

## NO PLACE TO HIDE? THE PRIVACY OF DIVORCE IN THE SCOTTISH COURTS

[1] Privacy of divorce proceedings in Scotland is in a state of confusion. The general principle is that all judicial proceedings are heard and determined in public. Scots law and procedure held to the principle of “a fair and public hearing” long before the principle was enshrined in article 6 of the European Convention on Human Rights. The principle applies in divorce proceedings just as in other proceedings. In a Scottish divorce all issues are generally determined together, that is the divorce, financial provision and the future of children. If the case requires final judicial determination then the judge sits in a court that is open to the public and hears the case. The press, the friends and relations and the general public can all sit and listen.

[2] The general restraint on the press remains the Judicial Proceedings (Regulation of Reports) Act 1926. This is a measure that applies in Scotland, England and Wales, not Northern Ireland. It is designed, according to the long title, to prevent injury to public morals. It contains a general prohibition on publishing indecent matter from judicial proceedings. Divorce proceedings are clearly regarded as a particular threat to public morals, as there is an express ban on publishing anything other than:

- (i) the names, addresses and occupations of the parties and witnesses;
- (ii) a concise statement of the charges, defences and counter-charges in support of which evidence has been given;
- (iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;
- (iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment.

[3] This Act was the subject of comment in the Supreme Court in a judgment given on 27 January 2010 in a case involving anonymity orders for alleged Al-Qaida facilitators (*Application by Guardian News and Media Ltd in HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 1). Aggrieved parties in family proceedings now have the highest authority for comparing their about to be ex-spouses with terrorists.

[4] The origins of the Act lie in the unhappy circumstances of the birth of a child, whose appearance sadly gave rise to lengthy proceedings for divorce before a jury in the High Court in London. In the first trial the jury disagreed, and the case was reheard, at great expense and to the considerable embarrassment of those concerned as “the most private and embarrassing marital intimacies were investigated and extensively regaled to a salacious public” (*Ampthill Peerage Case* [1977] AC 547, *per* Lord Simon of Glaisdale at p575B-D). Parliament were alarmed and passed the 1926 Act. Ironically the baby at the

centre of the furore went on to become the deputy chairman of Express Newspapers Limited.

[5] Lest it is thought that this old statute has no modern relevance, it was given a face-lift by the Civil Partnership Act 2004, which extended its application to dissolution of civil partnership.

[6] Contravention of the 1926 Act carries criminal sanction. Only a proprietor, editor, master printer or publisher is liable to be convicted, but on summary conviction those persons may be fined up to level 5 (currently £5,000). The offence also carries a penalty of imprisonment for up to four months. There does not appear to have been a plethora of prosecutions. In 1998 five Scottish newspapers carried reports about divorce proceedings in the sheriff court in Paisley between a Mr and Mrs McIlroy. The procurator fiscal in Paisley prosecuted all five in Paisley sheriff court. The prosecution failed on the ground that the sheriff in Paisley did not have jurisdiction to try the case as the offence had not been committed in the relevant sheriff court district. The procurator fiscal argued that the circulation of the newspapers concerned in Paisley resulted in the principal harm being done in that area. The sheriff, whose decision was sustained by the High Court of Justiciary held that the newspapers had not been published in Paisley. A newspaper is published for the purposes of the 1926 Act at the point where it is printed and the publisher offers it for sale or distribution. The decision of the High Court of Justiciary was delivered by the Lord Justice-General Lord Rodger who rejected the Crown's argument partly because it "rested on a misunderstanding of the purpose of the legislation: it was not introduced to protect the privacy of those involved in the proceedings but to prevent injury to the morals of those who might read the reports in the newspapers" (*Friel v Scott* 2000 JC 86). Lord Rodger, giving the unanimous judgment of the Sepreme Court on 27 January 2010 confirmed this is the purpose of the legislation.

[7] The decision of the High Court of Justiciary in *Friel* does not sit easily with English jurisprudence in so far as this rests on a case with close Scottish connections, namely *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302. The couple were famously divorced in the Court of Session in Scotland in 1963. The Duke was granted decree of divorce. A crosspetition for the Duchess was withdrawn. In the English action the Duchess sought an injunction to restrain the Duke from communicating information relating to her private life to certain newspapers and editor and proprietor of the newspapers from publishing particulars relating to the divorce proceedings in Scotland. She relied (*inter alia*) on the 1926 Act. Ungood-Thomas J rejected the submission that this Act was solely for the protection of public morals and held that the Act extended to the protection of those taking part in divorce proceedings. He granted interlocutory injunctions. The case was not cited in the Scottish case of *Friel v Scott*. *Friel* must however now be regarded as authoritative, given the judgement of the Supreme Court in *Application by Guardian News and Media*.

[8] In *Nicol v Caledonian Newspapers* 2002 SC 493 Lady Paton considered *Duchess of Argyll v Duke of Argyll*, and declined to follow the reasoning of Ungoed-Thomas J. *Nicol* was a defamation action arising out of the reporting of divorce proceedings. Lady Paton decided that the Judicial Proceedings (Regulation of Reports) Act 1926 did not confer any civil law right to recover damages for defamation. She gave four reasons. First the Act provided only a criminal sanction. Second the long title of the Act suggested its purpose was the protection of the public from salacious detail, rather than the protection of the privacy of individual litigants. Third litigants were not an identifiable class of persons intended to be protected. The Act did not prevent allegations of a defamatory nature being published, if they were made in parties' pleadings. Fourth, while Ungoed-Thomas J may have found a sufficiently stateable *prima facie* case to justify an interim order, it did not follow that an individual would be entitled to other private civil rights. Lady Paton went on to hold that a breach of the 1926 Act would not remove the defence of qualified privilege. She was addressed on article 8 and 10 of the European Convention on Human Rights, but held, rather briefly, that the 1926 Act reflected a balance between the general interests of the community and the personal rights of the individual.

[9] This raises the question of what protection exists for the individual engaged in divorce proceedings. The question does not appear to have been directly addressed in Scotland. This is in contrast with the recent UK rules of the First-tier Tribunal where there is a general power to prohibit publication of specified documents or information or any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified. In cases before the Tribunal there can be a balancing of rights in terms of articles 6, 8 and 10 of the European Convention on Human Rights. This is not the general position in divorce proceedings. At least in so far as there are no express measures. What we can take from *Application by Guardian News and Media Ltd in HM Treasury v Mohammed Jabar Ahmed and others* is that the Court, as a public authority in terms of section 6 of the Human Rights Act 1998 cannot act in a way that violates Convention rights. If therefore there would be a violation, the court is required to take steps to conduct its proceedings in such a way as to protect those rights. Lord Rodger referred to Lord Steyn in the House of Lords in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 speaking for appellate committee and saying "the foundation of the jurisdiction to restrain publicity ... is now derived from Convention rights under ECHR".

[10] Where does that take us. To "alphabet soup" as counsel in the *Guardian News* case put it, referring to the plethora of cases identified only by their initials ? Attention may have been directed to the problem in the Court of Session in 2007 in relation to the publication of Court of Session opinions on the internet. The publishers of the standard looseleaf "The Parliament House Book" have included in their text a "Practice Note No 2 of 2007" entitled "Anonymising Opinions Published on the Internet". The avowed purpose of the Note is to advise on the policy of the court on the anonymising of opinions. The mystery of the Note is that it does not appear on the Scottish Courts website which contains the opinions. Worse,

there is on the website a “Practice Note No 2 of 2007” which covers an entirely different subject.

[11] The elusive Practice Note on “Anonymising Opinions Published on the Internet” restates the principle that judicial proceedings are heard and determined in public and that there should accordingly be public access to judicial determinations. It then purports to list the exceptions. It refers, for example to adoption proceedings, where it states that “an order may be made” requiring the proceedings to be heard and determined in private. This is incorrect. Legislation requires adoption proceedings to be heard and determined in private, unless the court otherwise directs (Adoption (Scotland) Act 1978, section 57 and now Adoption and Children (Scotland) Act 2007, section 109). When dealing with interim orders relating to parental responsibilities and parental rights at a “Child Welfare Hearing” the sheriff has a discretion to sit in private. Proceedings in the sheriff court relating to children referred to the children’s hearing (broadly children who offend or are the victims of abuse or neglect) are to be heard “in chambers” (Children (Scotland) Act 1995, section 92(5)). This is rather different from “in private”. The press may be admitted at the discretion of the sheriff. Lord Hope, giving the Opinion of the First Division of the Court of Session in the Orkney case (*Sloan v B* 1991 SC 412 at p442ff) emphasised that the general rule is that proceedings of a court are open to the public. A direction from the Inner House is required before an appeal to the Court of Session about a children’s hearing matter may be heard in private (RC 41.32).

[12] What was the point of the mysterious Practice Note? It may have been an uneasy sense that issuing opinions on the internet raised the spectre of the Data Protection Act 1998. The court has become a “data controller” and must as such adhere to the principle of fair and lawful processing of data. The Data Protection Act was raised, and dismissed at first instance in *Murray v Express Newspapers plc* [2007] EWHC 1908, the case involving clandestine photography of JK Rowling’s young son on the streets of Edinburgh. The Court of Appeal, [2008] EWCA Civ 446, reversed the judge at first instance and revived the issue, holding that if the balance between the child’s article 8 rights and the article 10 rights of the press were to be struck in favour of the child, it would follow that the processing of the child’s personal data was unlawful for the purposes of the Data Protection Act 1998. This implies that judges should consider both how parties are identified and the content of judgments, balancing the need for privacy against the need for freedom of expression.

[13] In divorce cases there is no direct measure to which litigants may resort to protect their own privacy. Worse, in some cases the evidence on financial matters may contain material of a commercially sensitive nature, which may require to be aired in court, in full public view. Where there are children resort may be made to the Children and Young Persons (Scotland) Act 1937, which allows the court to make a direction that no newspaper, picture or broadcast report shall reveal the name, address or school or include particulars calculated to lead to the identification of a person under the age of 17 concerned in the proceedings. The court is generally ready to give such a direction. It does not always work. There was an interesting

instance where one of the principal Scottish newspapers published details about the dispute over the children, carefully excluding all identifying information. Another principal Scottish newspaper gave the names of the parties and details of their financial dispute, but did not mention the children. Putting the two reports side by side it was quite obvious that they referred to the same case. Identifying details had been published, but neither paper had breached the direction of the court.

[14] The present position leaves parties in divorce cases exposed to sensitive information emerging in full public view. Newspapers face criminal sanction if they breach the 1926 Act, but as Lord Justice-Clerk Rodger said in *Friel v Scott* “The paucity of decisions on the Act is, presumably, a tribute to the effectiveness of the legislation.” Mr and Mrs McIlroy and Mr Nicol may beg to disagree. Damages for defamation may represent a disincentive where the parties are sufficiently wealthy to commence proceedings, but for those of more modest means there appears to be limited private sanction. The judge may observe the Practice Note No 2 of 2007 and frame an opinion so as to protect the anonymity of persons involved, where he or she considers this appropriate. The court may consider whether there is a reasonable expectation of privacy for the purposes of article 8 of the European Convention on Human Rights and carry out a careful balancing exercise with respect to the right to freedom of expression under article 10 of the Convention, albeit the need to do so has not been made explicit to Scottish judiciary, nor has the question of data protection. Parties may be unhappy about taking the risk of publicity. In Scotland those who value their privacy should cherish their marriages.

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