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SUPPRESSION AND THE INTERNET: THE 'CYBER MEMORY' CASE – A NEW ZEALAND RESPONSE

By **Ursula Cheer**

In New Zealand recently, a non-binding decision in the Youth Court at Manukau, a division of the District Court, attracted world-wide media coverage and interest because of an unusual attempt by the judge to control internet coverage of aspects of the case.

In *New Zealand Police v KOrs*,[1] Judge Harvey made a partial non-publication order in relation to proceedings before him where three defendants were charged with offences relating to a murder. This order allowed publication of reports about the proceedings in contemporaneous broadcasts or publications. Thus, contemporaneous reporting in newspapers and on television and radio was unrestricted. However, accounts on the internet, or by way of placing of stored audio, video or text files on the internet, were prohibited. This sort of partial suppression order had not been seen before in New Zealand. The decision and the suppressed details in it were almost immediately commented on by overseas bloggers on-line, and in one case, a Canadian on-line news outlet carried a version of the story containing the suppressed details. The decision was seen by bloggers in the United States of America in particular as a restriction of freedom of expression and unenforceable. Many of these bloggers had clearly not read the decision itself. Furthermore, these criticisms are not new, as it is by no means the first time the internet has been the subject of suppression orders in New Zealand.

This case involved two adult accused jointly charged with a young person in relation to offences arising from the murder of a young man. The charges were heard together in the Youth Court, where reporting of proceedings is automatically suppressed unless leave of the court is given,[2] and the name of the young accused cannot be disclosed.[3] The decision was an exercise by Judge Harvey of his discretion to give leave for the proceedings to be reported. Therefore, the judge was attempting to open the proceedings up to more scrutiny, rather than less. He chose to do this by allowing contemporaneous reporting, but did not permit storage of that reporting on the internet. Thus, the names and images of the two adult accused were made public on radio, television and in newspapers and have therefore been available to the New Zealand public.

It is clear from the judgment, that the judge's main concern was to prevent the creation of searchable internet records which could be used by members of a jury at a later trial. He said, at paragraph 5: 'The intent of the limited order was to ensure that at a later stage, any concerns about a fair trial would not be prejudiced as a result of the availability of information stored on the internet. Potential jurors could, if such material were available, have reference to it which could well have an adverse affect upon a fair trial.' Judge Harvey's specific concern about the internet being the main source of such prejudice, and his method of dealing with his concerns, is novel. This method has been somewhat undermined, however, by the disproportionate attention his order received. The case is continuing, and the judge advised the media he would hear submissions from them about issues of suppression when the order fell for reconsideration. The judge has now looked at the matter again and reaffirmed his original decision.[4] The

[1] *Unreported, Youth Court, Manukau, 25 August 2008, Judge Harvey.*
[2] *Children, Young Persons and Their Families Act 1989, s 438(1).*
[3] *Section 438(3).*
[4] *New Zealand Police v KOrs, Unreported, Youth Court, Manukau, 3 September 2008, Judge Harvey.*

In granting suppression, the courts have regard to the nature and seriousness of the charge, the likely extent of publicity, and the likely effects of publication on the individual and those associated him or her.

judge noted that no member of the media made submissions, and no counsel opposed the continuation of the order.

In New Zealand, discretionary suppression is most commonly exercised under s 140 of the Criminal Justice Act 1985, which gives open discretion to judges in criminal cases to suppress publication of the name of persons involved in the proceedings or of any particulars likely to identify them. The starting point is the principal of open justice, and the person requesting suppression must make out a clear case. The leading cases are *R v Liddell*[5] and *Lewis v Wilson & Horton Ltd*.[6] In granting suppression, the courts have regard to the nature and seriousness of the charge, the likely extent of publicity, and the likely effects of publication on the individual and those associated him or her. Distress, embarrassment and adverse effects on the accused, such as financial, are insufficient unless out of the ordinary. Serious offences do not usually attract suppression, and this is so in relation to sexual offences in particular (unless the victim will be identified).

New Zealand Police v KOrs did not involve an exercise of s 140 discretion. However, in his second decision, Judge Harvey acknowledged that the principles applying to those sections are of assistance in deciding whether publication would be permitted under the Children, Young Persons and their Families Act.[7] He then addressed evidence which tended to support the continuation of the order, and referred to cases which noted the importance of preserving the right to a fair trial not only for the accused, but also for the public to maintain overall confidence in the administration of justice, recognised the inevitable tension between freedom of expression and the right to a fair trial, noted a prominent Australian case where media specific and internet non-publication orders have been made,[8] and referred to a recent New Zealand Court of Appeal decision where the court had acknowledged the possibility of jurors undertaking a search of the internet to find information on the accused, and commented that there is no perfect way for judges to deal with the availability of prejudicial material on the internet.[9]

Because no media were in court to make submissions opposing the order, the judge identified possible arguments himself. He thought that arguments about the unprecedented nature of the order should fail because similar orders had been issued in other jurisdictions (such as Australia in the 'Underbelly' case, and France in the 'Yahoo' case[10]), in Germany to enforce obscenity laws, and in New Zealand itself to protect anti-smoking legislation.[11] In Judge Harvey's view, the internet is simply not a 'law free zone'[12] because there is existing and developed jurisprudence regulating it.[13]

Judge Harvey also addressed the tension between the need for a fair trial and the right to free speech, which are represented in the New Zealand Bill of Rights Act 1990.[14] He concluded briefly that existing New Zealand case law affirms that the right to a fair trial can override all, and additionally suggested his 'postponed publication order' is a way of resolving the tension.[15]

Following Judge Harvey's first decision, the author was of the tentative view that the best way for this case to be dealt with now may be for a strong instruction to the jury when the matter finally comes on for hearing in about a year, and not to use the internet when members retire to consider their verdict. This happened in New Zealand during a series of prominent historic rape trials, which began in March 2006 where two former police officers had been convicted previously of rape in 1989 and were serving prison sentences at the time they faced two later trials. Suppression orders continued after the first trial, but these were breached. Protestors

[5] *[1995] 1 NZLR 538.*
[6] *[2000] 3 NZLR 546.*
[7] *Paragraph 10.*
[8] *General Television Corporation Pty Limited v Director of Public Prosecutions, (2008) VSCA 49 – the 'Underbelly' case.*
[9] *Paragraph 57.*
[10] *LICRA and UEJEF v Yahoo (Tribunal De Grande Instance Paris, No RG: 005308, 22 May 2000).*
[11] *Paragraphs 63-64.*
[12] *Paragraph 65.*
[13] *Paragraph 66.*
[14] *See ss. 25 and 14. This Act is not supreme law, but interpretative only. Rights in it are weighed in a balancing process. Rights jurisprudence in New Zealand is nascent.*
[15] *Paragraph 68.*

The judge makes clear that his aim was to significantly reduce the amount of information available to potential jurors by eliminating a potential search string on news websites – if such information is not on the websites, then there will be no hits.

believed the juries should have known about the prior convictions, and this led to convictions for contempt after the 2006 trial. Only one member of the media, RadioWorks, breached the suppression orders, and was fined NZ$750. Otherwise, the information was circulated by members of the public through pamphleteering and was available on the internet at various times, in particular on the Trade Me web site. Although the court took action to have that material removed, the accused applied for a stay of prosecution of the last trial, on the grounds that they would not be able to obtain a fair trial. In dealing with that application in *R v Rickards, Shipton and Schollum*,[16] Randerson J took a robust view, and thought a fair trial was still possible if the trial judge gave clear instructions to the jury. Although the precise approach would have to take account of the circumstances at the time of the trial, Randerson J suggested that the trial judge should take a direct approach, raise the pre-trial publicity at the outset, and refer to the original trial and the outcome, the likelihood that at least some members of the jury had heard about it and the suppressed information, remind jury members of their oath, and excuse any jury members if they had doubts about their ability to deal with the evidence fairly.[17] At the subsequent and final trial, the jury did indeed appear to be able to put the information out of their minds, and acquitted all of the accused.

Judge Harvey addresses this suggested course in his second decision.[18] He pointed out that potential jury contamination can only arise if the information is there in the first place, and supports his approach by outlining how Google searches usually rank newspaper reports highly in search returns. The judge makes clear that his aim was to significantly reduce the amount of information available to potential jurors by eliminating a potential search string on news websites – if such information is not on the websites, then there will be no hits.

Judge Harvey also scrutinised the main concern expressed about his first decision, which was the lack of enforceability based on a view that the internet cannot be censored.[19] He rejected this, pointing out that no order is completely enforceable, and all orders can be undermined in some way. Suppression in particular has always been a bit of a blunt instrument. But Judge Harvey obviously shares the pragmatic view of most New Zealand judges, who persist in the belief that if most of the information which is causing concern can be kept from most of the relevant audience, then orders are still worth making. Indeed, a case law search carried out by the author reveals that over the period of nine months during 2008, twenty-one New Zealand suppression decisions have been made, ordering that information not be published in news media or on internet or public databases until the final disposition of trial. There has been no outcry about the enforceability of those decisions, although they do, of course, differ from that made by Judge Harvey, in that they were not partial.

Judge Harvey made clear that the fact that breaches of suppression orders can occur on the internet does not excuse such actions, because information does not just 'appear' on the internet. He developed his view of a form of facilitatory liability arising in relation to internet publication. The judge stated, at paragraph 73, that:

> 'It requires direct or indirect human intervention. It is important to remember that such information first emanates from New Zealand and is transmitted by means of internet communications protocols (which is still publication) to the administrator of the off-shore website. Such action is still a facilitatory step towards the commission of the breach of the non-publication order .... publication on the internet takes place where the information is received and comprehended.'

[16] *Unreported, High Court, Auckland, CRI 2005-063-1122, 25 May 2006.*
[17] *Unreported, High Court, Auckland, CRI 2005-063-1122, 25 May 2006, 60-67.*
[18] *Paragraphs 69-71.*
[19] *Paragraphs 72-74.*

This is certainly arguable by analogy with the example of information being leaked over the telephone by someone in New Zealand to an overseas publication such as a newspaper.[20]

On the issue of lack of enforceability bringing the law into disrepute, the judge forcefully defended the value of trying to protect the right to fair trial, and suggested that it 'is perhaps better for the law to recognise that there is a problem and attempt to do something about it rather than put it into the "too hard" basket for another day and risk injustice.'[21]

Finally, the judge dealt with an argument that his order implied that internet publication will be stifled in all cases[22] and rejected this, emphasising that some, but not all, circumstances will justify postponed publication under a partial order. He identified these as high profile and sensational cases, where publicity is intense, public sentiments run high and media coverage is at saturation levels.[23] Judge Harvey emphasised once again that in such cases, the interests at stake in relation to fair trial are not only personal to the accused but also public, in the administration of justice generally. He concluded, finally, that his interim order should continue and clarified the point at paragraph 79:

> '... this means that publication of the names or images of the defendants on or by way of stored video or images on any website or internet server is prohibited. Publication of names and images in the "traditional" print medium is permitted as is publication of names and images on a contemporaneous radio or TV broadcast. Publication by means of the internet is prohibited. Names and images cannot be made available on a website. Because "blogs" utilise web technology and protocols they are necessarily included. Publication by means of enabling the names and images of the defendants to be obtained from an internet server are prohibited. This is wide-ranging and is intended to be, given that all information on the internet is retained upon and made available from servers.'

This decision is not novel because it deals with suppression of the internet. It is novel in that it attempts to pre-empt a 'cyber memory' effect which the judge has accepted will turn harmless publication today into prejudicial publication a year later during a trial. The judge acknowledged the order may not be completely enforceable, but was satisfied that it is enforceable enough to be effective, however.

As he completed the reasons for his decision, Judge Harvey received late submissions from media interests. He has agreed to hear further argument on 12 September 2008. It would be expected that such submissions will deal forcefully with Bill of Rights arguments, with the scope of the order and once again, with enforceability and effectiveness.

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[20] *J. Burrows and U. Cheer, Media Law in New Zealand (2005, 5th edn, OUP), 339.*
[21] *Paragraph 74.*
[22] *Paragraph 76.*
[23] *Paragraphs 77-78.*