

RE S (MINORS) (WARDSHIP: DISCLOSURE OF MATERIAL)

Family Division

Booth J

16 December 1986

Wardship – Duty of court to protect wards – Public interest – Police seeking access to medical records, video recordings and local authority case records with regard to children allegedly subjected to sexual abuse – Whether leave of court required for disclosure of material for criminal investigations – Different categories of material – Criteria for grant of leave

In wardship proceedings the wardship of four children had been continued and the wards had been committed to the care of the local authority. Leave had been given for the local authority to take the wards to the Great Ormond Street Hospital for Sick Children for interview and examination by the sexual abuse team. The findings of that team confirmed the likelihood that some if not all of the children had been sexually abused. This matter became the subject of investigation by the police, who sought leave of the court for the disclosure to them of (1) medical records, and (2) video recordings made at the hospital during diagnostic interviews. The police also sought leave to interview the children and have them medically examined. Directions were also sought with regard to inspection by the police of the local authority's case records.

Since a conflict might have arisen between the interests of the police to investigate crime and of the children for whom the local authority was responsible, the judge directed that the police should be separately represented. Notice of the application to seek leave for the disclosure of the material was given neither to the mother of the children nor to her cohabitee. In respect of the latter there had been evidence which strongly suggested that he had sexually abused the children. The police believed that prior knowledge by them of the application could be prejudicial to the outcome of their investigations. The application proceeded in their absence.

Held –

(1) Having regard to the nature of the application the police were justified in not serving notice of the application on the mother and her cohabitee. Furthermore, it was proper to proceed with the application in their absence on two grounds: first, because they were not directly concerned with the application as the protection of the children's interests was now primarily a matter for the local authority to whose care they had been committed, and secondly, proceeding in their absence was justified because of the possible prejudice to the police.

(2) When the wardship jurisdiction was invoked and exercised the court retained its duty to protect the interests of the wards for the duration of the wardship and did not divest itself of that duty by committing them to the care of the local authority or to the care and control of one or more of the parties. For that reason, it was necessary to seek directions from the court whenever it was proposed to take a major step in the lives of the wards. The disclosure to the police of the medical records and video recordings held by the hospital was of considerable importance in their lives and therefore required the leave of the court. Similarly, if the police wished to interview the wards or have them medically examined, the leave of the court had to be given beforehand. The judge had an unfettered discretion to grant or refuse such applications and in making that decision he had to balance the court's duty to protect the ward against the public interest which required that no obstacle be placed in the way of the police in the course of their criminal investigations. The

likely outcome of granting these types of applications and its effect upon a particular ward had to be considered in every case. However, when balanced against the public interest it could only be in exceptional circumstances that the interests of the individual ward should prevail. In this case, although the results might be far-reaching and unpleasant for the wards, their interests were secondary to the greater public need and leave would be given for the disclosure of the medical records and video recordings. Leave would also be given to the police to interview them and, if necessary, to have them medically examined.

(3) The case records of the local authority fell into a different category from the other material. First, they were not prepared for legal proceedings and, secondly, these were confidential documents which, as a general rule, were privileged from disclosure in court. Therefore, since the court could not compel their disclosure it would not seem appropriate for it to exercise any control over them. It was for the local authority to determine whether or not to allow the police access to them. However, if the police or any other body by reason of having had access to them wished to take steps directly affecting the wards, leave of the court would be required.

(4) Where extracts from the case records of a local authority were exhibited to an affidavit and used in evidence, the extracts constituted 'information relating to proceedings' within the meaning of s. 12(1) of the Administration of Justice Act 1960 and therefore the leave of the court was required for their publication. The court, in determining whether to give leave, had to apply the same approach as that which applied to medical records and video recordings. Leave would be given in this case for the same reasons.

(5) Case records which did not form part of the evidence, but upon which the evidence was based continued to be protected by public interest immunity. Since their confidentiality could not be considered to have been waived simply by being used as the basis of evidence, those records did not fall within the ambit of s. 12 of the 1960 Act and therefore did not require the leave of the court for their publication.

Note

The police withdrew an application to see the affidavits and any transcripts of the oral evidence called in the wardship proceedings. Nor did they seek the disclosure of documents which had at any time been in the possession or control of the mother or her cohabitee.

Statutory provision considered

Administration of Justice Act 1960, s. 12

Cases referred to in judgment

D (Infants), Re [1970] 1 WLR 599; [1970] 1 All ER 1088; 134 JP 387; 114 SJ 188, CA

D v NSPCC [1978] AC 171; [1977] 1 All ER 589, HL

G-U (A Minor) (Wardship), Re [1984] FLR 811, FD

R (MJ) (A Minor) (Publication of Transcript), Re [1975] Fam. 89, FD

Scott v Scott [1913] AC 417; 82 LJP 74; 109 LT 1; 29 TLR 520; 57 SJ 498, PC

S and W (Minors), Re (1982) 12 Fam. Law 151

Y (A Minor) (Child in Care: Access), Re [1976] Fam. 125; [1975] 3 All ER 348, CA

Patricia May for the police;

Barbara Slomnicka for the local authority.

BOOTH J:

On 29 October 1985, I made an order dealing with the longterm future of four wards of court, two boys aged 8 and 5, and two girls one of whom is nearly 4 and the other is 2. The plaintiffs in the proceed-

ings are the London Borough of Camden. The mother is the first defendant and her former cohabitee, who is the father of the youngest child, is the second defendant. I will refer to him as Mr D. By my order I confirmed the wardship and committed all the wards to the care of the local authority with leave for them to be placed with long-term foster-parents with a view to adoption. I terminated access by the mother and Mr D.

During the course of a long hearing some evidence was given by the local authority's social workers which strongly suggested that the wards had been subjected to sexual abuse by Mr D. In view of that, at the conclusion of the hearing I gave leave to the plaintiffs to take the wards to Great Ormond Street Hospital for Sick Children for interview and examination by the specialist team working with sexually abused children. The findings of this team have confirmed the likelihood that some, if not all, of the wards have indeed been so abused and this matter is now the subject of investigation by the Metropolitan Police.

It is against that background that counsel instructed on behalf of the Metropolitan Police Commissioner has sought the leave of the court for the disclosure to the police of medical records and video recordings made in consequence of my order at diagnostic interviews with the children at Great Ormond Street Hospital and for leave for the police to interview the children and subject them to medical examinations. Counsel also seeks directions with regard to inspection by the police of the plaintiff local authority's case records which are relevant to this issue and which may be of some assistance to their inquiry. The summons also asked that all documents in the wardship proceedings be disclosed to the police but that request has not been pursued.

The application was first made on behalf of the police by the plaintiff local authority without notice to the mother or Mr D. Quite apart from the question whether or not the mother and Mr D should be informed, I took the view that in the circumstances it was not a proper step for the plaintiffs to take since a conflict might arise between the interests of the police and those of the wards for whom, by my order, the plaintiffs were responsible. I further indicated that I wished to hear legal argument with regard to this application.

Accordingly, I directed that the police should be separately represented for this purpose, as is now the case. Their application is, however, supported by the plaintiffs, save in so far as it relates to having the wards further medically examined, as to which some concern is now expressed as to whether it is in the best interests of the wards.

Notice of this application has not been given either to the mother or Mr D. The police have at all times been anxious that they should not be given prior knowledge of the intended investigations as they believe that this could be prejudicial to their final outcome. Having regard to the nature of the relief sought, I consider this to be a proper course to take. The police do not now ask to see any affidavits or any transcript of the oral evidence before the court, nor do they seek the disclosure of any documents which have at any time been in the possession or control of either the mother or Mr D.

So far as the wards are concerned the protection of their interests is now primarily a matter for the local authority to whose care they have been committed. So it seemed to me that neither the mother nor Mr D were

directly concerned with the subject matter of this application and that in view of the possible prejudice to the police investigations, were they to be involved, it was proper to proceed in their absence.

In so far as the police desire to see the medical records and video recordings held by Great Ormond Street Hospital, in my judgment leave of the court is first required, despite the fact that such records and recordings only came into existence after the conclusion of the wardship hearing.

When the wardship jurisdiction is invoked and exercised the court retains its duty to protect the interests of the ward for the duration of the wardship and does not divest itself of that duty by committing the ward to the care and control of one or more of the parties or, as in this case, to the care of the local authority: see in *Re Y (A Minor) (Child in Care: Access)* [1976] Fam. 125, CA; *Re G-U (A Minor) (Wardship)* [1984] FLR 811. So it is still necessary to seek directions from the court whenever it is proposed to take a major step in the lives of the ward.

In my judgment, the disclosure to the police of the medical records and recordings for the purpose of criminal investigations falls into this category of decision and is a matter outside the scope of a party to whose care the ward is committed. The decision is not a matter which arises in the day-to-day care of the ward and the effect of granting the application could be far-reaching. Indeed, the result of it could lead to the direct involvement of the ward in criminal proceedings, a fact which could be regarded as detrimental to his or her interests. It is, therefore, clearly a step of considerable importance in the life of any child.

Similarly, if the police are to interview and conduct medical examinations of the wards then leave of the court must first be given. Such medical examinations do not have a therapeutic purpose, but a forensic purpose, and, as in the case of the disclosure of the medical records and the video recordings, they may lead to the wards' direct involvement in subsequent proceedings. But if leave is given for the disclosure of those records and video recordings it seems to me that it must follow that leave must also be given to the police to conduct interviews with and, if necessary, examinations of, the wards. Having enabled the police to start upon an enquiry it would not be realistic, save in exceptional and presently unforeseen circumstances, to impose such limits upon them.

A judge dealing with an application such as is now made by the police has an unfettered discretion to grant or to refuse it: per Rees J in *Re R (MJ) (A Minor) (Publication of Transcript)* [1975] Fam. 89, at p. 98.

In this case it is a matter of balancing the interests of the four young children who are the wards against the public interest that requires that no obstacle be placed in the way of the police in the course of their criminal investigations. From the wards' point of view, they have already been subjected to disturbed and unsettled lives during the course of which some, if not all, have been sexually abused. The elder children are undoubtedly able to remember a good deal of what has taken place and their memories cannot be healthy or pleasant. The process of healing those wounds, in so far as they can be healed, has only just begun. If the wards are now to be subjected to renewed questioning and examination it seems to me, as a matter of common sense, that it could lead to further distress and unhappiness which would be compounded were they to be called to give evidence in criminal proceedings.

I accept the assurance of the police that all necessary procedures would be carried out with the least possible inconvenience and distress to the wards and with their welfare in mind. It has been made clear that medical examinations would be conducted only when they were clearly shown to be necessary by reason of the other information in the hands of the police. Nevertheless, I would be failing in my judicial duty to the wards were I not to consider that by granting the leave that is sought the likely outcome for them would be unhappy, if not, in a sense, detrimental. The court not only has a duty to protect its wards from potential harm, it also has a duty to uphold the public interest. Mrs May, on behalf of the Commissioner, has argued that public policy dictates that nothing should impede the police in carrying out their statutory duties or impede anyone from giving the police information in furtherance of their lawful enquiries.

I am told by Miss Slomnicka, counsel for the London Borough of Camden, that it is the invariable practice of the plaintiffs, and no doubt of many other local authorities, to invite representatives of the police to attend case conferences relating to the children in their care. This being so, information is available to the police from this source as to whether or not a criminal offence may have been committed.

In relation to those children who are not wards of court the police, with the co-operation of the local authority, are free to conduct such investigations as they think fit and they will, where necessary, have access to the case records made by the social workers.

The court, therefore, should be slow to interfere in this process in respect of its wards who are in local authority care. The protection afforded to a child by the exercise of the wardship jurisdiction should not be extended to the point where it gives protection to offenders against the law and, indeed, offenders against the wards themselves. The court must take into consideration, as a matter of public policy, the need to safeguard not only its wards but other children against the harm they may suffer as the result of recurring crimes by undetected criminals.

The likely outcome and its effects upon a ward of granting an application such as the police now make must be considered in each and every case. But when balanced against the competing public interest which requires the court to protect society from the perpetration of crime it could only be in exceptional circumstances that the interests of the individual ward should prevail.

In this case, although the results may be far-reaching and unpleasant for these young and damaged children, their interests are secondary to that greater public need. I am satisfied that on the facts this application is wholly justified and that the police should have the leave they seek in respect of the medical records and video recordings now in the possession of Great Ormond Street Hospital and that they should have leave to interview and, if necessary, medically examine the wards.

I turn now to the application which relates to the case records made in respect of the wards by the local authority. The police ask for access to those documents. They do not ask to see the evidence filed by the plaintiffs in the wardship proceedings. Nevertheless, much of that evidence, particularly that of the social workers, was based upon information contained in the records. In one instance an extract from the case records relating to allegations made by the children to their foster-mother and to the social

worker, was exhibited to an affidavit which was before the court. As a result, if the police have access to the case records then they will come to know a good deal of the information which was placed by way of evidence before the court. The local authority are willing that this should be so, but in the circumstances they seek directions as to whether or not the leave of the court is first required.

Section 12 of the Administration of Justice Act 1960 precludes the publication of information relating to proceedings in private. The relevant part of that section reads as follows:

‘(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say –

- (a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant.’

It is well established that the court has an absolute discretion to give leave in a proper case to publish such information relating to proceedings: see *Re R (MJ) (A Minor)* (above). Thus, if it is desired to disclose evidence placed before the court in such proceedings, leave is undoubtedly necessary. In this case the first question I have to determine is whether the words in the section ‘information relating to proceedings’ should be construed to cover documents which do not themselves form part of the evidence but which contain information upon which evidence was based.

The general rule that the court sits in private in wardship proceedings was evolved to guard the interests of the ward: see per Viscount Haldane LC in *Scott v Scott* [1913] AC 417, at p. 437. Equally, the statutory prohibition against publication of information relating to such proceedings must be deemed to have been enacted for the protection of the child.

I have not heard argument from the Bar as to the construction of this subsection but if the court is to fulfil its duty to protect a child then the words ‘information relating to proceedings’ must not bear too narrow a meaning. In the context of a case such as this the statute would preclude publication of the evidence presented to the court and, in my judgment, this would extend to statements prepared by a party or a witness for the purpose of such proceedings. If this were not to be the case the intention of the legislature could be thwarted by the publication of such statements upon the basis that they did not themselves constitute evidence before the court.

The case records of the social services department come within a different category. First, they are not records which are prepared for the purpose of legal proceedings: they are made by local authorities pursuant to a duty imposed upon them by the Boarding-Out of Children Regulations 1955 (SI 1955 No. 1377). Secondly, by reason of public interest, the confidentiality of case records is preserved and as a general rule they are privileged from disclosure in court: see *Re D (Infants)* [1970] 1 WLR 599, applied in *D v NSPCC* [1978] AC 171, 191, HL. This is the application of the principle now known as public interest immunity.

In those circumstances, since it cannot compel the disclosure of those

records, it would not seem appropriate for the court to seek to exercise any control over them and to make them the subject matter of any directions. If this is so, then in this case the local authority must be free to determine whether or not to allow the police access to them.

Again, this is not a matter upon which I have had full argument from the Bar. But I am satisfied that so far as the case records do not relate to matters which were placed in evidence before the court, there could be no basis upon which the court could, or should, give the local authority any directions as to their use. If, by reason of having had access to such records, the police or any other authorized agency or person then wishes to take steps directly affecting a ward, leave of the court will first be necessary.

I have been less clear as to the position with regard to those case records upon which evidence placed before the court was based, although they do not of themselves form part of that evidence. Undoubtedly, such records continue to be protected from disclosure by reason of the principle of public interest immunity: see *Re S and W (Minors)* (1982) 12 Fam. Law 151. Although the court has the statutory right and duty to protect a child by means of its control over information relating to proceedings heard in private, this must be balanced against the right of the local authority to preserve the confidentiality of its records and thereby to control access to them.

Since confidentiality in the records could not be considered to have been waived by reason only of the fact that they have been relied upon as the foundation for the social workers' evidence, I have come to the conclusion that those records also do not fall within the ambit of s. 12(1) of the 1960 Act. In fact, to come to the contrary decision could have the effect of placing an unrealistic fetter upon the local authority in the course of their day-to-day use of their records and it would also serve to draw a distinction between the records of those children in care who are wards and those who are not, which would be difficult to observe.

In my judgment, a distinction must be made with regard to the verbatim extract from the case records, which in this case was exhibited to an affidavit made by a social worker. This exhibit was disclosed and filed by the local authority as part of its evidence to the court. Confidentiality in respect of this part of the case records has clearly been waived.

The exhibit undoubtedly contains information relating to the proceedings since it constitutes a part of the evidence. I am satisfied that for this reason the extract of the case records comes within the ambit of s. 12(1) of the 1960 Act and that its publication is precluded without leave of the court. As to whether or not that leave should be given I must adopt the same approach as I have taken with regard to the medical records and video recordings, and for the same reasons I give leave for this extract from the local authority's case records to be made available to the police.

Solicitors: *F. Nickson & Co.* for the local authority;
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P.H.