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Lucy Letby trial and Open Justice- explaining the restrictions and their implications for the English and Welsh Criminal Justice system. 29th August 2023.

The reporting restrictions imposed by judges in the criminal justice process and trial of convicted serial child killer Lucy Letby have been unprecedented and controversial.

There has been no case in British legal history, or indeed as far as I am able to establish in the history of English speaking common law legal jurisdictions such as Australia, New Zealand, Canada, and USA where the identity of seven murder victims, and ten attempted murder victims have been censored, and further reporting restrictions have given life-long anonymity to nine of the adult prosecution witnesses; namely doctors and nurses who worked alongside Lucy Letby on the neonatal unit at the Countess of Chester hospital.

The restrictions were imposed as a result of legislation passed by Parliament in 1999- the Youth Justice and Criminal Evidence Act, specifically section 45 'Power to restrict reporting of criminal proceedings involving persons under 18' See: https://www.legislation.gov.uk/ukpga/1999/23/section/45 , and section 46 'Power to restrict reports about certain adult witnesses in criminal proceedings.' See: https://www.legislation.gov.uk/ukpga/1999/23/section/46

The restrictions in respect of the attempted murder victims could have been much more draconian in terms of running for the lifetime of the victims had the court made orders under Section 45A of the legislation 'Power to restrict reporting of criminal proceedings for lifetime of witnesses and victims under 18'. See: https://www.legislation.gov.uk/ukpga/1999/23/section/45A

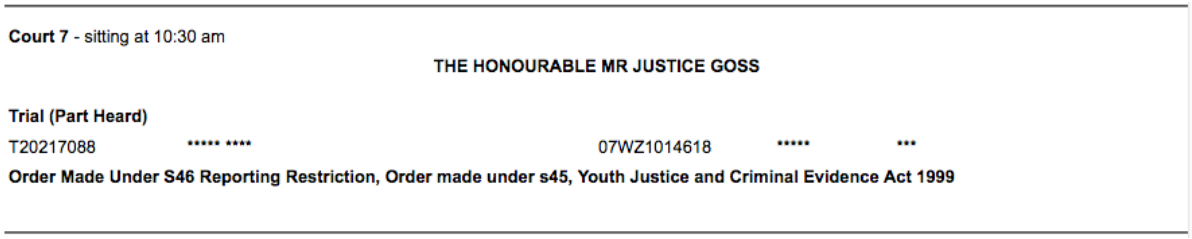
The degree of secrecy and censorship even extended to the return of the guilty verdicts by the jury. It seems the trial judge Mr Justice Goss, imposed an order under Section 4(2) of the 1981 Contempt of Court Act preventing the media from reporting any of the verdicts until all had been returned by the jury or it was clear they were unable to return verdicts on some of the charges, which was the case in respect of some of the attempted murders.

This means there were several days when Lucy Letby had been found guilty of murder, but neither the professional media, nor indeed anyone else were permitted to report this to the general public.

The nature of the censorship is and was a form of discrimination. If you as a member of the public or a journalist (with proper accreditation) could physically gain access to any of the proceedings, you would have been able to hear the names and full identities of everyone mentioned in court. And you would have heard the return of guilty verdicts before they were all reported.

But the public gallery space in the courtroom was very limited and there would have been the added problem of actually finding the location of the murder trial.

The public listing of the trial even omitted the name of the defendant. It is not clear whether this was also on the direction of the judge.



Court 7 - sitting at 10:30 am

THE HONOURABLE MR JUSTICE GOSS

Trial (Part Heard)

T20217088 ***** **** 07WZ1014618 ***** ***

Order Made Under S46 Reporting Restriction, Order made under s45, Youth Justice and Criminal Evidence Act 1999

There are still major problems analysing and reporting on the reporting restrictions themselves. I have asked journalists who reported the trial if they might send me copies of the court orders, directions and indeed the ruling of the judges.

It is understandable that they cannot because they say to do so would breach the restrictions themselves and they do not wish to be criminally prosecuted for breaching them.

Qualified barristers and solicitors would be able to see the unredacted rulings naming the murder and attempted murder victims and adult witnesses given anonymity under the legal privilege they enjoy as officers of the court.

While the trial was in progress I asked for information on the reporting restrictions and whether there had been any challenges by media publishers.

Those I asked said they were unable to assist me. An email sent the Media Lawyers' Association did not elicit any reply.

I have asked if the trial judge Mr Justice Goss and another High Court judge, Mrs Justice Steyn, who made one of the key rulings in respect of child victims, would be prepared to release their rulings to the National Archives, and HM Judiciary website in order to assist the teaching of media law and more accurately inform discussion and analysis of the reporting bans.

As a media law lecturer and solely for the purposes of teaching journalism students and trainee journalists, I do not want or indeed need to know the identities restricted.

I would like access to the reasoning and summary of the challenges made by counsel for the media publishers' consortium. Would not this be possible with redacted court rulings? This is a longstanding practice on the part of courts at all levels.

The trial judge has gone on very well deserved leave given the fact he has presided over a highly sensitive, high profile, complex, demanding and long criminal trial. A decision will be made when he returns from holiday.

What we understand about these restrictions at the moment has to be based on reports by the *Guardian* and *Telegraph* newspapers.

The *Guardian* seems to be neutral on whether they should have been imposed though discloses it supported the applications by a media consortium of journalism publishers, which also included the BBC, to challenge them.

The *Telegraph* is very critical of the restrictions and their reports include comments by Geoffrey Robertson KC and the former Lord Chancellor and Secretary of Justice Sir Robert Buckland KC.

The censorship continues with a fair proportion of the parents of the victims giving extensive multimedia interviews providing great detail about their feelings and views about Letby and the NHS executives of the NHS trust which employed her.

This extends to the intense public interest and political debate about what kind of public inquiry should be held.

Will the public inquiry continue the censorship? To what extent will the head of the inquiry be bound by the judicial decisions of Mrs Justice Steyn and Mr Justice Goss?

If media groups did challenge the reporting restrictions before both judges and were unsuccessful, why did they not appeal these decisions to the Court of Appeal Criminal Division, which they could have done under section 159 of the 1988 Criminal Justice Act https://www.legislation.gov.uk/ukpga/1988/33/section/159 ?

I will try to address these issues. First here are the headlines and links to the Guardian and Telegraph articles:

Guardian 18th August 2023 by Helen Pidd: 'Lucy Letby trial: why the babies remain anonymous. None of the 17 babies involved in the trial have been named and nine hospital staff cannot be identified.' See: https://www.theguardian.com/uk-news/2023/aug/18/lucy-letby-trial-why-babies-remain-anonymous

Telegraph 18th August 2023 : "'Rare anonymity orders on Lucy Letby witnesses 'will have chilling effect on future cases' Highly unusual reporting restrictions were imposed despite victims and families being widely named when the nurse was first charged." (Behind

paywall) See: https://www.telegraph.co.uk/news/2023/08/18/lucy-letby-court-trial-witnesses-granted-anonymity/

Former Lord Chancellor and Justice Secretary Robert Buckland said: 'Criminal trials need to be open to secure justice for the public. Imposing reporting restrictions may now have a negative impact on the ability of the press to report an accurate version of events.' (Behind paywall) 18th August 2023 See: https://www.telegraph.co.uk/news/2023/08/18/criminal-trials-open-secure-justice-for-public-lucy-letby/

Telegraph newspaper editorial 18th August 2023 (behind paywall) 'A Crime of Unimaginable Horror' See: https://www.telegraph.co.uk/opinion/2023/08/18/a-crime-of-unimaginable-horror/

The reporting of the attempted murder babies' names was restricted under section 45 of the Youth Justice and Criminal Evidence Act 1999, while the names of the parents who were potential witnesses for the prosecution were restricted under section 46 of the Youth Justice and Criminal Evidence Act 1999 by Mrs Justice Steyn on 15th January 2021.

This followed a special hearing to rule on the reporting restrictions held during December 2020, two years before the trial before a jury even began.

It is presumed that this was not reported because it would have been covered by a reporting restriction under Section 4(2) of the 1981 Contempt of Court Act postponing reporting until the end of the future trial.

However, the restrictions imposed by Mrs Justice Steyn appear to have been retrospective. They were banning publication of information already placed in the public domain.

According to the *Telegraph*:

1. The murder victims had already been 'widely named' when Lucy Letby was first charged and when she first appeared at Warrington Magistrates' Court on November 12th 2020;
2. This was done lawfully by the Magistrates Court. It has always been custom and practice and something of an immutable in Open Justice terms that alleged murder victims, even children, are identified as part of the public domain and historical record.

According to a report by the *Chester Standard* and other local media 'District Judge Nicholas Sanders imposed an order restricting the reporting of the names of the surviving babies subject to the attempted murder charge.' This would have been done under Section 45 of the Youth Justice and Criminal Evidence Act.

The *Telegraph* reports that the application for reporting restrictions on the identity of the parents of the murder victims, which would render the identity of the infant murder victims anonymous, was made by the prosecution:

1. ‘The decision followed highly emotional arguments put forward **by the police and prosecutors** on behalf of the families that claimed the press would report the trial in an “irresponsible manner”, unless names were removed.’
2. ‘There was also an inaccurate comment in one statement submitted to the court, suggesting the media had “released” the names of the murder victims into the public domain, when in fact that was done by the magistrates’ court.’
3. ‘In a concerted bid to persuade a judge of the need for blanket anonymity, pro forma application forms were submitted on behalf of the families, stressing the negative impact press coverage would have on them.’
4. ‘..the prosecution argued the ability of the victims’ parents to give evidence would be severely affected if they were named in any coverage of the trial.’
5. Mrs Justice Steyn agreed saying: ‘the quality of evidence given by each of these witnesses is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified.’
6. ‘…lawyers for a number of Letby’s colleagues also successfully applied for anonymity, arguing that their mental health would suffer if they were identified.’
7. ‘Despite one lawyer warning that replacing the names of so many people with letters risked turning the trial into “alphabet soup”, the [Trial] judge granted anonymity orders for all those who applied.’
8. ‘Throughout the trial the victims were identified only as Babies A to Q, making it difficult for members of the public to follow the evidence easily.’

The Guardian’s North of England Editor, Helen Pidd, made the following points in her report on the restrictions:

1. Mrs Justice Steyn banned publication of anything that could lead to the identification of the only living children [attempted murder victims] until their 18th birthdays. Thus the orders were under section 45 and not section 45A of the Youth Justice and Criminal Evidence Act. Had they been under section 45A they would have been lifetime orders in perpetuity.
2. These children were born in either 2015 or 2016 and were between six and eight years old at the time of the hearing in 2020. Some were living with profound disabilities – partly, the prosecution argued, as a result of Letby’s actions.
3. The order also prohibited the publication of anything that could lead to the identification of the parents as witnesses in the proceedings, including the surnames of the deceased babies. The law is such that no court has the power to specifically anonymise the identity of any murder victim, but the anonymity can be imposed by the shadow and impact of a restriction order in respect of their parent or other family member who is a party to the proceedings by way of witness, victim of another charge or defendant.
4. Consequently the nature of Mrs Justice Steyn’s order had the effect of preventing publication of the dead children’s identities, because of the sibling groups and the fact their parents would be giving evidence. Among the 17 babies were three sets of twins and one set of triplets.
5. Some of the parents ‘wanted the restrictions not just to ban publication of their names and addresses but also details of their jobs, their ethnicities or nationalities,

their medical conditions and the circumstances of their children's conception, gestation and births.'

Helen Pidd's report makes some more interesting points about the hearing before Mrs Justice Steyn.

1. A coalition of media outlets through counsel argued that if such wide-reaching restrictions were imposed, the case would be impossible to properly report.
2. The Judge partially agreed, 'ruling that it was relevant that one of the parents involved worked as a GP – given their medical knowledge – and it was not in itself an identifying feature. She thought the same about nationality and ethnicity.
3. 'The judge also allowed the media to report that the triplets were naturally conceived and identical, on the grounds that such detail would be unlikely to lead to the identification of the living triplet or their parents.'
4. 'Although Steyn's order allowed the media to report the first names of the dead babies, media organisations agreed it would be better not to name any of the children involved in the case. Each baby was allocated a letter from A to Q to protect their identities. They were named chronologically.'

There is no doubt that Mrs Justice Steyn and Mr Justice Goss had the statutory powers to make the orders that they made.

The real damage to the Open Justice principle is clearly the censorship of identities of the murder victims. But close analysis of the terms of Section 46 of the Youth Justice and Criminal Evidence Act demonstrates the wide degree of discretion granted to the court (I have put in bold those parts I think may have been relevant in the Letby case):

'(3)For the purposes of this section a witness is eligible for protection if the court is satisfied—
(a)that the quality of evidence given by the witness, or
(b)the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case, is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness in the proceedings.
(4)In determining whether a witness is eligible for protection the court must take into account, in particular—
(a)**the nature and alleged circumstances of the offence to which the proceedings relate**;
(b)the age of the witness;
(c)such of the following matters as appear to the court to be relevant, namely—
(i)the social and cultural background and ethnic origins of the witness,
(ii)**the domestic and employment circumstances of the witness**, and
(iii)any religious beliefs or political opinions of the witness;
(d)any behaviour towards the witness on the part of—
(i)the accused,
(ii)members of the family or associates of the accused, or
(iii)any other person who is likely to be an accused or a witness in the proceedings.

(5)**In determining that question the court must in addition consider any views expressed by the witness.**

And under section 46(8) 'in determining whether to give a reporting direction the court shall consider—(a)**whether it would be in the interests of justice to do so**, and (b)**the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings**.

The media only had recourse to section 46(8)(b) in challenging the probity, evidence and force of the prosecution's application.

One only has to put oneself in the position of the court where the prosecution is saying the cooperation of its witnesses is diminished and so is the quality of their evidence if they are named.

And the witnesses themselves are providing detailed statements evidentially setting out why this is the case.

Is it really in **'the interests of justice'** to allow that to happen?

As for measuring the public interest in '**a substantial and unreasonable restriction on the reporting of the proceedings**.'

Are the reporting bans 'a substantial' restriction to reporting the proceedings?

Preventing the identification of murder and attempted murder victims, and key prosecution witnesses such as physicians and medics who worked with the defendant, would certainly be so.

In view of the risk to the interests of justice by not allowing the anonymity, are the substantial restrictions to the reporting reasonable in these circumstances?

Could the prosecution and trial have proceeded successfully without the reporting restrictions?

Here are the points of criticism made by Geoffrey Robertson KC and Sir Robert Buckland KC as well as the *Telegraph* by way of editorial. They are more generic in terms of the consequences of such a trial taking place with these restrictions in place:

1. The imposition of far-reaching and highly unusual reporting restrictions led to the abandonment of the 'sacred principle' of open justice and this will have 'a chilling effect' on future court cases.
2. Geoffrey Robertson: 'Open justice is the most sacred of all British legal traditions, yet in this case it was abandoned because witnesses and victims said they felt discomfort about being identified;'
3. 'Their claim to privacy was allowed to outweigh the public right to see justice done. But this is not a question of balancing these two irreconcilable values: open justice

should always prevail except in cases of national security or where victims would be seriously harmed;'

4. 'That appears not to be the case here and the very fact these secrecy applications succeeded will doubtless encourage more attempts to suppress information about what goes on in court.'
5. 'It was unsatisfactory that in this case the application was made by the prosecution, the agent of a state that should be proud of its open justice tradition;'
6. Sir Robert Buckland argued the reporting restrictions 'may now have a negative impact on the ability of the press to report an accurate version of events. If, as the lead consultant in the neonatal unit where she worked now alleges, hospital bosses failed to investigate allegations against Letby and tried to silence doctors, and that he raised concerns in October 2015, after some children had already been killed, the ability of the press to name victims would allow the public to understand the full timeline of events;'
7. 'The principle of open justice is fundamental to our system – it reflects the principle that justice must be seen to be done. The overwhelming general presumption is that the names of witnesses and defendants are matters of public record, available for use by the media. Public knowledge of, and confidence in, the administration of justice is enhanced by comprehensive media reporting. Clear and accurate news reporting of our courts is part of the lifeblood of journalism in the UK;'
8. 'The starting point must be open justice. Much more should always be required before reporting restrictions are imposed, or we risk more criminal trials being veiled by an impenetrable shroud of secrecy.'
9. The *Telegraph* editorial said anonymising the murder victims had 'blunted our ability to understand the true impact of the alleged failings; [of the NHS]'
10. 'Normally, murder victims are named in court, including children, because it is judged to be in the public interest that the details of horrifying crimes such as this should be made known and, tragically, there is no longer any question of privacy;'
11. The *Telegraph* argued: 'Media organisations already face strict guidelines to ensure that court hearings are covered responsibly. Automatic reporting restrictions exist in law on such matters as publishing the identity of complainants in cases involving a sexual offence, modern day slavery or female genital mutilation allegations, as well as of child defendants and witnesses in youth courts. Yet in the Letby case, the limitations went further. As well as restrictions on naming the children who were murdered, the parents were also granted anonymity under section 46 of the Youth Justice and Criminal Evidence Act, to ensure that publicity did not affect the quality of their evidence.'
12. 'It is possible to feel both the greatest sympathy for the families who had their lives ruined by Letby, along with the witnesses who had to recall the circumstances surrounding her unspeakable acts, and be concerned that the decision has established a dangerous principle and that public knowledge of event s has been hindered in this particular case.'
13. 'Courts have consistently ruled that it is perfectly legitimate, and indeed in the public interest, that witnesses and victims of crime should be named. In 2017, the Supreme Court held that media reporting should be permitted, after the end of a major sexual abuse conspiracy trial, of the identity of a man referred to in the proceedings who

was arrested but not charged with sex offences. Thus, media freedom outweighed his right to privacy.'

14. 'Anything else is likely to result in only the partial coverage of important cases – with the potential result that misinformation is allowed to spread. Ultimately, access to, and dissemination of accurate and vital information is the best way to shine light on the most disturbing elements of British society, as well as on failing systems.'

There are very few professional journalists and court reporters who would argue with the points and arguments put forward by Geoffrey Robertson KC, Sir Robert Buckland KC and the *Telegraph*'s editorial.

Yet, why did the media coalition which usually pools its financial and legal resources in cases such as this, not mount an appeal under Section 159 of the 1988 Criminal Justice Act?

[I am presuming they did not in the absence of any evidence or reference to a Section 159 Court of Appeal Criminal Division ruling on the Letby reporting restrictions in the National Archives or at https://www.bailii.org/.]

This right of appeal was won after a test case challenge by myself when I was a young court reporter at the Central Criminal Court around 40 years ago.

Geoffrey Robertson KC was my counsel at the Divisional Court when the NUJ and Liberty (then known as NCCL) supported my campaign to overcome the lack of any appeal rights for journalists and media publishers to challenge reporting restrictions imposed by Crown Court Judges.

The case went to Strasbourg and after a preliminary indication the UK legal system was in breach of the European Convention of Human Rights the UK government agreed to settle the action by legislating for an appeal mechanism.

Unfortunately, the reform contained flaws which I strongly argued against at the time. One of which is that under Section 159(1) 'the decision of the Court of Appeal shall be final.'

This was ten years before the 1998 Human Rights Act.

I thought it was absurd and discriminatory that critical issues about freedom of expression should have a reduced ceiling in terms appeal. Why should Open Justice issues in the Crown Court not be adjudicated for ruling precedents at UK Supreme Court level if necessary? [At that time the highest court in the UK was the judicial committee of the House of Lords.]

In practice they can be, usually if media appellants are able to use judicial review as their mechanism of appeal.

And there are several higher court precedents which would appear to place Open Justice and freedom of expression on a higher plane of pragmatic priority than privacy rights.

The *Telegraph* referred to the case of PNM v Times Newspapers Ltd & Ors [2017] UKSC 49 (19 July 2017)

By 5 to 2, UK Supreme Court Justices ruled in favour of Times Newspapers, The Oxford Mail & Others.

PNM was 'a prominent figure in the Oxford area. He was arrested at about the same time as the nine and was released on bail on terms (among others) that he surrender his passport. The reason for his arrest was that one of the complainants had told the police that she had been abused by a man with the same, very common, first name. However, she failed to pick him out at an identity parade. He was later told by the police that he would be released from arrest without charge but that the case would be kept under review. That remains the position. Police investigations are continuing, but PNM has never been charged with any offence, and there is no present reason to believe that he ever will be.' [Paragraph 3]

He was frequently referred to by name in the criminal trial of others and he repeatedly sought and secured court reporting orders under the 1981 Contempt of Court Act preventing publication of his name.

Lord Sumption provided the majority ruling that he was not entitled to privacy protection in these circumstances.

At paragraph 16 he explained what was at stake constitutionally:

'…restrictions on the reporting of what has happened in open court give rise to additional considerations over and above those which arise when it is sought to receive material in private or to conceal it behind initials or pseudonyms in the course of an open trial. Arrangements for the conduct of the hearing itself fall within the court's general power to control its own proceedings. They may result in some information not being available to be reported. But in Convention terms they are more likely to engage article 6 than article 10. Reporting restrictions are different. The material is there to be seen and heard, but may not be reported. This is direct press censorship.'

[Paragraph 34(5)] 'The policy which permits media reporting of judicial proceedings does not depend on the person adversely affected by the publicity being a participant in the proceedings. It depends on (i) the right of the public to be informed about a significant public act of the state, and (ii) the law's recognition that, within the limits imposed by the law of defamation, the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration. PNM's identity is not a peripheral or irrelevant feature of this particular story.'

Another influential precedent is from the Judicial Committee of the House of Lords in S (a child), Re [2004] UKHL 47 (28 October 2004)

The issue here was whether the ruling of the High Court Family Division over the privacy rights of an 8 year-old boy took precedence over the right of the media and public to the Open Justice identification of the boy's mother as being a murder defendant accused of the murder of his 9 year-old brother by salt poisoning.

In Lord Steyn's ruling Open Justice in the criminal proceedings was given the pragmatic priority.

At paragraph 30 he said: 'A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.'

At paragraph 34 he said:

'Thirdly, it is important to bear in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.'

At paragraph 36 he said:

'Fifthly, it is easy to fall into the trap of considering the position from the point of view of national newspapers only. Local newspapers play a huge role. In the United Kingdom according to the website of The Newspaper Society there are 1301 regional and local newspapers which serve villages, towns and cities. Apparently, again according to the website of The Newspaper Society, over 85% of all British adults read a regional or local newspaper compared to 70% who read a national newspaper. Very often a sensational or serious criminal trial will be of great interest in the community where it took place. A regional or local newspaper is likely to give prominence to it. That happens every day up and down the country. For local newspapers, who do not have the financial resources of national newspapers, the spectre of being involved in costly legal proceedings is bound to have a chilling effect. If local newspapers are threatened with the prospect of an injunction such as is now under consideration it is likely that they will often be silenced. Prudently, the Romford Recorder, which has some 116,000 readers a week, chose not to contest these proceedings. The impact of such a new development on the regional and local press in the United Kingdom strongly militates against its adoption. If permitted, it would seriously impoverish public discussion of criminal justice.'

The 'Alphabet Soup' syndrome in excessive reporting restrictions rendering the reporting of court cases useless is very much represented in Guardian News and Media Ltd & Ors, Re HM Treasury v Ahmed & Ors [2010] UKSC 1 (27 January 2010) where Geoffrey Robertson KC was the lead advocate for the media group appeal.

Lord Rodger's rather famous opening paragraph highlighted 'a widespread phenomenon' in the British legal system. See:

"Your first term docket reads like **alphabet soup."** With these provocative words counsel for a number of newspapers and magazines highlighted the issue which confronts the Court in this application. In all the cases down for hearing in the first month of the Supreme Court's existence at least one of the parties was referred to by an initial or initials. Thanks to the relevant Practice Note, the same goes for the very last case heard by the House of Lords (*BA (Nigeria) v Secretary of State for the Home Department* [2009] UKSC 7; [2009] 3 WLR 1253) and the very first judgment handed down by the Supreme Court (*In re appeals by Governing Body of JFS* [2009] UKSC 1; [2009] 1 WLR 2353). See *Practice Note (Court of Appeal: Asylum and Immigration Cases)* [2006] 1 WLR 2461. Indeed, so deeply ingrained has the habit of anonymisation become that the judgment of the Court of Appeal in *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634 was published under that name, and came on appeal to the Supreme Court under the same name, even though Maurice Kay LJ had begun his judgment by saying that anonymity was unnecessary. At the hearing of the appeal that assessment proved to be correct. See *Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 1 WLR 48.'

That was then- 2010. What kind of vocabulary is available to substantially expand the problem or 'phenomenon' as much bigger and wider than 'widespread' in 2023?

The Alphabet Soup case concerned three appellants 'A, K and M' who were brothers in their thirties. On 2 August 2007 each of them was informed that the Treasury had reasonable grounds for suspecting that he was, or might be, a person who facilitated the commission of acts of terrorism.

This was freedom of expression Open Justice versus the appellants' claim to their rights under article 8 of the European Convention on Human Rights and Fundamental Freedoms to respect for their private and family life.

At Paragraph 63 Lord Rodger made the following observation:

'What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2009] 3 WLR 142, 152, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the

viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.'

At paragraph 71 Lord Rodger outlined how M had engaged in strong public debate behind the privilege of his anonymity by issuing a press release through his solicitors criticising the UK government:

'It is unusual, to say the least, for individuals to enter a debate, using highly charged language and accusing the Government of dishonouring a pledge, but at the same time to insist that they should have the right to hide behind a cloak of anonymity. It is also unusual for someone to assert the need for the press to respect his private and family life by not reporting his identity while simultaneously inviting them to report his version of the impact of the freezing orders on himself and members of his family. The public can hardly be expected to make an informed assessment of the argument if they are prevented from knowing who is making these points and, therefore, what his general stance is.'

The media group won this appeal. But as most journalists and specialist media lawyers will fully recognise one or two steps forward for Open Justice and Freedom of Expression in the higher courts can often be followed by one or two steps backward.

Whither a Lucy Letby trial Open Justice appeal?

Of course, in the Lucy Letby case the circumstances are different, as they always tend to be when new issues arise in the tension between freedom of expression Open Justice and privacy rights and the administration of justice.

In PNM and R: S (a child) the request for restrictions came from third parties. They were not parties to the criminal proceedings. In Letby, the request for censorship strongly citing the demands under the administration of justice argument came from the Prosecution and the police. The restrictions did fundamentally engage the parties in the trial- alleged victims and prosecution witnesses.

The Alphabet Soup case of 2010 was not a criminal trial and more in the manner of high court proceedings with the request for anonymity being made by respondents or appellants in respect of designation under terrorism financial regulation.

Mrs Justice Steyn and Mr Justice Goss are experienced and respected High Court judges who in their decision on the reporting restrictions were following the rule of law. As has been demonstrated they derived their powers from existing statute.

Is it not possible the 'media coalition' properly evaluated the likelihood and consequences of an appeal?

To deal with this issue, I would recommend an addressing of this further question:

Would a Court of Appeal Criminal Division have seriously overturned two High Court Judges who imposed reporting restrictions on the basis they were asked for by the prosecution

because the administration of justice needed them to ensure the quality and cooperation of key witnesses in a trial of a nurse accused of seven murders and ten attempted murders?

If your answer to the question is no, then the decision not to appeal can be considered perfectly reasonable.

Recent Section 159 appeals by the media to the Court of Appeal Criminal Division have not been particularly encouraging. In Pembrokeshire Herald, Re (leave to appeal) (Rev1) [2021] EWCA Crim 1165 (27 July 2021) a weekly newspaper sought to challenge Section 46 orders in the trial of a teacher whose defence succeeded with evidence provided to the jury by his professional colleagues.

The Herald argued the Section 46 order giving these adult witnesses anonymity for life was exceptional 'as it would in effect prohibit significant reporting of the defence case.'

The Court of Appeal rejected the appeal and said: ''Decisions about reporting restrictions are evaluative in nature, involving a balancing exercise akin to the exercise of a discretion; although the fact that Convention rights are engaged means that review of the decision under challenge must be intense, the appellate court will be slow to interfere…'

And in 2013 ITN News & Ors v R. [2013] EWCA Crim 773 (21 May 2013) was another unsuccessful appeal against a Section 46 order which prevented publication of images of an adult witness and those of her children in a manslaughter trial.

It is possible to make some positive observations about the media reporting of the Lucy Letby trial.

Those UK reporters assigned to cover this extraordinarily long and complicated case have represented the profession of journalism to the highest standards.

An example of bringing outstanding 'Open Justice' where reporting restrictions had substantially reduced it has been the Lucy Letby Trial Podcast published by the *Daily Mail* with weekly reporting and production by Daily Mail northern correspondent Liz Hull and broadcast journalist Caroline Cheetham.

See: https://podcasts.apple.com/gb/podcast/the-trial-of-lucy-letby/id1653090985

By 28th August 2023 there had been 59 episodes downloaded by millions.

Episode 47 covered the subject of Open Justice with an interview with Mike Dodd- 'former reporter and long term advisor to the Press Association (now PA Media). See: https://podcasts.apple.com/gb/podcast/the-trial-of-lucy-letby/id1653090985

Nevertheless, it can be argued that Open Justice in the British criminal justice system is in a very bad place as a result of this case.

The Section 45 orders under YJCEA 1999 for the attempted murder child victims are standard practice and began being imposed almost by default by the District Judge at the Magistrates Court as they are in most criminal courts.

Is there now ever a case where youth victims of crime in the adult courts are ever identified? That is a rare phenomenon.

Even before the Lucy Letby trial, Section 46 anonymity orders under YJCEA 1999 for adult witnesses and indeed adult victims of crime beyond the statutory automatic categories of sexual offence complainants, victims of FGM, Forced Marriage, Slavery and People Trafficking have been spreading.

An example during the past year included an adult victim of a causing injury by dangerous driving offence. He had been a passenger in the speeding car and lost a leg in the collision.

Police forces have been and will continue to use the possibility, and what may well become the potential likelihood, of anonymity at trial to persuade reluctant witnesses that they will not necessarily face the embarrassment or discomfort of media publicity by agreeing to give evidence.

They cannot guarantee something which only the court has the discretion to provide, but as in the Letby case, they can explain to the potential witnesses of the advantages of making a statement with grounds that qualify under Section 46(2) to 46(5) of the Youth Justice and Criminal Evidence Act legislation.

All families of murder victims are potential witnesses because of the system's requirement for victim impact statements following conviction. Consequently, the restrictions in the Letby trial do provide a precedent for more orders which 'shadow' impact on identifying murder victims.

The reports of the content of the victim's family statements in the Lucy Letby case reveal a disturbing trend to justify censorship on the basis of anticipating allegedly harmful media coverage rather than actual and specific evidence of coverage which creates a substantial risk of serious prejudice.

What is the threshold of risk that the courts are assessing in respect of the impact of media coverage on a witness?

Is it so they are sure or believe it is more likely than not that media coverage undermines or will undermine the quality of a witness's evidence and willingness to cooperate and give evidence?

Lucy Letby was convicted of seven murders and six attempted murders. The jury was unable to reach verdicts in respect of four other attempted murder charges.

The anonymity means that seventeen potential local weekly newspapers were unable to fully report on a crime victim from their areas being involved in this high profile trial.

While we can be sure it was never the intention of anyone, anonymising crime victims does dehumanise their presence in media coverage.

It dissolves the essence of human interest and potential sympathy, empathy and understanding.

One of the administration of justice purposes of identifying witnesses in criminal trials and for there to be accurate and fair reporting of what they say is that the public scrutiny enhances the qualities of veracity and integrity.

Reporting of such proceedings serves to protect the administration of justice in preventing miscarriages of justice.

It means potential witnesses either for the prosecution or the defence could come forward with vital evidence.

One of the risks of too much secrecy in criminal trials and the anonymising of trial participants is that the lack of key and specific information undermines the credibility and confidence of the public in the trial process.

The development of any significant conspiracy theories and beliefs about the trial could be evidence that the undermining of public confidence in the trial process is already underway.

It is depressing that the families of Lucy Letby's victims had such a negative and fearful anticipation and view of the media's role in covering criminal trials. This may be part of an unfortunate and wider pattern of demonising and delegitimizing professional journalism.

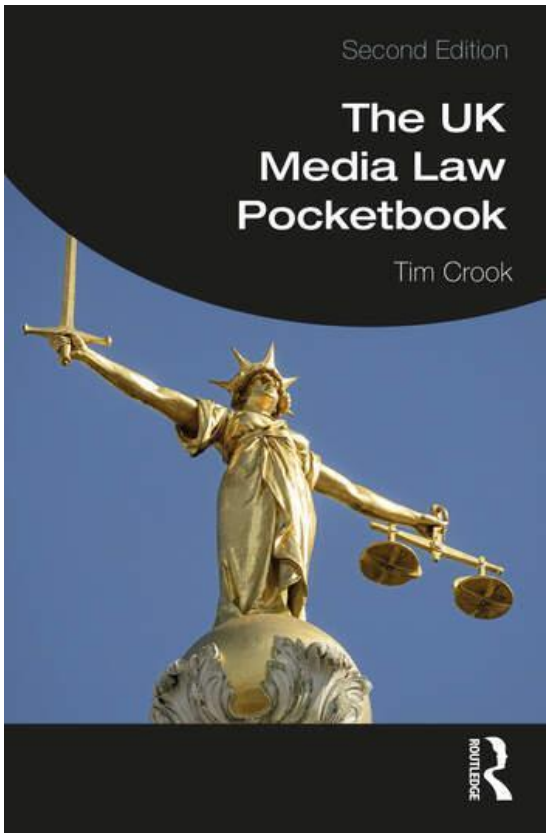
The Lucy Letby trial highlights the need for journalists covering court cases to do everything they can to be vigilant about the importance of Open Justice and to do everything they can to persuade the courts they are covering to maximise openness and identification of trial participants, particularly defendants, victims, prosecution and defence witnesses notwithstanding the automatic anonymity categories.

Those journalists present, and their legal representatives should they be necessary, are still entitled to persuade judges to listen to and respond to their arguments for Open Justice, to adopt and engage in restrictions which in all the circumstances are the least restrictive on open, accurate and fair reporting.

The reporting of the Lucy Letby trial by dedicated and consummate professional court reporting journalists has been a model on how to negotiate a complex nexus of reporting restrictions.

Press Gazette 29th August 2023 'Reporting restrictions and writing through tears: The 'incredibly complex' task of reporting Lucy Letby trial. Witnesses in the case were unusually given anonymity without reasons of national security or a risk to life.' See: https://pressgazette.co.uk/media_law/journalists-reporting-lucy-letby-trial-reporting-restrictions/

This briefing may be amended should the detail of the court rulings on reporting restrictions become available or further proceedings relating to the Open Justice issues develop in any way.



The second edition of *The UK Media Law Pocketbook* presents updated and extended practical guidance on everyday legal issues for working journalists and media professionals. This book covers traditional print and broadcast as well as digital multimedia, such as blogging and instant messaging, with clear explanations of new legal cases, legislation and regulation, and new chapters on freedom of information and social media law. Links to seven new online chapters allow readers to access all the most up-to-date laws and guidance around data protection, covering inquests, courts-martial, public inquiries, family courts, local government, and the media law of the Channel Islands and the Isle of Man. Tim Crook critically explores emerging global issues and proposals for reform with concise summaries of recent cases illustrating media law in action, as well as tips on pitfalls to avoid.

The UK Media Law Pocketbook is a key reference for journalists and media workers across England, Wales, Scotland, and Northern Ireland. The book's companion website provides downloadable sound files, video summaries, and updates all the developments in one of the most dynamic and rapidly changing fields of law. Visit https://ukmedialawpocketbook.com.

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