RE M (CARE PROCEEDINGS: DISCLOSURE: HUMAN RIGHTS)

Family Division

Elizabeth Lawson QC (sitting as a deputy High Court judge)

16 July 2001

Care – Disclosure of confidential information – Parents admitting causing serious injury to child – Unauthorised disclosure of parents' admissions to police – No other evidence on which criminal prosecution could be sustained – Police seeking disclosure of evidence given in care proceedings – Whether disclosure should be ordered

The young child had suffered serious injuries consistent with shaking. The police investigated but were unable to identify the perpetrators. During the care proceedings, the mother wrote an account in which she admitted responsibility for the injuries, and both parents made further written statements. A social worker disclosed information about these documents to a case conference without leave of the court and the police were sent minutes of that meeting. The deputy High Court judge made an interim care order pending therapy and assessments to determine whether the child could safely be cared for by the parents. The Metropolitan Police Commissioner applied for disclosure of the mother's account, the written statements and such parts of the transcripts as were relevant to the causation hearings.

Held – refusing the application – in all the circumstances of the case, and taking account of the various factors set out in *Re C (A Minor) (Care Proceedings: Disclosure)*, a balance was tipped towards the importance of maintaining frankness and confidentiality, notwithstanding the serious nature of the offence and the countervailing public interest in the pursuit of crime and inter-agency co-operation.

Statutory provisions considered

Administration of Justice Act 1960, s 12(1)
Local Authority Social Services Act 1970, s 7
Children Act 1989, ss 27, 47, 98
Family Proceedings Rules 1991 (SI 1991/1247), rr 4.16(7), 4.23
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 6

Cases referred to in judgment

C (A Minor) (Care Proceedings: Disclosure), In re [1997] Fam 76, [1997] 2 WLR 322, *sub nom Re EC (Disclosure of Material)* [1996] 2 FLR 725, [1997] Fam Law 160, CA
Cleveland County Council v F [1995] 1 FLR 797, [1995] 1 WLR 785, [1995] 2 All ER 236, FD
G (Social Worker: Disclosure), Re [1996] 1 FLR 276, [1996] 1 WLR 1407, *sub nom Re G (A Minor) (Social Work Disclosure)* [1996] 2 All ER 65, CA
L (Police Investigation: Privilege), Re [1995] 1 FLR 999, CA
M (Disclosure), Re [1998] 1 FLR 734, CA
Oxfordshire County Council v P [1995] Fam 161, [1995] 1 FLR 552, [1995] 2 WLR 543, [1995] 2 All ER 225, FD
Saunders v United Kingdom (1996) 23 EHRR 313, [1998] 1 BCLC 362, ECHR
V and L (Sexual Abuse: Disclosure), Re [1999] 1 FLR 267, [1999] Fam Law 14, sub nom *Re L and V (Minors) (Sexual Abuse: Disclosure)* [1999] 1 WLR 299, CA

W (Disclosure to Police), Re [1998] 2 FLR 135, *sub nom W and Another (Minors) (Social Worker: Disclosure)* [1999] 1 WLR 205, [1998] 2 All ER 801, CA
W and Others (Wards) (Publication of Information), Re [1989] 1 FLR 246, FD

Cases cited but not referred to in judgment
Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 WLR 817, [2001] 2 All ER 97, *sub nom Procurator Fiscal, Dunfermline and Her Majesty's Advocate General for Scotland v Brown* [2001] UKHRR 333, PC
D (Minors) (Wardship: Disclosure), Re [1994] 1 FLR 346, CA
F (Minors) (Wardship: Police Investigation), Re [1989] Fam 18, [1988] 3 WLR 818, *sub nom F and Others (Wards) (Disclosure of Material)* [1989] 1 FLR 39, CA
Funke v France (1993) 16 EHRR 297, ECHR
L (A Minor) (Police Investigation: Privilege), Re [1997] AC 16, [1996] 2 WLR 395, [1996] 2 All ER 78, *sub nom Re L (Police Investigation: Privilege)* [1996] 1 FLR 731, HL
L (Care: Confidentiality), Re [1999] 1 FLR 165, [1999] Fam Law 81, FD
Practice Direction: Case Management [1995] 1 FLR 456, [1995] 1 WLR 262
R (MJ) (An Infant) (Proceedings Transcripts: Publication), Re [1975] Fam 89, [1975] WLR 978, [1975] 2 All ER 749, FD
R v Martin and White [1998] 2 Cr App R 385
R v Myers [1988] AC 124, [1997] 3 WLR 522, [1997] 4 All ER 314, HL
S County Council v B [2000] 2 FLR 161, FD
S (Minors) (Wardship: Police Investigation), Re [1987] Fam 199, [1987] 3 WLR 847, [1987] All ER 1086, *sub nom Re S (Minors) (Wardship: Disclosure of Material)* [1988] 1 FLR 1, FD
Vernon v Bosely (No 2) [1999] QB 18, [1998] 1 FLR 304, [1997] 3 WLR 683, [1997] 1 All ER 614, CA

Gordon Murdoch QC and *Heather MacGregor* for the mother
Gordon Murdoch QC and *June Venters* (Solicitor Advocate) for the father
Stephen Cobb for the local authority
Richard Alomo for the guardian ad litem
Jonathan Loades for the Metropolitan Police Commissioner

Cur adv vult

ELIZABETH LAWSON QC:
This is an application made by the Metropolitan Police Commissioner on 5 June to see what the application describes as a 'letter of admission' made by the mother in the course of care proceedings. The application was amended on 18 June to include the written statements filed in the proceedings by the parents, and such parts of the transcript as are relevant to the causation hearings, and the directions sought by the Metropolitan Police Commissioner are to give effect to that application.

The application is supported by the evidence of WPC Kay Toye, which appears to be dated 8 July although I think, from the actual chronology, it was probably made on 8 June.

The child in this case, K, was born on 11 January 2000. He was taken to hospital with an occipital fracture, bilateral chronic subdural haematomas and retinal haemorrhages on 25 July last year, caused, it was believed by the paediatricians, by some form of shaking impact injury. The hospital, therefore, in accordance with recognised procedures, notified both the police and social services departments. There was a strategy meeting between those

agencies, and the initial child protection case conference was held on 8 August. This was conducted as a police investigation, rather than a joint investigation, into offences of assault occasioning grievous bodily harm or malicious wounding on the baby K.

The police themselves obtained medical reports from the hospital and took statements from members of the family and neighbours. They took photographs and interviewed both parents, who denied knowing how K's injuries were caused.

Section E of this court bundle contains documents and statements taken by the police and which were made available by them to the Court in these proceedings. At E98 is found a summary of the point reached in the investigation by 24 and 25 October last year. This says:

> 'I have reviewed the progress of this investigation and the evidence obtained to date. In summary, there are non accidental injuries to the child which could have been inflicted at different times by different people at any time up to five weeks before admission to hospital. Both parents have been interviewed twice and claim they were not responsible for inflicting the injuries to K. They also claim that they have no knowledge of how or who caused the injuries. The paternal and maternal grandparents have provided statements as well as the other family members, who saw K during the week prior to his admission to hospital. No concerns were raised by any of these people as to K's wellbeing. To date we are left with the very unsatisfactory situation that K has undoubtedly suffered non accidental life threatening injuries, but owing to the time span over which they could have been caused it has not proved possible to identify the persons responsible for those injuries. All practicable police investigation has been undertaken to identify the persons responsible for causing these injuries. Unless further information or evidence becomes available no further police inquiries are to be made.'

That remained the situation when the causation hearing began before me on 26 February 2001. K had clearly sustained non-accidental injuries on more than one occasion. The injuries could have been caused by either parent and the view of the local authority was that if the parents maintained their denials the Court might be unable to be satisfied which of the two parents caused those injuries.

During the course of that hearing the mother wrote an account in which she admitted responsibility for K's injuries, and both parents made further written statements. It is those which are the subject of paras 1 and 2 of the Commissioner's application.

Counsel for the mother in the causation hearing made a strong application that having produced that written material the mother should not have to give oral evidence. I insisted that she did so, regarding her as a compellable witness by virtue of s 98 of the Children Act 1989. There were discrepancies between her statement and that of the father which, in fairness to him, needed to be clarified.

Information about the existence of these documents was disclosed to a case conference on 30 April by the social worker without leave of the court. The police were not at the conference but were sent minutes of the meeting.

It was those minutes which led to this application. The relevant passage on p 3 reads as follows:

> 'The Social Worker reported that on the second day of the hearing [the mother] presented a written letter confessing to causing the injuries to K. She did not tell anyone she was going to write it so [the father] was not aware of it. She said that during a period in June when [the father] was in hospital she felt overwhelmed. K was crying and she shook him until he sounded as though he was in pain. She did not tell anyone. She admitted to feeling unable to meet K's needs.
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> A second incident occurred in July when [the father] was wearing headphones. He was sitting with his back to her while she was trying to calm K down. She dropped him on the floor where he fell on his back. She told [the father] about this later on and went to work. They later noticed that K had become quieter than usual. They became anxious of the implications if they took him to the hospital, so took him to [the father]'s mother who checked him and asked questions. She advised them to take him to the hospital.
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> The Chair of the case conference asked the parents whether this was an accurate account and they both admitted that it was.'

The case conference then regarded that as encouraging and went on to look at the proposed care plan.

On 18 June the matter came back before me for consideration of what should happen to K in the light of those findings. By that stage there was substantial agreement between the parties about what care plan was in K's best interests, and the only real issue before me was whether or not that should be implemented under an interim care order or a full care order. In the event I made an interim care order while therapy takes place, and further assessments are made, to see whether K can safely (and again I emphasise the word 'safely') be cared for by his parents in the future. The final hearing of that matter is to take place in May 2002.

It is against that background that this application for disclosure is made. The basic regulatory framework protecting confidentiality is well established and admirably summarised in the submissions of Stephen Cobb for the local authority, which I have no hesitation in plagiarising. The starting point in relation to children's cases is r 4.16(7) of the Family Proceedings Rules 1991 which provides for these hearings to be in chambers. By s 12(1) of the Administration of Justice Act 1960 disclosure of information relating to proceedings in court sitting in private brought under the Children Act 1989 is prohibited and unauthorised disclosure is a contempt. Information relating to the proceedings have been held to extend to the evidence, proofs of witnesses, interviews, reports and advocates' submissions. That is the case of *Re W and Others (Wards) (Publication of Information)* [1989] 1 FLR 246.

By r 4.23 of the Family Proceedings Rules 1991 it is provided that no document other than a record of an order held by the court and relating to proceedings under the Children Act 1989 may be disclosed, other than to a specified class of persons, without leave of the judge or District Judge.

In addition, s 98 of the Children Act 1989 itself provides that in any proceedings in which a court is hearing an application for an order under Part 4 or 5, no person shall be excused from (a) giving evidence on any matter; or

(b) answering any question put to him in the course of his giving evidence on the ground that doing so might incriminate him or his spouse of an offence. And subs (2) provides that a statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse in proceedings for an offence other than perjury.

These are provisions intended by Parliament to protect the confidentiality and privacy of children and others engaged in proceedings about them, and are clearly intended to encourage frankness. Thus, it is on the person seeking disclosure to make out a positive case to justify breaching that code of confidentiality. The courts on a number of occasions have considered the countervailing considerations which would justify doing so.

All the parties are agreed that I have to exercise a discretion which involves balancing a number of considerations, some of which are in conflict with each other. In the case of *In Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, which is reported elsewhere as the case of *Re EC (Disclosure of Material)* [1996] 2 FLR 725, the court considered the considerations which apply. During the hearing of care proceedings in relation to a surviving child the father in that case apparently made admissions that he had caused the injuries to a younger child which resulted in her death. The surviving child was placed in care and, so far as appears from the reports, there was no question of rehabilitation between that child and her family. With the trial judge's leave the police were informed by a telephone call and letter by the local authority of the father's admission. As a result the police applied for the disclosure of the medical reports; the transcripts of the medical evidence, and the evidence of the parents and other members of the family in relation to causation. Wall J in a closely reasoned judgment gave leave to disclose the medical reports and transcript of the medical evidence. He refused leave to disclose the evidence given by the family, relying on s 98. This part of his decision was reversed by the Court of Appeal.

The judgment was given by Swinton-Thomas LJ, the only member of the court with any experience of the work of this Division. On p 85 starting at letter C he lists the considerations which the Court should take into account, the importance of which will vary from case to case. Considerations, numbers 1–4 and number 9, encompass the arguments against disclosure, and paras 5–8 the arguments in favour of it, together with para 10, depending on the circumstances of the case. It is unsurprising therefore that the argument for the Commissioner lays stress on the latter criteria and that of the parents on the former.

Before turning to those considerations in detail, I remind myself that these and other passages in the authorities are not statutory provisions, and that it is generally unwise to interpret them without regard to the facts of the case in which they were uttered.

The first consideration is, as one might expect, the welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way this will be a very important factor. In approaching this aspect of the case I was also referred to the passage in the judgment of Lord Bingham of Cornhill MR, in *Re L (Police Investigation: Privilege)* [1995] 1 FLR 999. The case itself went to the House of Lords but this passage was effectively approved. That was a case in which the mother, in interim care proceedings, had obtained an

expert's report which concluded that her explanation of how the child had swallowed methadone was inconsistent with the scientific findings. The police applied for the report, to assist in determining whether or not a crime had been committed. So far as it appears from the reports, no determination as to the cause of the child's injuries had been made in the care proceedings at the time when the matter fell to be considered. At 1019 Lord Bingham of Cornhill MR said:

> 'The authorities show that many factors are potentially relevant, depending on the facts, to the exercise of the discretion. Where material has come into existence in the course of proceedings to determine, whether in wardship or under the Children Act, how the welfare of a child will be best served, it is plain that consideration of the welfare of the child will be a major factor in the exercise of the discretion: if disclosure will promote the welfare of the child, it will readily be ordered; if disclosure will not affect the welfare of the child, other considerations are likely to carry the day one way or the other; if disclosure will prejudice the welfare of the child, disclosure may nevertheless be ordered if there are potent arguments for disclosure but the court will be much more reluctant to make the order. It is plain that the public interest in the fair administration of justice and the right of a criminal defendant to defend himself are accepted as potent reasons for disclosure. If, on the other hand, it could be shown that disclosure would for some reason be unfair or oppressive to a party to the wardship or Children Act proceedings, that would weigh against an order for disclosure.'

The Commissioner, who has no knowledge of the outcome of the care proceedings beyond what is contained in the case conference minutes, submits that there can be no question of damage to K as a result of the disclosure requested. Indeed, he says, it would be in his best interests if the matter were properly investigated and/or proceedings instituted.

In the written submissions made on her behalf, K's guardian ad litem, who was neutral on the application, rather surprisingly offered no view as to whether disclosure would be in the interests of K or not. In response to a question from me, her unconsidered response was that she could see no benefit to K from disclosure but was unable to say whether it would be detrimental to him or not. In my judgement, it is not the fact of disclosure alone which has to be considered but the consequences which will inevitably flow from it.

The parents submit that it would be detrimental to K's welfare to disclose this material. I agree. One crucial distinction between this case and *In Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725 is that whether K can safely be returned to the care of his parents is currently the subject of intensive psychiatric, parenting and social work assessment. K has recently been moved from his foster carer to the care of his maternal grandfather and his partner. He will begin to put down roots there. The matter is to come back before the Court in May 2002 to see whether the parents have been able to make sufficient progress in a time scale which meets his needs for K to be able safely to return to them. That care plan, as I have indicated, was agreed by all parties (including his guardian ad litem) as being in K's best interests.

There is, therefore, only a narrow window of opportunity during which the necessary intensive work can be done if K is ever to have the undoubted benefit of being brought up by his own parents. The outcome, however, is by no means certain. The parents will have to demonstrate very significant progress. If, instead of being able to concentrate on this, the parents are distracted by the stress and worry that the re-opening of the criminal investigation and the possibility of a criminal trial would cause them, the chances of successfully reuniting K and his parents would, in my judgement, be significantly reduced. The criminal process would cut right across the time scale envisaged in the care proceedings, which has K's welfare as the paramount consideration. It is obvious that the re-opening of the criminal investigation, with the real possibility of a criminal trial for a serious offence likely to carry a sentence of imprisonment, would be very stressful for any parent. Whatever sympathy one might have for the parent, and I have considerable sympathy for these young parents, this would be a factor of little weight (as it was in *In Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725 itself) if there was no question of the child living with that parent again.

In a case such as the present, however, the impact of the criminal process on these particular parents seems to me to be important because their personal capacity to cope with that additional stress is highly relevant to K's long-term welfare.

The father suffers from sickle-cell anaemia which is affected by stress. He was admitted to hospital in crisis a few days after K's admission to hospital in July 2000. If he were to have a further crisis, or a series of crises, his ability to engage in this work would be significantly impaired.

The mother copes with stress by bottling up and suppressing her feelings. She finds it difficult to talk about her experiences or emotions. The necessary engagement in therapy is therefore likely to be difficult and stressful for her. She is carrying an enormous burden of guilt about her responsibility for K's injuries. Shaking a baby can cause injuries disproportionate to the actual violence involved, and is almost invariably instantly repented by the carer responsible. As Mr Murdoch QC points out in his submissions on the parents' behalf, the fear that anything said in therapy may also be the subject of a disclosure application in these proceedings may prevent the parents – and especially the mother – from being able to be frank in therapy and thereby hindering the progress which is so desirable in K's interests.

There is another factor which is particular to this mother. She was herself the victim of a terrifying attack by a former boyfriend who was subsequently charged with kidnapping, false imprisonment and aggravated burglary, for which he was eventually sentenced to life imprisonment with a recommendation that he serve a minimum of 18 years. He assaulted her with his fists and with a knife. The mother was in fear for her life. She had to give evidence at his trial. The first trial was aborted because of interference with the jury, and so there was a second trial with the result that the mother had to give evidence twice. Since these events she has experienced features of post-traumatic stress disorder and the damaging impact of this event on the mother's personality and mental state is one of the matters to be addressed in therapy. This traumatic experience formed an important plank in the submission made to me that the mother should not have to go through the ordeal of giving evidence in the care proceedings. The impact on the stability

of this mother's mental health at the prospect of facing a further criminal trial can readily be imagined. In my view it would almost certainly prevent her from engaging effectively in therapeutic work.

In saying this I do not lose sight of the important fact that K was the victim of a serious assault and has the same right as any other citizen to have the perpetrator brought to justice. However, it is not necessary in the circumstances of this case for the criminal investigation to proceed in order to protect him and keep him safe. The care proceedings, which do that, have effectively been completed with a causation hearing and the care plan which has been made in consequence. This seems to me to put this case, like *In Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725 itself, into a different category from the majority of these cases where disclosure to the police or the defence is sought at a time when the facts have yet to be determined by the court in the care proceedings. The further investigation which the police wish to pursue here is to be based on evidence which has already come to light in the care proceedings and by virtue of them. The investigation and prosecution, if any, is unlikely therefore to add anything to the sum of the court's or the parties' knowledge of the risks to K, or the steps necessary to protect him. The benefit to K of the crime against him being punished is therefore theoretical rather than demonstrable at this stage of his life. He will in time have to wrestle with why he came to be injured. Whether he will be helped or hindered by knowing that one or both of his parents were prosecuted is at present unknowable. For my own part I find it hard to see how the fact that the police were able to take their investigation to a conclusion, if the decision is not to prosecute, will be of any assistance to him in the future in coming to terms with what happened to him.

The second matter I have to take into account is the welfare and interests of other children generally. This offence is not linked to any crimes against other children, and there is no suggestion that either parent is a danger to children generally. The only interest of other children generally, therefore, is in the proper investigation and prosecution of those who offend against them, for the reasons I have already touched on. The only relevant children are any future children who may be born to these parents. I agree with Mr Murdoch that any such children are if anything more likely to be protected by allowing the parents to complete the assessment and therapeutic programme which should establish whether they can safely parent K or any other child, than by the prospect of a further investigation and possible conviction even if that were to lead to a custodial sentence.

The next matter is the maintenance of confidentiality in children's cases. I set out above the basic regulatory framework protecting the privacy and confidentiality of those involved in children's cases, and the positive case which must be made to justify disclosure.

The Commissioner says, and I accept, that if this material is disclosed to the police they would respect its confidential nature and that it would be treated confidentially by them for the purpose of their investigation. The problem comes if there is a prosecution resulting from that investigation which makes use of the disclosed material, albeit indirectly, because of the provisions of s 98(2) of the Children Act 1989. The information disclosed then passes into the public domain. It follows, in my judgment, that a decision to disclose this material almost inevitably subordinates this

consideration of the importance of maintaining confidentiality in children's cases to the public interest in prosecuting offences.

In this context I should also mention the headnote in the case of *Re V and L (Sexual Abuse: Disclosure)* [1999] 1 FLR 267. That case was not concerned with disclosure of confidential information to the police but to others. During the course of what appears to be an ex tempore judgment, Butler-Sloss LJ, as she then was, at 270E, says:

> 'From the guidelines in *Re C* and the earlier decisions it is clear that the court in family proceedings is *likely* to disclose relevant information to the police or to a defendant to criminal proceedings unless there are powerful reasons to the contrary.' (my emphasis)

I do not read that passage as meaning that it is for the party resisting disclosure to justify it, rather than for the person seeking disclosure to have to do so. She is, I think, referring only to the *likely* outcome of the balancing exercise in those circumstances. It is unfortunate, to say the least, that that passage is misquoted in the headnote of the case as 'disclosure to the police or to a defendant in criminal proceedings *would be ordered* unless there were powerful reasons not to do so' (my emphasis). That does suggest that the burden is on the party resisting disclosure, and that the exercise of any real discretion is severely restricted. I consider that passage in the headnote to be a misstatement of the law and very misleading (my emphasis).

Apart from the issues of confidentiality arising under this statutory framework, there are no issues of confidentiality, for example, in relation to the medical evidence, which arise in this particular case.

The next point is closely linked to it. That is the importance of encouraging frankness in children's cases. In *In re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, 85, sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725, 733:

> 'All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which s 98(2) applies. The underlying purpose of s 98 is to encourage people to tell the truth in cases concerning children, and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently it is important in this case. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.'

That was a reference to the particular argument being advanced in that case.

It may well be that the perspective of a deputy judge, who is also a practitioner specialising in this area of work, is different from that of the permanent judiciary especially in the Court of Appeal, but there is no doubt in my mind that the impact of the reported authorities and the trend whereby disclosure is almost routinely ordered to the police, has greatly discouraged the frankness which is so necessary to the resolution of children's cases and which Parliament sought to protect. On the one hand, the courts have made full and frank disclosure in children's cases mandatory. On the other hand, the result for a parent of frankness, whether to the court or in the context of a discussion with a psychiatrist or a guardian ad litem, is that it is highly likely that the information will be disclosed to the prosecution authorities.

The police now play a much greater role in the investigation of child abuse than they did before the coming into force of the Children Act 1989, and the main focus of their inquiries is on whether or not there is sufficient evidence to prosecute the parents for any offence. They share their information with other agencies who have statutory responsibilities towards children. In practice, however, particularly in cases such as this, it is those parents who make admissions who are prosecuted and those who deny all knowledge of how the injuries were caused are not, because where the child is too young to speak for himself the evidence to support a prosecution is often insufficient in the absence of an admission. It should not be under-estimated how difficult it is for any parent in this situation to face up to what they have done and to speak frankly about it, even in the most favourable circumstances. Many of these parents will never have faced police questioning before. The fear that they will be prosecuted and sent to jail keeps many silent. They remain silent often for many months or clutch at the straws of alternative explanations for how the child came by his injuries. During those months the children's future is effectively put on hold until a court determines how the injuries occurred and who caused them, often to the detriment of that child.

The reluctance to speak because confidentiality cannot be ensured or guaranteed is highlighted in cases such as *Cleveland County Council v F* [1995] 1 FLR 797 and *Re G (Social Worker: Disclosure)* [1996] 1 FLR 276. In both of those cases the parents were expressing a reluctance to speak to those concerned with the child care proceedings unless they were guaranteed confidentiality because of the fear of the consequences. A fear that there would be criminal consequences was certainly a significant factor which influenced the parents' behaviour in this case.

In the present case the eventual frankness of the mother was crucial. It was a case where the medical evidence did not narrow down the time when the injuries were caused in a way which enabled one of the parents to be excluded as the perpetrator. As I have said, the case was opened on the basis that it might well not be possible for the Court at the end of the hearing to decide when, how and by whom the non-accidental injuries, which K undoubtedly suffered, were caused. It was only the mother's frankness which permitted these matters to be resolved. Not only was that in K's interest but it also served the interests of justice. But for her admission I would have done the best I could to make findings on the rest of the evidence. I might have concluded, (wrongly as it turns out), that it was the father who caused the injuries. An inability to decide which of them was the perpetrator would have left him under a cloud of suspicion which would have had an impact on his being allowed to look after any other children in the future.

That brings me to the next consideration, which is the public interest in the administration of justice. It is said that barriers should not be erected between one branch of the judiciary and another because this is inimical to the overall interests of justice. I agree with Mr Murdoch that it is Parliament and not the judiciary which has erected the barriers of confidentiality in this type of case to serve a legitimate end. In cases where there are criminal proceedings in existence, to which the evidence in family proceedings is highly relevant, the importance of ensuring the fairness of those criminal proceedings may well be a powerful argument for disclosure. Here there are as yet no criminal proceedings. As I was repeatedly reminded by Mr Loades on behalf of the Commissioner, the police seek this information for the

purpose of further investigation. I therefore consider that this abstract consideration, important though it is, has less weight in this case than it will do in many others.

The sixth consideration is the public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases this is likely to be a very important factor.

This is obviously the main argument relied on by the Commissioner and is the most powerful one in favour of disclosure. As I have said, the case was being considered by the police as one involving grievous bodily harm or wounding, and K did sustain serious injuries, as the medical reports (already in their possession) made clear. Mercifully, it seems, he may well not suffer any long-term disability arising from those injuries. Mr Murdoch QC does not seek to argue that the injuries were not serious nor that a serious offence was committed, but he points to the substantial mitigating factors as also a matter to be weighed in the balance. I have highlighted already the likely impact of this consideration on the welfare of K.

The next matter is the gravity of the alleged offence and the relevance of the evidence to it. In this case, as I have said, the offence itself is grave. The evidence sought in paras 1 and 2 of the application is highly relevant. Without it there is unlikely to be a prosecution at all as the other evidence is insufficient to show who is responsible for causing the injuries. The medical evidence is relevant but unlikely on its own to take the matter any further forward, save for the oral evidence of the only medical witness who gave evidence after the mother's admissions, who was questioned about whether her explanation was or was not consistent with the injuries he had sustained. If I come to the conclusion that the disclosure sought in paras 1 and 2 should not be granted, I do not think I could permit that part of the transcript to be disclosed either.

The next matter is the desirability of co-operation between the various agencies concerned with the welfare of children, including the social services departments; the police service; medical practitioners; health visitors, schools, etc. This is particularly important in cases concerning children. This is an important factor but this case has highlighted some of the difficulties. It is all too easy to assume that the interests of all the agencies involved in working together in a child's interests are the same, when there are at times in practice real tensions and constraints in disclosing the information. The existence of statutory restrictions on the disclosure of information relating to the proceedings also limits the sharing of information which has come into existence by virtue of those proceedings themselves.

There are two relevant statutory provisions. The first is s 27 of the Children Act 1989, which provides that a local authority may request help for children in need from any local authority, local education authority; local housing authority; any health authority; special health authority or NHS Trust, and any person authorised by the Secretary of State.

Section 47 of the Children Act 1989 imposes on the local authority a duty to investigate those cases where they have reasonable cause to suspect that a child who lives or is found in their area is suffering, or likely to suffer, significant harm, and to take appropriate action pursuant to such an

investigation. Subsections (9) and (11) impose a duty on the same agencies to assist the local authority with those inquiries, in particular by providing relevant information and advice if called upon by the local authority to do so. Subsection (10) does not oblige any person to assist a local authority where doing so would not be unreasonable in all the circumstances of the case.

In these provisions the objective of the inter-agency co-operation is for the other agencies to offer help and information to the local authority to enable it to carry out its statutory obligations towards children. For this reason, these statutory provisions do not in themselves pose any problems regarding the statutory restrictions on disclosure of information relating to the proceedings. They also conspicuously do not include the police.

In addition to these provisions the Government has issued guidance in a document known as *Working Together*, pursuant to s 7 of the Local Authority Social Services Act 1970. This provides a framework for inter-agency co-operation and highlights a number of important matters. But it deals primarily, and indeed almost exclusively, with inter-agency co-operation as it relates to the investigation, assessment and safeguarding of the child prior to care proceedings being concluded, and mainly with a decision whether or not they should be instituted. It does not address what, if anything, is to happen after the court has made a determination of the facts and has decided whether or not to make a care order or is in the process of doing so. At this stage, as this case highlights, there are real difficulties for the local authority in sharing information which it has only because it is a party to the care proceedings. That information, unlike some of what I might call the 'hybrid' information (which originates with the local authority or one of the other agencies and is then put before the court), is protected by confidentiality and cannot be disclosed without the leave of the court, although one understands the obvious human need to share the information with the other agencies, especially when there may have been close inter-agency co-operation over many months at an earlier stage. In terms of the statutory framework, however, at this stage the local authority is seeking the help of the other agencies for a child in need under s 27 of the Children Act 1989, and is no longer investigating child protection issues under s 47.

Information which was protected by r 4.23 of the Family Proceedings Rules 1991 and s 12 of the Administration of Justice Act 1960 was, as I have shown, given to the April case conference by the social worker without leave of the court. I think that leave is necessary where the information comes into the local authority's possession solely by reason of the proceedings.

In *Oxfordshire County Council v P* [1995] Fam 161, [1995] 1 FLR 552 Ward J, as he then was, made certain observations which were not necessary for the decision and which he said represented his provisional views about the extent to which there could be informal disclosure of material given in care proceedings to the police. In any event he was considering the position when inquiries were still pending. That was also the situation in *Re M (Disclosure)* [1998] 1 FLR 734 where leave was being sought to disclose information to some members of the case conference but not to others. Leave was granted for the disclosure which was not limited in the way sought, and the Court of Appeal does not appear to have suggested that it was unnecessary to seek leave in the circumstances of that case.

I accept, as I have been told, that the social worker in this case felt under some pressure to give the information she did to the case conference, and

that the disclosure was not made in wilful disregard for its confidentiality. But it clearly went beyond the information which is permitted to be given by *Re W and Others (Wards) (Publication of Information)* [1989] 1 FLR 246 to which I have already referred, and it forms the basis of this application.

As I have said, the police are not one of the agencies covered by either s 27 or s 47 of the Children Act 1989. Pursuant to the general principle of *Working Together*, however, they have made the results of their investigation available to the local authority and, as I have said, it has been used by them in these proceedings. It is clearly desirable that the police should co-operate in this type of case when they can, and the other agencies with them. But it is important to bear in mind that there is no general statutory obligation on the police restricting what they can disclose which is at all comparable to the legal restrictions in proceedings involving children. So there cannot be full reciprocity so far as the local authority sharing information with them is concerned, and it is important to recognise this limitation to the otherwise generally desirable sharing of information which is designed to protect children.

The role of the police is set out in paras 3.57–64 of *Working Together*. The extent to which these passages have been re-written in the most recent edition of the guidance reflects the increasing role of the police in the investigation to which I have already referred. The police disclosure in this case was made pursuant to para 3.60. This says:

> 'The police are committed to sharing information and intelligence with other agencies where this is necessary to protect children. This includes a responsibility to ensure that those Officers representing the Force at child protection conferences are fully informed about the case as well as being experienced in risk assessment and the decision making process. Similarly they can expect other agencies to share with them information and intelligence they hold to enable the police to carry out their duties. Evidence gathered during a criminal investigation may be of use to Local Authority solicitors while preparing for civil proceedings to protect the victim. The Crown Prosecution Service should be consulted, but evidence will normally be shared if it is in the best interests of the child.'

As I have said, pursuant to that the police made their information available to the local authority.

Disclosure in this case is requested to allow the police to conclude their criminal investigation. They are, as I have said, no longer engaged in collecting information to protect this child. That distinguishes this case from many of the reported cases concerned with disclosure at an earlier stage. The decision whether or not to prosecute is not one for the Family Division judge but for the Crown Prosecution Service. It is covered by para 3.62 which reads:

> 'The decision as to whether or not criminal proceedings should be initiated are based on three main factors: whether or not there is sufficient evidence to prosecute; whether it is in the public interest that proceedings should be instigated against a particular offender, and whether or not a criminal prosecution is in the best interests of the child.'

It emphasises that that is the decision not for the police, who are involved in the child protection conference, but for the Crown Prosecution Service.

It is nevertheless important for those deciding whether to make information in family cases available to the police to note the different ordering of priorities in that passage from those which prevail in the family proceedings themselves, where the welfare of the child is the paramount consideration. In relation to the decision to prosecute it is not.

The next consideration, no 9 in the list in *In Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725, reads as follows:

> 'In a case to which section 98(2) applies, the terms of the section itself, namely, that the witness was not excused from answering incriminating questions and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.'

The police submit that s 98 of the Children Act 1989 does not apply to the material they seek under paras 1 and 2, although they accept that it does to the transcripts. Mr Murdoch argues that the word 'statement' in s 98(2) covers the initial document produced by the mother and the witness statements, and is not confined to the oral evidence. I agree and that approach seems to me to be consistent with the authorities.

If the police obtain this information they will use it as a basis to re-interview the parents (especially the mother) effectively trying to get her to make the same admissions in a way which can be used in criminal proceedings. They submit that it is for the judge in the Crown Court and not for this court to decide, if a prosecution ensues, whether or not material so obtained is admissible and/or whether it is in breach of Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. I accept that the primary responsibility for determining that matter does lie with the trial judge in the Crown Court, but considerations of fairness to the person incriminating himself and others affected, and the danger of oppression, which are alluded to by Swinton-Thomas LJ in this passage, seem to me to encompass the question of whether or not the material sought could fairly be used against the parents in any criminal trial. If it could not, that seems to me to be a material consideration for the court in deciding whether or not to permit its disclosure. It will obviously have greater significance in cases where there is already a pending prosecution against the parents or carers, and some of the refinements of the argument advanced by Mr Murdoch are very speculative in the context of a case where no charges have yet been brought.

I have already expressed my thanks to all the legal representatives in this case for the thoroughness and skill with which they have deployed their arguments, which I have found extremely absorbing. I have been referred to a number of authorities which have considered the use which may be made in criminal cases of material obtained in circumstances where the privilege against self-incrimination has been abrogated by statute, and the use which may be made of such material in a criminal trial. The leading case is

Saunders v United Kingdom (1996) 23 EHRR 313. I would like to do justice to the full argument which has been advanced in this case, but it is likely to arise more directly in other cases where, as I have indicated, there is already a prosecution or likely prosecution. It is perhaps better left for decision there.

For the purposes of this case, and this particular aspect, it seems to me sufficient to consider Mr Murdoch's summary, namely that the whole train of events is unfair and oppressive to the mother. There is the obligation of disclosure to the Family Court; the removal of the privilege against self-incrimination; her frankness being turned against her, since it is that which in this case makes the difference between prosecution and no prosecution, and the use which may be made of material which is not only inimical to candour in care proceedings, but is also profoundly unfair.

I think that this is a case, bearing in mind the circumstances of the admission, not only that it was crucial to this court's determination of what happened but also to the element of compulsion in her giving oral evidence, which does make it unfair to the mother to disclose it and that there is a danger of oppression in the use that will be made of it. The mother would undoubtedly be closely questioned in interview in a way which would nullify the protection which s 98(2) of the Children Act 1989 was intended to give her.

The final matter that I have to consider is whether there has been any other material disclosure which has already taken place. In *In Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725 itself the police had already been told about the father's admission with the leave of the trial judge. That was also the case in *Re W (Disclosure to Police)* [1998] 2 FLR 135, where it was also considered a significant factor that a large part of the information which would have been disclosed by the assessment report was already available in material which was not subject to the statutory protection.

In this case the only disclosure which has been made was made in breach of the provisions of s 12 of the Administration of Justice Act 1960, and I consider that it would be wrong to take that into account or to give it any weight in the balancing exercise. Even if I am wrong about that, it does not affect the conclusion I have reached.

Weighing the different considerations in paras 2–10, I conclude that the matter is finely balanced but in all the circumstances of this case tipped towards the importance of maintaining frankness and confidentiality, notwithstanding the serious nature of the offence and the countervailing public interests in the pursuit of crime and inter-agency co-operation. When I also put into the balance the welfare of K and where his interests lie the balance, in my judgement, comes down against disclosure in this case. Although the considerations are slightly different in relation to the transcript evidence from the other matters, I do not think that that material could properly be disclosed without a risk of other material coming to light which I consider should not be disclosed. Accordingly, I refuse disclosure of all parts of the application sought by the Metropolitan Police Commissioner.

MR LOADES:

My Lady, I am formally instructed to seek permission to appeal my Lady's judgment. This is a matter of public importance and public interest concerning the welfare of children, and in those circumstances is a matter which, in my submission, should be granted leave to appeal.

MR MURDOCH:
My Lady, I respectfully submit that this is essentially a matter which falls within the exercise of your Ladyship's discretion and in those circumstances there is no real prospect of such an appeal being successful, and on that ground would invite your Ladyship to refuse leave.

ELIZABETH LAWSON QC:
The Commissioner seeks leave to appeal my decision on the basis that it is a matter of public importance. It is, however, a matter in which the authorities are clear and that what has to be undertaken is a balancing exercise. I have done my best to carry out that balancing exercise and it therefore seems to me that if leave to appeal the decision is to be granted it must be done by the Court of Appeal who, having reviewed what I have done, conclude that I have strayed outside the bounds of discretion or not exercised it in accordance with statutory principles. I therefore refuse leave at this stage.

MR MURDOCH:
My Lady, I wonder whether your Ladyship would think that it is nevertheless a matter of sufficient importance for your Ladyship's decision to be reported if the law reporters think it is appropriate? There are so many cases which tend in the opposite direction and there is also the point about s 12 and the disclosure of material at case conferences which perhaps deserves wider dissemination.

ELIZABETH LAWSON QC:
Does anyone else wish to say anything about that? I do give leave for it to be reported if anyone thinks it is worth reporting.

MR MURDOCH:
I do not know whether any question arises in relation to the costs of this application. I certainly for my part am not instructed to raise any point. There is a further matter in relation to the other aspects of the case that I would like to mention. I wanted to give everyone an opportunity to tie up any loose ends in relation to the police application before I do that.

MR COBB:
My Lady, in respect of costs I am instructed to ask for an order for detailed assessment of the parents' costs, I think not simply in relation to this application but in relation to the matter generally. I think that may not have been dealt with on the previous occasion. So I invite your Ladyship to maybe make that –

ELIZABETH LAWSON QC:
Yes. If there is no claim against the Commissioner and there is no other matter that you wish to raise, Mr Loades, then perhaps we can ask you to leave while we deal with the other aspect of this.

MR LOADES:
I will.

ELIZABETH LAWSON QC:
Thank you very much indeed.

MR COBB:
I have, I hope, faithfully and in accordance with the discussions we had on Friday, amended the draft which I put before your Ladyship on Friday afternoon, with specific reference in para 2 to a point raised by Miss McGregor on behalf of the mother, not in fact I think formally adjudicated

upon by your Ladyship but I am certainly content for the authorities part to include that provision in the draft order. I hope that I have, by reference to my own note of the discussion, properly accounted for the documents which your Ladyship wishes there should be disclosed to the Omoja Family Centre.

MR MURDOCH:
My Lady, there was one very small matter. In the second paragraph the second line should read 'on hearing the solicitor advocate' – singular. I was wondering, more importantly, whether your Ladyship might think it appropriate to add in para 1, before (a), after 'Omoja Family Centre', 'The following documents on the basis' —

ELIZABETH LAWSON QC:
I am sorry, Mr Murdoch, I am still catching up with the first one. I think it is right. What is wrong is the comma after 'Second Respondent', or are you saying that —

MR MURDOCH:
No, it is 'solicitor advocate' – singular – 'for the Second Respondent' is what it should read, I think. That is all.

MR COBB:
It was a typographical error. There have been solicitor advocates acting for two clients in the past.

ELIZABETH LAWSON QC:
Yes. I was just trying to make sure where we were up to.

MR MURDOCH:
My Lady, the other matter was in para 1, the third line, after —

ELIZABETH LAWSON QC:
Should it say 'leading Counsel for the First Respondent', if we are being technical?

MR COBB:
When I first prepared this I really had imagined that my learned friend Mr Murdoch was instructed really to deal with a pleas application, which is why Miss McGregor rose to her feet to deal with this aspect.

ELIZABETH LAWSON QC:
He can hide his light under a bushel for the purpose of this order.

MR MURDOCH:
In the third line of para 1, after 'Omoja Family Centre', I wonder whether it might be desirable (although the local authority would say something to this effect in any covering letter with the documents) – 'the following documents on the basis that they are to remain strictly confidential'. I merely suggest that on the basis that I do not think the Omoja Family Centre are part of the local authority in any way. It is crucial that it should be impressed upon them that these are confidential documents.

MR COBB:
I have for my part sought to reassure my learned friend for the parents that the letter which accompanies these documents would include a strong warning that documents are confidential and should not be disclosed or discussed otherwise than by those engaged in the family assessment. I had hoped that that might have sufficed. I have no strong opposition to that being reflected on the order if your Ladyship felt that it was insufficient to have

that warning put on the letter to accompany these documents.

ELIZABETH LAWSON QC:
I think it is probably enough for you to spell the matter out in a covering letter.

MR COBB:
I will make sure that is done.

ELIZABETH LAWSON QC:
Perhaps if the documents are put together in some form of a bundle it could have a warning written on the front of it.

MR COBB:
On the top sheet certainly. I will suggest that to those who instruct me and ensure that that is done.

ELIZABETH LAWSON QC:
Thank you.

Order accordingly.

Solicitors: *Mackesys* for the mother
Venters Reynolds for the father
Local authority solicitor
Yvonne Brown & Co for the guardian ad litem

CHRISTOPHER WAGSTAFFE
Barrister