "No [Judge], however so sophisticated his education or eclectic his interests or broad his experience, could hope to be familiar with all these fields and as society becomes more complex and science more specialised, so the role of the amateur is diminished and the problem of assimilation and comprehension becomes greater. There are, in my view, times when the ability of Judges to understand the effect of evidence given sufficiently to make an informed judgment is taxed to the very utmost …."

Happily, the expert medical evidence which I have had to evaluate in the present case does not present this kind of exacting challenge. It is readily comprehensible and belongs to a field, psychiatry, with which lawyers and Judges have, within their intrinsic limitations, become progressively familiar during recent years, in various forms of litigation. I find that the medical evidence in this matter is balanced, carefully compiled, demonstrably well researched and credible.

[26] I consider the first question for the Court to be whether publicity actually exposing, or tending to expose, the Plaintiff's identity could generate a risk to his life via suicide. The evidence clearly impels to an affirmative answer. The Court is next required to determine whether such risk is "*real*". I remind myself that a real risk is one that is objectively verified. In making this assessment, I find it helpful to contrast a risk that is trivial, minimal or remote. I have outlined above the essential elements of the expert medical evidence. I would not describe this evidence as overwhelming in nature. However, the governing principles do not require it to have this quality. Rather, the test is one of sufficiency. Acting on this evidence, I conclude that publicity of the Plaintiff's identity would generate a real risk of his suicide. The final question to be addressed is whether this risk is immediate, in the sense that it is present and continuing. Once again, the contrast with a remote, distant, possible future risk or one that is long expired, purely historical provides some assistance. The answer to this final element of the test is also to be found in the medical evidence. Acting on this evidence, I conclude that the risk is of this nature. In summary, the foundation for my findings on the issue of a real and immediate

risk to the Plaintiff's life is the medical evidence, duly supplemented by the Plaintiff's affidavit. This evidence enables me to make confident findings and conclusions.

[27] The effect of these findings and conclusions is that the Plaintiff's case against the second Defendant succeeds, subject to section 12(4) of the Human Rights Act (recited in paragraph [9] above). As noted in Venables and Thompson and in other decisions, the Convention right to freedom of expression has been accorded a special status by this provision. As the decided cases show, section 12(4) is most likely to arise in practice where the Court is obliged to conduct a balance between this qualified Convention right and one of the other qualified Convention rights, typically the right to respect for private and family life protected by Article 8. The present case is, however, of a markedly different nature. The effect of section 12(4) in the present case is to pit Article 2 against Article 10, inviting the Court to conduct a balancing exercise. In the present context, the exercise which the Court is mandated to carry out has a certain tinge of unreality. The right to life is absolute. It has consistently been described as sacrosanct, fundamental, supreme and inviolable. I readily acknowledge the elevated status which has consistently been accorded to the right to freedom of expression, duly reflected in section 12. The public interests which this right serves to protect and promote are undeniable. I concur with the first Defendant's contentions that Court reporting enhances public confidence in and understanding of the criminal justice system and can deter the commission of further offences. In my opinion, responsible and accurate Court reporting occupies a central position in the principle of open justice. Fundamentally, it furthers and fortifies the rule of law. However, in the present case, my conclusion is unequivocal: the right to freedom of expression must yield to the right to life. The first Defendant's legitimate ambition of reporting the prosecution and punishment of the Plaintiff in a manner which identifies the offender cannot be fulfilled on the special facts of this case. It must surrender to the most supreme of rights.

[28] Similarly, the principle of open justice must yield to the right to life in the context of the present case. This does not entail emasculation of this supremely important principle. Rather, it involves an adjustment, a limited dilution, which the principle itself permits, necessitated by the Court's evaluation of the Article 2 issues. This qualified common law principle, of unmistakable importance, must submit to an absolute human right.

[29] The Court's resolution of the Plaintiff's private law action against the first Defendant leads to the same result in substance. The correct analysis , in my view, is that the information concerning the Plaintiff's identity is confidential [which was undisputed] and has been acquired by the first Defendant with an accompanying expectation that it will not be published if to do so would violate the Plaintiff's right to life under Article 2 ECHR. This is the nature of the confidence in play in the present context. I repeat my analysis and conclusion in paragraphs [26/27] above. I find no countervailing public interest impelling to disclosure of this confidential information in the present case and I struggle to conceive of one in the abstract.

[30] I emphasise that this is a decision on its particular facts. Scrupulous independent judges and responsible medical professionals, in tandem, will ensure that unmeritorious convicted prisoners will gain nothing from this intensely fact sensitive decision. There will be no litigation bandwagon or conveyor belt. The Legal Services Commission may have a potentially important role to play. Publicly funded access to justice is intended for, and reserved to, the truly deserving. Frivolous or vexatious claims will be readily detected.

[31] Finally, I add that the evidential matrix available to this Court was substantially greater than that considered by the Crown Court Judge when making the impugned order.

[32] At the time of promulgation of this judgment, the full text of the injunction to be made has not been finalised. In substance, it will prohibit the Defendants from publishing anything identifying or tending to identify the Plaintiff. This will not prevent appropriate reporting of the prosecution of the Plaintiff or the outcome thereof or of these proceedings. Furthermore, there has been no editing of this judgment, which can be reported in full.