HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 10

on appeal from: [2003] EWCA Civ 1573

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Polanski (Appellant)
v.
Condé Nast Publications Limited (Respondents)

ON
THURSDAY 10 FEBRUARY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Slynn of Hadley
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell

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Polanski (Appellant) *v.* Condé Nast Publications Limited (Respondents)

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THE LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. Condé Nast Publications Ltd publishes the magazine 'Vanity Fair' in this country. Roman Polanski, the celebrated film director, is suing Condé Nast for libel in respect an article included in the July 2002 edition of this magazine.

2. The words of which Mr Polanski complains refer to an incident said to have taken place 35 years ago. On the night of 8 August 1969 Mr Polanski's wife, the actress Sharon Tate, was murdered at their home in California USA by members of the so-called 'Manson Family'. Mr Polanski was working in London at the time. He flew to California and remained there until after his wife's funeral on 13 August 1969. On his return journey from Los Angeles to London he stopped in New York. He went to 'Elaine's' restaurant. There he met the actress Mia Farrow. That was on 27 August 1969 or thereabouts.

3. The July 2002 edition of 'Vanity Fair' contained a feature article about 'Elaine's'. The article included the following passage:

> '"The thing about Elaine's", says Lewis Lapham, "is that nobody will allow himself to be impressed by anybody. You could say, 'I just sold 17,000 copies of my book today', and they'd ask what you did yesterday. The only time I ever saw people gasp in Elaine's was when Roman Polanski walked in just after his wife Sharon Tate had been viciously murdered by the Manson clan. I was sitting at a table with a friend of mine who had brought the most

> gorgeous Swedish girl you ever laid eyes on. I don't think I've ever seen a more beautiful woman. Polanski came over and asked to join us. It turned out that Polanski had been in London when the atrocity took place, and he was on his way back to Hollywood for the burial. The Swedish beauty was sitting next to me. Polanski pulled up a chair and inserted himself between us, immediately focusing his attention on the beauty, inundating her with his Polish charm. Fascinated by his performance, I watched as he slid his hand inside her thigh and began a long, honeyed spiel which ended with the promise 'And I will make another Sharon Tate out of you'".'

4. Mr Polanski sought a correction and apology. Condé Nast refused. Condé Nast was willing to consider for publication a letter setting out Mr Polanski's position, but its solicitors said 'our clients stand by their story'. Mr Polanski began these proceedings on 20 August 2002. It is now common ground that, contrary to what was stated in the 'Vanity Fair' article, the meeting at Elaine's took place on Mr Polanski's return journey to London after his wife's burial.

5. The trial of these proceedings has yet to take place. There are three issues in the proceedings. The first issue concerns the meaning of the words. Mr Polanski's case is that the words bear the following defamatory meanings: that on his way to attend the burial of his wife, who had just been viciously murdered, he had stopped in New York and publicly and shamefully seduced the female companion of one of the other customers at Elaine's; that as an inducement for her sexual favours he had promised to make the girl famous; and that by this conduct he had shown such appalling and callous indifference to the fate of his murdered wife that even the hardened regulars of Elaine's had gasped in astonishment. No evidence is admissible on this issue.

6. The second issue is justification. Condé Nast allege that the words were true in so far as they bear the meaning that, even though his wife had just been viciously murdered, Mr Polanski showed a callous indifference to her memory by shamelessly exploiting her name and the prospect of emulating her fame in order to make sexual advances to another man's female companion whom he had only just met in a restaurant. This allegation of fact is denied by Mr Polanski. At the trial he will rely primarily on his own evidence and that of Ms Farrow. Condé Nast will rely on the evidence of Mr Lapham and the 'friend of

mine' to whom the article referred, Mr Edward Perlberg. The third issue is damages.

7. Thus far Mr Polanski's proceedings are straightforward. But there is a complication, which has given rise to this interlocutory appeal. Mr Polanski is a fugitive from justice. In August 1977 he pleaded guilty before a Californian court to a charge of unlawful sexual intercourse with a girl aged 13 years. He underwent tests ordered by the court, spending 42 days in the state penitentiary for this purpose. He then fled from the United States before he was sentenced. He returned to his home in France. As a French citizen he cannot be extradited from France to the United States. Since then he has never visited the United States again. Nor has he ever returned to the United Kingdom. If he came to this country he would be at risk of being extradited to the USA.

8. In these circumstances Mr Polanski has said he will not come to this country to give oral evidence at the trial of his libel action. Instead, he has sought a pre-trial direction that he may be allowed to give his evidence from France by means of a video link, pursuant to CPR 32.3. This rule provides the court 'may allow a witness to give evidence through a video link or by other means'.

9. Eady J gave this direction on 9 October 2003. The judge said the reason underlying the application was unattractive, but this did not justify depriving Mr Polanski of his chance to have his case heard at trial. The Court of Appeal, comprising Simon Brown, Jonathan Parker and Thomas L JJ, discharged the judge's order: [2004] 1 WLR 387. The general policy of the courts should be to discourage litigants from escaping the normal processes of the law rather than to facilitate this. The judge's order overlooked and undermined this policy. Giving evidence by video conference link is not yet the procedural norm. Mr Polanski is seeking an indulgence from the court. In denying him that indulgence the court is not shutting him out from access to justice; the choice is entirely his.

10. The question raised by this appeal is whether, as the Court of Appeal held, the judge misdirected himself in principle when exercising his discretion in favour of permitting Mr Polanski to give his evidence by video conference link. The issue is whether the administration of justice would be brought into disrepute if the judge's order were allowed to stand.

The parties' interests

11. One matter is clear. There can be no doubt that, as between Mr Polanski and Condé Nast, the judge's order was rightly made. The Practice Direction supplementing CPR Part 32 provides that when the use of video conferencing is being considered a judgment must be made on cost saving and on whether use of video conferencing 'will be likely to be beneficial to the efficient, fair and economic disposal of the litigation'. As between the parties that test is satisfied in the present case.

12. Several points can be noted in this regard. First, there is no question of this libel action being an abuse of the process of the court. True it is that the principal circulation of 'Vanity Fair' is in the United States of America: 1.13million copies at the relevant time. Its circulation in Europe is much smaller. In mid-2002 the circulation of the magazine in England and Wales was 53,000 copies and in France 2,500 copies. It is also true that Mr Polanski has not set foot in England since February 1978. His home is in France and has been so for more than 25 years. But Mr Polanski's reputation is international. Despite the facts just mentioned Condé Nast does not suggest Mr Polanski's choice of England as the forum for his proceedings is improper. He is entitled to bring this action in this country in respect of the publication of the offending article which took place here. Thus the question is not *whether* the action should be tried here. The question is *how* it should be tried.

13. Next, objections about the form in which evidence may be given at the trial usually arise when one party claims a particular course would be prejudicial to him in the conduct of the litigation. That is not so in the present case. Condé Nast has no relevant interest in Mr Polanski being required to give his evidence in person in court. A direction that Mr Polanski's evidence may be given by means of video conferencing, or 'VCF' in short, would not prejudice Condé Nast to any significant extent. If anything, as Simon Brown LJ observed, any prejudice would more likely be suffered by Mr Polanski, by reason of the lessened impact of his evidence and celebrity status on the jury.

14. Condé Nast does not suggest otherwise. Improvements in technology enable Mr Polanski's evidence to be tested as adequately if given by VCF as it could be if given in court. Eady J, an experienced judge, said that cross-examination takes place 'as naturally and freely as

when a witness is present in the court room'. Thomas LJ said that in his recent experience as a trial judge, giving evidence by VCF is a 'readily acceptable alternative' to giving evidence in person and an 'entirely satisfactory means of giving evidence' if there is sufficient reason for departing from the normal rule that witnesses give evidence in person before the court: [2004] 1 WLR 387, 402. Whether Mr Polanski's reason is sufficient is the all-important question to which I shall return.

15. Thirdly, if a VCF order is refused Mr Polanski will be gravely handicapped in the conduct of these proceedings. In practice he will either abandon his action or, possibly, continue but under the serious disadvantage that his oral evidence on the crucial dispute of fact, concerning what took place at the restaurant, will not be placed before the jury. Either way, in its conduct of this litigation Condé Nast will receive an unjustified windfall at the expense of Mr Polanski. Condé Nast will find itself in the fortunate position of not being called to account for having published what may be a serious libel.

The public interest in the administration of justice

16. Unfair consequences of this kind, prejudicial to one party and correspondingly beneficial to the other, are not unusual when questions of 'public policy' arise. Public policy is based on wider considerations than the interests of the parties themselves. But this does not mean the consequences for the parties are irrelevant when considering wider questions of public policy. On the contrary they may be of relevance and importance. They are so in the present case. They are one of the factors the court will take into account when deciding whether a VCF order in respect of Mr Polanski's evidence would bring the administration of justice into disrepute. Mr Pannick QC, appearing for Condé Nast, rightly accepted this.

17. This approach accords with the contemporary trend in this area of the law. The trend on matters of this kind is to look broadly at the requirements of justice. Whether the use of the court's procedures in a particular way would bring the administration of justice into disrepute or, as it is sometimes put, would be an affront to the public conscience, calls for an overall balanced view. This does not mean the courts now apply lower standards in the administration of justice or that the public conscience is now less easily affronted. Rather, it means the courts increasingly recognise the need for proportionality. The sanction must be appropriate having regard to all the circumstances. Indeed, an over-

rigid interpretation of the requirements of public policy in this field may be counter-productive. A legal principle based on public policy which ignores the consequences for the parties can itself bring the administration of the law into disrepute. It may also involve a breach of the parties' rights under article 6 of the European Convention on Human Rights.

18. A similar approach is now adopted in cases where a party seeking to be heard by the court is in contempt of court. That fact is not of itself a bar to the contemnor being heard: see Denning LJ in *Hadkinson v Hadkinson* [1952] P 285, 298, approved by Lord Bridge of Harwich in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 46. In *Arab Monetary Fund v Hashim* (21 March 1997, unreported), quoted by Potter LJ in the judgment of the Court of Appeal in *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113, 128, Lord Bingham of Cornhill CJ said the preferable approach is to ask

> 'whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.'

19. The same type of problem arises from time to time where a claimant, in order to pursue his claim, is forced to rely on his own illegal conduct. Then, on grounds of public policy, the court may refuse to aid him. This principle was affirmed, in a somewhat rigid form, in *Tinsley v Milligan* [1994] 1 AC 340. Whether this is the last word on this controversial subject remains to be seen. That is not an issue arising on this appeal.

Fugitives from justice

20. Against this background I turn to consider the point of legal principle raised by this appeal. A fugitive from justice is unwilling to come to this country to give evidence in person in civil proceedings properly brought by or against him. Can that be a sufficient reason for making a VCF order? Or would such an order, made for that reason, bring the administration of the law into disrepute?

21. These questions did not arise in past years. In the past oral evidence required physical presence. But recent advances in telecommunication technology have made video conferencing a feasible alternative way of presenting oral evidence in court. The issue before the House is whether the development of this new facility should ensure for the benefit of fugitives from justice as much as it does for other parties to litigation.

22. There are three possible answers on this issue. They may be broadly summarised as follows: (1) as a general rule a fugitive's unwillingness to return to the jurisdiction of this country is a valid reason, and can be a sufficient reason, for making a VCF order; (2) as a general rule a fugitive's unwillingness to return is not a valid reason for making a VCF order; and (3) there is no general rule: everything depends on the circumstances.

23. Possibility (3) is not attractive. That would leave at large the answer to the question of legal policy raised by this appeal. That would not be satisfactory. The fugitive's reason for seeking a VCF order must, as a matter of legal policy, either be acceptable in principle or not. The House must give guidance on this issue. So the choice lies between answers (1) and (2).

24. A number of features are to be noted. First, in the present case Mr Polanski's criminal conduct did not take place in this country. But the public interest in furthering the proper processes of investigation, trial and punishment of criminal offences committed in the United Kingdom applies equally where an extradition crime has been committed or allegedly committed in a country with which the United Kingdom has a relevant extradition treaty. Countries which are parties to an extradition treaty or the like have a mutual interest in seeing that persons who commit crimes in one country do not escape trial or punishment by fleeing abroad: see Lord Templeman in *Re Evans* [1994] 1 WLR 1006, 1008.

25. Second, a fugitive from justice is not as such precluded from enforcing his rights through the courts of this country. This is so whether the fugitive is claimant or defendant. Mr Polanski's status as a fugitive offender does not deprive him of any rights he would otherwise possess in respect of the subject matter of this action. His flight from California in 1978, and the steps he has taken ever since to remain beyond the reach of the Californian court, do not preclude him from

bringing proceedings in England in respect of damage to his reputation flowing from publication of defamatory material in this country.

26. At first sight this may seem unattractive. It may seem unattractive that a person can, at one and the same time, evade justice in respect of his criminal conduct and yet seek the assistance of the courts in protection of his own civil rights. But the contrary approach, adopted in the name of the public interest, would lead to wholly unacceptable results in practice. It would mean that for so long as a fugitive remained 'on the run' from the criminal law, his property and other rights could be breached with impunity. That could not be right. Such harshness has no place in our law. Mr Polanski is not a present-day outlaw. Our law knows no principle of fugitive disentitlement.

27. Thirdly, a direction that a fugitive such as Mr Polanski may give his evidence by use of video conferencing is a departure from the normal way a claimant gives evidence in this type of case. But the extent of this departure from the normal should not be exaggerated. It is expressly sanctioned by the Civil Procedure Rules. The power conferred by the rules is intended to be exercised whenever justice so requires. Seeking a VCF order is not seeking an 'indulgence'.

28. Fourthly, in the situation under consideration a VCF order will not assist the fugitive's evasion of justice. Whether a VCF order is made or not, the fugitive will not come to this country. He will not put himself at risk of arrest. In the present case, come what may, Mr Polanski's longstanding evasion of justice will continue. It will be unaffected by the court's decision on whether to make or refuse a VCF order. The effect of making a VCF order will be different. In the present case the effect will be to relieve Mr Polanski from one of the disadvantages of his fugitive status, namely, that he cannot travel freely to a country which has a relevant extradition treaty with the USA. To that extent a VCF order will enable Mr Polanski to sidestep one of the adverse consequences of his own criminal conduct and flight from justice. A VCF order will enable him to present his evidence orally to an English court in proceedings properly brought by him here, without being physically present in the court room.

29. Thus the practical consequences of the alternative answers on this issue are that if a court makes a VCF order, the fugitive will be relieved of a disadvantage otherwise attendant upon his fugitive status; but if the court refuses to make a VCF order, the fugitive's oral evidence will not

be available at the trial. By adopting the latter course the court will in effect be saying be saying to the fugitive: 'unless you surrender your fugitive status you cannot pursue (or, as the case may be, defend) your civil proceedings'.

30. I understand the intuitive dislike of relieving a fugitive of a disadvantage which until recently was inherent in his self-created status. Until recently the fugitive had to make up his mind whether (a) to surrender his fugitive status and give his oral evidence in court or (b) to maintain his flight from justice and suffer whatever disadvantages this might have in civil proceedings to which he was a party as claimant or defendant.

31. I understand that. But overall the matter which weighs most with me is this. Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is, and remains, a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to have recourse to the court to protect his civil rights even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive. To regard the one as acceptable and the other as not smacks of inconsistency. If a fugitive is entitled to bring his proceedings in this country there can be little rhyme or reason in withholding from him a procedural facility flowing from a modern technological development which is now readily available to all litigants. For obvious reasons, it is not a facility claimants normally seek to use, but it is available to them. To withhold this facility from a fugitive would be to penalise him because of his status.

32. That would lack coherence. It would be to give with one hand and take away with the other: a fugitive may bring proceedings here, but his position as a fugitive will tell against him when the court is exercising its discretionary powers. It would also be arbitrary in its practical effect today. A fugitive may bring proceedings here but not if it should chance that his own oral evidence is needed. Then, despite the current availability of VCF, he cannot use that facility and a civil wrong suffered by him will pass unremedied.

33. For this reason I consider the judge was entitled and, indeed, right to exercise his discretion as he did. *Rowland v Bock* [2002] 4 All ER 370 was correctly decided. There Newman J made a VCF order in respect of a claimant who risked arrest and extradition to the USA on charges of fraud. No doubt special cases may arise. But the general rule should be that in respect of proceedings properly brought in this country, a claimant's unwillingness to come to this country because he is a fugitive from justice is a valid reason, and can be a sufficient reason, for making a VCF order. I respectfully consider the Court of Appeal fell into error by having insufficient regard to Mr Polanski's right to bring these proceedings in this country even though he is and will continue to be a fugitive from justice.

34. I would allow this appeal and restore the judge's order. Mr Polanski was convicted of a serious crime. His reluctance to return to this country is grounded in a fear that he may be extradited and receive a custodial sentence in California. That does not take the case out of the general rule. However, at the trial the jury will be told these facts and will take them into account on all issues to which they are relevant.

Use of a claimant's statements as hearsay evidence

35. I add a brief footnote on a different procedural point raised before the Court of Appeal. Having regard to the conclusion I have reached on the main issue this point does not strictly arise on this appeal. But it is a point of general importance to practitioners. In the present case the Court of Appeal set aside the judge's VCF order and added this:

> 'and [we] further indicate that, if the claimant were to seek to put in his statements as hearsay evidence and the defendants in those circumstances were to apply to call him to be cross-examined upon their contents, the court would be bound to allow such application and if the claimant were not to attend court in person for such cross-examination, the court would then be bound to exclude the statements from evidence.'

36. I agree with the Court of Appeal that the court's case management powers under CPR 32.1 are wide enough to enable the court to make the orders indicated by the Court of Appeal in this passage. But I do question whether in the present case, had a VCF order

been refused, the court would have been 'bound' to make an order excluding Mr Polanski's statements from evidence if he did not present himself in court for cross-examination. Such an exclusionary order should not be made automatically in respect of the non-attendance of a party or other witness for cross-examination. Such an order should be made only if, exceptionally, justice so requires. The overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly. The principle underlying the Civil Evidence Act 1995 is that in general the preferable course is to admit hearsay evidence, and let the court attach to the evidence whatever weight may be appropriate, rather than exclude it altogether. This applies to jury trials as well as trials by judge alone, as noted by Brooke LJ in the judgment of the court in *O'Brien v Chief Constable of the South Wales Police* [2003] EWCA Civ 1085, paras 68-69.

LORD SLYNN OF HADLEY

My Lords,

37. The appellant, who lives in France, claims that he was libelled in an article published in July 2002 in the United States, in this country and in France in the magazine "Vanity Fair" by the respondents. The article made allegations against him of his behaviour in New York in August 1969. The details are set out in the opinion of my noble and learned friend Lord Nicholls of Birkenhead to which I refer without repeating.

38. The appellant has issued proceedings in England but not in the United States or in France. He says that though he can validly issue proceedings here in respect of the libel (which is correct) he cannot come to give oral evidence here because he would be liable to be, and would be likely to be, extradited to the United States to be sentenced in connection with an offence of unlawful sexual intercourse with a thirteen year old girl in 1977 to which offence he pleaded guilty. He fled the United States between conviction and sentence and has not been back there or to the United Kingdom since. As a French citizen he cannot be extradited from France to the USA to be sentenced.

39. He asks accordingly that he should be allowed to give evidence from Paris by video link under Rule 32.3 of the Civil Procedure Rules which provide that "The Court may allow a witness to give evidence

through a video link or by other means." On the face of it there is no restriction on the Court's power to permit evidence to be given by video link but the grant of permission is a matter for the discretion of the Court which itself in my view may be affected by policy as well as by case management considerations.

40. His present application raises at least two policy considerations which are in conflict. The first is that the Court should not frustrate his accepted right to sue in the civil courts here by refusing a procedural step provided for by the Rules when there is no valid reason to do so. The second is that the civil courts should not take steps the effect of which is to frustrate or impede the due execution of the criminal procedure of another state with which the United Kingdom has an extradition treaty and under which if the appellant were in England the United Kingdom would be required to respond to a request for his extradition so that he could be sentenced and obliged to comply with any sentence imposed.

41. On the one hand thus if he comes here to give evidence and is extradited the criminal proceedings in the Californian Court can continue, as in the interests of justice it is said they should. It was a serious offence which he admitted and he only avoided punishment because he had the wherewithal to flee, and did flee, the United States to live in a country from which he could not be extradited. On the other hand if he is allowed to give evidence by video link he will not be extradited, the criminal proceedings in California will not continue and he will avoid punishment. He will, however, be able to pursue his civil claim for libel in England. If he cannot give evidence by video link he will not realistically be able to come here to give evidence or he will be arrested and extradited. If he cannot give oral evidence in one way or another his case probably cannot be pursued effectively or perhaps at all.

42. There are strong arguments both in favour of and against his being allowed to give evidence by video link as the judgments of Eady J on the one hand and the Court of Appeal on the other, and the differing views that my noble and learned friends Lord Nicholls of Birkenhead and Lord Carswell show. They are set out so clearly that it is not necessary to repeat them more.

43. It seems to me however that as a starting point it is important to recall that although evidence given in court is still often the best as well as the normal way of giving oral evidence, in view of technological

developments, evidence by video link is both an efficient and an effective way of providing oral evidence both in chief and in cross examination. Eady J's experience led him "to believe that there is in most cases very little, if any, actual disadvantage or prejudice to either side when that means is adopted" and that "my experience is that the process of cross examination takes place as naturally and freely as when a witness is present in the courtroom." Thomas LJ's opinion was very much to the same effect. It may be, however, that in different types of case the balance tilts more in favour of evidence in a courtroom. It has been suggested that defamation actions are one such type of case. Even so it seems to me clear that video link evidence cannot be ruled out *ab initio* as not being effective in this sort of case.

44. However, as to whether as a general procedure, video link evidence should be allowed, it is relevant to refer to Annex 3 to the Practice Direction to the Civil Procedure Rules Part 32. It is said that

> "[VCF] is, however, inevitably not as ideal as having the witness physically present in court . . . A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation."

45. As between the parties, if all other questions of policy are ignored, it seems here that the use of video link could be efficient and fair and contribute to the economic disposal of the litigation. If indeed there is any disadvantage it may be to the person asking for video link evidence and it is not established that the respondents would be adversely affected by the use of video link evidence.

46. It weighs heavily in the appellant's favour that this article, if not true, is a serious and unpleasant libel only published some 33 years after the incident and with a motive about which it would be wrong to speculate. On any view it is one in which his desire to clear his name from the slur, whatever other suggestions may have been made about his conduct in sexual matters, is well understandable.

47. It is also clear that whether or not he could have sued in France or the United States of America he was entitled to start an action here and

for it to be pursued in accordance with our procedural rules, those which are mandatory and those which include the power of the court to regulate the way in which evidence may be given. It is clear that the fact that he is a fugitive offender does not bar him from starting proceedings any more than an alleged terrorist is barred from claiming that his human rights under the European Convention have been violated.

48. It does not, however, follow that when it comes to the exercise of its discretion as to how permissive powers are exercised, the Court cannot have regard to all the circumstances of the particular case. The guidance notes state "A judgment must be made in every case in which the use of VCF is being considered" in respect of the matter specified. In my view those matters are not exclusive and it may be necessary to consider the significance of other matters.

49. It is thus in my opinion relevant to inquire why he asks for this permission. The reason is clear and there is only one reason. It is to avoid the risk or likelihood of arrest and extradition and to escape sentence and punishment in the USA for an admitted offence. No other reason is suggested as to why video link evidence should be provided or is needed.

50. In this connection the appellant can no doubt say that the Extradition Treaty does not in terms require the United Kingdom to seek to bring him here or to avoid any step which would result in his not having to come here. It only needs to extradite when he is in fact in the United Kingdom. At present he is not actually in the United Kingdom so that there is no Treaty obligation to extradite. But that is too narrow a construction of the appropriate policy. Just as the United Kingdom has an interest in ensuring that people wanted here for criminal trial or following conviction here are brought here by extradition from other states, so by the very nature of the extradition process the United Kingdom has an interest in seeing that those who have been convicted are returned, in this case, to carry out their sentences. It seems to me that to accede to a request like the present, whose avowed sole aim is to avoid his being extradited, in the absence of other overriding considerations compelling the grant of the application, is contrary to public or judicial policy.

51. The position might well be different if there is a valid self-standing reason for allowing the evidence to be given by video link and

the avoidance of punishment or extradition are incidental consequences. So also it may in other cases be relevant to consider whether being a defendant rather than a plaintiff (so that there is no choice about being a party to the proceedings) would more readily justify the order for a video link.

52. It is relevant in the present case to consider whether proceedings elsewhere were open to the appellant. It seems that he could not sue in the United States whilst out of the jurisdiction as a fugitive offender and if he were to go back and take his sentence it might not be possible for him effectively to pursue his claim. To say that he could leave the claim until he was free again after serving due sentence is subject to obvious difficulties. I am prepared to assume that he could not effectively take proceedings in the United States. But the same is not true it seems of his position in France of which he is a citizen and where he resides. True there is a short limitation period but as far as I can see he began his action in England well within the limitation period applicable in France when he could have sued there. I have not seen an acceptable excuse put forward on his behalf as to why he could not have sued in France. The publication in France was in smaller numbers than in England and much less than that in the USA. It may be for that and other reasons that he would be likely to recover less damages in France than he would in the United Kingdom. That does not seem to be here a significant reason for not suing in France since, as I understand it, the appellant's motive is not to secure a large sum of money but to clear his reputation of what he regards as a nasty slur. Qualitatively if not quantatively that could be done as well in France as in England.

53. It has been suggested that since the language of the article is English it could be more easily dealt with in an English speaking country. There are cases where that is likely to be true, where there are nuances or refinements of language not easy to translate. The words here are, however, direct and clear. I do not see that a French judge would have difficulty in understanding what is said very baldly or what is its alleged effect.

54. It does not follow, as seems to be suggested, that if the video link is refused here a fugitive offender can never in any case assert his civil rights without risking extradition and imprisonment. His evidence may not be needed where he is asserting either a right to property or damages for breach of a written contract which is admitted. He may be able to sue elsewhere.

55. I agree with Jonathan Parker LJ that an English court would be most unlikely to grant a video link approval where the sole reason was that the applicant should be able to avoid going back to England where he would be liable to sentence and perhaps punishment or indeed liable to prosecution. It seems to me, as a matter of comity, that the same should apply to an application by the United States between which country and the United Kingdom an extradition treaty exists. If he was sought in order to face charges rather than to receive sentence for a conviction following a plea of guilty, different considerations might, but would not necessarily, arise.

56. The task of the Court here is one of balancing different policy considerations and not merely deciding case management. Where a person convicted on his own admission flees the jurisdiction, it seems to me that in the absence of special factors compelling a different result, a video link conference may and should here be refused where the sole reason for asking for it is that he wishes to escape conviction or sentence in the country where he has commenced proceedings or to avoid extradition to another country for the same reason. The mere fact that the person cannot pursue proceedings here does not necessarily mean that a video link must or should be granted. The policy requirement of satisfying the criminal sentence is by no means less important than the desirability of his suing in libel for an allegation which is serious but no more serious than the criminal offence of which he has been convicted. The possibility of suing in France is a further contra-indication to any obligation to grant such a video link.

57. Accordingly in my view the learned judge to whose great experience in these matters tribute has rightly been paid did not give the necessary weight to the policy arguments to which I have referred.

58. I agree with what Lord Carswell has said about possible cross-examination on written statements admitted by way of a hearsay notice and like Simon Brown LJ I do not consider that to refuse a video link would amount to a breach of Article 6 of the European Convention on Human Rights as Scheduled to the Human Rights Act 1998. I would, therefore, like Lord Carswell and substantially for the reasons he gives, dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

59. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. I agree with it, and for all the reasons that he has given I would allow the appeal and restore the order of Eady J. But, as we are differing from a unanimous decision of the Court of Appeal and as we are not ourselves unanimous, I should like to explain briefly in my own words why, like my noble and learned friend Baroness Hale of Richmond, I too have come to this conclusion.

60. As Lord Nicholls points out, it would not be satisfactory for your Lordships to dispose of this issue, as the Court of Appeal did, by saying that it all depends on the circumstances: see [2004] 1 WLR 387, 399, para 46. A general rule must be identified. The question then is, what is the general rule to be? Is the fact that the applicant for an order under CPR r 32.3 wishes to remain outside the United Kingdom so that he can avoid the normal processes of the law in this country a sufficient reason in itself for refusing to allow him to give evidence by means of a video link? Or is the court, as a general rule, not entitled to decline to make the order on this ground?

61. I take as my starting point Eady J's observation that nothing that had been said to him led him to conclude that he would be justified in shutting out the appellant from access to justice in these proceedings in his attempt to vindicate himself in respect of the publication in this jurisdiction of the 'Vanity Fair' article. The question whether the administration of justice would be brought into disrepute if his order is allowed to stand is said to raise a question of public policy. But it also raises a question about access to justice. On the one hand a fugitive from justice must accept the consequences of his criminal act. He is not entitled to seek the assistance of the court in seeking to avoid these consequences. That is the essence of the public policy objection. But access to justice is also founded on the rule of law, and in this respect too the rule of law informs public policy. Where civil rights have been infringed the law provides remedies. To deny a fugitive access to the courts where his rights have been infringed is to deny him access to those remedies.

62. As the search is for a general rule, the particular circumstances of this case need to be viewed more generally. The appellant complains of libel. But others in his position may have claims in this jurisdiction for the infringement of their property rights, as Lady Hale has pointed out, or may have claims for damages for personal injury. The general rule must be capable of being applied generally, irrespective of the nature of the civil right that the fugitive seeks to enforce. The principle which guarantees access to justice does not distinguish between different types of claim, nor does it distinguish between different classes of litigant.

63. The appellant did not commit his criminal act in this country. That does not, of course, mean that the public interest in furthering the ends of justice is less important in his case than it would have been if his crime had been committed here. The general rule ought not to depend on where or when the crime was committed. So it should be capable of being applied generally to all fugitives, irrespective of the jurisdiction in which the crime was committed and irrespective of the particular processes which the authorities might wish to pursue against him were he to set foot in this country.

64. But not all fugitives abroad can remain at large indefinitely. Extradition is the normal process by which they can be brought here to face justice, and in the majority of cases extradition will be available. Where extradition arrangements are in place fugitives abroad are likely, as are domestic fugitives who are seeking to escape the ends of justice, to wish to remain out of sight for as long as possible. They are not likely to risk revealing their whereabouts by pursuing civil claims in this country. So we are not dealing here with fugitives who are amenable to the ordinary processes. The class of fugitives who will be in a position to seek an order under CPR 32.3 without compromising their liberty is a limited one. It is limited to fugitives who cannot legally be extradited to this country, or who cannot legally be extradited to countries to which the United Kingdom would be under an obligation to extradite them if they were to come here. In practice the class is confined to fugitives in countries with whom there is no extradition treaty and to those like the appellant to whom, as citizens of the countries in which they reside, a constitutional right is given not to be extradited.

65. This brings me to what I see as the critical factor. It is the factor that leaves me in no doubt that the general rule should be that the fugitive's unwillingness to come to this country is not in itself a reason for refusing to allow his evidence to be given through a video conference link. This is that the granting or refusing of the order will

have no effect whatever on the claimant's continued status as a fugitive. The granting of the order will not help him to escape from the normal processes of the law, nor will declining to grant the order do anything to assist them. This is because he is already beyond the reach of those processes. So long as the claimant remains where he is, and irrespective of whether or not the order is made, those processes will be incapable of reaching him if he is a member of that class of fugitives that cannot be extradited.

66. The appellant is in that position because he has an undoubted constitutional right, as a citizen of France, not to be extradited. That is his right, and he wishes to exercise it. He is not trying to hide from anybody. It is incorrect, then, to say that his sole aim in seeking the order is to avoid being extradited. He does not need the help of the courts of this country to do that. This is not why he asks for the order to be made in his case. His reason for asking for the order to be made is so that he can give evidence in a case where, leaving aside issues of public policy, he has a legitimate interest in doing so. The effect of refusing the order will not be to assist the normal processes of the law. Its only effect will be to deny him access to justice. I think that Eady J was right to see this as the crucial point which justified the making of the order in his case. But now that we are looking for a general rule, I would hold that the appellant's case falls within the generality of cases where the fact that the claimant wishes to remain outside the United Kingdom to avoid the normal processes of law in this country is not a ground for declining to allow him to remain abroad and give his evidence by VCF.

67. There is however a further point which should be mentioned. For the reasons that Lady Hale has given, with which I respectfully agree, I think that the Court of Appeal went too far when it held that the court would be bound to exclude the appellant's witness statement, which would otherwise be admissible as hearsay evidence under section 1(1) of the Civil Evidence Act 1995, if he did not attend court in person for cross-examination. There are, of course, various procedural safeguards, failure to give effect to which may affect the weight to be given to the evidence. The power under CPR r 33.4(1) to permit another party to call the maker of the statement for the purpose of cross-examining him is one of those safeguards. But a failure to attend for cross-examination does not in itself make such a statement inadmissible.

68. The appellant has made it clear that he would be willing to make himself available for cross-examination by VCR if his request that he should be allowed to give his evidence by this means were to be refused

on grounds of public policy. Eady J tells us that in his experience the process of cross-examination in this way takes place as naturally and freely as when a witness is in the court room. So it cannot be said that the appellant was seeking to obtain a tactical advantage by offering himself for cross-examination by this means, or that he was attempting to prevent a proper evaluation of the hearsay evidence: see 1995 Act, section 4(2)(f). The objection to his giving evidence by this means on grounds of public policy, if upheld, would not have justified the sanction of refusing to admit the witness statement into evidence, for what it might be worth. This is a further indication that the interests of justice are better served in this case by allowing him to give his evidence by VCR, as he seeks to do.

BARONESS HALE OF RICHMOND

My Lords,

69. I agree, for all the reasons given by my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead, that this appeal should be allowed and the judge's order restored. In brief:

(1) As between the parties to this action, there is no doubt that this order was correctly made. The respondent will suffer no prejudice from the appellant's evidence being given in this way; it is common ground that any prejudice will be suffered by the appellant, not least because the jury will be forcibly reminded of the reasons why he is not present in person and will be obliged to take them into account where they are relevant.
(2) As between the competing public interest arguments, there is a strong public interest in allowing a claim which has properly been made in this country to be properly and fairly litigated here.
(3) Against that, there is also a strong public interest in not assisting a fugitive from justice to escape his just deserts. But the appellant will escape those deserts whether or not the order is made. He will continue to be outside the reach of the US authorities in any event. All the refusal to allow his evidence to be given by VCF will do is effectively to deprive him of his right to take action to vindicate his civil rights in the courts of this country.
(4) If this were almost any other cause of action, I venture to think that the outcome would not be in doubt. Suppose, for example, that the appellant had suffered personal injuries while in transit from the US to France and his evidence was necessary to prove

either the circumstances of the accident or the extent of his injuries: would we hesitate to allow it to be given by VCF? Suppose, perhaps more plausibly, that there were a dispute about whether the appellant had intellectual property rights in one of his films which is distributed or marketed here: would we hesitate to allow his evidence to be given by VCF? It should not make a difference that the right in question is the right to such reputation as he has, rather than a right to bodily integrity or a right to property. That reputation was attacked in an English language publication and is most appropriately defended in an English language jurisdiction.

(5) Generally, therefore, I agree that this should be an acceptable reason for seeking a VCF order, although there may be cases in which the affront to the public conscience is so great that it will not be a sufficient reason. This is not such a case.

70. I wish, however, to expand a little on the question of whether the appellant's witness statement should have been admitted if he were not permitted to give oral evidence by VCF. The judge assumed that if he were not called to give evidence, his witness statement would be admitted as hearsay evidence. The Court of Appeal took the view that it would not: indeed they said in terms that if the appellant failed to attend in person to be cross examined on his witness statement, the court would be 'bound' to refuse to admit it: see [2004] 1 WLR 387, 401, para 53. In my view this goes far too far.

71. It remains the general procedural rule that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence: see CPR 32.2(1)(a). But in civil proceedings this is now a matter of procedure rather than substance. The substantive rule is that all relevant evidence is admissible unless there is a rule excluding it. There used to be a rule excluding hearsay evidence, that is, a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated: see Civil Evidence Act 1995, s 1(2). To this rule there were numerous exceptions which deprived it of much of its force in civil proceedings. But in 1995 the rule itself was abolished. Section 1(1) of the 1995 Act provides simply that:

> "In civil proceedings evidence shall not be excluded on the ground that it is hearsay."

72. This new rule is *not* made subject to the later provisions of the Act which provide for procedural safeguards where hearsay evidence is to be adduced. Section 2 requires a party proposing to adduce hearsay evidence to give such notice of that fact as is reasonable and practicable in all the circumstances to enable the other party to deal with it. But a failure to comply with this requirement (or with the rules of court dealing with how such notice is to be given) 'does not affect the admissibility of the evidence'; rather it may be penalised in costs and taken into account in assessing weight: see section 2(4).

73. Section 3 gives power for rules of court to provide that if the party adducing hearsay evidence does not call the maker of the statement to give evidence in person, the other party may do so and may cross-examine him as if he had been called by the party adducing the statement; see also CPR 33.4. Nothing in section 3 or in the CPR provides or suggests that if the maker does not attend for cross-examination at trial his statement becomes inadmissible. Section 4 provides for the considerations relevant to assessing the weight (if any) to be given to hearsay evidence, the first of which is whether it would have been reasonable or practicable for the maker of the statement to be called as a witness. Section 5(2) provides that the same evidence of credibility or of inconsistent statements is admissible as would be admissible had the maker of the statement been called to give evidence: see also CPR 33.5. Section 6 deals with the treatment of statements made by people who *are* called as witnesses in the proceedings.

74. The substantive law following the 1995 Act, therefore, is that relevant hearsay is always admissible; there are various procedural safeguards aimed at reducing the prejudice caused to an opposing party if he is not able to cross-examine the maker of the statement; but the principal safeguard is the reduced – even to vanishing – weight to be given to a statement which has not been made in court and subject to cross-examination in the usual way. The court is to be trusted to give the statement such weight as it is worth in all the circumstances of the case.

75. The 1995 Act was the result of the recommendations of the Law Commission in their Report on the Hearsay Rule in Civil Proceedings (Law Com No 216, 1993). The main objection to the proposed abolition of the rule was that it might lead to 'superfluous, repetitious, or prolix evidence prolonging trials unnecessarily' (para 4.20). The Commission had canvassed the possibility of an express rule allowing the exclusion of otherwise admissible evidence if its probative value were outweighed by considerations of undue delay, waste of time, or the needless

presentation of cumulative evidence. But they declined to recommend an express statutory provision to that effect, for several reasons. One was that they believed that 'although not well known, the power to exclude repetitious and superfluous evidence in fact already exists' (para 4.22(ii); the scope of the power is explained in paras 4.49 to 4.58). The project referred to the Commission by the Lord Chancellor (as a result of a recommendation of the Civil Justice Review in 1988) had been limited to the hearsay rule in civil proceedings, whereas any statutory provision to this effect could not sensibly be limited to hearsay evidence. The power to exclude needlessly prolix or repetitious evidence was part of the courts' inherent power to control their own proceedings. There was a developing trend away from the judge as 'passive umpire' and towards much stricter court control of the proceedings both before and during the trial. Civil procedure was then in the process of review and development which culminated in the 1998 Civil Procedure Rules. Hence if it were thought that the courts' exclusionary powers should be made more explicit, this should be done by rules of court rather than by primary legislation (paras 4.22 – 4.24; 4.62 – 4.64).

76. Thus we find that the power of the court to control evidence is spelled out in CPR 32.1:

> "32.1(1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
> (b) the nature of the evidence which it requires to decide those issues; and
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
> (3) The court may limit cross-examination."

77. This is clearly part of the powers of active case management which permeate the whole of the Civil Procedure Rules, all of which are subject to the overriding objective set out in CPR 1.1:

> "1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
> (2) Dealing with a case justly includes, so far as practicable, –

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
  (i) to the amount of money involved;
  (ii) to the importance of the case;
  (iii) to the complexity of the issues; and
  (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

78. It is well within this objective to seek to get the parties to agree as many facts as possible, to limit the number of witnesses who may be called to give evidence on a particular issue, or to restrict the amount of documentary evidence placed before the court. But it would be a strong thing indeed to use such case management powers to exclude the admissible evidence of one of the parties on the central facts of the case. There may be circumstances in which this could be done. The unreasonable refusal of that party to subject himself to cross-examination may be one of them. It might be grossly unjust to the other party, even contrary to his right to a fair trial under article 6 of the European Convention on Human Rights, to decide a claim principally on the untested evidence of a party who had not been subject to cross-examination of any sort. But that is not this case. The appellant is quite willing to be cross-examined by a procedure which is agreed will cause no prejudice to the respondent. Accordingly, I share the view of the judge that it would be difficult, not only to exclude his witness statement but also to accord it less weight on the ground that he was unwilling to be cross-examined. In those circumstances, it is infinitely preferable to allow him to give his evidence orally and be cross-examined on it by video link.

79. I do not think that CPR 32.7 is any real help on this issue. It is expressly limited to 'a hearing other than the trial'. The general rule at such hearings is still that evidence is given in writing: see CPR 32.2(1)(b). This is no longer limited, as it was under the previous rules, to evidence given on affidavit. The previous rules also made provision, equivalent to that in CPR 32.7, for the court to give permission for the person giving that evidence to be cross-examined and for his evidence not to be used without the court's permission if he failed to attend as required by the court. There is no equivalent express provision as to

what is to happen at trial. The considerations applicable to satisfying the overriding objective when an action is being tried are obviously different from those applicable at an interlocutory stage. Even at that stage, the Court of Appeal has hesitated to exclude such evidence altogether: see *Phillips v Symes* [2003] EWCA Civ 1769.

80. The Civil Evidence Act 1995 and the Civil Procedure Rules 1998 are part of a new approach to civil litigation in this country. The court is in charge of how the dispute which the parties have put before it is to be decided. Technicalities which prevent the court from getting the best picture it can of the case are so far as possible to be avoided. The court is to be trusted to evaluate the weight of the relevant evidence for itself. The evidence is to be given in the most efficient and economical way consistent with the object of doing justice between the parties. New technology such as VCF is not a revolutionary departure from the norm to be kept strictly in check but simply another tool for securing effective access to justice for everyone. If we had a rule that people such as the appellant were not entitled to access to justice at all, then of course that tool should be denied him. But we do not and it should not.

LORD CARSWELL

My Lords,

81. The appellant Roman Polanski is unwilling to come to this country lest he be arrested and extradited to the United States of America to receive punishment for an offence of unlawful sexual intercourse with a 13-year-old girl which he committed in California in 1977. He fled that jurisdiction in 1978 after pleading guilty to the offence and spending some six weeks in prison undergoing pre-sentence tests, but before sentence was pronounced by the court. He has resided since then in France, from which country he cannot be extradited to the United States, as he has French citizenship and the French Republic will not extradite its citizens. If he were to come to this country he would be liable to be extradited under the terms of the extradition treaty with the United States.

82. The appellant has brought an action in which he has claimed damages for libel against the respondents, the publishers of the magazine Vanity Fair, in respect of the publication in this country of an

article which was contained in the July 2002 issue of the magazine and published in several countries. The content of the publication and the issues in the action have been set out in the opinion of my noble and learned friend Lord Nicholls of Birkenhead and I need not repeat them.

83. In an interlocutory application in the action the appellant sought a pre-trial direction that he be allowed to give his evidence from France by means of a video conferencing link ("VCF"), pursuant to CPR rule 32.3, which provides that "The court may allow a witness to give evidence through a video link or by other means." His admitted object in seeking this direction is to avoid the necessity of coming to this country, with the concomitant risk that he would be arrested and extradited.

84. Certain matters are not in dispute. The technology used in giving evidence by VCF is good, so that there is little disadvantage to the other party, as Eady J said in his ruling to which I shall refer. That disadvantage has not, however, been entirely eliminated, and it is to be noted that in para 2 of the VCR Guidance set out in Annex 3 to Practice Direction – Written Evidence, set out in section 32PD.33 of the CPR, it is stated, after the advantages have been enumerated:

> "It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use ... In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it."
>
> I would refer also to the discussion in paragraphs 27-9 of the judgment of Simon Brown LJ in the Court of Appeal, in which he accepted that by reason of the factors there set out "VCF evidence is less ideal even than usual in a case like this".

85. Eady J gave a direction on this issue in a ruling on 9 October 2003, in which he carefully set out the several factors which he considered should be balanced in reaching his decision. His conclusion was contained at pages 6-7 of the ruling:

> "In all the circumstances it seems to me that the considerations which I have to take into account in the exercise of my discretion weigh very heavily in favour of this route being taken and the countervailing disadvantage to the defendants is in my judgment very small, if any."

If the only factors to be weighed in the balance were those which operated to confer advantage or impose disadvantage on one or other of the parties, I should have no hesitation in accepting that this was a proper and correct exercise of Eady J's discretion.

86. In giving his ruling, however, the judge did not take into account the factor of public policy, which was the foundation for the Court of Appeal's reversal of his decision. In pursuance of the principle that people should not be permitted to escape the consequences of their criminal conduct, the law discourages litigants from escaping the normal process of the law, a policy which the order permitting the appellant's evidence to be taken by VCF would tend to undermine. It is one species of the genus described by Lord Diplock in *Hunter v Chief Constable of the West Midlands* [1982] AC 529 as –

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of procedure rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

The principle is one which should be applied on grounds of public policy, not for the benefit of a party who may gain by its application.

87. After weighing the relevant considerations, including the principle of public policy which I have described, the Court of Appeal held that in all the circumstances of the case Eady J was wrong to give a direction permitting the appellant to give his evidence by video link. Simon Brown LJ set out his conclusions at paragraph 47 of his judgment:

> "This claimant is a fugitive offender, convicted of a serious offence for which he has yet to be sentenced. Anxious though he may be to nail what he says is the lie about his having sought (34 years ago) to exploit his tragically deceased wife's name, such a libel action is, as Mr Shields submits, a "volunteer action" (or "action for choice") and, moreover, one which could more appropriately have been brought in the United States where the principal publication took place or in France where the claimant lives. He is invoking this court's jurisdiction for his own benefit, not defending a claim brought against him. He should not be permitted to litigate on special terms. No libel action has ever yet been fought in this country in the claimant's absence (although in one action the claimant gave no evidence at all, and in another the claimant gave evidence by VCF as to damages). This is not the appropriate case for that unique distinction. Clearly the court's general policy should be to discourage litigants from escaping the normal processes of the law, rather than to facilitate this. The order made below to my mind overlooks and undermines that policy. If an order is properly to be made in favour of this claimant then it is difficult to imagine a case when it would not be."

Jonathan Parker LJ said at paragraph 58:

> "Had Mr Polanski been convicted in England, it seems to me inconceivable that the English courts would have allowed him, as claimant, to conduct civil litigation here via VCF solely in order to enable him to continue to escape the consequences of his conviction; and I cannot see why the fact that his conviction was in the United States, with whom the United Kingdom has an extradition treaty, makes any difference."

Thomas LJ concluded at paragraph 63:

> "In the result there can be no reason, let alone sufficient reason, which can properly be advanced to permit the

> claimant to give his evidence by VCF and thus to depart from the normal rule that a witness should give evidence in person in the court room and be cross-examined in person on it. He is not being shut out from access to justice; it is entirely his decision as to whether he comes to London to give evidence in support of his claim."

88. There is an important countervailing factor, that the courts should be slow to resort to public policy considerations which will defeat a claim that ex hypothesi is a good cause of action. That factor was clearly articulated by Lord Lowry in *Spring v Guardian Assurance* [1995] 2 AC 296 at 326:

> "I also believe that the courts in general and your Lordships' House in particular ought to think very carefully before resorting to public policy considerations which will defeat a claim that ex hypothesi is a perfectly good cause of action. It has been said that public policy should be invoked only in clear cases in which the potential harm to the public is incontestable, that whether the anticipated harm to the public will be likely to occur must be determined on tangible grounds instead of on mere generalities and that the burden of proof lies on those who assert that the court should not enforce a liability which prima facie exists. Even if one should put the matter in a more neutral way, I would say that public policy ought not to be invoked if the arguments are evenly balanced: in such a situation the ordinary rule of law, once established, should prevail."

89. I acknowledge and accept the importance of this principle, which underlies the conclusion of those of your Lordships who would allow the appeal. The ground on which I respectfully differ from that conclusion is that in my judgment greater weight requires to be given to the implications of a decision allowing the appellant to give evidence in this case by video link.

90. I may state at once that I would not support the application of the principle in such a way that a person in the position of the appellant would become in effect an outlaw. Mr Pannick QC for the respondents, quite rightly in my opinion, disclaimed reliance on any such use of the principle. I also respectfully agree with the view expressed by Lord

Nicholls of Birkenhead in paragraph 19 of his opinion that it is not appropriate to have resort to the doctrine of *ex turpi causa non oritur actio*. Nor is it necessary to import into our legal system the full rigour of the fugitive offender doctrine accepted in courts in the United States.

91. Where I part company with the majority of your Lordships is in the application of the opposing principles and the weight which should be given to each in a case such as the present. Before the Court of Appeal counsel for the appellant was prepared to accept that, in some cases at least, the court could properly refuse to make a VCF order in favour of a fugitive from justice, that is to say, a litigant who had committed an offence in this country and had left the jurisdiction in order to avoid arrest. Before the House, however, this concession was not forthcoming. If a VCF order is made in the present case in favour of the appellant, one might next find such a fugitive from justice claiming that there is no sustainable reason why it should be refused to him. For the courts to permit a fugitive to give his evidence by video link so that he could stay out of the jurisdiction and avoid arrest would in my opinion affront the public conscience and bring the administration of justice into disrepute. I do not consider that that case could be distinguished by the argument that it would constitute an abuse of the process of the court and that the present case would not fall into that category. I do not find it necessary to attempt in this opinion to define the limits of abuse of the process of the court, for it seems to me that both that area of the law and the one invoked on behalf of the respondent in the present case are applications of the same principle, viz the power of the court to prevent misuse of its procedure in a way which would bring the administration of justice into disrepute.

92. When one accepts the validity of the proposition that a claimant who has fled from justice in this jurisdiction should not receive the assistance of the court to bring a civil claim without giving his evidence in person in court in the ordinary fashion, then I do not think that one can easily reach a different conclusion in respect of an offender in another jurisdiction who wishes to avoid extradition from this country. They seem to me to be governed by the same principle, and if there is a difference between them it is only one of degree. I cannot myself accept that, absent other distinguishing factors, it is right to refuse one permission to give evidence by VCF and give it to the other.

93. I therefore consider that the Court of Appeal was correct in its approach to the issue. The court has to weigh up a number of considerations. Those which Lord Nicholls has discussed in his opinion

are of course of importance and due weight must be given to them, as also to those enumerated in paragraph 46 of the judgment given by Simon Brown LJ. One must take into account on one side of the equation the fact that the technology is now well established and its use would not cause much prejudice to the respondent. If, as appears probable, the appellant would be unlikely to succeed in his case if he were unable to give evidence is obviously a consideration of great strength. As against that is the fact that he could have brought timeous proceedings in France if his main object is, as he claims, to clear his name – he commenced the action in England before the time-limit had expired in France. Most heavily against him has to be weighed the factor, which to my mind is a very powerful one, that the claimant wishes to have the assistance of the court to give his evidence in a special way, which will enable him to avoid the consequences of his criminal act. I consider that it would be quite wrong to allow him to do that, even if it were to mean that the exercise of his right of action for the publication in this country of a defamatory article is fatally inhibited. I agree with the Court of Appeal that this factor should prevail when the balancing exercise is carried out and that the order was wrongly made by the judge.

94. Counsel for the appellant also argued that the refusal to permit the appellant to give evidence by video link, which was tantamount to excluding him from presenting his case in court, constituted a breach of Article 6 of the European Convention on Human Rights. I would not accept this argument. The European Court of Human Rights has stated and regularly applied the principle that the right of access is not absolute. So in *A v United Kingdom* (2002) 36 EHRR 917, having stated in paragraph 73 of its judgment that the right of access to a court constitutes an element inherent in the right to a fair hearing, the Court continued in paragraph 74:

> "However, the right of access to court is not absolute, but may be subject to limitations. These are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and

> if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

95. In *Eliazer v Netherlands* (2001) 37 EHRR 892 the Court dismissed an application from a person who had been convicted *in absentia* on an appeal and refused a hearing by the Netherlands Supreme Court because no appeal lay against proceedings *in absentia*. At paragraph 30 of its judgment the Court reiterated the same principle:

> "The Court recalls that the right to a court guaranteed by article 6 of the Convention, of which the right of access is one aspect, is not absolute. It may be subject to limitations, particularly regarding the conditions of admissibility of an appeal. However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved. In addition, the compatibility of limitations under domestic law with the right of access to a court guaranteed by article 6 of the Convention will depend on the special features of the proceedings concerned and account must be taken of the whole of the proceedings conducted in the domestic legal order as well as the functions exercised by a court of cassation whose admissibility requirements are entitled to be more rigorous than those of an ordinary appeal court."

In *McElhinney v Ireland* (2001) 34 EHRR 322 the Court dismissed an application brought by an applicant who claimed that he had been injured by a shot fired by a British soldier who had been carried for two miles into the Republic of Ireland, clinging to the applicant's vehicle following an incident at a checkpoint. He brought proceedings in the Irish courts, which dismissed his claim on the ground of State immunity. The judgment was mainly concerned with the principle of State immunity, but the Court at paragraphs 39-40 of its judgment added a further ground for rejecting the application: since the applicant could have sued the British Government in the Northern Irish courts, the decision of the Irish court did not in these circumstances exceed the margin of appreciation allowed to States in limiting an individual's right of access to court. I accordingly consider that, in application of the principle contained in these cases, no breach of Article 6 was involved

in the decision of the Court of Appeal to refuse the appellant permission to give his evidence by video link.

96. I should mention in conclusion one other suggested course which was discussed in the judgment of Thomas LJ and in argument before the House. This was that the appellant might seek to have his written statement admitted by way of hearsay notice given in pursuance of CPR Rule 33.2. Under Rule 33.4, however, the respondent might apply to the court to permit the appellant to attend to be cross-examined. If he then refused to come to this country for that purpose, then I think that the same policy reasons apply as in the issue of permitting him to give his evidence by video link and that the grounds for allowing the statement to be admitted in evidence are no stronger. I therefore consider that in those circumstances the court should clearly use the provisions of CPR Rule 32.1 to exclude the statement from use in evidence.

97. For the reasons which I have given I would therefore dismiss the appeal.