

Additional Material for Chapter 15 – Open justice and access to court information

Section numbers from the book are used. Its content provides fuller explanations and context.

15.1 Open courts—a fundamental rule in common law

What was *Scott v Scott*?

The House of Lords judgment in *Scott v Scott* in 1913 gave clear expression in the UK to the general principle of open justice. The principle was recognised earlier than this. But this case set precedent on the extent to which it should apply, and so invigorated its effect. The societal benefits of open justice - for example, it helps ensure that the justice system is fair and therefore worthy of respect – are explained in 15.1.1 in *McNae's*.

No journalist was involved *Scott v Scott*. The case concerned a person's right to tell the world what had happened in court proceedings in which that person was involved. But the House of Lords' judgment continues to resonate. It has since 1913 been cited in many cases considering the extent of the media's right, as the eyes and ears of the public, to report from the courts. It remains the main case on the open justice principle and the requirement that *any* derogation from it has to be necessary for the administration of justice.

The marriage ends

Scott v Scott was a 'nullity' case - that is, it concerned annulment of a marriage. Annie Maria Morgan and Kenneth Mackenzie Scott had married in 1899. But in 1911 Mrs Scott began civil proceedings to have the marriage annulled - declared null and void - on the basis that it had not been sexually consummated in those 12 years. Annulment would free her life from Mr Scott and let her to wed again, if she chose to.

Matrimonial cases were at that time dealt with in a branch of the High Court, known as the Divorce Court, which had evolved from ecclesiastical courts. This court, following what was normal procedure in nullity cases, appointed doctors to examine the couple. The court also ordered, because of the intimate nature of such evidence, that the case should thereafter be heard *in camera* (in private, with no members of the public permitted to be present). Mrs Scott saw the appointed doctor and was found to be a virgin. Mr Scott filed a document denying impotence, but did not submit himself to medical inspection. He then withdrew his defence to Mrs Scott's action, and so the marriage was annulled.

Mrs Scott reveals what happened

In August 1911 Mrs Scott asked her solicitor Percy Braby to obtain a copy of the official transcript of the court case, made by the court's shorthand writer, which he did. Further copies were typed out. Mrs Scott sent one to Mr Scott's father, one to his sister and another to a third person.

Mr Scott reacted by asking the Divorce Court to commit his ex-wife and Braby to prison for contempt of court, because her sending of these transcripts had revealed to other people what was said at a

hearing which the court had decided should be held in private. The transcripts disclosed the medical evidence concerning Mrs Scott, and the allegations of impotency. Mr Scott wanted the court to stop Mrs Scott sending the transcripts to anyone else, and Braby's involvement to be punished.

Mrs Scott told the court she sent out the transcripts because Mr Scott had cast aspersions on her sanity and given out inaccurate reports of the annulment (presumably by denying that the marriage was not consummated, and therefore claiming she had lied about this). She said she had sent the transcripts in defence of her reputation. But she and Braby were ruled to have committed contempt, and ordered to pay the case's costs.

They appealed. The Court of Appeal did not fully scrutinise the case or, apparently, realise its full significance, and dismissed the appeal as being outside its jurisdiction. A further appeal was made to the House of Lords.

In 1913 the Law Lords examined the case, and the jurisprudence on open justice, and considered the powers the Divorce Court had inherited from the church courts. The House of Lords judgement in *Scott v Scott* recognised that in common law there are limited occasions when a court hearing can validly be held in private - see also 15.3 in *McNae's*. But the House of Lords ruled that the Divorce Court did not have the power to hear an annulment case in private, and said that the judge in the subsequent contempt action was wrong to believe that reports of the annulment case, because it was heard in private, could be suppressed perpetually after it ended. Was Mrs Scott not to be allowed to state the truth of what had happened and why the annulment was granted? Lord Shaw, one of the Law Lords, said that enforcing such silence on her would be 'an exercise of judicial power violating the freedom of Mrs Scott in the exercise of those elementary and constitutional rights which she possessed.'

Lord Shaw said that if the area of permitted secrecy in the court process was to be extended, this would have to be done by Parliament by means of statute, because of the limits in common law to the power of courts to sit in secret. He added that publicity in the administration of justice was 'one of the surest guarantees of our liberties.'

Lord Shaw expressed shock at the way the Divorce Court and Court of Appeal failed to uphold the open justice principle for Mrs Scott. He quoted, in his part of the *Scott v Scott* judgment, words written by the 19th century philosopher Jeremy Bentham: 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice'. The quote continued: 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'

There is now statutory provision for medical evidence in nullity cases to be heard in private. But other evidence in such cases, if contested, would normally be heard in open court. See what the extended version of *McNae's* ch. 14 on www.mcnaes.com says about matrimonial cases.

15.3 The limited scope of common law exceptions to open justice

What was *Attorney General v Levenson*?

The full name of this case is *Attorney General v Levenson Ltd and others*. It concerned allegations that contempts of court had been committed. It arose from another case - the 'ABC' trial, which concerned charges under official secrets legislation. That legislation is explained in general in *McNae's* ch. 33 and the extended version of that chapter on www.mcnaes.com. To provide the context of *Attorney General v Levenson*, the facts of the ABC case need to be set out.

The ABC trial

The media called this case the ABC trial because of the surnames of the three defendants - journalists Crispin Aubrey and Duncan Campbell, and a former Army signals officer John Berry, who by the time of the relevant events was a social worker. Campbell, who wrote for *Time Out* and *New Scientist* magazines, was (and is still) an investigative journalist. After getting a first class degree in physics, in the 1970s Campbell began publishing material revealing the mingled nature of the UK's civil and military communications systems. His articles revealed details of how they were used - through, for example, the huge GCHQ communications base in Cheltenham - in the State's intelligence-gathering at home and abroad, and that this involved the interception of radio signals and tapping phones. His disclosures of the scale of this State activity, and the cost, which had previously been subject to very little public or Parliamentary scrutiny, made him the target of investigation by the police Special Branch, acting for the UK's (then still officially secret) security service MI5.

The chain of events which led to the trial began after Aubrey, who wrote for *Time Out* magazine and knew of Campbell's expertise, learned indirectly that Berry was willing to be interviewed about his time as an Army signals officer which, when he was based in Cyprus, included eavesdropping on Turkish and Iraqi signals traffic. Aubrey arranged for Campbell to conduct the interview. The pair visited Berry's flat in London in February 1977. As they left it, they and Berry were arrested by 13 Special Branch officers.

The three were charged under section 1 of the Official Secrets Act 1911. This section contains the heaviest jail penalties in such law and is usually reserved for prosecutions of foreign spies.

But the ABC defendants were not accused of spying. Berry was accused of communicating to Campbell information from his Army career deemed likely to be of use to an enemy. Campbell was charged with receiving it - which under the Act was an offence in itself, although nothing from the interview had been published. Aubrey was charged with aiding and abetting Campbell. Put simply, Campbell and Aubrey were charged because they arranged and carried out the interview with Berry. Campbell also faced a section 1 charge of collecting - allegedly 'for a purpose prejudicial' to the State - sketches, notes and information regarding defence communications. The case was the first - and so far the only - occasion on which section 1 has been used against journalists.

This prosecution, which was sanctioned by Attorney General Sam Silkin, was widely seen as oppressive, and symptomatic of a British establishment obsession with secrecy. The prosecution was also seen as punishing Campbell for his earlier work of exposing to democratic debate the nature

and scale of the UK's electronic and communications 'eaves-dropping' in intelligence-gathering, including the UK's close co-operation with the USA in this.

During the ABC trial, conducted at a Crown court in 1978, it emerged that Campbell's knowledge of this intelligence-gathering, and his collection of material about it, came not from any 'spying' by him but from his meticulous, journalistic collation of material from published sources, including openly-published Army staff magazines. The section 1 'collection' charge against him was dropped. Berry, it emerged, was unlikely to have disclosed to Campbell anything of which the UK's potential enemies were not already well-aware. The interview with Berry also added little to what Campbell already knew about State eavesdropping on signals traffic. But Berry knew he was subject to official secrets law in relation to his military career. Having heard most of the evidence, Mr Justice Mars-Jones told the prosecution he did not agree with it persisting with the remaining section 1 charges. The prosecution withdrew these, leaving each defendant facing only a charge under section 2 - a more general and less serious 'catch-all' provision making communication of official information without authorisation unlawful. The jury found these charges proved. But the trial remained a public relations disaster for the Attorney General and the Government.

The judge gave Berry a six-month prison sentence, suspended for two years, and gave both the journalists conditional discharges - that is, no punishment at all. So all three walked free from court.

Contempt proceedings against Leveller magazine and others

Earlier, during the committal (preliminary) stage of the ABC case, magistrates at Tottenham had agreed to a prosecution request that one of its witnesses should only be referred to in court as 'Colonel B'. The magistrates, defence counsel and defendants were given his real name in writing. At that time, witnesses could be called in person to give evidence at committal hearings, in which magistrates decided if there was sufficient evidence for a Crown court trial. The prosecution claimed Colonel B's name needed to be kept from the public and press because its disclosure would harm "national security". He had commanded an Army signals regiment, and then had a job in the Ministry of Defence.

It transpired as he was cross-examined that his identity was not always regarded as an official secret. He agreed that when he was appointed to the Ministry of Defence role his name and photograph had appeared in the Royal Signals Association's magazine, which the public could obtain, with a jocular reference to him there as the 'don of the communications underworld.' As a well-known commander, he featured in the magazine several times. The admission was one of many pieces of evidence in the ABC case which highlighted the absurdity of officialdom's instinctive claims of the need for such extensive secrecy. Colonel B also gave his Army number in evidence at the committal hearing. From such detail and from the reference there to the magazine, journalists with an interest in the controversial ABC case were able to identify him.

One month later *Peace News* magazine published his name correctly as Colonel H. A. Johnstone. *The Leveller*, which was a radical magazine and *The Journalist*, which was the membership newspaper of the National Union of Journalists (NUJ), subsequently also named him. Their actions were in protest

against what was felt to be over-use of official secrecy in his identity being kept secret in the ABC case.

The Attorney General launched contempt of court proceedings against the companies which published *The Leveller* and *Peace News*, 10 people involved in producing the relevant issues of these magazines, and against the NUJ. The Attorney General claimed that they all had committed contempt in common law (see 19.1 in *McNae's* on contempt) because, he alleged, they had deliberately flouted the Tottenham magistrates' decision that Colonel B should not be identified. The High Court found them guilty of contempt, fining the companies £500 each, the NUJ £200, and the individuals nothing at all. *Peace News Ltd*, the NUJ and the 10 individuals appealed to the House of Lords against the convictions.

In 1979 the House of Lords considered the case, including the question of whether Tottenham magistrates had made a clear order prohibiting publication of Colonel's B identity or whether they had merely ordered the name not to be used in court. The Law Lords quashed the convictions.

Lord Diplock said in the lead judgment that to constitute an offence of contempt, the relevant deed had to involve 'an interference with the due administration of justice, either in a particular case or more generally as a continuing process'.

The Law Lords also considered the principles of open justice, including the circumstances in which a court could lawfully restrict publication of its proceedings or sit in private. It was in this context that Lord Diplock said that a court could depart from the open justice principle 'only where the nature and circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule' (*Attorney General v Leveller Magazine Ltd* [1979] AC 440).

Publication of Colonel B's name involved no interference with the due administration of justice and was not in any other way a contempt of court, Lord Diplock said. He made clear that he reached this view because the Tottenham magistrates had not explicitly made an order forbidding publication - 'everything was left to implication'.

He added: 'My Lords, in cases where courts, in the interests of the due administration of justice, have departed in some measure from the general principle of open justice no-one ought to be exposed to penal sanctions for criminal contempt of court for failing to draw an inference or recognise an implication as to what is permissible to publish about those proceedings unless the inference or implication is so obvious or so familiar that it may be said to speak for itself.'

Two years later Parliament passed the Contempt of Court Act 1981, a re-codification of contempt law, which superseded some common law elements of it. A court which has decided in its proceedings to withhold from the public a name or matter can now use section 11 of the Act to forbid publication of that name or matter. The prohibition can then apply should the media discover such information from elsewhere or if the name or matter is mentioned by mistake in court - see

12.6 in *McNae's*. This power existed in common law, but section 11 provided clear statutory basis for it.

Balloons, the beach and Colonel B

Publicly naming Colonel B, during and after the ABC trial, became a defiant sport for those who saw that prosecution and the contempt proceedings against *Leveller* magazine, the NUJ and the other co-defendants as oppressive. Geoffrey Robertson, who was Campbell's barrister in the trial, relates in his book *The Justice Game* how outside the courtroom Colonel Johnstone's name was printed on balloons distributed by the defendants' supporters and how, when the National Union of Journalists held its annual conference in Whitley Bay, delegates wrote the colonel's name in huge letters in the sand on the beach there. By the time police arrived the tide had erased it. A backbench MP named Colonel B in Parliament, in a session being broadcast live. Mainstream newspapers, the BBC and ITV then reported the name as coverage of those Parliamentary proceedings, a defiant response to threats by the Attorney General and the Director of Public Prosecutions that if they did, they too could be prosecuted for contempt - threats which were not carried out. Since the ABC trial, UK Governments have been more circumspect in using official secrets law against journalists. No other journalist has been prosecuted to trial under this law, though this remains a possibility.

David Hooper's book *Official Secrets: The use and abuse of the Act*, also gives an account of the ABC case. There is also information about it on Duncan Campbell's website, <http://www.duncancampbell.org/content/abc-case>

15.9 Statute law on open and private hearings

Sentence review for informants

Section 75 of the Serious Organised Crime and Police Act 2005 gives a Crown court power to exclude 'as it thinks appropriate' the public and journalists when reviewing a sentence previously imposed on a defendant who pleaded guilty and who has given or offered assistance - for example, information about a crime - to a prosecuting or investigating agency such as the police. The section also gives the court power to ban, as it thinks appropriate, publication of any matter relating to the review proceedings, including the fact that a prosecutor has referred the case to the court for a sentence review.

Section 75 says such an exclusion order or one to restrict reporting may be made only to the extent that the court thinks that it is necessary to do so to protect the safety of any person, *and* that it is in the interests of justice.

For example, a section 75 exclusion order can be made to ban the public from the court because the defendant would be at risk of retaliation from other criminals in prison if the fact that he/she gave or offered such assistance to the police, and so in the review got a 'discounted' (more lenient) sentence, became known. For the same protective reason, if journalists are allowed into the court a section 75 order could restrict what can be published contemporaneously about the review hearing or postpone all reporting of it until further order.

Guidance issued by the Crown Prosecution Service (CPS) says: 'Instances may arise where the very

fact that a sentencing review was being sought would draw attention to the fact that someone serving a custodial sentence had, or was about to provide assistance to the prosecution in a manner that would endanger their safety.'

If the original sentence was lenient because the defendant had already offered such assistance but then knowingly failed to give it, the review can increase the sentence. If a defendant has failed to honour a pledge of assistance, a journalist has strong grounds for arguing that a lenient ('discounted') sentence should be reviewed in open court and that hearing reported fully, because the public needs to be confident that the defendant received an appropriate sentence in the review.

The CPS guidance says: 'The power to exclude the public and the press from sentence review hearings should be used with great caution, particularly where the review arises under section 74(2) following failure to fulfil an agreement to provide assistance.'

The guidance says too: 'Where practicable alternatives are available to closed hearings they should be adopted if possible. In any event a full transcript of the entire hearing of the proceedings should be prepared immediately after its conclusion, and retained in appropriate conditions of secrecy by the specified prosecutor, and kept available for further directions by the court in relation to publicity if and when the public interest so requires, at least until further order by the court, and in any event until the end of the sentence.'

This CPS guidance reflects the Court of Appeal judgment in *R v P; R v Blackburn* [2007] EWCA Crim 2290, which included the emphasis that a court needed to have 'great caution' before making an order to exclude journalists. The CPS guidance says the judgment thereby 'indicated' that it is unlikely that journalists would be excluded.

The guidance tells prosecutors they 'need to be aware of the risks and sensitivities' when preparing applications for exclusion or reporting restrictions as regards a sentence review. The guidance adds: 'Accordingly, if practicable alternatives are available, (e.g. anonymising proceedings), then these should be adopted. The judge and court should be notified of any potential s.75 application in advance of the hearing and it is important that prosecutors ensure the avoidance of any unnecessary publication of sensitive information in court lists.' For the two sets of this guidance, see Useful Websites, below.

Case study: In 2012 the CPS revealed that three years earlier a convicted terrorist Saajid Muhammad Badat had his jail sentence reduced under the review procedure. The original sentence was of 13 years, imposed in 2005 after he pleaded guilty to one count of conspiracy with others to destroy a passenger airliner. Badat's co-conspirator was 'shoe bomber' Richard Reid who was restrained by other passengers on the plane before he could explode a bomb hidden in his shoe, and who was later jailed for life in the USA after admitting eight terrorism charges. The CPS said that in 2009 it had entered into a formal agreement with Badat under powers in the 2005 Act to encourage co-operation. The CPS said that this was the first time such a deal had been made in the UK with a convicted terrorist, and that Badat had helped with investigations and was due to give evidence in New York at the trial of Adis Medunjanin,

'relating to an alleged, al-Qaeda martyrdom plot' (Medunjanin was later convicted of this plot to bomb the New York subway system). The CPS said that on 13 November 2009, under the terms of the agreement, full details of the assistance Badat had already provided were referred to the Crown court to allow a judge to consider reducing his sentence. 'The judge took into account the valuable assistance provided and reduced his sentence to 11 years' imprisonment.' The judge made an order under section 75 banning publication of any matter relating to the review proceedings until further order. The CPS said: 'This was for the safety of Badat. It was agreed that when Badat would be required to give evidence in a public court the order would be lifted' (*CPS and Metropolitan Police Service press release*, 16 April 2012).

Closed material procedure

In part 2 of the Justice and Security Act 2013 Parliament made law to permit 'closed material procedure' in civil cases in the High Court, the Court of Appeal or the Supreme Court. This procedure can be adopted when a claim involves the court considering 'sensitive' material which, the court must be satisfied, cannot be aired in open court or disclosed in the normal way to the other party in the case without risking damage to national security.

In this procedure the court, to protect such material, sits in secret with the claimant - for example, someone suing the Government - and his/her lawyers excluded, as well as the public and media being excluded. If the claimant is someone who, for example, was detained as a terrorist suspect, suing for damages for alleged unlawful detention or ill-treatment in during detention, the 'sensitive' material produced by the Government may concern intelligence on why he/she was arrested and allegations about his character and associates.

In these secret sessions a 'special advocate', who is allowed to see the material, presents the arguments for the claimant. This would be a lawyer officially vetted ('security-cleared') to ensure he or she was sufficiently trustworthy not to disclose such material outside of the procedure, appointed to be such an advocate by the Attorney General. The claimant and his/her lawyers will not even be shown the material - other than possibly in a summary - and so will not be able to know anything or much about it, discuss its detail or challenge it in person, being excluded from the sessions. Under the Act either side in a case can apply for this procedure to be adopted, but in reality it will in most or all such cases be the Government or an official agency, as defendant, which wants the procedure to be imposed on the claimant.

The Government created this law in the 2013 Act after the Supreme Court ruled in *Al Rawi and others v Security Service and others* [2011] UKSC 34 that, as the law stood at that time, a court was not entitled to adopt a closed material procedure in a civil claim for damages. In that case six men were suing for damages after being detained. They alleged they were subject to 'rendition' and mistreatment in various locations, including the USA's Guantanamo Bay prison. They alleged that the UK security service and other organs of the state had been complicit in this detention and ill-treatment of them by foreign authorities, and that they had suffered trespass to the person, conspiracy to injure, torture and other breach of their human rights. The Government denied liability, but - even before the Supreme Court ruling - had decided to make payments, reportedly totalling millions of pounds, to settle that case and claims from others detained at Guantanamo Bay.

The Justice Secretary, Kenneth Clarke, told the House of Commons: 'The alternative to any payments made would have been protracted and extremely expensive litigation in an uncertain legal environment in which the government could not be certain that it would be able to defend departments and the security and intelligence agencies without compromising national security'. The 'closed material procedure' will, the Government said, enable it to defend such cases in future.

Ministers also hoped this law will protect the UK's relationships with allies who might otherwise - it is argued - be reluctant to share intelligence if there was a prospect of it being aired as evidence in open court in the UK in such cases, in that this would increase the risk of intelligence sources and operations necessary for their own national security being compromised. However, the many critics of Part 2 of the 2013 Act say it is to the detriment of the UK's tradition of open justice and fairness in trials, and that it will hinder public and media scrutiny of the darker side of the 'war against terror', including allegations of state complicity in torture.

Earlier statute has enabled special advocate and closed material procedure to be introduced in other fields of civil law, including in employment tribunals when a dispute concerns national security issues, cases heard by the Special Immigration Appeals Commission and cases in which the High Court reviews the Home Secretary's use of Terrorism Prevention and Investigation Measures against terrorism suspects. The tribunals system and the Commission are outlined in 18.2 and 18.5 in *McNae's*. There is more detail about employment tribunals in the extended version of ch. 18 on www.mcnaes.com. TPIM law is outlined in the online chapter 40: 'Terrorism and the effect of counter-terrorism law', also on www.mcnaes.com.

Some background to the history of the special advocate and closed material procedure is given in the Government's Justice and Security Green Paper, published in 2011. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228860/8194.pdf

15.10.1 Criminal cases—rules on open and private hearings

Bail applications at Crown court

Bail hearings, including those in which a defendant wants a Crown court judge to overturn a refusal by magistrates to grant bail, should normally be held in public. The Criminal Procedure Rules, in what is now rule 14.2, state that a hearing of a bail application may be held in public or private. But Mr Justice Gray, in a High Court ruling in 2006, said this did not mean there was a presumption that they should be held in private (*Malik v Central Criminal Court* [2006] EWHC 1539 (Admin)).

Case study: In 2014 journalists were allowed to attend a bail application made on behalf of a nurse Victorino Chua, who was accused of murdering three hospital patients. There was a 'Court in Chambers' sign on the courtroom at Manchester Crown court before the start of the hearing. Journalists were told that the assumption of the prosecution, defence and the court was that the application would be heard in private. Judge David Stockdale agreed to hear representations from the press, which included reporters from Press Association, *Daily Mail*, BBC and Granada/ITN. The Press Association representations referred to the Criminal Procedure Rules. Afterwards the judge said he had a 'discretion' to make the hearing in private but on this occasion did not think it necessary to do so. He said the media should only

report the result of the application, not evidential matters or details of reasons for granting or refusing bail. Chua, 49, of Churchill Street, Stockport, was refused bail. In 2015 he was convicted of two of the murders, in which he poisoned two patients with insulin at Stepping Hill hospital. He was also convicted of offences which included his poisoning of 19 other patients. These were 22 counts of attempted grievous bodily harm, one count of grievous bodily harm, seven of attempting to administer poison and one of administering poison (*Media Lawyer*, 29 April 2014; BBC website, 18 May 2015; *The Guardian*, 19 May 2015)

Case study: *Warrington Guardian* reporter Jo Lean wrote to a judge to protest after court staff refused to let her into a Crown court bail hearing in a robbery case. A few hours later the judge agreed she could have information on what was decided in the hearing (*Media Lawyer*, 3 July 2008).

15.10.2 Dealing with contempt of court

Rule 48.2 says that when a criminal court enquires whether or considers an allegation that someone has committed a contempt of court – for example, by disobeying a court order or threatening a witness in the courtroom – it must announce in public proceedings that person's name, in general the nature of any conduct he or she admits, or the court finds proved; and any punishment imposed. This reflects that, particularly as the punishment could be a jail term, the open justice principle should apply as far as possible - even if the enquiries are held in private to minimise the risk of contemporaneous publicity prejudicing an ongoing trial.

Part 81.28 of the Civil Procedure Rules says that a court which decides to commit someone to prison for contempt of court must in public state their name, in general terms the nature of the contempt, and how long the jail term is.

15.10.3 Civil cases—rules on open and private hearings

Part 39(2) of the Civil Procedure Rules (CPR) says that the general rule for civil cases is that a hearing is to be in public. As 15.10.3 in *McNae's* explains, there are some exceptions to this rule. In some cases the media may need to argue, including by citing their and the public's rights in Article 10 of the European Convention on Human Rights, against these exceptions being used. That argument was successful in a case which two Saudi princes wanted to be heard in private - see **15.13.4.2**, below

Case study: In 2012 a High Court judge refused to allow a property developer embroiled in a legal fight with two of the UK's best-known businessmen to give evidence in private. Patrick McKillen, from Belfast, argued that evidence he wished to give related to 'personal financial matters' and should not be heard in public. Mr McKillen was embroiled in a court battle with Sir David Barclay and his twin brother Sir Frederick Barclay over the control of three of London's most famous hotels. Several media organisations objected to Mr McKillen's application, which he made under rule 39(2) of the CPR, for this evidence to be heard behind closed doors. The Barclays too opposed the application. Mr Justice David Richards, dismissing it, said that the nature of this evidence came 'nowhere near' overcoming the 'basic requirement for open justice'. The judge said that allowing Mr McKillen to give evidence in

private could be viewed as a 'significant departure' from fundamental common law principles of open justice and natural justice. He added that any departure from those principles had to be done on the basis of 'necessity' not 'convenience'. The judge said that rule 39(2) in its reference to 'personal financial matters' draws a distinction between purely personal, and commercial or business, financial circumstances. He said that information 'does not become personal financial information just because Mr. McKillen chooses to conduct some but not all of his property investment business in his own name...In my judgment the balance comes down clearly in favour of the whole trial being conducted in public.' He ordered Mr McKillen to pay the legal costs of parties who had objected to his privacy application. Lawyers indicated that the total bill would run into hundreds of thousands of pounds (*Patrick McKillen v Misland (Cyprus) Investments Ltd and others, and Patrick Gerard McKillen v Sir David Rowat Barclay and others* [2012] EWHC 1158 (Ch); *Media Lawyer*, 27 April 2012).

15.12.2 Protocol on court lists and registers

A protocol agreed between the News Media Association, the Society of Editors and Her Majesty's Courts and Tribunals Service (HMCTS) says: 'Crown court staff are encouraged to cooperate with local newspapers when they make enquiries'.

Case study: The *Reading Post* cited this part of the protocol successfully when persuading Reading Crown court to disclose the age and address of a defendant. Reporter Linda Fort had asked an usher for the information, but the defendant's barrister intervened to tell the usher he should not give it to her, and told her to apply to the case judge, Nicholas Wood. The judge then told Linda: 'I can't stop the press publishing the address. But an officer of the court, be it a clerk or an usher, is not obliged to reveal that if it has not been said in open court.' The paper's news editor Sarah Hamilton wrote to the judge, asking him to review the decision, so the information could be provided. She cited what the protocol says about court staff cooperating with local newspapers, and *R v Evesham Justice ex p McDonagh* (for this case, see 15.12.5 and 16.6.2.5 in *McNae's*). Judge Wood then ruled in the *Post's* favour after discussion with fellow judges (*Holdthefrontpage*, 11 August 2014).

15.13.4.2 Civil case documents for which copies can be obtained

As 15.13.4.2 in *McNae's* explains, the Civil Procedure Rules give non-parties, and therefore journalists, some rights to inspect and copy case documents in civil cases. Judgments have made clear that normally these rights cannot be over-ridden by claims that such access will breach personal privacy. Also, the media's purpose in wanting access to case documents does not have to be restricted to coverage of that particular case. Judges have accepted - for example, see *Chan v Alvis*, below - that such access can properly lead to news stories about wider or other matters.

Case study: In 2013 in the High Court Mr Justice Morgan upheld the right of *The Guardian* and the *Financial Times* for access under rule 5.4C of the CPR to see 'statements of case' and other case documents from litigation over a business dispute. One side of the dispute included Global Torch Ltd and two Saudi princes, and the other side Apex Global Management Ltd and its owner Jordanian businessman Faisal Abdel Aziz Hafiz Almhairat. This dispute was being waged in the Chancery Division Companies Court. Global Torch was incorporated in the British

Virgin Islands. Apex was incorporated in the Seychelles. The judge rejected an application by Global Torch and the two princes - Prince Abdulaziz bin Mishal bin Abdulaziz Al Saud, a director of Global, and his father Prince Mishal Bin Abdulaziz Al Saud - that the litigation should be conducted in private hearings, under rule 39(2) of the CPR. He also rejected their application that the media should not be allowed under rule 5.4C to see or obtain copies of any documents in the case. It was argued for the princes that allegations made against them in the litigation, which they denied, were being made to put pressure on them 'through the fear of publicity' and to cause reputational damage, embarrassment and distress to them, and to affect the reputation of the ruling, Royal family of Saudi Arabia. It was argued for Mr Almhairat, who with the newspapers opposed these applications, that Global Torch had initiated the litigation and chosen to make very serious allegations about him; he had responded with equally serious allegations; and if either party had made unfounded allegations, the innocent party would receive vindication in the form of a public judgment to that effect.

Mr Justice Morgan said that to grant the applications made by the Global side 'would go a long way to undermining the principle of open justice' He also said that privacy rights under Article 8 of the European Convention on Human Rights were 'not infringed by the making of the disputed allegations in the context of this litigation nor by the resulting publicity given to what has been said at a public court hearing'. He said that *The Guardian* and the *Financial Times* had sought access to the case documents 'for a proper journalistic reason', in order to report the litigation. He added: 'There are good reasons why the news media should have available to them the documents which they seek to assist them in preparing a fair and accurate report of hearings which have, or should have, taken place in public' (*Global Torch Ltd v Apex Global Management Ltd, Faisal Abdel Aziz Hafiz Almhairat, and FI Call Ltd, and Apex Global Management Ltd v FI Call Ltd, Global Torch Ltd, HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud, Emad Mahmoud Ahmed Abu-Ayshih and HRH Prince Mishal Bin Abdulaziz Al Saud* [2013] EWHC 223 (Ch)). The Court of Appeal upheld Mr Justice Morgan's rulings.

Case study: In 2012 Mr Justice Vos ruled that *The Guardian* and therefore other news organisations should be allowed to have copies of 'a Notice to Admit' and 'the Response' to it which were case documents created in the course of joint litigation against News Group Newspapers Ltd (NGN) by various claimants. These included the singer Charlotte Church. Their claims alleged that NGN was responsible for the voicemail systems of their mobile phones being hacked. The extent of this alleged hacking was by then was the subject of a renewed investigation by the police (see the outline in 35.1 in *McNae's* of the police investigation into phone-hacking). Mr Justice Vos said these two documents were not part of the 'statement of case'. But he exercised the discretion available to him under rule 5.4C(2) of the CPR to allow copies of these documents to be supplied to the media. He said these documents related to NGN consenting to the assessment of aggravated damages on the basis set out in a paragraph of the Notice to Admit, namely 'that the senior employees and directors of NGN knew about wrongdoing in respect of hacking, and sought to conceal it by putting out public statements they knew to be false, deliberately failing to provide the police with all facts of which it was aware, deliberately deceiving the police in respect of the purpose of payments to [Glenn]

Mulcaire, and destroying evidence of wrongdoing'. At the time Mr Justice Vos made these rulings these documents had already been referred to and some parts of them read out in a pre-trial review which was held in public, and some claimants had agreed settlements with NGN. The judge also ruled that copies of the 'generic particulars of claim', part of the 'statement of case', could be released to the media under rule 5.4C(1). But he ruled that some parts of all three documents must be redacted before copies were released, because of confidentiality owed to claimants and third parties, and after representations by Mulcaire that publication of some information might create a substantial risk of prejudice to any further criminal proceedings he might face concerning the hacking allegations. The judge said he would also consider the extent of redactions sought by NGN 'concerning the level of seniority at which the allegedly unlawful activities were approved'. The judge observed that *The Guardian* had said it wanted the documents so that it could understand the arguments at the trial of this litigation. He added that the truth seemed to him closer to what Mulcaire's counsel had contended, namely that the newspaper wanted to publish 'any material they can about this litigation, and will use whatever extracts from the three documents that they think will make a story'. But, he said, that fact did not mean that the newspaper's application should fail, or that this motivation was improper (*Various claimants v News Group Newspapers Ltd and Glenn Mulcaire* [2012] EWHC 397 (Ch)).

Case study: The *Journal* newspaper was able to publish the story of a footballer's dispute with his former landlords because reporter Emma King asked Newcastle County Court if she could see the claim form. Former Sunderland player El Hadji Diouf had been taken to court by the landlords, who claimed he owed them £12,000. But before the case was due to start they reached a settlement with him which included a confidentiality clause. Ms King asked the court if she could see the claim form as it was a public document and argued that it was in the public interest to publish the allegations in it. Diouf's barrister initially opposed her request, citing the confidentiality agreement, but was told by Judge Christopher Walton that a report of the case would be in the public interest as the footballer was a well-known figure (*Holdthefrontpage website*, 13 May 2011). For the report see Useful Websites, below.

15.13.4.4 Interlocutory hearings and judicial reviews

The CPR rules on access to documents apply to interlocutory hearings (*Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Ltd* [2005] EWHC 2101 (TCC)). They also apply to judicial reviews (*R (on the application of Corner House Research and Campaign Against Arms Trade v Director of the Serious Fraud Office and BAe Systems plc* (Interested Party) [2008] EWHC 246 (Admin)); *Media Lawyer*, 19 February 2008).

15.13.4.7 Access to statements of case and witness statements after a civil case concludes

Case study: In 2004 the *Guardian* newspaper successfully applied to the High Court for access to witness statements in a case involving Alvis Vehicles Ltd, a subsidiary of armaments company BAe Systems. Alvis was being sued by a businessman Chan U Seek, who said he was entitled to a commission arising from sales of military vehicles to an overseas government. The context was that newspaper had for several years investigated BAe's payments of

commissions (see *The Guardian's* website). A *Guardian* reporter attended some hearings of the case, but it was then unexpectedly settled by the parties. Alvis opposed the newspaper seeing witness statements. But Mr Justice Park, equating the press with the public, upheld the principle that the public should not, by reason of modern practice, lose the ability to know the contents of witness statement evidence-in-chief which they would have had under the earlier practice when evidence-in-chief was given orally. He ruled that an application to inspect witness statements, as well as for a statement of case, could be made successfully under rule 5.4C(5) of the Civil Procedure Rules even after a case had ended. The judge also said the fact that *The Guardian* did not have a reporter permanently in court did not change his view. He agreed that that *The Guardian* over-egged the pudding by saying in its application notice that it wished to inspect and copy the documents 'because *The Guardian* wanted to prepare a fair and accurate report of [*Chan v Alvis*] proceedings'. The judge said 'In my judgment that was not the real reason'. He indicated that he considered the real reason was that *The Guardian* was considering publishing an article about 'a particular factual matter' one of its reporters had described in a letter to Alvis's parent company. However, Mr Justice Park added that he did not think he should refuse the newspaper's application because the reason expressed in the application notice 'can be shown not to give an accurate impression'. He said: 'In this case why should it not be said that *The Guardian* has an entirely legitimate interest in inspecting the pleadings and witness statements in *Chan v Alvis*? The nature of its interest is not related to other legal proceedings in which it is involved, but it is very much related to the core of its business and, as I am sure its editor and reporters would say, the purpose of its existence. *The Guardian* is a newspaper and a serious newspaper. It publishes stories which it believes to be of interest to its readers and which, in some cases, it believes could raise serious issues of public concern. Its reporters consider that, through Mr Chan's skeleton [argument], they have discovered such a story, and they wish to see whether there is more relevant material in documents which passed into the public domain through proceedings in open court. It is not for me to second-guess the reporters on whether the story really is interesting or whether it really does raise serious issues. If a litigant in current proceedings can see identified documents from an earlier court file because they may bear on his current litigation, then it appears to me that a serious newspaper should be able to see identified documents from an earlier court file because they may bear on a current story or article which it is interested in publishing. The judge also said there was 'no absolute rule that an application to inspect documents in the court file of a case must be made while the case is still in progress... If it becomes a matter of whether the discretion is to be exercised under the rule, I can see that, if an application was made by a newspaper to inspect the court file of an old and stale case, the court might be inclined to refuse. But this case is not like that. *The Guardian* was taking an interest in *Chan v Alvis* while the case was in progress.. ..I do not think that *The Guardian* can be accused of any form of unreasonable delay in getting this application on foot' (*Chan U Seek v Alvis Vehicles Ltd and Guardian Newspapers* [2004] EWHC 3092 (Ch)); *Guardian*, December 9, 2004). But because Alvis objected to the witness statements being provided to *The Guardian*, the judge held a hearing to decide this issue, so the newspaper, had it lost the application, could have been held liable for Alvis's costs for the hearing.

As 15.13.4.3 in *McNae's* explains, a right exists in the Civil Procedure Rules for anyone to inspect during the course of a civil trial witness statements which stand as evidence-in-chief. Mr Justice Park's ruling in the above case makes clear that a right to see such witness statements, and the right in CPR rule 5.4C to see a 'statement of case', can apply after a case ends.

Privilege in reports based on case documents

In 2012 in the High Court Mr Justice Tugendhat considered in a defamation case whether two *Mail on Sunday* articles, which drew on case documents from a civil claim launched by three businessmen against a banker, were protected in defamation law by the statutory defence of qualified privilege in schedule 1 of the Defamation Act 1996. This law is explained in 22.7 in *McNae's* and the schedule is set out in the Additional Material for ch. 22 on www.mcnaes.com. Paragraph 5 of Part 1 of the schedule bestows such privilege on publication of a 'fair and accurate' copy of or 'extract' (which can mean 'summary') of any document required by law to be open to public inspection. The Act, in addition to this requirement for fairness and accuracy, states that the defence will not protect publication of matter 'which is not of public interest' [* see footnote] and publication of which 'is not for the public benefit', or publication proved to have been made with 'malice'.

The first *Mail on Sunday* article reported that the three men had alleged in a 'writ' that banker Irfan Qadir had used a group of 10 men with large dogs to frighten them into signing over their shares in a club and restaurant, that in this writ the three were claiming £3.5 million in damages from him and the Bank of Scotland, and that the Bank said it would vigorously defend itself against the allegations.

The second article also alluded to this legal action. In the period to which these allegations referred Mr Qadir worked for the Bank of Scotland, and subsequently for the Bank of Ireland. He sued the *Mail on Sunday's* owners Associated Newspapers Ltd for libel over what the newspaper and Mail Online published in these two articles. As explained below, in 2013 Associated apologised and in a settlement paid him 'substantial damages' for what was published.

The first article

Mr Justice Tugendhat's 2012 judgment in this defamation case was on preliminary issues concerning privilege and malice. In it he said that material in the *Mail on Sunday's* first article, published in May 2011, was based on a claim form (a 'writ') issued in February 2011 by the three men against Mr Qadir, and on the accompanying 'particulars of claim' in which they set out their allegations against him. A freelance journalist had sent a draft of the article to the newspaper after obtaining the men's 'statement of case', which included the claim form and the 'particulars, under in rule 5.4C of the Civil Procedure Rules. As 15.13.4.2 in *McNae's* explains, this rule allows non-parties, and therefore journalists, to inspect and copy case documents. The newspaper edited the draft and added material in the version published.

Mr Justice Tugendhat ruled that the article was fair and accurate in its summary of the men's 'particulars of claim' but nevertheless was not protected by the defence of qualified privilege in the 1996 Act. This was because the article had not stated the fact that Mr Qadir, in that he had filed a defence against the men's claim, was denying the allegations they made in it. Therefore publication of the article was 'not in the public interest' and 'not for the public benefit'. Mr Justice Tugendhat

added that the newspaper should have known that Mr Qadir was defending himself against the men's allegations, because under rule 5.4C case documents are only made available for public inspection if the defendant has filed with the court an 'acknowledgement of service' - the filing of which indicates that a defendant has received the claim form and intends to file a defence - or if a defence itself has already been filed. Mr Qadir had filed an 'acknowledgement of service' in March 2011 and the following month had filed his defence. But this had not been mentioned in the May article.

Mr Justice Tugendhat said: 'In summary, the effect of these [rule 5.4C] provisions is that a non-party cannot obtain a claim form or particulars of claim from the court records if the defendant does not dispute the claim, or if there is mediation, unless and until there is a judgment of the court [on the claim]'....Where a defendant has filed a defence or an acknowledge of service, then that will necessarily state or imply that the defendant disputes the claim.'

He added: 'I find it hard to envisage any circumstances in which there would be a public benefit in publishing defamatory extracts from a claim form or particulars of claim without there being included in the publication a statement that the allegations are disputed or, if it be the case, denied.'

Mr Justice Tugendhat added that not only had the *Mail on Sunday* omitted to publish the fact that Mr Qadir was defending the men's claim, it had included in the article a misleading statement that he 'declined to comment' before its publication. There could be no public benefit in that misinformation being published, the judge said. He added that he accepted Mr Qadir's evidence that he did not get any message from the relevant *Mail on Sunday* journalist before its publication, although the judge also accepted that messages had been left for him on what the journalist believed was Mr Qadir's voicemail.

The judge said that the *Mail on Sunday* had, by including some extraneous material in the article - including the misleading statement that Mr Qadir had refused to comment - produced not just a report of what was recorded in the case documents but had made the article 'the product of a journalistic investigation'. Mr Justice Tugendhat said: 'If a journalist reporting on a trial chooses to approach lawyers, parties or witnesses, then he is carrying out his own investigation'.

The article had also been published in May on the *Mail OnLine* website, and continued to be available there until September 8, 2011, with no amendment made to reflect the fact that Mr Qadir had filed a defence against the three men's claim, But - Mr Justice Tugendhat said - Associated knew from June 17 that this defence had been filed. Therefore, he added, there has been recklessness in Associated allowing the website version to be published from June 17 without that amendment. Therefore Mr Justice Tugendhat ruled that Mr Qadir's plea that there had been malice in publication of the article succeeded in respect of the period from June 17 to September 8. This ruling on malice meant that Mr Justice Tugendhat was giving another reason for the article, as regards its online publication in this period, not being protected by qualified privilege.

The second article

Mr Justice Tugendhat also made rulings concerning a second article the *Mail on Sunday* published, on June 19, 2011, about Mr Qadir. It claimed Mr Qadir had been named in a court case 'as a central figure in Britain's biggest mortgage fraud, though he has not been charged with any offence.' These words were a reference to the fact that Mr Qadir's name had been mentioned by a barrister in a hearing at Southwark Crown court on June 14, when the barrister was pleading mitigation for Ian McGarry, who was a surveyor for property consultancy Dunlop Haywards. McGarry was due to be sentenced in what the newspaper referred to as 'the Dunlop Haywards case' - for taking bribes from property developer Saghir Afzal to provide false valuations of properties in a huge mortgage fraud.

Mr Justice Tugendhat said that the barrister submitted in that mitigation that other people may have had a role in banks lending these mortgage advances and in this submission had also said that Mr Qadir when employed by the Bank of Scotland 'was involved in a large number of transactions'. But, Mr Justice Tugendhat added, the judge in that hearing, Judge Beddoe had interrupted the barrister to emphasise that this submission was irrelevant and unsupported by evidence. Judge Beddoe had also specifically said at that hearing that he had not heard any evidence that Mr Qadir was involved in any lending of bank money for such mortgages. Yet the *Mail on Sunday* had, in the June article, not reported these statements by Judge Beddoe. The article had said: 'It is understood that Qadir made no lending decisions at either bank linked to the Dunlop Haywards case'. But, Mr Justice Tugendhat said, this sentence was 'notably less fair to Mr Qadir' than inclusion of Judge Beddoe's statements would have been. 'What is important in this case is that Judge Beddoe stated that he had heard evidence in the case, and stated very clearly that Mr Qadir had not lent any money, and that there was no suggestion in any of the evidence he had heard that any of those who had lent were complicit with any of the conspirators in the fraud.' Mr Justice Tugendhat said he ruled therefore that the June article in its reporting of the Southwark Crown court hearing was not fair or accurate, and so was not protected under the 1996 Act by absolute privilege in respect of contemporaneous publication or by qualified privilege in respect of non-contemporaneous publication online.

He ruled that another reason why such qualified privilege did not apply was because the reporting, because of the omission of these statements by Judge Beddoe, 'was not for the public's benefit'. Mr Justice Tugendhat also ruled that Simon Watkins, Deputy Editor of the *Financial Mail on Sunday*, who wrote this June article, was in it 'deliberately publishing a report that was unfair to Mr Qadir in omitting to attribute to the judge [Beddoe] the statement that "Mr Qadir did not lend any money"'. Mr Justice Tugendhat said that Mr Qadir's claim that the June article was published with malice succeeded. The *Mail on Sunday* did not have a reporter at the Southwark Crown court hearing. But Mr Justice Tugendhat said that Mr Watkins had seen a report alluding to Judge Beddoe's statements.

Mr Justice Tugendhat also ruled that common law privilege - law explained in the Additional Material for chapter 22 on www.mcnaes.com - did not apply to either article.

His judgement is *Irfan Qadir v Associated Newspapers Ltd* [2012] EWHC 2606 (QB). It can be read in full at <http://www.bailii.org/ew/cases/EWHC/QB/2012/2606.html>

Damages paid

In 2013 Mr Qadir accepted 'substantial' damages and a public apology from Associated, made at the High Court, over the *Mail on Sunday's* articles. Solicitor Mark Dennis, for Associated, said it offered its apologies to Mr Qadir for the distress and embarrassment caused (*Media Lawyer*, 31 January 2013).

**Footnote:* At the time of Mr Qadir's action against the *Mail on Sunday* the relevant wording in the 1996 Act was 'of public concern'. The wording was changed to 'of public interest' by provision in the Defamation Act 2013 to amend parts of the 1996 Act. The change from 'concern' to 'interest' does not signify a change of meaning but a harmonisation in use of terms in the Act.

What lessons can be drawn from *Irfan Qadir v Associated Newspapers*?

The case illustrates the care journalists need to exercise if they report on a civil case by using documents obtained through an inspection right in the Civil Procedure Rules (CPR) or obtained because the judge exercises discretion to release the documents to the media.

Remember that, as regards an ongoing case, rule 5.4C says that a journalist should only be allowed to inspect the 'statement of case' if the defendant has indicated, by filing an 'acknowledgement of service', that a defence will be filed, or if it has already been filed.

So, such reporting should always make clear that the case is going to be defended. Also, if a defence has been filed by the time the report is prepared, the report should include sufficient detail, including from those defence documents, to ensure that what is published is fair and accurate overall as regards the contents of documents open to inspection, and is therefore protected by qualified privilege.

As noted above, rulings made by Mr Justice Tugendhat in the *Qadir* case concerned whether qualified privilege in paragraph 5 of Part 1 of schedule 1 of the Defamation Act 1996 applied. As 22.7.2.4 in *McNae's* explains, this paragraph bestows such privilege on publication of a 'fair and accurate' copy of or 'extract' of any document required by law to be open to public inspection. The CPR, as explained in 15.13.4.2 in *McNae's*, set out what these documents are as regards civil court cases in England and Wales (though the provision of qualified privilege by the 1996 Act schedule to reports based on court documents open to inspection by law applies irrespective of where in the world the court is based). Mr Justice Tugendhat said that if a court granted a journalist access to any other case document - that is, when the court was not required by an inspection right to do so - a report based on it would need to rely on qualified privilege bestowed by the schedule in its paragraph 10. This can protect reports based on documents 'made available' by a court, a definition which is wider than the categories of court documents 'open to public inspection' covered by paragraph 5. Paragraph 10 is in Part 2 of the schedule. Mr Justice Tugendhat said: 'Where para 10 applies, the qualified privilege is subject to the claimant [that is, the claimant in a defamation action over what was published] having been given the right to ask for opportunity to contradict or explain the document.' What Part 2 of the schedule specifies about publication of contradiction or explanation is explained in 22.7.1 in *McNae's*.

It may be that some legal experts would challenge the view that material published from documents 'made available' enjoys qualified privilege under Part 2 and not Part 1 of the schedule. For example, if – to report a civil case fairly and accurately – the media needs to quote from a document not covered by an inspection right, and the judge agrees there is such need, and so releases the document to the media, then arguably the document has to be deemed part of the court's public proceedings. The media has qualified privilege under paragraph 2 of Part 1 of the schedule to report a court's public proceedings, with no requirement to publish 'explanation or contradiction' from anyone defamed by the report, if the defence's requirements are met. Also, 'a report of the public proceedings' of a court is, if fair and accurate and reported contemporaneously, covered by absolute privilege bestowed by section 14 of the 1996 Act. Also, as noted in 15.13.1 in *McNae's*, the ruling in *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates Court*, [2012] EWCA Civ 420 was a landmark victory for the media. That ruling established a presumption in law that journalists covering hearings in all types of courts should be able to see case material, to aid that coverage.

The usual meaning of 'proceedings' is what is said orally in court. But in May 2014 Hugh Tomlinson QC wrote on the Infirm blog: 'The statutory reference to a 'report of proceedings in public' should, in my view, be interpreted as covering a report of not just oral evidence and argument but also evidence and argument put before the Court in writing'. But, he said, the issue does not appear to have been decided in any libel case.

The news media should bear in mind that privilege defences for the reporting of court cases do not extend to extraneous material intermingled with or added to such reports. Therefore, when reports of a court case are based on case documents required by law to be open to inspection or 'made available' by a court, care must be taken not to create any defamatory effect by inclusion of comments on the case by the parties in it, or by including any statement that they refused to comment, unless another defence in defamation law applies to protect the publication of the extraneous material, or other provision in the 1996 Act bestows privilege.

15.13.4.5 Skeleton arguments

As 15.13.4.5 in *McNae's* says, it is now accepted by judges that journalists covering civil cases should normally be given copies of the skeleton arguments which barristers submit to a court in advance of a hearing and which explain the detail of the claim, the legal argument, and the cases they intend to cite as authorities supporting their submissions.

In 2011 barristers acting for H M Revenue and Customs in a case involving the Football League's rules on insolvency of football clubs refused to give journalists copies of the skeleton arguments they had submitted to the court, arguing that they were confidential documents. But the judge in the case, Mr Justice David Richards told Gregory Mitchell QC, for HMRC: 'They are not confidential documents.' He added: 'You can do whatever you like with your skeleton arguments. You can post them on a website. Whatever you want.' He said: 'I would suggest that you do supply copies of skeletons to the press' (*Media Lawyer*, 30 November 2011)

In 2008 Mr Justice Eady ordered that journalist and legal observer Benjamin Pell should be given copies of skeleton arguments put into court as part of an unsuccessful application to stop Channel 4 broadcasting a programme about former SAS officer Simon Mann, who was at that time being held in Equatorial Guinea on charges of leading a coup attempt intended to overthrow the country's government. But Mr Justice Eady said the parties did have the right to redact confidential material from the documents (*Media Lawyer*, 4 April 2008).

For journalists' rights to see skeleton arguments used in criminal cases, see 15.13.2 in *McNae's*.

15.13.4.6 Judgments and orders

Case study: Mr Justice Jacob said in the Chancery Division in January 1998 that, with very rare exceptions and even when a hearing was in private, no judgment could be regarded as a secret document (*Forbes v Smith* [1998] 1 All ER 973).

Public register of monetary judgments, orders and fines

A public register shows whether a person or business has had a county court or High Court monetary judgment made against him/her/it if the sum was not paid within the required timescale. The register also shows if the sum is recorded as having being paid later or as still unpaid. This information stays on the register for six years. It is run by the Registry Trust and can be searched online by name and address. Not all High Court judgments are shown. See Useful Websites, below, for more detail of the register.

The register includes records of:

- fines which were not paid quickly, or which remain unpaid, after being imposed in criminal cases by magistrates' courts or Crown courts;
- Child Support Agency liability orders—see in the extended version of ch. 14 on www.mcnaes.com: 'Types of case in family courts'
- tribunals' 'enforced' awards—sums owed after a tribunal has ordered them to be paid, e.g. after a successful claim at an employment tribunal. Ch. 18 in *McNae's* covers tribunals.

As this register is open to public inspection, a fair and accurate report of matter on it is protected from a libel action by qualified privilege if all the requirements of the defence are met—see 22.7.2.4 in *McNae's*. Take care to understand what the register shows.

Useful Websites

<https://www.cps.gov.uk/legal-guidance/socpa-agreements-note-those-representing-assisting-offenders>

Crown Prosecution Service guidance on sentence reviews – updated in 2016

<https://www.cps.gov.uk/legal-guidance/queens-evidence-immunities-undertakings-and-agreements-under-serious-organised-crime>

Crown Prosecution Service guidance on sentence reviews

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228860/8194.pdf

Justice and Security Green Paper

www.thejournal.co.uk/news/north-east-news/el-hadji-diouf-agrees-out-of-court-4431319

Journal story on the Newcastle county court case involving footballer El Hadji Diouf

<http://www.bailii.org/ew/cases/EWHC/QB/2012/2606.html>

Irfan Qadir v Associated Newspapers Ltd judgment

www.trustonline.org.uk/about-us/

Registry Trust public register