[2002] EWCA Civ 195

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION

The Hon. Mr Justice Gross
Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 27th February 2002

Before:
LORD PHILLIPS M.R.
LORD JUSTICE JUDGE
LORD JUSTICE CARNWATH

Between :
H (A Healthcare Worker) Claimant
-and-
Associated Newspapers Limited Defendant

AND

H (A Healthcare Worker) Claimant
- and -
N (A Health Authority) Defendant

Mr Robert Francis, QC and Mr Andrew Hockton (instructed by Clyde & Co) for H (A Healthcare Worker)
Mr Alastair Wilson, QC and Mr Jeremy Reed (instructed by Reynolds Porter Chamberlain) for Associated Newspapers Limited
Mr Philip Havers, QC and Mr Jeremy Hyam (instructed by Beachcroft Wansbrough) for N (A Health Authority)
Ms Leigh Ann Mulcahy (instructed by the Office of the Solicitor) for the Department of Health (Intervenor)

Lord Phillips, M.R. :

This is the judgment of the Court.

1. This appeal raises issues as to the jurisdiction of the Court to restrain publication of information. It also raises a difficult question as to how that jurisdiction should be exercised on the facts of this case. The issues arise in two

actions which are closely interrelated.

2. H is the claimant in each action. H has the misfortune to be suffering from AIDS. H was diagnosed as HIV positive some months before the first action was commenced. At that time H was working as a healthcare worker in the area for which N is the responsible Health Authority. Upon being diagnosed as HIV positive H ceased to carry on practice as a healthcare worker and notified N of the reason for this.

3. In the course of H's practice H had provided medical services to National Health Service patients, under contract with N, and to private patients under contracts with those patients.

4. The Department of Health provides guidance to Health Authorities as to the action that should be taken if a healthcare worker is diagnosed as HIV positive. At the time that H was so diagnosed this was provided in a Health Service Circular HSC 1998/226 entitled 'Guidance on the Management of AIDS/HIV Infected Health Care Workers and Patient Notification' ('the Guidelines').

5. According to the Guidelines, patients who had undergone medical procedures believed to involve a degree of risk of infection, known as 'exposure prone procedures', should have been notified that they had been treated by a worker who was HIV positive and offered HIV testing and advice. Most of H's patients fell into this category. Accordingly N wished to carry out a patient notification exercise, otherwise known as a lookback. To do this N requested H to supply particulars of the patients and their medical records.

6. H did not believe that his patients were at sufficient risk to justify the patient notification exercise. H had received expert advice that led H to believe that the Guidelines were unsound. H handed over to N details of some, at least, of his NHS patients because he believed that he was contractually obliged so to do. He declined to provide any information about his private patients. He contended that he could not disclose private patient records protected by the Data Protection Act 1998 unless the Court ruled that this was necessary. And he told N that he would not authorise them to make use of such information as he had provided for the purpose of a patient notification exercise without an Order from the Court.

7. Some months elapsed without resolution of the situation. Then H commenced action 4481 against N ('the first action'). The relief that he sought included the following:

> "(a) Declaration that:
>
> 1. The proposed 'look back' exercise is unlawful by reason of breach(es) of clinical confidentiality relating to the claimant's patients and/or the claimant.
>
> 2. The claimant is unable lawfully to disclose

confidential patient records for the purpose of the exercise.

(b) An Order restraining the Defendant from making any use for the purposes of or in connection with the proposed 'lookback' exercise of any of the patient records previously disclosed to it by the Claimant, and restraining the Defendant from taking any steps which might directly or indirectly reveal the identity of the Claimant and his HIV status to any person, until such time as the Court has determined all the issues in paragraph 19(a) above."

8. Before starting the first action H obtain an Order from Master Leslie date 22nd October 2001, which included:

"1. Permission under Rule 39.2(2) to issue the Claim Form in the form as initialled and the Schedule to the Claim Form in the form as initialled.

5. Under Rule 39.2.(2) the identity of the parties is not to be disclosed."

The form, as initialled, described the claimant as 'H' and the health authority as 'N'.

9. The Mail on Sunday, published by Associated Newspapers Limited ("ANL") learned of the first action. They wished to publish a story about it and, by making enquiries, made it clear that this was what they intended to do. This led H to commence action 4799 ('the second action') against ANL. In the second action H obtained an interlocutory injunction from Scott Baker J. on 19th November 2001 restraining ANL from:

"(a) the soliciting or publication of any information which may directly or indirectly lead to disclosure of the identify or whereabouts of the applicant or his patients;

(b) in particular, publication of details of the applicant's speciality (other than the fact that he is a healthcare worker) or details as to when he was diagnosed as HIV positive and went off work sick."

10. On Sunday 18 November ANL published in the Mail on Sunday a front page article under the headline 'Judge's gag over Aids threat to patients'. This article gave some clues as to H's speciality to the extent that it is arguable that it breached the terms of Scott Baker J's Order.

11. On 23 November 2001 ANL applied to Gross J. to vary the orders of both Scott Baker J. and Master Leslie. ANL accepted, as they still accept, that it was appropriate for the Orders to place an embargo on naming H or on publishing

information which was bound to lead to the identification of H. They contended, however, that the Orders should be modified so as to permit them to name the health authority, N, to identify H's speciality and to give the approximate date when H was diagnosed as HIV positive. They also challenged that part of Scott Baker J's Order which prohibited the solicitation of information.

12. After the conclusion of the hearing before Gross J., but before judgment, a letter was received from the Department of Health, which was placed before the Judge. This stated that the policy set out in the Guidelines was no longer necessary. It was to be replaced by a policy under which a lookback would be conducted on a case by case basis, according to revised guidance. This guidance was in the course of preparation. So far as H was concerned, the expert advice was that the lookback should be postponed until the revised guidance became available, which might show that a more restricted lookback, or even no lookback at all, was necessary.

13. Gross J. gave judgment on the 3rd December. He set aside both Orders, and replaced them with an order in the following terms:

> "That Associated Newspapers Limited be restrained from publishing the identity or whereabouts of H or his specialty within the Health Service (other than that he is a health care worker) or details of when he was diagnosed as HIV positive or went off work sick or any other personal details about H which would lead directly or indirectly to his identification. This injunction shall not prevent the publication of articles including *inter alia* the following matters alone or in combination:
>
> a. An indication to the effect that many months elapsed before Action no. HQ01X04481 was started
>
> b. An indication to the effect that a look back exercise (if any) is unlikely to start for some months and that if it does it will be at least a year since the Health Authority was first alerted to the fact that H is HIV positive
>
> c. The name of N."

14. Before us H has appealed against that part of Gross J's Order which (a) permits N to be named and (b) permits ANL to solicit information about H's identity. ANL, for their part, have contended that Gross J. should have given them the option of either identifying N or disclosing his speciality and the approximate date on which he was diagnosed as HIV positive.

15. N appeared before us, as they did before Gross J., to urge that their identity should not be disclosed. We also gave permission to the Department of Health to intervene through counsel in order to place before us information which supplements that placed before Gross J. in its letter.

The nature of the Orders that are in issue

16. Master Leslie's order in the first action purported to be made pursuant to Rule 39.2(2). This is plainly an error. The relevant provisions of the rule are as follows:

> "**39.2 General rule - hearing to be in public**
>
> (1) The general rule is that a hearing is to be in public.
>
> (2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.
>
> (3) A hearing, or any part of it, may be in private if -
>
> (a) publicity would defeat the object of the hearing;
>
> ….
>
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
>
> ….
>
> (g) the court considers this to be necessary, in the interests of justice.
>
> (4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

No challenge has been made to the vires of this rule.

17. Master Leslie's Order was made in response to an application supported by a witness statement of Mr Mitchell of Clyde & Co, H's solicitors. After the conclusion of the hearing we requested sight of this statement in order to see the basis upon which the order was requested. That statement, dated 19 October 2001 makes it plain that the anonymity requested was solely to protect H's right to confidentiality and privacy. The reason for seeking an Order that N should be anonymous was in order to protect against the deductive identification of H.

18. The Order that H's identity should not be disclosed was one which could be made under Rule 39.2(4). The same is not true of the order that N's identity should not be disclosed. This was sought not to protect N's interests, but H's interests. ANL have taken no point on this, but have conceded that if naming N is likely to

lead to the identification of H, Master Leslie's order was a proper one. We consider this concession properly made. Rule 39.2(3)(a) and (c) gave the Court power to sit in private in order not to defeat the object of the hearing or where publicity would damage confidentiality. It must, we believe, be implicit that the Court could take the lesser step of enabling the identity of N to be concealed in order to achieve the same objectives – see the comments of Lord Diplock in *A-G v Leveller Magazine* [1979] AC 440 at p.451.

19. The Order made by Scott-Baker J. was not a conventional Order restraining a defendant from disclosing confidential information that had come into his possession. The information in question had not yet come into ANL's possession and was only likely to do so in consequence of information gleaned by ANL as a result of the first action – in the event a statement subsequently put in evidence has enabled ANL to identify N. Scott Baker J's Order only makes sense in the context of the first action and it was in that context that the Order was sought by Mr Mitchell.

20. It seems to us that logically Scott-Baker's Order should have been made in the first action, rather than in a separate action. Had it been made in the first action it would almost certainly have bound third parties, including ANL, with notice of it on the ground that breach of the order would constitute an interference with the due process of justice and a contempt of court – see *A-G v Leveller Magazine; A-G v Guardian Newspapers No 2 (Spycatcher)* [1990] 1 AC 109; *A-G v Punch* [2001] 2 WLR 1713.

21. In the circumstances we think it right to approach the two Orders by considering whether they could properly have been made as an interlocutory incident of the first trial. When answering that question it will be highly relevant to consider whether H and N have substantive legal rights which can properly be protected by a 'gagging order'.

The competing interests

22. All parties have accepted that on this appeal we have to perform a balancing exercise. It is, however, important to identify the interests that fall to be weighed in the balance.

Freedom of the press

23. We do not need to dwell at length on the importance of this interest, which is invoked by ANL. The right of the press to inform the public, and of the public to be informed by the press has long been recognised by our common law. It is an aspect of the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights that is of paramount importance. This is recognised by the terms of Section 12(4) of the Human Rights Act 1988. It has been repeatedly emphasised by the House of Lords – see, for instance, *R v Secretary of State for the Home Dept. ex parte Simms* [2000] AC 115 at p.126 per Lord Steyn

and *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at p.200 per Lord Nicholls of Birkenhead. The jurisprudence of the Strasbourg Court shows that rarely will that Court hold that interference with media freedom is justified under Article 10(2) of the Convention. Good examples of this are *Jersild v Denmark* (1995) 19 EHRR 1 and *Bladet Tromso v Stensas Norway* (1999) 29 EHRR 125.

24. Sometimes when restrictions on the media are in play before the Courts it is not apparent that there is a strong public interest in learning of the subject matter under dispute. That is not this case. The story that ANL wish to publish has a number of features of considerable public interest. It is a matter worthy of debate whether N should not have reacted swiftly and forcibly when faced with a healthcare worker who was challenging the Department of Health Guidelines, but that debate will be less lively if N is not identified and thus takes no part in it. It is a matter worthy of debate that there are, at present, no guidelines in place covering notification to patients that they have been treated by someone who is HIV positive. It is a matter worthy of debate that there is at present a hiatus during which the patients of a healthcare worker with a particular speciality are not being notified that he is HIV positive, even though guidance may, in due course, recommend that his patients should be notified. That debate will be muted while the speciality remains unknown.

25. We consider that this interest on the part of ANL weighs heavily in the balance. ANL accept that they cannot publish the identity of N, H's speciality *and* the approximate date when he was diagnosed as HIV positive. This information, when taken together, would almost certainly result in the identification of H. Mr Alastair Wilson, Q.C, for ANL, has argued that we should vary Gross J's Order, so as to leave with ANL the decision of whether to publish N's identity or H's speciality. For H, Mr Francis, Q.C, produced an answer to this proposition which, in our view, laid it to rest. An injunction giving an option would be likely to be treated by other organs of the media as giving them the same option. Some might exercise one and some the other, with the result that information would be placed in the public arena which would enable H to be identified. ANL's primary case is that Gross J's Order should stand. Only if we conclude that this Order cannot be upheld will we consider whether, in place of permitting ALN to name N, we should permit them to identify H's speciality.

H's interest

26. ANL have accepted that they should not identify H or publish information that would lead to his identification. We think that they were right to do so. H disclosed to N the fact that he was HIV positive in confidence. His right to confidentiality was one which could properly be protected by injunction. Whether it should give way to the requirements of a lookback exercise was the subject matter of the first action. In these circumstances, Master Leslie was plainly justified in holding that H could bring the first action under cloak of anonymity. To hold otherwise would have been to frustrate the submission to and determination by the Court of an issue which, in our view, was a proper one for judicial determination.

27. The consequences to H if his identity were to be disclosed would be likely to be distressing on a personal level. More than this, there is an obvious public interest in preserving the confidentiality of victims of the AIDS epidemic and, in particular, of healthcare workers who report the fact that they are HIV positive. Where a lookback exercise follows, it may prove impossible to preserve the identification of the worker but, if healthcare workers are not to be discouraged from reporting that they are HIV positive, it is essential that all possible steps are taken to preserve the confidentiality of such reports. This is a point that is emphasised in the Guidelines.

28. H has another interest to which it is necessary to have regard when performing the balancing exercise. His patients have a right of confidentiality in relation to their medical records. In *A Health Authority v X* [2001] Lloyds (Medical) 349 at 351 Munby J. said of the duty of the doctor in that case:

> "Dr X's ultimate obligation is to comply with whatever order the court may make. But prior to that point being reached his duty, like that of any other professional or other person who owes a duty of confidentiality to his patient or client, is to assert that confidentiality in answer to any claim by a third party for disclosure and to put before the court every argument that can properly be put against disclosure."

In the Court of Appeal Thorpe LJ was inclined to endorse this statement – see transcript 21 December 2001 at paragraph 25. We would, however, express the reservation that a doctor's primary duty is to the welfare of his clients and that there will sometimes be circumstances in which it is in their interests to disclose their records.

29. H brought his first action in part to protect his patients' rights to confidentiality. He was not prepared to disclose records of his patients which would result in his patients being informed that he was HIV positive unless this was demonstrated to be in his patients' interests. The issue in the first action is whether H's patients' rights to confidentiality, and with them H's own right to keep confidential the fact that he is HIV positive, should give way to the requirements of a lookback exercise. If disclosure of N's identity is likely to set off a chain of events which will lead inexorably to a lookback exercise, pre-empting the result of the action, this is further justification for the order in the first action that N should remain anonymous.

N's standing in the dispute

30. N is party to the proceedings as defendant in the first action. The Order that in that action N's identity should be concealed was made at H's behest in H's interest. Nonetheless we consider that N is entitled to advance any legitimate interest that N has in resisting disclosure of N's identity. Gross J. held at paragraph 19(7) of his judgment that N had a separate public interest in resisting identification which was a legitimate consideration to be taken into account in the balancing

exercise. This was:

> "(i) the need to maintain public confidence and patient safety in the respects already canvassed when setting out the guidelines (ii) patient and employee confidentiality (iii) the avoidance of unnecessary panic and alarm (iv) the proper functioning of the heath authority…. (v) the question of resource implications when limited public funds are involved."

31. Later in his judgment Gross J. identified some of the relevant consequences to N that would follow if N's identity were disclosed. Some of these did no more than buttress H's case on the risk of deductive disclosure of his identity. N's Director of Public Health (DPH) in a witness statement said:

> "If the identity of N is disclosed this would in my view quickly result in deductive disclosure of H's name because the professional network within the N area is close knit and H is an established and well known figure. Furthermore, a substantial number of his patients, employees and colleagues are aware that he has been off sick and the date when he last worked."

32. We accept that N has a legitimate interest in striving to protect the information that they have obtained in confidence that one of their healthcare workers is HIV positive. In addition to this, however, DPH adverted to the consequences that would follow publication of the fact that one of N's healthcare workers was HIV positive in circumstances where N could not reassure the vast majority of patients who had had no contact with H. Widespread alarm would be caused to patients within the health area. Many help lines would have to be set up to deal with enquiries. Because N would not be able to reassure those who were not H's patients, they would have to offer HIV testing to anyone who sought it.

33. Before us DPH's evidence was supported by evidence adduced by Department of Health ('DH'). In her written submissions, which fairly summarised the Department's evidence, Miss Mulcahy said:

> "The likelihood and degree of public anxiety should not be under-estimated. Communication of risk is a complex exercise. There is undoubtedly still stigma and ignorance surrounding the issue of HIV/AIDS, which can generate unjustified public alarm and the manner of communication in this sensitive area must be handled carefully. Even if patients are informed in the course of a typical patient notification exercise, some individuals may worry about the risk of contracting a potentially fatal illness to the extent that they may claim to have suffered diagnosable psychiatric illness. There is a higher risk of public alarm and of inaccurate public perception of risk if communication of the risk is through sensationalised news stories in the national media

> rather than directly through the health authority concerned as part of a responsibly conducted lookback exercise. This is well illustrated by the case of *A & B v Tameside & Glossop Health Authority* [1997] 8 Med LR 91, CA in which an action was brought on behalf of patients who allegedly suffered psychiatric illness because they had been informed of the fact that they had previously been treated by an HIV-positive health care worker by a letter instead of face to face from a GP or experienced health worker. The Judge at first instance found that publication of the issue in the national media (following a leak) at a time when helplines were not available may well have intensified the impact on patients of the notification letters received a couple of days later.
>
> ….
>
> *Resources*: In order to maintain public confidence as far as possible, it seems likely that the Health Authority will have to be prepared to offer HIV testing and counselling to the entirety of the patient group treated by any clinical specialty in its Area within the last 10 years if a patient is concerned and does not wish to wait for the forthcoming decision on, and the implementation of, any lookback exercise. If so, it has the potential to be the largest and most costly exercise in the HIV notification field yet undertaken. If no lookback or a more limited lookback ultimately goes ahead, NHS resources will have been wasted. Even if a full lookback goes ahead, if patients who were <u>not</u> treated by the health care worker concerned have been offered HIV testing, it will have been a considerably more expensive exercise than would normally be the case."

34. We had some doubt as to the extent to which these problems, however likely and serious, were matters that N could legitimately raise as a reason for restricting press freedom. We asked Mr Havers whether it was his case that N had a free standing interest that would have entitled them to seek an injunction, even if H's claim to confidentiality had not been in play. What if the story that ANL was proposing to publish was that one of N's healthcare workers had died of AIDS?

35. Mr Havers referred us to Article 10(2) of the Convention, which qualifies the freedoms of expression in this way:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

> protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

36. We asked Mr Havers to identify the manner in which interference with freedom of expression to accommodate interests which were essentially administrative was, in this country, 'prescribed by law'. Mr Havers did not find it easy to answer this question. He submitted that, as a party to the first action, N had a right to be heard. This was never in doubt, but the right to be heard does not bear on the interests that can legitimately be advanced in the exercise of that right.

37. Ultimately Mr Havers submitted that, if he had to demonstrate a right to relief that was independent of H, he would rely on the decision of this Court in *Broadmoor Special Hospital v Robinson* [2000] QB 775. In that case, the majority – Lord Woolf MR and Waller L.J. held that the Court had the following jurisdiction:

> "if a public body is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the court should grant such an application when 'it appears to the court to be just and convenient to do so'" (see p.795)

38. The decision in *Robinson* represents a significant step down a path which our law appears to be treading towards using the injunction to restrain behaviour which, while open to objection, does not represent a breach of duty owed under public or private law.

39. An example of this trend is provided by the 'stop now' orders which can be sought in the form of injunctions to restrain breaches of regulations introduced to comply with the requirements of European directives. These are of course the creature of statute - see Stop Now Orders (EC Directive) Regulations 2001 (SI No.1422).

40. This trend is to be distinguished from the development of the law of privacy, under the stimulus of the Human Rights Act, under which the possibility of a new civil law right is being recognised as one that can be legitimately protected by the grant of an injunction – see *Douglas v. Hello! Ltd* [2001] QB 967; *A v B and C* [2001] 1 WLR 2341. In *Venables v News Group Newspapers Ltd* [2001] 2 WLR 1038 the President, sitting in the Family Division, extended the law of confidence to justify the grant of an injunction in wide terms designed to ensure that the identity of the Bulger killers, now released into the community as young men, remains confidential. The remarkable and novel feature of the injunction granted in that case was that it was expressly stated to be against the whole world.

41. In *Venables* the President was at pains to reject the submission that the Court

had jurisdiction to grant an injunction to prevent an interference with one of the fundamental human rights, where no breach of a duty owed under our private law was made out. We would view with concern any attempt to invoke the power of the Court to grant an injunction restraining freedom of expression merely on the ground that release of the information would give rise to administrative problems and a drain on resources. Such consequences are the price which has to be paid, from time to time, for freedom of expression in a democratic society. N's more cogent claim to be heard arises on behalf of the patients in N's health area for whose medical welfare N is responsible.

42. Gross J concluded (paragraph 29) 'the true focus of public interest lies with N not with H'. He weighed in the balance 'N's independent interest in preserving its anonymity'. He concluded that the balance still tilted in favour of freedom of expression. We consider that a somewhat different approach to the balancing exercise is called for.

43. The first action was commenced in order to obtain the decision of the Court as to whether a lookback exercise should take place, which would involve the disclosure of confidential medical records held by H and, in all probability, the confidential information that H was HIV positive. It has not been suggested that this action should not have been started, nor that the issues that it raises should not be determined by the Court. In these circumstances, we consider that the Court could properly make an Order in the proceedings restraining the publication of information made available in the course of or as a result of the conduct of the proceedings which, if disclosed, would pre-empt the decision of the Court on the issues before it. The power to make such an Order is inherent in the Judge's power to control the proceedings in such a manner as is necessary to achieve the due administration of justice and is implicitly recognised by the provisions of CPR 39.2. Third parties with knowledge of such an Order will be in contempt if they disclose information which the Court had ordered should not be disclosed. Justification for the restriction of freedom of expression inherent in such an Order is to be found in Article 10.2 of the Convention, for the Order is a necessary incident of 'the protection of health, the protection of the rights of others and the prevention of the disclosure of information received in confidence'.

44. Treating the Order of Scott-Baker J. as if made in the first action, we consider that it should only be maintained insofar as necessary to prevent the pre-emption of the determination of the issues before the Court in that action. The same is true of Master Leslie's Order permitting N's identity to be concealed. The immediate consequences to N if N's identity is disclosed are of importance insofar as they may lead to the pre-emption of the determination of the issues in the action. Putting this consideration on one side, it is plain that disclosure of N's identity is likely to cause alarm to patients within N's area, with consequent administrative and resource implications for N. Mr Wilson has not submitted that these considerations should be ignored. They weigh against disclosure of N's identity. How much weight they should carry is a question on which the views of individual members of the Court have differed. Ultimately, that question has not proved critical.

45. We turn, then, to consider what consequences would be likely to flow from disclosure of N's identity.

Deductive identification of H's identity

46. H contends that if N's identity is disclosed, this will lead to the identification of H because of the information that is already in the public domain by reason of the publication in the Mail on Sunday on 18 November 2001. H contends that if, to this information, there is added N's identity, it will be possible to deduce who H is.

47. Gross J. was not persuaded that this risk justified preserving N's anonymity. He held, in effect, that the casual reader of the November article would not have subjected it to the kind of scrutiny that would lead to deduction of information about A. If an investigative journalist were to put two and two together, the injunction would still restrain any publication of material that would lead to the deduction of H's speciality or of when he was diagnosed as HIV positive.

48. We are less sanguine than Gross J. about the risk of deductive disclosure of H's identity. The November article is in the public domain. The information in that article, coupled with the identification of N, could well lead anyone who had personal knowledge that H had retired through ill-health to deduce that the article was written about H. A prime, and not unreasonable, concern of H may well be that those whom he knows personally should not become aware of the nature of his illness.

49. We have, however, quite different concerns as to the manner in which disclosure of N's identity might lead to the identification of H. When addressing the concerns on the part of N at the public anxiety and alarm that would follow the naming of N the Judge concluded that these concerns were answered by the Guidelines. He said at paragraph 52:

> "As it appears to me, paragraphs 11.41 and 11.45 of the guidelines make provision for and are readily applicable to the very situation which will arise as and when N's identity becomes known. It may well be that in responding to any publicity and in giving its version of events N will draw heavily on those paragraphs. In a nutshell, publication of N's identity does not take the matter out of the guidelines and into uncharted territory; instead the guidelines have contemplated and make provision for this eventuality."

50. It is necessary to say a word about the Guidelines and to consider whether the Judge was correct to conclude that they would apply to the situation that would arise when N was named. The Guidelines were published in December 1998. Under the Guidelines the policy was that *all* patients who had undergone any exposure prone procedure performed by an infected health care worker should, as far as practicable, be notified of this (para. 8.2) and offered HIV testing. 'Exposure prone

procedures' ('EPPs') are those where there is a risk that injury to the health care worker could result in his or her blood contaminating a patient's open tissues.

51. On being notified that a healthcare worker was HIV positive, a Health Authority had to carry out a period of evaluation before embarking on a lookback exercise. In the course of this evaluation, the exposed patient population had to be identified. The paragraphs of the Guidelines to which Gross J. referred made provision for the action that should be taken in the event of media interest. They gave the following advice:

> "11.41 In the event of media interest or other external enquiries during the period of evaluation prior to a patient notification exercise, the DPH should acknowledge that a case is being investigated. If necessary the media should be told that when the evaluation is complete anyone who is considered to have been at risk will be notified individually, counselled and offered HIV testing. At the same time an assurance should be given that the overall risk is considered very low.
>
> ….
>
> 11.45 If, however, a proactive public announcement is judged necessary, it will normally be made through a press release. This should be as informative as possible whilst avoiding the inclusion of information which could lead to deductive disclosure of the health care worker's identity. The health care worker should not be named [see Section 10]. It should:
>
> - refer to 'a health care worker' unless more explicit information about the worker's profession has already entered the public domain;
>
> - include details of arrangements which are being or have been made to contact patients;
>
> - reassure that all patients who may have been exposed to risk will be or have been contacted individually, and offered HIV testing as appropriate."

52. These Guidelines were designed for a situation where evaluation was already in progress. It does not seem to us that they can realistically be applied to cover the facts of the present case. At present there is no DH guidance in place as to the criteria to be applied in the evaluation exercise. The only advice is to do nothing until the new guidance is available. It was initially expected that this would be in mid-February. We are now told by Miss Mulcahy that it will not be until mid-March. We cannot be confident that this guidance will be in place before N's identity is disclosed.

53. If ANL are permitted to disclose N's identity, there is no doubt that they will make the most of this. They will be entitled to do so. The stance of the Mail on Sunday is that H's patients are entitled to know that they have been treated by someone who is HIV positive. The manner in which they break the news of N's identity is likely to lead to many of those who have received medical treatment of one kind or another in N's area ringing up N to find out whether they are potentially at risk.

54. N's original stance was that, when faced with such enquiries they would not be in a position to reassure those who had not had treatment from H that they were not at risk. They would simply have to say that it was not yet possible to say whether they were at risk, but that if they were the risk would be very slight and they would be informed of it in due course. Those who wanted reassurance would have to be offered HIV tests, which would involve the invasive procedures of taking blood and saliva samples. The overall cost of the operation might amount to £2 million.

55. We found this scenario disturbing and unrealistic. If N's identity were released tomorrow, N would be in a position to reassure the vast majority of those patients who telephoned in alarm that they were not at risk. Each patient could be asked what treatment had given rise to concern and, where the treatment was from someone other than H, they could be told that they had no cause for concern. To allow patients to submit to HIV testing as an alternative to this swift and simple reassurance would, so it seemed to us, be absurd. Any patient exposed to such a procedure would have justifiable cause for complaint.

56. The alternative would, however, almost inevitably involve the disclosure of H's identity. Those who phoned in would no doubt include some of H's patients. They would have to be told that they might be at risk, and thus H's identity would be likely to emerge. It seemed to us that this would be the lesser of two evils. The Guidelines recognise that the anonymity of the healthcare worker may have to be sacrificed in the interests of the patients. If N's identity were disclosed in the circumstances of the present case, the logical consequence would be a process of patient reassurance that would be likely to result in H's identification.

57. When we put these considerations to Mr Havers, he took instructions and informed us that, if N's identity were disclosed, N would indeed seek to be relieved of the obligation to do nothing that might reveal H's identity. N would do so in order to be free to reassure those who were not H's patients. We consider that the Court would be bound to accede to such an application. The disclosure of N's identity would thus set in train a course of events which would be likely to result in the disclosure of H's identity. H's patients would have to be offered HIV testing and counselling. The very state of affairs that H had sought, by the first action, to prevent would be brought about.

58. For these reasons, we have concluded that, in order to avoid the pre-emption of the determination of the issues raised in the first action, the Order that both H and

N should only be identified by initials was appropriate, and that Gross J's modification of the Orders to permit the identification of N must be set aside.

Identification of H's speciality

59. We turn to the question of whether the embargo on disclosing H's speciality should remain in force. The Guidelines recognise that different specialisations give rise to different degrees of risk. H argued that even this information would be likely to lead to his identification. We do not agree. There must be a risk that some who know the details of H's retirement may suspect, and it can be no more than a suspicion, that he is the healthcare worker in this action. Provided, however, that the other restraints in Gross J's Order remain in force, which we consider that they should, we do not consider that this risk justifies continuing the restraint on disclosing H's speciality. As we indicated early in our judgment, this restraint is inhibiting debate on what is a matter of public interest. We have concluded that this restraint is not justified.

The restraint on soliciting information

60. Scott Baker J's Order restrained ANL from soliciting information which might 'directly or indirectly lead to the disclosure of the identity or whereabouts' of H or his patients. Gross J. set that Order aside. Mr Francis has sought to reinstate the Order. In doing so he submitted simply that the Order was justified because the information was confidential.

61. We do not propose to reinstate the Order. To restrain a newspaper from soliciting information is a particularly draconian fetter on freedom of expression. ANL are now aware of the identity of N. If their reporters were to start making enquiries in N's area in an attempt to identify H, this might lead to those they questioned deductively identifying both N and H. That would clearly be contrary to the spirit of Gross J's Order. If there were grounds for anticipating that they might behave in this way, these might have justified a tightly drawn injunction restraining them from doing so. The terms of that part of Scott Baker J's Order are, however, too wide to be justified.

Disclosure to N of the medical records of H's patients

62. A significant period has elapsed since H was identified as HIV positive. This has been due in part to the hiatus caused by the withdrawal of the old Guidelines without replacement with new guidance. The hearing of the first action has been put back pending publication of the new guidance. Should it be determined, as it well may, that a lookback exercise should be carried out in relation to some of H's patients, it is important that there should be no further delay to the process of evaluation that is likely to be involved. H has indicated that, if the Court declares it necessary, he will hand over to N the records of his patients over the last ten years. We consider, for the reasons that we have given, that he should make available such records as are reasonably required for the purpose of evaluation. The records should

be made available to N on terms that they do not disclose them, or take any action on the basis of them, without either the permission of H or the permission of the Court.

Order:

1. **Appeal allowed to extent indicated**

2. **No order for the costs of the appeal**

3. **Leave to appeal to the House of Lords refused**

4. **Minute of order to be provided by council**

(Order does not form part of the approved judgment).