

‘Sunlight [as] the best of disinfectants’?¹

John Anderson²

Mersey Care NHS Trust v Ackroyd

Court of Appeal; Sir Anthony Clarke MR, Lord Neuberger of Abbotsbury and Leveson LJ
[2007] EWCA Civ 101 (‘Ackroyd’)

Introduction

The report opens with the sentence, ‘[t]his is a most unusual case.’ It is the submission of this writer that only this circumstance can justify the result. The result is itself in any event doubtful.

The Facts

B is a patient of Ashworth Hospital, a hospital for those detained under the Mental Health Act 1983 and who require treatment under conditions of special security on account of their dangerous, violent or criminal propensities.

A is an investigative journalist. In 1999, A was passed some of B’s medical records by a source whose identity A wished to keep secret. Some of this material - which related to complaints by B of mistreatment during a ward move and the Hospital’s response to a hunger strike undertaken by B in protest - was later published by the Mirror (‘MGN’). The Hospital sued MGN, seeking an order that MGN reveal the source of the material. After much litigation culminating in a visit to the House of Lords³ in June 2002, MGN was ordered to identify its source. It did so, naming A. As A was not the source of the ‘leak’ from the Hospital, but the person to whom the leak had been made, this advanced the Hospital’s desire to identify the source of the leak no further. The Hospital then sued A, seeking an order that A, in turn, reveal his source.

After an initial success on a summary application (in the light of the outcome of the case against MGN) overturned on appeal⁴, the Hospital failed, both before Tugendhat J at first instance⁵ in 2006 and on appeal in 2007.

Two Questions

The first question will be, *why did the Hospital fail?*

The second question will be, *should the Hospital have failed?*

However, it is first necessary to set out the relevant legal context of the claim for disclosure and the relevant findings of fact.

1 To borrow from and adapt Judge Louis Brandeis of the United States Supreme Court writing extra-judicially in ‘Other People’s Money and How the Bankers Use It’ (1933), cited, albeit in Lord Bingham’s reformulation from *R v Shayler* [2003] 1 AC 247 in *Ackroyd* at para. 31. All paragraph references are, unless otherwise stated, references to the judgement of the Court of Appeal in *Ackroyd*.

2 *Solicitor, Eversheds (Newcastle upon Tyne)*

3 The Court of Appeal decision is reported at [2002] 1 WLR 515 and that of the House of Lords ([2002] UKHL 29) at [2002] 1 WLR 2033 each as *Ashworth Hospital Authority v MGN Ltd* (‘Ashworth’)

4 ‘Ackroyd’ [2003] EWCA Civ 663

5 ‘Ackroyd’ [2006] EWHC 107 (QB)

The Legal Context

There was never any doubt as a matter of domestic law that A could be ordered to disclose his source, as had MGN been, if wrongdoing – the threshold requirement for the disclosure sought – on the part of the unnamed source was found⁶.

This the trial judge did find, as it might readily be inferred that whoever had disclosed the records, whether or not employed by the Hospital, had been in possession of those records only subject to obligations of confidentiality owed to both B and the Hospital, obligations necessarily breached by the disclosure without the consent of each.

Whatever had been B's attitude to the disclosure at different times, the Hospital had never consented to that disclosure. Furthermore, the source, whoever he was, was found not to have had any public interest defence or justification for the disclosure.

That the information might be said to be of interest to the readers of the Mirror did not mean that it was in the public interest to disclose it. It did not relate to serious misconduct or otherwise to a matter disclosure of which was important to safeguard public welfare or anything of comparable importance.

Nor were there identified any material differences between that purely domestic legislation⁷ that had governed the initial stages of 'Ashworth' and the Human Rights Act 1998, which had come into force in 2000 (by which the European Convention on Human Rights⁸ had been incorporated into domestic law) and which governed the proceedings (the balance of 'Ashworth' and the whole of 'Ackroyd') thereafter.

So, the Hospital succeeded in establishing (i) that there had been wrongdoing in the form of a breach of confidence (ii) that could not be justified by the anonymous source on public interest grounds.

Yet it still did not obtain an order against A in the second set of proceedings that he disclose his source.

Comment

Why did the Hospital fail?

A claimed that his Article 10 rights would be infringed if he were ordered to disclose his source.

Article 10 provides that everyone has the right to freedom of expression⁹ (including the freedom to receive and impart information without interference by public authority), a freedom which can be made subject to such restrictions only as are prescribed by law and are necessary in a democratic society for, amongst other things, preventing the disclosure of confidential information.

The ability of a journalist to maintain the anonymity of his sources is accepted to be a manifestation of this right, in which the public has a vital interest.

As a general proposition, case law¹⁰ has now established, to use the present formulation, (a) that the necessity for any restriction on the freedom of expression must be convincingly established as 'a pressing social need'¹¹ and (b) that the imposition of the restriction – for which sufficient and relevant reasons

6 *In this respect, the case was merely an example of the jurisdiction conferred upon the Court by Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133.

7 *Contempt of Court Act 1981*

8 *References to 'Articles' are to the Articles of the Convention.*

9 *Usually wrongly called 'the right of free speech'.*

10 *cf X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 *under the Contempt of Court Act 1981 with 'Ashworth' itself for cases after the coming into force of the Human Rights Act 1998.*

11 *A phrase seemingly owing its provenance in the domestic law context to the judgement of Laws LJ in 'Ashworth'.*

must be advanced – should be proportionate to the legitimate aim being pursued, which here would be the preservation of confidence.

In both 'Ashworth' and 'Ackroyd', it was established that the protection of the confidentiality of patient records was a legitimate aim of the Hospital, in principle fulfilling a pressing social need and both necessary and proportionate.

In the former case the Hospital succeeded but in the latter case it failed.

Essentially, this was because when at first instance in 'Ackroyd' the balancing exercise came to be made between (i) A's freedom of expression and (ii) the Hospital's domestic law and Article 8 right to privacy, matters looked different to the Court than they had on appeal in 'Ashworth'.

On appeal in 'Ackroyd', the Court was unwilling to interfere with the outcome of the balancing exercise between different factors on a question of law 'heavily fact-dependant and value-laden'¹² that had been reached at first instance.

It was no longer believed, as had been the case in 'Ashworth', that the source had been paid for the information that had been disclosed. That was something as to which A, whose evidence was necessarily not available in 'Ashworth', could give evidence, which the Hospital did not challenge. This was felt to make the risk of repetition somewhat less.

The passage of time alone was also thought to argue against disclosure. Staff turnover at the Hospital since the date of the disclosure meant both (a) that the chances of identifying the source as a current employee who might be disciplined or dismissed had reduced and (b) that what was described as the 'cloud of suspicion' hanging over all of the Hospital's employees as result of the source not having been identified, had largely dissipated, principally by that passage of time.

The risk of further disclosure was also felt to be substantially less because of changes to working practices and procedures that had been introduced since the original leak.

Further factors that weighed in the balance included that the Hospital in particular, as well as other institutions of its nature in general, had a bad record when it came to scandals disclosed by earlier journalistic reports of wrongdoing based on leaks and that A has a good record of serious and responsible investigative journalism.

Again, the nature of the information leaked, was not felt to be highly sensitive - it did not, for example, disclose details of the medical treatment to which B was subject other than the lawful and publicly acknowledged force-feeding regime imposed on B by the Hospital. In 'Ackroyd' the Court knew more about what had actually been disclosed than did the court in 'Ashworth'.

All in all, therefore, Tugendhat J felt that the Hospital had not convincingly established a present pressing social need for disclosure. Such an order would not be proportionate in the pursuit of the Hospital's legitimate aim to seek redress against the source in respect of disclosure of confidential information of the sort disclosed when balanced against the vital public interest in the protection of a journalist's source¹³.

The Court of Appeal *was* concerned, however, by the consideration that both the Hospital and all the judges who had considered 'Ashworth' had been labouring under the false apprehension that an order for disclosure would reveal the name of the source.

¹² Para 35.

¹³ Endorsed by the Court of Appeal as a conclusion to which the judge had been entitled to come at para 85.

MGN had of course all along known that it would not and that all it would disclose would be the name of A, who would have and could assert (as he did) his own Article 10 rights.

The Court of Appeal could see that had that fact been known, no appeal would have been allowed from the first instance disclosure order in 'Ashworth' and that the trial and appeal in 'Ackroyd' would not then have been delayed by 5 years.

This is a significant point, as the fact of delay caused factors to enter the scales against the Hospital that would not otherwise have weighed against it. It is of course not possible to say that the result would have been different but for the delay but that delay, which was not the consequence of anything for which the party suffering the wrongdoing was responsible, counted against it.

That this should be so seems wrong, although the likelihood of repetition is discounted by the Court's suggestion¹⁴ that in future a failure by an editor to confirm that his source is not a journalist with Article 10 rights should result in an application for summary judgement against the editor for disclosure of the journalist's name by the person seeking to uphold the confidence.

Of course, should the editor confirm his source as a journalist, a summary disposal of the application against the editor is also likely.

Should the Hospital have failed?

It has been said¹⁵ (1) that neither Article 8 (privacy) nor Article 10 (freedom of expression) has priority over the other; (2) that when they are in conflict, an 'intense focus' on the comparative importance of the specific rights being claimed in the individual case is necessary; (3) that the justifications for interfering with, or restricting, each must be taken into account; and (4) that the test of proportionality must be applied to each right – collectively, this is called the 'ultimate balancing test'.

It is at least highly arguable that applying this ultimate balancing test should have resulted in a different outcome in 'Ackroyd'.

It is hard to imagine information that should enjoy a higher degree of confidentiality than medical and other hospital records relating to the treatment of patients like B.

The maintenance of full records, while critical to all proper medical practice, is surely more vital still where they will contain a range of material covering the whole treatment and therapeutic regime to which such a patient may be subject.

Those records may very well contain material consisting of opinions and observations falling outside the range of medication applied and symptoms, strictly defined, observed.

They may extend to observations of patient mood changes, word repetition and other behavioural patterns, the changing dynamics of interaction between patient and staff and indeed other patients, all of which may be critical to treatment and other decisions directly impacting upon safety, for patient and third party alike.

Any development in the law which, however indirectly, discourages frankness and full recording in such records is to be deplored. Nothing is more likely to lead to the next 'scandal' of harm caused because 'the signs were missed' because they were not recorded or their significance not understood by those who discharge the obligation of care uninformed by comprehensive past experience of this particular patient.

A hospital does not have a collective consciousness.

¹⁴ At para 90.

¹⁵ per Lord Steyn in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (cited at para 29)

Much was said in the case about the 'chilling effect' on journalism should sources be named. What about the potential effect of a failure to maintain full records to the potential prejudice of the safety of patient and staff alike because the risk of disclosure causes staff to self-edit what they record? One can imagine the headlines in the Mirror now.

Set against this vital public Article 8 and domestic law interest, can one really say that A's Article 10 right was comparably more important? Applied to the facts, the answer is, in my submission, plainly not.

One of the reasons for not ordering disclosure was that part of what had been disclosed was about the non-medical aspects of a move between wards during which B alleged, it was found not without foundation, that he had suffered mistreatment.

Granted that such mistreatment is of itself capable of being a matter of legitimate public interest about which there can and should be free discussion, there never was any question of that matter being in any way suppressed, either in terms of B's remedy (he instructed solicitors to sue the Hospital) or about the allegations about mistreatment becoming public. B was always free to make the allegations of mistreatment directly by letters to the press and through intermediaries, which he did.

Where is the critical interest here then, in the public learning through disclosure of what is confidential about a matter (the alleged mistreatment) in which there is legitimate concern but of which, but for which disclosure, they would not know? There is clearly no such matter, as the matter was public knowledge and no attempt had been made to suppress it.

By contrast, the other aspects of what was disclosed consisted of edited extracts of a 'diary' maintained, amongst other things, to record B's reaction to the regime of force-feeding to which he was subject against his will, a regime that can hardly be described as secret, as its lawfulness is the subject of a reported legal decision¹⁶.

This material is of precisely that sort that may be critical to maintaining a doctor/patient relationship and a safe system of work for patients and staff alike and no focus, intense or otherwise, on the respective importance of the conflicting rights of confidentiality and freedom of expression, with proportionality applied to the potential restriction of each right, seems to the writer to lead to a conclusion that the source should not be named. The 'pressing social need' is that he should be named.

This result would seem perfectly just, as far as the source is concerned. The source was found to have been in breach of an obligation of confidence, however derived, and to have had no legitimate public interest defence to have made the disclosure.

The protection conferred by the decision on the wrongdoer by the side wind of protecting the public's right to know by one means (breach of confidentiality) partly that (the alleged mistreatment in the ward transfer) which it would come to know anyway through another means (B's right to make free complaint) and partly that (the 'diary') in which it has no legitimate interest outweighing the need for confidentiality, seems hard to justify.

Conclusion

There is very little to be said for a result which, even with all of the various statutory and other safeguards of the rights of patients such as B, tends to the encouragement of the leaking of medical records, a fortiori where the records in question will necessarily, or ought to, cover matters of a kind not merely pharmaceutical.

It is that within the material that excites curiosity and prurience that justifies its confidentiality.

¹⁶ *R(Brady) v Ashworth Hospital Authority* [2000] Lloyd's Med R 355.