

Maintaining privacy

Alice Twaite discusses issues arising from new research on jigsaw identification, and wider concerns as to transparency in children cases



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Practice guidance on transparency in the family courts was issued by the president of the Family Division, Sir James Munby, in January 2014, and took effect on 3 February 2014. The guidance requires certain judges, in certain family cases (including care proceedings), to ordinarily allow their written judgments to be published. Judgments are usually published on the free-to-access British and Irish Legal Information Institute (Bailii) website on the basis that the anonymity of the children and families involved is maintained.

On 31 October 2014, the president's retrospective consultation on the effects of this guidance, together with a consultation on further potential transparency reform, closed. There have been no further developments for the family courts, although a pilot of more hearings to be held in public began at the end of January 2016 in the Court of Protection.

This article considers the findings of a research report published by the Association of Lawyers for Children (ALC) and National Youth Advocacy Service (NYAS), *A review of anonymous judgments on Bailii: Children, privacy and 'jigsaw identification'* (Brophy, Perry and Harrison, November 2015) (the Brophy report), the approach of the courts to transparency, and what steps might be taken to ensure a more consistent approach.

Brophy report

The Brophy report involved a pilot investigation whereby a group of nine young people, aged between 17 and 25 years, analysed judgments posted

on Bailii between 2010 and 2015 to ascertain how easy it is to 'jigsaw identify' children from judgments, with the benefit of local knowledge and using the internet. The exercise involved the young people (with local knowledge where possible) reviewing 21 judgments published on Bailii for what was termed 'identifying' information, and then cross-referencing that information with social media and media reports. They were asked to address two questions:

Whether the judgments contained information that would allow children to be identified by someone from their peer group, or a member of their local community

The report states that 13 of the 21 judgments contained specific information that would permit children to be identified by peers or those local in the community (paras 12.1-12.2). The investigators defined:

... any area information including naming a town; information about a school or school issues; gender and age of children; information about extended family members; and information about religious/cultural customs within households...

as 'high risk in-borough geographical markers', ie denoting a high risk of narrowing down the location of a child beyond the local authority or court area and details of professionals. They identified at least four of the five markers in six of the 21 judgments that 'placed children at high risk of being identified by peers at school and in local communities'. They also audited

judgments for details of abuse and parenting difficulty.

It is difficult to evaluate the claims without access to the judgments, and the completed semi-structured schedule referred to, but not included, in the report. Risks posed by information defined as ‘a high risk geographical marker’ varied considerably. One judgment disclosed the town the family currently lived in, a serious anonymisation error, and another mentioned two towns where the family had lived but did not reveal their current address. Another judgment included information about a specific school attended, but did not say that this was the current school, nor was the school named.

There is no suggestion that the young people were actually able to identify children from the information in the judgments, even with their local knowledge, but the fact that they perceived a risk of children being recognised by their peers from cumulative ‘narrowing’ information in judgments is of concern.

Whether someone with local knowledge and/or intent to identify a child could do so from information in the judgment combined with social media and media reports online

Searching using the specific information from the judgments allowed the investigators to find coverage online on media and social networking sites, and to identify children and other family members (paras 13.1 and 13.6). They found mainstream media reports (including online family law content) for 24% of the judgments, and social media site coverage for 33% of judgments. They also seemed to have been able to actually identify one child (named in several places on a grandparent’s Facebook page) (para 13.4). The research illustrates that children may be at potential risk of jigsaw identification by anyone likely to find and read the judgment, and search the internet, if families continue to post details of their children on social media sites, or if the press report on linked criminal proceedings.

Obvious contenders are journalists, researchers, legal bloggers and, much more seriously, those searching for particular children, such as organised paedophiles or perpetrators of violence

seeking families who have moved to confidential addresses. A recent example was the case of *H v A (No.2)* [2015], where a media representative informed the court that he had easily been able to identify a child from a published family judgment. Such potential for linking an anonymous judgment, in all its graphic detail, with an actual child, identified by name or location, through online media or social media reports about them or their family, threatens the privacy of

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relatively high numbers of children in proceedings, as well as the safety of a smaller number.

Identifying a child on social media sites can sometimes be lawful, as the statutory prohibition on publishing information that may lead to identification of children subject to proceedings ends when the proceedings end. It should be noted however that other prohibitions may apply, including any standard ‘rubric’ restriction on permission for publication of a judgment, providing that (para 21 of the president’s guidance):

... in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved.

Alternatively identification may occur where there is a disregard for, or ignorance of, the law. The law is complex. Relatives such as grandparents may not have access to legal advice even in care proceedings and may be aggrieved by injustice (perceived or real) with limited or one-sided information about what has gone on.

Wider concerns

The Brophy report also reveals that it is unlikely, even two years after implementation of the guidance, that young people have any idea that judgments exist, or are anonymously published from care proceedings, let

alone that they are freely available online. Bailii’s confusing array of databases would not encourage them to find out. Even the young people who carried out the research, who had direct experience of care proceedings and extensive knowledge of how information is shared from proceedings, through involvement in this and earlier studies, had no idea that judgments were published in this way and were shocked to find this out (and worried as they had

not been told). It would seem that lawyers representing children may not be discussing this issue with their older child clients, so as to have instructions if the issue arises at final hearing.

Further steps

The Brophy report sets out suggestions for future research (at para 14.10) including further analysis of the risks of jigsaw identification, a trial for summaries to be published on Bailii as opposed to full judgments, a review of anonymisation in official law reports, and a consideration of guidance and protocols for practice.

The report suggests that a summary might suffice for the purposes of publication on Bailii, with much of the detail of abuse and parenting difficulty redacted, to prevent the risk of jigsaw identification, but it is difficult to see how this would not compromise the very purpose of publication, let alone how it could work in practice.

Courts’ approach

The thinking underpinning the Brophy research seems to contrast powerfully with the approach taken by McDonald J in *H v A (No.2)*. He considered that jigsaw identification is:

- not of itself a reason to withhold publication of a judgment;
- a given in the internet age, requiring no change of approach in the transparency guidance; and

- simply an additional consideration for the court to feed into the case management decision on whether to publish the judgment and the level of anonymisation warranted.

McDonald J went on to say that the question for the court is whether the interference with rights under Art 8, European Convention of Human Rights (ECHR), ie a right to a private and family life, constituted by the risk of jigsaw identification arising out of

minimise the risk of an anonymisation error, or jigsaw identification of children, is still not in place.

Without a protocol for safe anonymisation, children practitioners (ie social workers, guardians, lawyers for children, and local authorities) do not know what they can expect from the judiciary to ensure that judgments are adequately checked on behalf of children before publication. Nor can they talk confidently to young people about the publication of judgments,

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publication, outweighs the interference to the Article 10 right of freedom of expression constituted by withholding publication. He considered that where there had been publicity regarding related criminal proceedings, creating a risk of jigsaw identification, the court should consider making an amendment to the standard rubric.

In *H v A (No.2)* the balance fell in favour of publication of the judgment (anonymising the children, parties and solicitors), together with a reporting restriction order prohibiting the reporting of the names, or whereabouts, of the children or mother (however obtained, and even to the extent that the information was already in the public domain). Publication of information that might lead to jigsaw identification was not specifically prohibited. Of particular interest is the closing comment of McDonald J (at para 103) that the individual rights of children to privacy cannot perhaps be entirely reconciled with the wider rights of children and society generally, making such cases particularly challenging to decide.

Discussion

Notwithstanding the different views on the correct starting point to balance competing rights, and the extent to which jigsaw identification matters, it is concerning that, some two years on from the president’s guidance, a transparent and systematic process to

safeguards and any applications that may be warranted in a particular case.

Practitioners need to have access to implementation guidance, checklists or training on safe anonymisation, dealing with:

- what information should routinely be redacted (and double-checked), eg names of family members, place names, school names and specific dates of birth etc;
- what may need to be redacted to prevent risk, eg the type of details that can become identifying in cumulative contexts, even if they would not be identifying in isolation, such as details of a disability, ethnicity, religion or culture; details of ages for large sibling groups; highly specific details of abuse; or physical consequences like scarring; and
- particular scenarios that warrant further consideration, including where children are specifically at risk of being located by violent perpetrators or organised paedophiles, or at risk from jigsaw identification due to media coverage of prior criminal proceedings or family postings on social media sites.

There is room for substantial disagreement on ‘best practice’ here,

but surely it is not impossible to draw up an agreed minimum ‘something’ in preference to a defeatist ‘nothing’.

Conclusion

There is a surprising lack of reported applications brought on behalf of children to alter the starting presumption imposed by the transparency guidance in individual cases, eg to redact details of abuse or parenting failures, or to oppose permission to publish at all. Such an objection might be based on evidence of a particular risk or vulnerability, or the expressed wishes of older children on the principle of privacy, notwithstanding anonymisation.

If the young people involved in the Brophy research are remotely representative of children and young people in proceedings, this might indicate that children practitioners are not routinely advising young people or taking their instructions on transparency issues. Concern that children were not being told of the small chance that the press might attend their hearings (and how it would be handled if such a situation arose) was also documented in an earlier report, *Safeguarding, privacy and respect for children and young people and the next steps in media access to family courts* (Brophy, Perry, Prescott and Renouf, ALC and NYAS 2014, page ii executive summary). It may be that this lack of information has now expanded to children involved in proceedings not being told about the publication of judgments either. It might also reflect low rates of publication of judgments generally. The guidance is limited (at para 17) to judgments that already exist in publishable form, or where a transcript has already been ordered. It may be that judicial decisions on whether and when to permit publication turn on the lack of a typed judgment or transcript direction.

Dr Brophy’s research report focuses on some key issues of children’s privacy and safety. A wider research strategy may also be required to encourage dialogue about improving reporting accuracy and issues of public awareness and confidence in family justice. ■

H v A (No.2)
[2015] EWHC 2630 (Fam)