



Open Justice, buttered parsnips and asbestos: third party access to court documents

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“Open Justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.”

Those were the words of a judge in 2012, when the Guardian newspaper applied for disclosure of court documents referred to in extradition proceedings brought by the American government against two British citizens. This year, the President of the Supreme Court has delivered a judgment on access to court documents, which drives at the heart of the principle that justice should not only be done, but also be seen to be done.

The background

Asbestos, we now know, is a human carcinogen. According to HSE statistics published in 2017, it still accounts for about 2,500 mesothelioma deaths in the UK each year, and probably for a similar number of lung cancer deaths. Asbestos related diseases, if they develop, are almost always fatal. They have very long latency periods, and so, although work with asbestos has been heavily regulated for many years, the figures mentioned above are a legacy of the heavy asbestos use of the past.

And so it is that organisations like the [Asbestos Victims Support Groups Forum UK](#) continue to provide help and support to those suffering from these diseases, as well as their nearest and dearest. This Forum also promotes asbestos awareness and is involved in lobbying activities.

Like the Forum, you may wonder for how long those operating in the manufacture and supply of asbestos containing materials knew of the dangers of the substance before what we all now take for granted became common knowledge. And what degree of influence did they have over industry, the regulators or their customers?

Cape Intermediate Holdings Limited was on the receiving end of a claim, brought by employers' liability insurers, in which it was alleged that they knew of the risks of asbestos but obscured the true position, misleading people about those risks. Cape denied the claim.

Thousands of pages of material were produced during the course of the case. The documents included statements of the parties' respective cases and the underlying evidence, amongst other things. A lengthy trial took place, but the case was settled before judgment was given.

After the settlement, the Forum applied for third party access to the court's records. It did not need them for a particular case, but wished to preserve the material in case it became important in furthering the Forum's aims in the future. This application, and the appeals that followed, sparked a discussion about precisely how much information should be disclosed to someone who is not a party to a case.

So what is open justice, and how is it applied?

The Supreme Court's decision and its implications can be distilled in this way:

- Open justice is a constitutional principle which applies to all tribunals exercising the judicial power of the state. It is there to enable the public to police the way in which the courts decide cases on the one hand, and to understand how the justice system works and why decisions are taken. In this way, judges are held to account for their decisions, and the public can be confident that the system is working as it should.
- In days gone by, all argument and evidence was placed before the court verbally. Even in criminal proceedings, that happens less these days and, in civil cases, much more material is in writing. What that means is that, although many hearings are in public, understanding what is going on without seeing what may be volumes of paperwork is nigh on impossible.
- A third party needs to explain why he is asking for access to the material held by the court. Does that person have a legitimate interest in doing so? The press may be able to demonstrate that fairly easily, for example.
- The default position is that, where documents have been placed before a judge and referred to during the course of proceedings, access should be permitted on the open justice principle. That is not limited to things that the judge has read (or says he has read). There are also some rules of procedure which inform this starting point.
- Where there is opposition to third party access, the court will conduct a balancing exercise. The value of the material in advancing the purpose of open justice is weighed, on the one hand, against the risk of harm which access to the documents may cause to the legitimate interests of others, or to the effectiveness of the judicial process, on the other. It may be necessary to think about the interests of vulnerable people, for example, or protecting privacy, trade secrets or confidential commercial information.
- Finally, the third party seeking access to documents can expect to have to pay the reasonable costs of being given access. Indeed, if the burden of being given access is out of proportion to the benefits to

the open justice principle, then access may not be granted at all. It will no doubt be cheaper and easier to be given access the closer the application is made to the time of the trial.

In reality, will the Supreme Court's decision change things significantly?

Possibly not. The case does have the potential to cause a flood of applications for access to documents, which may need careful management.

There will, no doubt, be cases of particular significance in which it will be in the public interest to allow third parties access to court documents. However, in most cases, particularly before a trial, there are likely to be good reasons why third parties should not be given access to the majority of the material.

Open justice principles will be most likely to kick in once a case is heard in public. In criminal cases, much of the argument and evidence is still delivered orally, and the Freedom of Information Act 2000 already provides a fairly effective mechanism for interested parties to obtain material. Very few civil cases reach a trial at all, and so in practice the need for third parties to understand how decisions have been taken by the court may not often arise.

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