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NAME THEM AND SHAME THEM? A CRITIQUE OF
NAME SUPPRESSION LAW IN NEW ZEALAND

LLB(HONS) RESEARCH PAPER

FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION
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The remainder of the paper considers the law governing name suppression in New Zealand. It examines the existing issues in this area of law. Particular attention is given to the operation of the court's discretion to order name suppression under section 140 of the Criminal Justice Act 1985. It is argued that inconsistent weight is attributed to the presumption of innocence in interim name suppression applications by the lower courts. There is a clear tension between the courts' insistence that no one receives favourable treatment before the law, and their readiness to suppress celebrities' names. The paper also argues that courts often neglect to assess whether name suppression is a justified limitation on the right to freedom of expression. The media has an important role to play in name suppression applications and their role in proceedings are outlined, as are the challenges that courts face in name suppression orders from the internet. It is argued that the continued availability of discretion is necessary for judges, but that judicial training may be warranted. To gain greater consistency in pre-trial suppression all defendants should receive suppression until the charges have been "put into" by the court. In such a case, freedom of expression is delayed and not destroyed.

The text of this paper (including abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 16,901 words.

Name Suppression-Criminal Justice Act, section 140-Freedom of Expression

ABSTRACT

This paper seeks to introduce readers to the law governing name suppression in New Zealand and highlights pressing issues in this area of law. Particular attention is given to the operation of the court's discretion to order name suppression under section 140 of the Criminal Justice Act 1985. It is argued that inconsistent weight is attributed to the presumption of innocence in interim name suppression applications in the lower courts. There is a clear tension between the courts' insistence that no one receives favourable treatment before the law, and their readiness to suppress celebrities' names. The paper also argues that courts often neglect to assess whether name suppression is a justified limitation on the right to freedom of expression. The media has an important role to play in name suppression applications and their role in proceedings are outlined, as are the challenges that courts face to name suppression orders from the internet. It is argued that the continued availability of discretion is necessary for judges, but that judicial training may be warranted. To gain greater consistency in pre-trial suppression all defendants should receive suppression until the charges have been "gone into" by the court. In such a case, freedom of expression is delayed and not destroyed.

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 16, 901 words.

Name Suppression-Criminal Justice Act, section 140-Freedom of Expression

I INTRODUCTION

“Anger at All Black suppression”,¹ “Disturbing Caller not named”,² “High Ranking man’s name suppressed in sex case.”³ Such headlines are currently bombarding New Zealand newspapers on a daily basis, provoking controversy about the granting of name suppression to defendants in criminal proceedings. Name suppression infringes society’s right to be fully informed about the workings of their public institutions⁴ and restricts the liberty of freedom of expression.⁵ Indeed to some, “[t]he most egregious suppression of free speech in New Zealand today is name suppression.”⁶ Name suppression is also viewed as a reduction of the expected cost in committing a criminal offence, as it prohibits publicity of an offender’s actions⁷ and consequently presents a façade to the public of an offender’s true character.

Because of these reasons, the Court of Appeal has made it clear that the discretion to suppress should only be exercised in situations where the harm which would be caused by publicity, is disproportionate to the public interest in disclosure and the freedom to receive information of any kind.⁸ This paper seeks to illustrate how consistently the Court of Appeal’s directions are being followed in the lower courts, amid allegations that name suppression is both inconsistent in application⁹ and given too readily to celebrities.¹⁰

This paper opens by canvassing the competing rights the courts must balance in name suppression applications. The case law suggests that too little attention is

¹ “Anger at All Black Suppression” (10 December 2004) <<http://tvnz.co.nz>> (last accessed 23 May 2005).

² John Henzell “Disturbing Caller not named” (15 January 2005) *The Press* Christchurch Local News.

³ Tony Wall and Emily Watt “High Ranking man’s name suppressed in sex case” (19 December 2004) *The Sunday Star Times* Auckland.

⁴ *M v Police* (1991) 8 CRNZ 14, 15 (HC) Fisher J.

⁵ This right is guaranteed in section 14 of the New Zealand Bill of Rights Act 1990.

⁶ Bernard Robertson “Internet: Giving you info your government doesn’t want you to have” (7 April 1995) *The Independent* Auckland 9.

⁷ Robertson, above n 6, 9.

⁸ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, para 68 (CA) Elias CJ for the Court.

⁹ “Name suppression to easily granted-law expert” (5 March 2005) Stuff NZPA National News <<http://www.stuff.co.nz>> (last accessed 23 May 2005), Nicola Boyes “Legal advisers favour secrecy” (31 August 2005) *The New Zealand Herald* Auckland News A2.

¹⁰ Boyes, above n 9, A2.

given to freedom of expression. The paper outlines the statutory provisions dealing with name suppression and the factors which are commonly raised in support of suppression. Particular attention is given to the varying weight judges accord the presumption of innocence in interim name suppression applications, which leads to inconsistent results. Consideration is also given to the clear tension between the courts' continued insistence that no class of people receives preferential treatment before the law and their constant suppression of the names of celebrities. The crucial role of the media in name suppression cases is also highlighted. The increasing problems associated with the internet warrant discussion, as name suppressions orders are being breached by internet users in New Zealand and abroad, raising questions about their usefulness. To some, name suppression is soon to be a "dead letter", because of the internet's increasing pervasiveness.¹¹ Proposed reform options are also critiqued.

This paper argues that name suppression should continue to be available, as in certain circumstances it is both necessary and desirable. However, courts need to be more thorough in their analysis of whether the harm caused by publicity is truly disproportionate to the need for open justice and uninhibited expression. In all other circumstances, the principle should be to name and shame defendants who have committed criminal acts.

II THE COMPETING RIGHTS

The courts have the power to suppress the publication of evidence, submissions and names.¹² Similar considerations apply to suppression of name and of evidence, but name suppression "is the aspect which arises most often and creates most problems in practice."¹³ When Courts receive such applications for name suppression, there must be a balancing of competing private and public rights.¹⁴

¹¹ Robertson, above n 6, 9.

¹² Criminal Justice Act 1985, ss 138-140.

¹³ John Burrows and Bill Wilson "Media Law" New Zealand Law Society Seminar (April 2003) 17.

¹⁴ *Lewis v Wilson & Horton Ltd*, above n 8, 559 Elias CJ for the Court.

A *Open Justice- "Publicity is the soul of justice"*¹⁵

The principle of open justice, which states that "justice must not only be done, it must manifestly be seen to be done" is a powerful starting point when considering suppression applications.¹⁶ This principle of openness states that a hearing should take place in open court and that members of the public (including reporters) have the right to be present.¹⁷ The Bill of Rights affirms this principle by providing that a person charged with an offence has a right to a "fair and *public* hearing by an independent and impartial court."¹⁸ The principle also gives the media a common law right to report proceedings.¹⁹

The rationale of the principle is that publicity acts as an aid to justice, accentuating accountability. As the prominent New Zealand educationalist Jack Shallcross said: "At the heart of democratic societies is the belief that free access to knowledge, information and opinion through the media is the only defence against tyrannies of all kinds."²⁰ Name suppression offends against the media's ability to report completely about proceedings, as the names of those involved remain concealed.

In criminal proceedings it is said that the openness principle carries its greatest force, as it is necessary to reflect the immense power over the individual's freedom which the state has by virtue of the criminal law.²¹ A social contract exists between citizen and state:²²

When a person commits a crime that person technically commits a crime against the State and not the victim of the crime. Citizens have, in effect, given over their

¹⁵ John Burrows and Ursula Cheer *Media Law in New Zealand* (5ed, Oxford, Melbourne, 2005) 325.

¹⁶ Burrows and Cheer, above n 15, 325.

¹⁷ *A-G Leveller Magazine Ltd* [1979] 1 All ER 745, 749-750 (HL) Lord Diplock.

¹⁸ New Zealand Bill of Rights Act 1990, s 25(a) (emphasis added).

¹⁹ *R v Felixstowe JJ* [1987] QB 582, 591 Watkins LJ.

²⁰ Karl Du Fresne "Defending the public's right to know" (3 May 2004) *The Press* Christchurch.

²¹ C Baylis, "Justice Done and Justice seen to be Done-the Public Administration of Justice" (1991) 21 VUWLR 177, 192.

²² (23 June 2004) 618 NZPD 13891.

responsibility to hold the accused person to account to the State for conviction and punishment, but consequently are entitled to hold the Court, as a state agent, to ensure that that obligation is being met fairly and properly.

The justice system belongs to the public and they have an interest in seeing offenders brought to justice, which is manifested through uninhibited access to the courts.²³

However, the granting of name suppression should not be heralded as the end of an accountable justice system.²⁴ This is because publication of an accused's name is only one facet of carrying out the courts business in public.²⁵ Name suppression prohibits publication of a person's name; the public and media may still visit the courtroom and see the person whose identity is suppressed. In this sense, the power of suppression is illusory, as the public still retain uninhibited access to the courtroom.²⁶

Notwithstanding that, the principle of open justice does not demand that publication of name occurs because a report can "fully inform the public of the course and result of the court proceedings without disclosing the accused's name."²⁷ After all, the public will still know that someone has been charged, found guilty or acquitted of an offence, without necessarily needing to know that person's identity. In cases involving suppression, the media will generally still be able to discuss the issues of the trial comprehensively and hence hold the justice system accountable.

However, the Court of Appeal has rejected this approach, arguing that full transparency is necessary to completely comply with the principle of open justice.²⁸ It

²³ Katrina Jones *The Suppression Discretion: Name Suppression Law in New Zealand* (LLB(Hons) Legal Writing Requirement, Victoria University of Wellington, 1995) 6.

²⁴ Roderick Munday "Name Suppression: an adjunct to the presumption of innocence and to mitigation of sentence-2" (1991) *Crim LR* 753, 757.

²⁵ *O'Malley v Police* (12 February 1993) HC CHCH AP 40/93, 2 Williamson J.

²⁶ An exception to this would be if the Judge ordered the court to be cleared under section 138(2)(c) of the Criminal Justice Act 1985.

²⁷ Burrows and Wilson, above n 13, 18.

²⁸ Hence the prima facie presumption is in favour of publication of the name of a defendant in order to comply with the principle of open justice: *R v Liddell* [1995] 1 NZLR 538, 546 – 547 (CA) Cooke P for the Court.

is difficult to identify situations where it is essential to know the defendant's name in order to hold the justice system accountable. For example, it may be harder to assess whether those with a high public profile receive special treatment before the courts if their names are suppressed. In such a case, the media cannot immediately identify whether equality before the law is being applied. But, even in this situation the media can usually describe the figure to a certain degree, by referring to them as a "sports player" or "television celebrity", for example. This indicates their status to the public and allows the media to assess whether those with a high public profile receive preferential treatment.²⁹ If the suppression order is eventually lifted, then the media can assess favourability. So, there is a strong argument that in most cases name suppression will not dramatically impede the public's right to open justice.

The Courts have recognised that while the principle is important, it is not unqualified. The principle "cannot be framed in absolute terms. Its content is neither inflexible nor immutable."³⁰ Sometimes the principle must give way to other considerations, such as the right to a fair trial.

B Freedom of Expression

The openness principle is coupled with the right to freedom of expression, as recognised in section 14 of the Bill of Rights Act.³¹ Not only is there a right to publish information about criminal proceedings, but the public has a right to receive information about such a fundamental process in society.³² However, this freedom is not absolute, as the Bill of Rights indicates.³³ The Court of Appeal in *Lewis v Wilson & Horton Ltd (Lewis)* stated that it will be necessary for the Judge to consider

²⁹ For example, in a case where a rugby player pleaded guilty to assaulting his wife, the player was named as an All Black. The fact that he was named as an All Black ensured people were able to discuss issues of equality before the law effectively; his name being published was not essential to that debate: Section VII.

³⁰ *Police v O'Connor* [1992] 1 NZLR 87, 96 (HC) Thomas J.

³¹ New Zealand Bill of Rights Act 1990, s 14.

³² Section 14 of the New Zealand Bill of Rights Act 1990 states that "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form" (emphasis added).

³³ Section 5 of the New Zealand Bill of Rights Act 1990 states that the rights and freedoms contained in it may be subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

whether in the circumstances an order prohibiting publication is a reasonable limitation on the right to receive and impart information freely, such as can be demonstrably justified in a free and democratic society.³⁴ Unfortunately, in practice, judges seem interested in drawing attention to the importance of open justice, but pay little attention to considering whether limits on free expression are truly justified.³⁵

C *Right to a Fair Trial*

Before conviction, other liberties apply, such as the right to a fair and public hearing by an independent court.³⁶ Steps must be taken to ensure that publicity will not prejudice a defendant's trial, as a fair trial is not only an individual's fundamental right, but is central to a free and democratic society. It has been held that no right is more inviolate than the right to a fair trial and to compel an individual to face an unfair trial is repugnant to justice.³⁷ The courts will grant suppression to ensure a fair trial:³⁸

Once...it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of freedom of expression must be departed from, not balanced against. There is no room in a civilised society to conclude that, 'on balance', an accused should be compelled to face an unfair trial.

An example of a situation where suppression might be needed would be if a defendant was facing charges for two similar offences. Suppression might be granted so that jury members are not prejudiced against the defendant, because of their knowledge that the defendant is facing further analogous charges.³⁹ Suppression may

³⁴ *Lewis v Wilson & Horton Ltd*, above n 8, para 43 Elias CJ for the Court.

³⁵ See section VIII.

³⁶ New Zealand Bill of Rights Act 1990, s 25(a).

³⁷ *B v R* (1 September 2000) CA308/00, para 10 Thomas J for the Court.

³⁸ *R v Burns (Travis)* [2002] 1 NZLR 387, 404-405 (CA) Thomas J.

³⁹ This was the situation in *The Queen v Rokas Karpavicius, David John Blaikie, Michael Edward Pearson, and Grant Anthony Martin* (2 October 2000) HC AK T0001037 Chambers J.

also be necessary in cases where identity is at issue in criminal cases. In such cases name suppression may only be granted until the completion of the trial.

There is also the right to be presumed innocent until proven guilty according to law.⁴⁰ Reconciling this right with the principle of open justice causes difficulty for judges, who are confronted with name suppression applications prior to conviction.⁴¹

III THE STATUTORY FRAMEWORK

A Automatic Suppression

There is an automatic prohibition on the publication of certain names and any particulars likely to lead to their identification. In these situations, Parliament has made a policy decision that the principles of open justice and free expression must give way to other interests, particularly the need for privacy. There is little controversy about the appropriateness of the following provisions.

Victims and alleged victims of sexual offences⁴² automatically have their names suppressed under section 139 of the Criminal Justice Act (the Act).⁴³ There is a prohibition on the publication of a person's name accused or convicted of incest.⁴⁴ Also suppressed are those accused or convicted of sexually assaulting a dependent family member, for example a foster parent who abuses a child in their care.⁴⁵

⁴⁰ New Zealand Bill of Rights Act 1990, s 25(c).

⁴¹ See section V.

⁴² These are defined as offences against the Crimes Act 1961, sections 128-142A or an offence against section 144A. These include sexual violation, indecency with under-age girls, and criminal sexual acts against males.

⁴³ Criminal Justice Act 1985, s 139. The only exception to this prohibition is if the Court permits publication. To do this, the victim must be over the age of 16 years: s 139(1).

⁴⁴ Criminal Justice Act 1985, s 139(2).

⁴⁵ Criminal Justice Act 1985, s 139(2). This section prohibits identification of those who have committed an offence against section 131 of the Crimes Act 1961. Section 131 makes sexual connection, attempted sexual connection and indecent acts with dependent family member's criminal offences. Dependant family member is defined in the Crimes Act 1961, s 131A.

These provisions are supplemented by section 375A(4) of the Crimes Act 1961 which restricts those who may be present when a complainant gives evidence and allows a judge to prohibit publication of the details of the criminal acts alleged.

The purpose of these provisions is to protect the victim's identity.⁴⁶ Hence, in cases such as incest, the identity of the defendant needs to be protected so that the victim also remains anonymous. Consequently, if a victim of a sexual offence no longer wishes to remain anonymous he or she can apply to the Court for an order permitting publication of his or her name⁴⁷ or the name of the perpetrator of the offence, in cases of incest or abuse by a caregiver.⁴⁸

A witness in a criminal proceeding who is under the age of 17 also receives automatic name suppression.⁴⁹ Any person who acts in contravention of these suppression orders can be liable for a fine not exceeding 1,000 dollars.⁵⁰

Automatic suppression orders for offenders convicted of sexual crimes form the majority of all suppression orders given to convicted persons. In 2004, 128 offenders received name suppression for sexual crimes, out of a total of 483 orders issued.⁵¹ This equates to 26 per cent. In 2004, 20 per cent of violent sexual offenders and 16.4 percent of "other sexual offenders" received name suppression.⁵²

⁴⁶ Criminal Justice Act 1985, s 139(1AA).

⁴⁷ Criminal Justice Act 1985, s 139(1A).

⁴⁸ Criminal Justice Act 1985, s 139(2A). In both cases, applicants must be over 16 and the Court must be satisfied that they understand the nature and effect of their decision to apply for such an order: Criminal Justice Act 1985, ss 139(1A), 139(2A). The new provisions do not make it clear whether the victim's application must be made during the course of the original proceedings or whether it can be made after their conclusion, perhaps even years later, as often occurs in cases of sexual abuse. Adopting a purposive approach the new provisions should cover the latter situation, otherwise they would be of limited efficacy: See *Chan v Attorney General* [2005] NZAR 135 (HC) MacKenzie J.

⁴⁹ Criminal Justice Act 1985, s 139A(1). The only other person whose name is automatically suppressed is a person in respect of whom an application has been made for an order to authorise the taking of a blood or DNA sample: Criminal Investigations (Blood Samples) Act 1995, s 14. The Judge may consent to publication if the person has been charged with the relevant offence: Criminal Investigations (Blood Samples) Act 1995, s 19.

⁵⁰ Criminal Justice Act 1985, s 139(3). Contravention of a suppression order under s 139A(1) of the Criminal Justice Act 1985 (publishing the name of a witness under 17) will result in a fine of 1,000 dollars for an individual or 5,000 dollars in the case of a body corporate: Criminal Justice Act 1985, s 139A(3).

⁵¹ Ministry of Justice "Name Suppression Orders" (September 2005) Table 1 (Obtained under Official Information Act 1982 Request to the Crime and Criminal Justice Team, Ministry of Justice). Please see the appendix on page 83. Table 1 refers to the number of offenders who were convicted of offences who received interim or permanent name suppression.

⁵² Ministry of Justice, above n 51, Table 2. "Other sexual offences" include incest and doing an indecent act. Table 2 refers to the percentage number of offenders who were convicted of offences who received permanent or interim name suppression. The statistics refer solely to convicted offenders and do not involve suppression orders given to victims, witnesses or others connected with proceedings.

B Discretionary Suppression

The courts also hold discretionary powers of suppression. The Act creates a presumption that criminal proceedings will be conducted in public, but provides various exceptions to this rule.⁵³ Section 140 is one such provision and is widely stated:⁵⁴

[A] court may make an order prohibiting the publication, in any report or account relating to proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

Thus, the court can suppress the name of the defendant, victim, witnesses or others connected with proceedings.⁵⁵ Any order can be made for a limited period, known as an "interim suppression order", or can have permanent effect.⁵⁶ The circumstances surrounding name suppression applications are varied and consequently Parliament has thought it wise not to lay down rules to regulate the courts discretion.⁵⁷ One constraint is that the views of the victim of the offence must be considered, but only in applications for permanent name suppression.⁵⁸ The Land Transport Act provides that the name of a person convicted of driving under the influence will generally not

⁵³ Criminal Justice Act 1985, s 138(1). For example, if the court is of the opinion that "the interests of justice, or of public morality or of the reputation of any victim of any sexual offence require" it may make orders forbidding publication of evidence, submissions and witnesses names: Criminal Justice Act 1985, s 138(2)(a), (i), (ii).

⁵⁴ Criminal Justice Act 1985, s 140(1).

⁵⁵ In the case of witnesses the order is more likely to be made under section 138(2) of the Criminal Justice Act 1985, which specifically authorises the suppression of witnesses' names. Both sections 138(2) and 140 only apply to criminal proceedings; the power to suppress names in civil proceedings derives from the court's inherent jurisdiction: *Angus v H & Anor* (June 17 1999) HC WN CP 129-99 Wild CJ.

⁵⁶ Criminal Justice Act 1985, s 140(2). A right of appeal lies against orders made. For example, if a District Court Judge refuses to suppress name, an interim order will be made for suppression pending an appeal: Summary Proceedings Act 1957, s 115C. There is a similar right of appeal from the High Court to the Court of Appeal. The order will terminate when the time for appeal expires, if no appeal has been lodged: Criminal Justice Act 1985, section 140(3). However, there is no right of appeal against an order lifting suppression during the course of a trial: *Re Victim X* [2003] 3 NZLR 220, 234 (CA) Keith J for the Court.

⁵⁷ *R v Liddell*, above n 28, 546 Cooke P for the Court.

⁵⁸ Criminal Justice Act 1985, s 140(4A). If the victim is not of sufficient maturity to express their views a parent or guardian will be consulted.

receive suppression.⁵⁹ The courts are obviously adhering to this because since 1998, less than 0.1 per cent of convicted offenders received name suppression.⁶⁰ Other than these considerations, the section is silent on the circumstances in which the discretion should be exercised.

This unfettered discretion found in section 140 has created controversy. The courts have declined to lay down any fettering code for exercising their discretion, which fuels allegations of inconsistency.⁶¹ The Law Commission says: "It is clear that some people believe that suppression orders are being made too frequently, in part due to the wide discretion vested in judges."⁶² Scott Optican, a legal commentator, believes the wide discretion vested in judges leads to inconsistent decisions.⁶³ But, some discretion is necessary because of the importance of factual considerations in name suppression decisions, which judges need to be able to balance with a degree of flexibility. New Zealand judges recognise that their discretion can bring them criticism: "name suppression cases are never easy and it is often a situation where different minds may take different views."⁶⁴ Hence, discretion is a double-edged sword; it avoids rigidity for judges, but means that their decisions may be seen as incorrect. Another judge (or a member of the public) may come to the opposite conclusion on the facts, because of different value judgments.

⁵⁹ Land Transport Act 1998, s 66.

⁶⁰ Ministry of Justice, above n 51, Tables 1 and 2. Table 1 shows that between 1998-2004 there were a small number of cases that received name suppression, but Table 2 refers to the percentage number as zero. This seems to be because when the individual cases are computed as a percentage of the whole the number is close to zero percent.

⁶¹ *R v Liddell*, above n 28, 547 Cooke P for the Court.

⁶² New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 313.

⁶³ "Name suppression too easily granted-law expert", above n 9. Similar sentiments have been expressed by Warren Young, acting President of the Law Commission in "Legal advisers favour secrecy", above n 9, A2.

⁶⁴ *G v Police* (17 July 1990) HC CHCH AP 166/90, 4 Tipping J.

IV OVERRIDING PRINCIPLE-SUPPRESSION THE EXCEPTION AND NOT THE RULE

A number of principles have been developed in relation to exercising the court's discretion, despite the absence of a strict code.⁶⁵ The Court of Appeal says: "The starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as surrogates of the public."⁶⁶ The Court has said "[T]he balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome."⁶⁷ The defendant must demonstrate "compelling reasons" or "very special circumstances" to justify suppressing their name.⁶⁸

Leaving aside considerations of free expression and open justice, there are other reasons for exercising the discretion sparingly. These include the possibility of suspicion falling on other innocent members of the community,⁶⁹ the chance of further victims coming forward following publicity and the prospect that publicity might lead to the discovery of additional evidence.⁷⁰ An absence of publicity might provide the accused with an opportunity to re-offend⁷¹ and there is also a need to give the public the ability to choose whether to continue contact with the alleged offender.⁷² However, some of these justifications only pertain to certain cases. For example, in cases of sexual offending there may be a real need to publicise the defendant's name so that other victims may seek assistance.⁷³ However, in the case of a first time offender charged with a minor offence these considerations are not so compelling. The courts seem to recognise this difference too, as where these

⁶⁵ Criminal Justice Act 1985, s 140.

⁶⁶ *R v Liddell*, above n 28, 546 Cooke P for the Court.

⁶⁷ *Lewis v Wilson & Horton Ltd*, above n 8, 559 Elias CJ Judgment of the Court.

⁶⁸ *Re Victim X*, above n 56, 239 Keith J for the Court.

⁶⁹ *Police v M* (5 March 2002) HC CHCH A9/02, para 37 Panckhurst and Chisholm JJ.

⁷⁰ *R v Liddell*, above n 28, 545 Cooke P for the Court.

⁷¹ *Prockter v R* [1997] 1 NZLR 295, 300 (CA) Thomas J for the Court

⁷² *Prockter v R*, above n 71, 300 Thomas J for the Court.

⁷³ *R v Liddell*, above n 28, 545 Cooke P for the Court. However, in another sexual abuse case there was little risk of other complainants coming forward and a real chance of prejudicing the defendant's trial by publication so suppression was ordered by the Court of Appeal: *P v R* (2 August 1996) CA 260/96 Thomas J for the Court.

justifications are largely absent trends indicate that the courts are more likely to grant interim suppression.⁷⁴

A further reason for granting permanent name suppression infrequently is because it allows the true character of the offender to remain concealed from society. Name suppression practices a deception on the public, by continuing to present the offender as a person of unblemished character.⁷⁵ This argument is particularly important in cases of serious offending.

The Court of Appeal has indicated that victims and witnesses must also demonstrate compelling reasons to justify suppression of their names.⁷⁶ The desirability of imposing the same high threshold on innocent parties is questionable, especially since many of the justifications mentioned here do not apply to them. This issue is discussed in section XIII.

V INTERIM SUPPRESSION

A defendant can seek name suppression at different stages in a criminal proceeding and for varying durations. Interim orders can be made until depositions, until trial or until conviction.⁷⁷ Commentators argue that interim orders are not infrequently made until the defendant enters a plea, or less frequently until the conclusion of a trial.⁷⁸ Unfortunately, there are no statistics which show the number

⁷⁴ For example the absence of suspicion falling on others and the lack of additional evidence coming forward was seen as highly relevant in *Serious Fraud Office v B and K* [1999] DCR 621, 624 Judge Hubble. See section V for a discussion of this issue.

⁷⁵ *Roberts v Police* (1989) 4 CRNZ 429, 432 (HC) Wylie J.

⁷⁶ *Re Victim X*, above n 56, 226 Keith J for the Court.

⁷⁷ Criminal Justice Act, ss 140(2), 140(3). Such limited orders may be replaced by further limited orders under section 140(4).

⁷⁸ Hon Bruce Robertson (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington, Criminal Justice Act 1985) para 140.08 (last updated September 2005). Similarly, Hall argues that "it is not unusual for an interim order for suppression to be granted only until the depositions hearing or shortly thereafter": Geoffrey Hall (ed) *Hall's Sentencing* (loose leaf, Butterworths, Wellington, Criminal Justice Act 1985) para CJA 140.1a (last updated July 2005).

of interim orders granted.⁷⁹ The considerations that apply to interim and permanent orders can differ, but the overriding principle of open justice remains the same.⁸⁰

A Initial Orders

Initially, an accused may seek an interim order so that family and friends can be informed of proceedings.⁸¹ Such interim orders may only apply for a week or so, and in most circumstances the police would not usually oppose such an application.⁸² Freedom of expression and open justice give way to the privacy interests of the accused and their family.

However, even such orders, are not automatic. For example, a Mangaere man was recently accused of intending to cause grievous bodily harm, after he attacked a truck driver with a hammer. He sought interim suppression.⁸³ Judge Harvey said the amount of publicity about the case and graphic images featured in the media via security camera meant he would not be prepared to grant interim suppression.⁸⁴

⁷⁹ Victoria Crawford, Policy Manager of the Crime and Criminal Justice Team at the Ministry of Justice, to the author "Official Information Act 1982 Request Reply" (16 September 2005) Letter.

⁸⁰ *Prockter v R*, above n 71, 298 Thomas J for the Court.

⁸¹ *Collie v Police* (14 June 1993) HC AK AP 103/93 Henry J.

⁸² Grant Huscroft and Scott Optican "Arguments for and against Name Suppression" (January 19 2000) *The New Zealand Herald* Auckland A12.

⁸³ Jarrod Booker "Hammer accused gets bail, name suppression" (26 August 2005) *The New Zealand Herald* Auckland General news. Interim name suppression was sought because the defendant's father had only just been released from hospital with a serious heart problem and did not know his son had been charged. The man also alleged he had a close relative taking part in a sporting activity soon after the charges were announced, who could "do without the publicity." An embarrassing situation could have resulted for the Court if the man had been given name suppression, given the fact that his claims to be related to a famous sports star appear to have been fabricated. Sione Lauaki, a current All Black recently denied being related to the man, Toma Lauaki: Deborah Diaz "Sports pair deny hammer attack link" (30 August 2005) *The Dominion Post* Wellington 1.

⁸⁴ Jarrod Booker, above n 83, 1. Corroborated by Rebecca Palmer "Hammer attack: name a secret" (26 August 2005) *The Dominion Post* Wellington 1. It is concerning that headlines about this story give the impression that the man was granted interim suppression. The man was actually denied suppression, his name remained suppressed so that he could appeal the decision. The casual reader could pick up the wrong impression of the case and become misinformed.

B Interim Suppression until Charges Dealt With

The accused may then seek interim suppression until the trial commences, or is completed. It is often difficult to assess the principles which apply to such interim applications, as many of the seminal judgments from the Court of Appeal concern requests for permanent name suppression. However, many of the same considerations are applicable. One Court of Appeal case concerning interim name suppression, *Prockter v R (Prockter)*, makes it clear that the principles of freedom of reporting and open justice remain the starting point both before and after conviction.⁸⁵

In the same manner as they do for permanent orders, the Court will examine the consequences of publication on the defendant, their family, work colleagues and the effects on financial and professional interests. Some damage out of the ordinary is required, as there are often negative and distressing personal consequences associated with any criminal proceeding.⁸⁶ An important consideration exists for interim orders, which does not apply to applications for permanent suppression. This is the presumption of innocence. A recent decision of Panckhurst J rightly recognises this distinction:⁸⁷

Not only do the former [interim orders] have to be considered in light of the circumstance that guilt is still to be determined, but also with due recognition of the fact that the question is often one of timing. The principle of open justice is of lesser significance where an interim order is made in recognition of the fact that at least until guilt is determined there are legitimate private interests which warrant protection in the meantime.

⁸⁵ *Prockter v R*, above n 71, 298 Thomas J for the Court.

⁸⁶ *Lewis v Wilson & Horton Ltd*, above n 8, 563 Elias CJ for the Court.

⁸⁷ *T v Police* (7 June 2005) HC CHCH CRI-2005-409-000098, para 24. Arguably Panckhurst J makes the presumption of innocence the starting point, contrary to the direction by the Court of Appeal to have open justice as the starting point. This is discussed at page 23.

Prior to conviction, the presumption of innocence must be recognised, in accordance with the Bill of Rights Act.⁸⁸ However, the weight to be accorded to this presumption is causing considerable difficulty in the courts, leading to inconsistent decisions.

1 Court of Appeal's Approach

In *Prockter* the Court was considering an application for interim name suppression, for a surgeon facing 22 counts of sexual abuse.⁸⁹ The hardship that would be caused to the surgeon and his family by publication was accepted as "extreme."⁹⁰ The surgeon also argued that publicity would destroy his professional practice.⁹¹ Indeed, even being accused of such a crime would be devastating for someone in the medical profession, as trust is the basis of the patient-doctor relationship.

However, the Court said that interim suppression should not be granted to a professional person, solely because of their reputation. The Court held: "one must be careful to avoid creating a special echelon of privileged persons in the community who will enjoy suppression where their less unfortunate compatriots would not."⁹² Consequently, potentially innocent people may have their careers destroyed, because of the need for open justice. It is noticeable that despite the Court of Appeal's stance on this issue professional people are often granted interim name suppression until the outcome of proceedings are known.⁹³ The reason for this seems to be because some courts recognise the irreparable effect on a professional's career that publicity of an accusation might have.⁹⁴

⁸⁸ New Zealand Bill of Rights Act 1990, s 25(c).

⁸⁹ The allegations related to six youths over an 18 year period: *R v Prockter*, above n 71, 296 Thomas J for the Court.

⁹⁰ *Prockter v R*, above n 71, 299 Thomas J for the Court.

⁹¹ *Prockter v R*, above n 71, 299 Thomas J for the Court.

⁹² *Prockter v R*, above n 71, 299-300 Thomas J for the Court.

⁹³ *Director of Proceedings v I* [2004] DCR 532, 551 (HC) Frater J.

⁹⁴ *Director of Proceedings v I*, above n 93, 551 Frater J.

Of most interest was the Court of Appeal's finding in *Prockter* that the presumption of innocence is just one factor to be taken into account and given such weight as is appropriate in each case.⁹⁵ The Court recognised that the presumption "becomes a significant factor to be weighed in the balance against the principles that favour open reporting."⁹⁶ The Court emphasised that while the presumption is a factor to be weighed, it cannot of itself displace the presumption of open justice. This is reasonable; otherwise every person would gain suppression, because every defendant is entitled to the presumption. The issue from *Prockter* is identifying the correct weight to be attributed to the presumption, in any given case.

In *Prockter* the presumption of innocence, coupled with some weighty personal factors, were insufficient to displace the presumption of publicity. The Court seemed to feel that the possibility of further victims coming forward was a weighty factor against suppression.⁹⁷

2 Issues with the Presumption of Innocence

Arguably, the Court's stance in *Prockter* fails to give sufficient weight to the presumption of innocence.⁹⁸ In the *Prockter* judgment there is no recognition of whether the limits on this right are demonstrably justified in a free and democratic society. Earlier High Court authority appeared to afford a greater weight to the presumption of innocence than the Court does in *Prockter*.⁹⁹ Fisher J notes the difficulty of failing to recognise the presumption of innocence:¹⁰⁰

Publication of name is frequently a major and appropriate element of an offender's punishment once it is established that he or she is guilty. But punitive considerations

⁹⁵ *Prockter v R*, above n 71, 298 Thomas J for the Court.

⁹⁶ *Prockter v R*, above n 71, 298 Thomas J for the Court.

⁹⁷ However, suppression was granted because of the possibility that one of the complainants might be identified by publicity and the need to ensure that the defendant received a fair trial: *Prockter v R*, above n 71, 302 Thomas J for the Court.

⁹⁸ This is the opinion of the Law Commission, above n 62, 316.

⁹⁹ See *M v Police*, above n 4, 15-16 Fisher J; *S(1) and S(2) v Police* (1995) 12 CRNZ 714 (HC) Neazor J.

¹⁰⁰ *M v Police*, above n 4, 15-16 Fisher J.

are obviously irrelevant before conviction. At that stage the defendant is entitled to the presumption of innocence...Consequently when a Court allows publicity which will have serious adverse consequences for an unconvicted defendant, it must do so in the knowledge that it is penalising a potentially innocent person...That is far from saying that suppression should always be granted before guilt is established...in my view the presumption of innocence and risk of substantial harm to an innocent person should be expressly articulated.

It has been noted that publicity "is one of the chief deterrents to evil doing; and one of the severest punishments that evil doers have to face."¹⁰¹ But, as Fisher J articulates such punitive considerations are irrelevant to an accused. Similarly, one must also remember that the stigma associated with being charged with a serious offence may not be easily erased following an acquittal; the feeling that there is often "no smoke without fire." Nigel Walker explains:¹⁰²

[To] assume that an acquittal leaves a person's reputation exactly as it was before trial...is unlikely to be true if the media have paid any attention to the case-some people will assume that he got off because of slightly defective evidence, a clever story or a sympathetic jury: and since guilty men are sometimes acquitted for these reasons it is impossible to combat this cynical assumption. It is a little paradoxical that a system of trial designed to give the accused the benefit of the doubt in court is almost bound to ensure the public does the opposite.

Therefore, reconciling the presumption of open justice with the presumption of innocence is controversial.¹⁰³ It is hard to justify harm to a person, who is entitled to the presumption of innocence, as a necessary consequence of openness and free speech.

¹⁰¹ Jones, above n 23, 11.

¹⁰² Heleen Scheer "Case and Comment" (1993) 53 CLJ 37, 39.

¹⁰³ Burrows and Cheer, above n 15, 338.

The lower courts are having difficulty with this issue. The problem is identifying “the appropriate weight to be given to the presumption, in the circumstances of the case.”¹⁰⁴ The innocence presumption has been seen as material in tipping the scales towards suppression in a number of lower courts interim decisions, indicating that it is being treated as a significant factor.¹⁰⁵

For example, Baragwanath J held that it might not be difficult to dislodge the publicity presumption at the initial appearance of an accused where a remand is granted, because of the need to recognise a person’s right to be presumed innocent.¹⁰⁶ The Judge was also obviously concerned about damaging the defendant’s standing in the community: “while freedom of expression is precious, so too is a well earned reputation.”¹⁰⁷

Similarly, in *T v Police* a man was charged with having two underage girls working at his unlicensed brothel.¹⁰⁸ Panckhurst J was content to order name suppression until evidence was placed before the Court, because he was concerned about protecting the man’s reputation and business interests.¹⁰⁹ The Judge elevated the presumption of innocence to being the starting point in the case.¹¹⁰ This is contrary to the Court of Appeal’s direction that the principles of open justice and free

¹⁰⁴ *Prockter v R*, above n 71, 298 Thomas J for the Court.

¹⁰⁵ See *J v Serious Fraud Office* (2 Oct 2001) HC AK A126-01 Baragwanath J; *Wellington Newspapers v XI* [2000] DCR 161 Judge Deobhakta; *Serious Fraud Office v B & K*, above n 74, Judge Hubble. Amazingly, even where an accused’s identity has already been published by the media, interim suppression has been granted, because of the need to recognise the presumption of innocence: See *Adams on Criminal Law*, above n 78, para 10.6.08.

¹⁰⁶ Once evidence was commenced Baragwanath J conceded it would be exceptional for suppression to continue: *J v Serious Fraud Office*, above n 105, paras 26-36 Baragwanath J.

¹⁰⁷ *J v Serious Fraud Office*, above n 105, para 31 Baragwanath J.

¹⁰⁸ The man was facing nine charges. These included operating an unlicensed brothel, receiving sexual services from a 14 year old, facilitating the provision of sexual services from underage girls, receiving money derived from such sexual services, supplying cannabis and being in possession of cannabis: *T v Police*, above n 87, para 2 Panckhurst J.

¹⁰⁹ *T v Police*, above n 87, para 26 Panckhurst J.

¹¹⁰ This is illustrated by the quote given on page 19: *T v Police*, above n 87, para 24.

expression should be the starting point.¹¹¹ Panckhurst J's decision was in opposition to a District Court ruling in the same case, where it was held that the public had the right to know the identity of a man charged with such a "grave social evil."¹¹² This demonstrates the variability of the amount of weight judges accord the presumption of innocence.

In *Serious Fraud Office v B and K* the defendants were charged with fraud.¹¹³ The Judge noted that personal and family factors are seldom sufficient to justify suppression and were absent in this case.¹¹⁴ Judge Hubble believed of greater importance was whether publicity would fall on other members of the community, the likelihood of further witnesses or evidence coming forward (which is linked to the nature of the charges) and whether the failure to publish would present the defendants with an opportunity to re-offend.¹¹⁵ These factors were not present. Because the facts relied upon to support the charges were not well known, Judge Hubble said "considerable weight should be given to the presumption of innocence."¹¹⁶

In a similar vein, Judge Deobhakta gave interim suppression to a number of wine makers who were facing prosecution by the Ministry of Health.¹¹⁷ Again, the Judge was persuaded that other complaints were unlikely to surface upon publication of the defendant's names. In this case, publication could cause irreparable damage to the defendant's reputations and might cause hardship to staff and third parties.¹¹⁸ These are considerations which generally attach to criminal proceedings. In *Prockter*, the devastating effects on the surgeon's reputation and family life were insufficient to justify suppression.¹¹⁹ However, in this case these reasons were sufficient; the presumption of innocence was given full weight.

¹¹¹ *Prockter v R*, above n 71, 298 Thomas J for the Court.

¹¹² *T v Police*, above n 87, para 6 Panckhurst J.

¹¹³ *Serious Fraud Office v B and K*, above n 74, 622 Judge Hubble.

¹¹⁴ *Serious Fraud Office v B and K*, above n 74, 624 Judge Hubble. This is consistent with the position adopted in *Prockter v R*, above n 71, 299 Thomas J for the Court.

¹¹⁵ *Serious Fraud Office v B and K*, above n 74, 624 Judge Hubble.

¹¹⁶ *Serious Fraud Office v B and K*, above n 74, 624 Judge Hubble.

¹¹⁷ *Wellington Newspapers Ltd v XL and others*, above n 105, 161 Judge Deobhakta.

¹¹⁸ *Wellington Newspapers Ltd v XL and others*, above n 105, 161 Judge Deobhakta.

¹¹⁹ *Prockter v R*, above n 71, 299 Thomas J for the Court.

In contrast, other judge's give lesser weight to the presumption, even in compelling circumstances. In *Warburton v New Zealand Police*, a solicitor sought interim name suppression, while he awaited a depositions hearing on fraud charges.¹²⁰ Depositions were said to be at least six months away. It was contended that publication of the man's name would adversely affect his legal practice, erode his professional income, thus curtailing his ability to fund his own legal defence at trial and pay his employees.¹²¹ No special weight was accorded to the presumption of innocence, it was merely a factor to be put in the mix and balanced.¹²²

The Judge was not concerned about damage to the solicitor's professional future, contrary to the other decisions discussed. Little weight was given to the effect on innocent third parties, the solicitor's employees. Also, there was no attention given to whether additional victims or evidence would result from publication, which seems unlikely in this case. The Judge did not order suppression.

In the case of *Campbell v Police*, a District Councillor seeking re-election sought interim name suppression.¹²³ He was charged with possession of child pornography and pleaded not guilty. The Judge stated that the presumption of innocence cannot be elevated above other factors, which is consistent with *Prockter*.¹²⁴ The Judge conceded that "publication would probably spell the end of Mr Campbell's life in public office, at least in the near future."¹²⁵ So in this case we have irreparable harm, but this is still insufficient to justify suppression. The Judge indicated that some irreparable harm to a third party would be necessary before the court would intervene.¹²⁶ This is a unique approach, given that the Court of Appeal has said that when the harm to the defendant outweighs the crime committed and the public interest in disclosure intervention is warranted.¹²⁷ The presumption of innocence was

¹²⁰ *Warburton v New Zealand Police* (19 August 2004) HC HAM CRI-2004-419-85, para 7 Priestley J.

¹²¹ *Warburton v New Zealand Police*, above n 120, para 17 Priestley J.

¹²² *Warburton v New Zealand Police*, above n 120, para 36 Priestley J.

¹²³ *Campbell v Police* (2004) 21 CRNZ 51 (HC) Harrison J.

¹²⁴ *Campbell v Police*, above n 123, para 14 Harrison J.

¹²⁵ *Campbell v Police*, above n 123, para 12 Harrison J.

¹²⁶ *Campbell v Police*, above n 123, para 13 Harrison J.

¹²⁷ *R v Liddell*, above n 28, 547 Cooke P for the Court.

unable to tip the scales. In contrast, in Christchurch the presumption was sufficient to give a councillor seeking election, name suppression for the grave charge of threatening to kill.¹²⁸

There is also variance in the way judges treat police officers. In *R v Police* suppression was granted to a police officer facing charges of grievous bodily harm and assault.¹²⁹ The Court based their decision on the presumption of innocence and the need to prevent attacks upon the police officer and his family. Suppression was given until the outcome of the trial was known.¹³⁰

This decision is inconsistent with the decision in *Abbott v Wallace*, where Constable Abbott was prosecuted for shooting and killing Mr Wallace.¹³¹ The circumstances for suppression were compelling. Affidavits were presented to the Court demonstrating the trauma felt by officers who are forced to shoot people and the effect on their families. As in *R v Police* the officer's family had been threatened.¹³² However these issues, coupled with the presumption of innocence and the risk to the officer's career were insufficient to justify suppression.¹³³ The circumstances justifying suppression were as convincing as in *R v Police*, considering that in this case the Constable was acting as a public officer performing a public duty.¹³⁴

¹²⁸ John Henzell "Local body politician committed for trial" (21 December 2004) *The Press* Christchurch Local News.

¹²⁹ *R v Police* (19 November 2002) HC WN AP 256/02 Wild J. The text of this case is restricted to lawyers, due to suppression orders. This raises issues of access to justice. For the purposes of this paper statements about the case are taken from the Lexis case summary available online:

<<http://helicon.vuw.ac.nz:2467/nz/legal/search/homesubmitForm.do>> (last accessed 1 October 2005).

¹³⁰ *R v Police*, above n 129, Wild J.

¹³¹ *Abbott v Wallace* [2002] NZAR 95 (HC) Salmon and Potter JJ.

¹³² *Abbott v Wallace*, above n 131, paras 9-10 Salmon and Potter JJ.

¹³³ *Abbott v Wallace*, above n 131, paras 35-39 Salmon and Potter JJ.

¹³⁴ A Private Members Bill was introduced into Parliament, but later abandoned, which gave police officers automatic name suppression in firearm cases. The Attorney General considered that the limitation on the right to freedom of expression was demonstrably justified, because of the need to protect the integrity of the Police Complaint's Authority's investigations, which may be hindered by media interest. Arguably, media interest may assist the Authority as those with information about the officer being investigated may come forward following publicity. Also, if Authority investigations are truly hindered by publicity (and there is no concrete evidence they are), questions arise as why suppression is not proposed for all officers investigated for all conduct. A further objective of the Bill was to protect the safety of police officers and their families. But, suppressing the name of the officer will be no use in small communities where the

The variance in sexual offending cases also warrants discussion. In *Prockter* it was held that publication is a "most important factor" in such cases, because of the possibility of further victim's coming forward.¹³⁵ Consistent with *Prockter* is *A Defendant v Police*.¹³⁶ A District Court Judge was charged with 21 charges of sexual offending, in respect of three complainants who were members of his wider family.¹³⁷ He unsuccessfully applied for suppression. The Court held that the presumption of innocence must weigh with any Court, but does not override the publicity presumption by itself. The Court was quick to recognise the need for open justice and seemed to give the presumption of innocence little weight: "It would seem that there would be a presumption of favouring the publication of the particulars of a judicial officer charged with an offence unless the reasons for suppression spoke loud and clear in a manner that would be accepted in any case relating to any other member of the public who was facing a charge."¹³⁸

However, in other cases, those charged with sexual assault have received interim suppression, with the courts giving great weight to the presumption of innocence. In *I v Police* a 70 year old man was charged with five counts of indecent assault, against three victims.¹³⁹ In direct contrast to *Prockter*, the court granted name suppression, because of the adverse effect publication would have on the man's children.¹⁴⁰ The defendant had had a long association with children in his work and social environment and the possibility of further victims coming forward could not be excluded.¹⁴¹ In *K v Police* the complainant desired publication of her stepfather's

identity of the officer will be hot gossip. A full analysis of this proposed reform is beyond the scope of this paper: See Attorney General "Police Complaints Authority (Conditional Name Protection) Amendment Bill: Consistency With The New Zealand Bill Of Rights Act 1990." (5 March 2003) <http://www.justice.govt.nz/bill-of-rights/bill-list-2003/p-bill/police-complaints.html> (last accessed 2 October 2005).

¹³⁵ *Procter v R*, above n 71, 300 Thomas J for the Court. Similar sentiments were expressed in *R v Liddell*, above n 28, 545 Cooke P for the Court. Publication is seen as more appropriately done before the trial, rather than after, because of the problems associated with admitting similar fact evidence.

¹³⁶ *A Defendant v Police* (1997) 14 CRNZ 579, 584 (HC) Doogue J

¹³⁷ *A Defendant v Police*, above n 136, 580 Doogue J.

¹³⁸ *A Defendant v Police*, above n 136, 588 Doogue J.

¹³⁹ *I v New Zealand Police* (8 April 2003) HC WN AP40/03, para 2 France J.

¹⁴⁰ *I v New Zealand Police*, above n 139, para 37 France J. Other factors were present but this one seemed to weigh most heavily with the Judge.

¹⁴¹ *I v New Zealand Police*, above n 139, para 21 France J.

name, who she alleged had raped her over a 25 year period.¹⁴² Because of the uncertainty of the historical evidence, the Judge felt that “the presumption of innocence and the protection of this man from a false allegation cannot be so confidently discounted that the public’s right to know must be given immediate predominance.”¹⁴³

In *D v Police* suppression was given to a convicted sex offender facing further charges of sexual assault.¹⁴⁴ Frater J was content to order interim suppression, based on the presumption of innocence and taking into account society’s interest in the man’s rehabilitation.¹⁴⁵ However, there was little threat of further victims coming forward, which seems to have weighed heavily in the Judge’s thinking

Giving the presumption extraordinary weight, Judge Tuohy argues that merely being charged with certain offences may cause sufficient harm to warrant name suppression:¹⁴⁶

Sometimes, particularly in relation to offences where a degree of odium attaches in the public mind simply because of people being charged, suppression is granted simply in the situation where there is a presumption of innocence before trial.

Cases of sexual assault are certainly those that attract “a degree of odium.” Judge Tuohy’s comments effectively elevate the presumption of innocence above other factors. This approach is problematic, because other judges do not accord the presumption such prominence.

There is little guidance available as to the weight to be attributed to the presumption and the circumstances when it should tip the scales.¹⁴⁷ Warren Young, of the Law Commission, argues that there is enormous inconsistency between different

¹⁴² *K v New Zealand Police* (3 February 1997) HC AK AP 11/97, 2 Robertson J.

¹⁴³ *K v New Zealand Police*, above n, 5 Robertson J.

¹⁴⁴ *D v New Zealand Police* (25 June 2004) HC AK CRI-2004-404-000051, para 1 Frater J.

¹⁴⁵ *D v New Zealand Police*, above n 144, para 32 Frater J.

¹⁴⁶ *Queen v X* (21 February 2005) DC WN, para 6 Judge Tuohy.

¹⁴⁷ *Adams on Criminal Law*, above n 78, CJ140.05(h).

judges and different courts in how pre-trial suppression is granted.¹⁴⁸ This claim is validated when the case law is examined.

4 *Medical Evidence*

The variability with which medical evidence is considered in interim name suppression applications by judges is also concerning. In one case a defendant who was suffering from cardiac problems was granted name suppression, because the stress associated with publication of his name could adversely affect his medical condition.¹⁴⁹ In contrast, in *Tukaokao v Police*, the defendant suffered from inoperable terminal cancer.¹⁵⁰ Publication of his name was expected to cause additional stress, which would aggravate his condition. The Court accepted that the allegations may even “hasten his demise.”¹⁵¹ This, coupled with other personal factors was insufficient to justify name suppression.

5 *Conclusion*

Various trends can be determined from the cases. Some judges will more readily grant interim suppression when it is clear that publication is unlikely to result in other victims coming forward or new evidence being discovered. When such factors are missing, the Prosecution must rely on the general principles of open justice and free expression, because there are no specific reasons dictating *against* suppression.

It is also clear that considerations about the presumption of innocence are linked to fears that a potentially well-earned reputation may be destroyed by publication of pending charges. Some members of the judiciary seem to recognise that to harm a potentially innocent person may have a devastating effect on their

¹⁴⁸ Boyes, above n 9, A2.

¹⁴⁹ *M, W, B and K v Serious Fraud Office* (26 January 2001) HC HAM AP 124/00, para 20 Randerson J.

¹⁵⁰ *Tukaokao v Police* (28 February 2001) HC ROT AP3/01, para 3 Rodney Hansen J.

¹⁵¹ *Tukaokao v Police*, above n 150, para 14 Rodney Hansen J.

livelihood. Some judges now adopt a stance where they sit back and ask "Would the defendant's name be suppressed after an acquittal?" If the answer is "yes", or even "probably" interim suppression is granted.¹⁵² But, other courts adhere closely to the *Prockter* approach, stating that adverse effects to reputation are generally an unavoidable consequence of criminal proceedings and are not sufficiently out of the ordinary to warrant suppression.

Missing from the judgments is a balancing of section 14 of the Bill of Rights.¹⁵³ Too often, the courts are citing that open justice and free expression must be the starting point, with no consideration of whether an order is demonstrably justified in a free and democratic society, the test which the Court outlined in *Lewis*.¹⁵⁴ If courts had to think harder about whether the limitations on section 14 were justified, different results may eventuate. On the other hand, there is no evidence that judges attempt to consider whether limiting the presumption of innocence is demonstrably justified either.

Interim orders do not mark the end of an accountable justice system. This is because they do not permanently frustrate the media's right to report court proceedings and only temporarily infringe the right to freedom of expression. However, there needs to be some consistency in their application. Currently some people obtain the benefits of suppression simply because their judge accords significant weight to the presumption of innocence. These inconsistencies are also concerning as there is no certainty for defendants or media outlets as to when the presumption will tip the balance in favour of suppression. For defendants an unsuccessful application for suppression may bring the very publicity that was trying to be avoided. These conclusions indicate that some reform may be needed of the law relating to pre-conviction suppression.¹⁵⁵

¹⁵² *Director of Proceedings v I*, above n 93, para 80 Frater J, *R v K* (21 February 2001) DC CHCH T 010512, 7 Judge Noble.

¹⁵³ New Zealand Bill of Rights Act 1990, s 14.

¹⁵⁴ *Lewis v Wilson & Horton*, above n 8, 559 Elias CJ for the Court.

¹⁵⁵ This is discussed in section XIII.

VI PERMANENT NAME SUPPRESSION

It is not possible to be exhaustive about the factors that justify permanent name suppression and no single consideration is determinative. Broadly speaking, permanent name suppression will be available where the possible harm to the offender or their family by publicity, clearly outweighs the gravity of the crime and the advantages that accrue to the public as a result of disclosure.¹⁵⁶ It will be harder to gain a permanent suppression order than an interim order, as considerations about the presumption of innocence do not apply and freedom of expression and open justice are permanently infringed.

A Nature of the Offending

1 Serious Offending

A relevant consideration is the nature of the offending and its seriousness. In *R v Liddell (Liddell)* a man had been convicted of serious sexual offences against boys at a school where he had been a counsellor.¹⁵⁷ The man was initially granted permanent name suppression, in order to protect his family.¹⁵⁸ The Court of Appeal reversed suppression:¹⁵⁹

The jurisdiction does extend to a name suppression order for the person convicted in such a case, but when a conviction is for [a] serious crime it can only be very rarely that the interests of the offender's family will justify an order suppressing disclosure...of identity.

The Court of Appeal has made it clear that sexual offenders cannot normally expect their names to be suppressed, because publicity warns the public of the

¹⁵⁶ *Roberts v Police*, above n 75, 431 Wylie J.

¹⁵⁷ *R v Liddell*, above n 28, Cooke P for the Court.

¹⁵⁸ Liddell's two sons attended the school where the abuse had occurred: *R v Liddell*, above n 28, 544 Cooke P for the Court.

¹⁵⁹ *R v Liddell*, above n 28, 547 Cooke P for the Court.

offender and may result in other victims coming forward.¹⁶⁰ In *Liddell*, the offender's job as a counsellor meant that the Court could not discount the possibility that there may be further victims. This was coupled with the need to alleviate future risk of re-offending, so publication of Liddell's name was desirable.¹⁶¹

However, in cases decided by lower courts sexual offenders have had their names suppressed.¹⁶² In the case of *R v Kealey*, permanent name suppression was initially awarded to a man who had been convicted of 10 counts of indecent assault.¹⁶³ This was a serious crime, there was a lack of personal circumstances justifying suppression and the public interest in knowing the man's identity was present.¹⁶⁴ Unsurprisingly, the Court of Appeal was scathing of the sentencing Judge's decision and overturned the order.¹⁶⁵

Like in interim applications, if further victims are unlikely to come forward, this tells against publication. In *R v W* suppression was awarded to a man convicted of incest, despite the victims desiring publication.¹⁶⁶ Suppression was thought necessary to protect the man's health, his innocent wife¹⁶⁷ and because the offending was historical: "The delay indicates to me there is no public interest in publication of the name on account of the possibility of other victims."¹⁶⁸ By suppressing the man's name the public interest in denouncing the conduct and deterring others is overruled. A further issue with sexual offenders gaining suppression is that the public are denied

¹⁶⁰ *Prockter v R*, above n 71, 300 (CA) Thomas J for the Court.

¹⁶¹ *R v Liddell*, above n 28, 545 Cooke P for the Court.

¹⁶² *D v New Zealand Police* above n 144, Frater J; *I v New Zealand Police*, above n 139, France J.

¹⁶³ *R v Kealey* (2001) 18 CRNZ 602, 603 (CA) Thomas J for the Court.

¹⁶⁴ *R v Kealey*, above n 163, 604 Thomas J for the Court.

¹⁶⁵ *R v Kealey*, above n 163, 604 Thomas J for the Court.

¹⁶⁶ *R v W* (30 May 2003) HC CHCH T 62/01, para 19 Panckhurst J. The victims were over 16 and desired publication so the suppression is not automatic, but involves discretion: Criminal Justice Act 1985, s 139.

¹⁶⁷ In *Liddell* the offender's wife was far more fragile than the wife in this case and in *Liddell* there was the need to consider the son's wellbeing, factors absent here: *R v Liddell*, above n 28, 545 Cooke P for the Court.

¹⁶⁸ *R v W*, above n 166, para 20 Panckhurst J.

knowing the character of the person seeking suppression. This public interest is seen as strong in cases of sexual offending, dishonesty and drug use.¹⁶⁹

However, this public interest is being not being truly considered in some decisions. For example, a businessman who was considered a prolific child porn viewer gained permanent name suppression.¹⁷⁰ This was despite the man being convicted of 40 child pornography charges and being in possession of 62,000 images.¹⁷¹ The man was granted name suppression, because he suffered from depression, which led him to “binge” on pornography.¹⁷² The Judge was persuaded by the fact that the man had sought psychiatric assistance before he was arrested.¹⁷³ This sets a dangerous precedent that if you can demonstrate depression to the court; you may gain the benefit of suppression. It seems extraordinary that a person convicted of a large number of grave offences should avoid the punishment of having their name published. The public should have the ability to know the character of the person in question so that they may choose to avoid him, or keep their children away from him.

This decision is also inconsistent with the decision in *Lerner v Department of Internal Affairs* where it was felt that offending involving child pornography justified publication.¹⁷⁴ Priestley J called such conduct “pernicious”, recognising society’s repulsion of it.¹⁷⁵ He felt that there was a strong need to denounce the conduct and deter others from engaging in such behaviour.¹⁷⁶

¹⁶⁹ *R v Liddell*, above n 28, Cooke P for the Court; *M v Police*, above n 4, Fisher J; *Roberts v Police*, above n 75, Wylie J.

¹⁷⁰ He was the only one out of six Canterbury men caught in an international sting to gain the benefit of name suppression: John Henzell “Name Secret in Porn Case” (1 July 2005) *The Press* Christchurch A3. The author was unable to obtain the judgment in this case.

¹⁷¹ These images depicted torture, urination and bestiality: “Name Secret in Porn Case”, above n 170, A3.

¹⁷² “Name Secret in Porn Case”, above n 170, A3.

¹⁷³ “Name Secret in Porn Case”, above n 170, A3.

¹⁷⁴ *Lerner v Department of Internal Affairs* (7 May 2004) HC AK CRI 2003 404 200 Priestley J.

¹⁷⁵ Priestley J was concerned that by subscribing to websites to access pornographic material, financial assistance was given to those who exploit young children: *Lerner v Department of Internal Affairs*, above n 174, para 7 Priestley J.

¹⁷⁶ *Lerner v Department of Internal Affairs*, above n 174, para 14 Priestley J

The courts should be extremely reluctant to order suppression to those convicted of serious offences, because publicity is part of the expected cost of committing a criminal offence.

2 *Trivial Offending*

The Court of Appeal has recognised that there may be cases where someone has been acquitted or even convicted of a “truly trivial charge” where “the damage caused to the accused by publicity would plainly outweigh any genuine public interest” in publication.¹⁷⁷ For example, an All Black player was convicted of a “technical assault” against his wife. The damage to the rugby player and his family by publicity were said to outweigh any interest in publication.¹⁷⁸ In cases of first time offending, involving trivial charges, concerns about protecting the community from future offending are lessened.

The practice of diversion is relevant to this question of name suppression for those charged with truly trivial offences. Diversion occurs where a person who is charged with an offence has the matter adjourned by the court, and during the adjournment engages in community activities at the police’s supervision. Upon satisfactory completion of the activities, the police request a withdrawal of the charge and no conviction is entered.¹⁷⁹

Diversion is normally granted to first time offenders on minor charges. Because of this, a practice developed in some New Zealand courts¹⁸⁰ that diverted defendants would automatically have their names suppressed by judges, because of

¹⁷⁷ *R v Liddell*, above n 28, 547 Cooke P for the Court.

¹⁷⁸ Amanda Spratt “Assault All Black’s name revealed on net” (27 February 2005) *The New Zealand Herald* Auckland 3.

¹⁷⁹ Burrows and Wilson, above n 13, 23. Under, section 36(1B) of the Summary Proceedings Act 1957 the Registrar can make a permanent suppression order if the police consent to the making of such an order. The following discussion does not relate to such instances.

¹⁸⁰ For example, in Auckland District Court the practice is to order a prohibition on the publication of names where diversion is granted: *Younger v Police* (31 October 2000) HC AK A169/00, para 2 Robertson J.

their participation in diversion.¹⁸¹ The diversion scheme allows first time offenders to rehabilitate themselves and make amends out of the public glare; hence name suppression may be considered appropriate to meet these aims.¹⁸²

However, two recent decisions have held otherwise. Robertson J believes a judge's discretion applies equally to diverted defendants as to any other kind.¹⁸³ Hence, defendants should not assume that suppression will be exercised in their favour. His Honour made the persuasive argument that if Parliament intended that all diverted defendants enjoy name suppression, a statutory provision should be enacted to such effect.¹⁸⁴

The reasoning of Robertson J has been recently followed by Judge Ryan, who refused suppression to a man charged with possessing a rifle without a licence and discharging it without reasonable excuse.¹⁸⁵ The Judge said the fact that the man had completed diversion satisfactorily was an insufficient reason to justify suppression.¹⁸⁶ These cases demonstrate the strength of the open justice principle and the need for uninhibited free expression, even in cases of insignificant offending.

It should also be noted that name suppression following an acquittal is not automatic, but the Court of Appeal has held that the discretion to award suppression may be more readily exercised.¹⁸⁷ However, it has been noted that the public may also have an interest in knowing about an acquittal.¹⁸⁸ In the case of *R v Dare* suppression was refused following an acquittal, because of legitimate public interest.¹⁸⁹ It is clear that in occasional cases the public desire the identity of an acquitted person to remain

¹⁸¹ Burrows and Wilson, above n 13, 23.

¹⁸² Simon Hendery "Privacy versus the Public's Right to Know" (16 January 2000) *The New Zealand Herald* Auckland A16.

¹⁸³ *Younger v Police*, above n 180, para 7 Priestley J.

¹⁸⁴ *Younger v Police*, above n 180, para 9 Priestley J.

¹⁸⁵ Robyn Bristow "Man tries to protect identity" (4 August 2004) *The Press* Christchurch Local News.

¹⁸⁶ Robyn Bristow, above n 185, Local News.

¹⁸⁷ *R v Liddell*, above n 28, 547 Cooke P for the Court

¹⁸⁸ *R v Liddell*, above n 28, 547 Cooke P for the Court. The Court adopted the reasoning in *R v D(G)* (1991) 63 CCC 3(d) 134.

¹⁸⁹ In this case a secondary school teacher was acquitted of indecent assault: *R v Dare* (25 June 1998) CA 195/98 Judgment of the Court.

suppressed. For example, a Nelson man was recently acquitted of both the murder and manslaughter of his disabled daughter, despite the existence of a videotaped confession in which he admitted ending her life. He was granted permanent name suppression and there was little public appetite in discovering his identity.¹⁹⁰

It seems iniquitous that suppression may be refused even where someone is acquitted, or completes diversion based on a trivial charge, but is given in more serious cases.

B Circumstances Relating to the Offender

An examination will be undertaken of the offender's personal circumstances. The courts have recognized that it is usual for embarrassment and adverse personal consequences to accompany any criminal proceeding. For this reason they will be looking for some damage out of the ordinary in order to justify suppression.¹⁹¹

The court will look to the mental and physical health of the offender. For example, it has been accepted in some courts that suppression is appropriate where the risk of an offender's suicide is high.¹⁹² But, in other decisions a hard line has been adopted towards suicide.¹⁹³ The Court of Appeal has said that the court must be sensitive to the possibility of an offender taking his or her life. But, "the fact that a psychiatrist is of the opinion that there is a risk that he or she will commit suicide does not mean that name suppression will automatically follow."¹⁹⁴ Instead, it is a relevant factor to be taken into consideration.¹⁹⁵ In three recent decisions, expert

¹⁹⁰ A *Holmes* poll found an overwhelming majority of people did not want the identity of the man and his family revealed, which led to Television New Zealand changing its mind about appealing the suppression decision: "Tapu Misa: Sense of Perspective needed in Name Suppression Debate" (9 March 2005) *The New Zealand Herald* Auckland A12.

¹⁹¹ *Lewis v Wilson and Horton*, above n 28, 559 Elias CJ for the Court.

¹⁹² *F v Police* (16 February 1984) HC HAM 13/84 Bisson J; *R v W*, above n 166, Panckhurst J.

¹⁹³ *McDonald v R* (24 August 1998) CA 84/98 Judgment of the Court.

¹⁹⁴ *McDonald v R*, above n 193, 5 Judgment of the Court.

¹⁹⁵ *McDonald v R*, above n 193, 6 Judgment of the Court. This hard line approach to suicide does not sit well with an older Court of Appeal decision which accepts that name suppression may be warranted where the defendant's safety or that of their family is in real danger, because of a third party's threats: See

psychiatric evidence has considered the risk of suicide high, yet name suppression has been declined in each case.¹⁹⁶

Obviously, the courts are guarding against people claiming they are suicidal in order to have their names suppressed, but arguably there is a real public interest in preventing people from committing suicide. It is difficult to justify that the public interest in open justice outweighs the risk of a person dying. Suicide risk should not justify automatic name suppression, but where a claim is found to be supported by expert medical testimony, the courts should consider the matter seriously. If name suppression is not granted in such dire circumstances, one wonders when it is appropriate.

Recent case law¹⁹⁷ shows a growing acceptance to order suppression where a family member's life is in danger because of illness. Thus, there is a difference in the way that an offender and their family are treated. The courts obviously have more empathy for the innocent third party, then for the suicidal offender, who has perpetrated the wrongdoing.

The court may order suppression where the defendant's efforts at self-rehabilitation may be rendered fruitless.¹⁹⁸ It seems odd that the Courts are willing to assist in the rehabilitation of offenders, but will not protect them so readily when they are suicidal. Previous good character and a lack of previous criminal convictions are insufficient to justify suppression, as is evidence of acceptance of responsibility.¹⁹⁹

Broadcasting Corporation of New Zealand v Attorney General [1982] 1 NZLR 120, 135 (CA) Richardson J. In cases of suicidal tendencies or danger from a third party, the rationale for protection arguably should be the same. In each case publication will negatively affect an offender's wellbeing.

¹⁹⁶ *Regina Lutomski & Aniela Mackiewicz v Accident Compensation Corporation* (2 July 2002) HC WN AP 119 & 120/02, Hammond J; *Kellet v Police* (2005) 21 CRNZ 743 (HC) Chisholm J; *GTR v Police* [2005] DCR 341 (HC) Chisholm J.

¹⁹⁷ Please see the discussion on page 39.

¹⁹⁸ *B v B* (6 April 1993) HC AK 4/92 Blanchard J, *D v New Zealand Police*, above n 144, Frater J.

¹⁹⁹ *Lewis v Wilson and Horton*, above n 28, 563 Elias CJ for the Court.

Consideration is also given to an offender's employment. For example, in *T v Police*, a man was charged with aggravated robbery.²⁰⁰ Permanent suppression was given on the grounds that there would be an adverse impact on a centre for intellectually handicapped children, which was the man's place of employment.²⁰¹ In *S v R*, suppression of the name of a teacher acquitted of assault was in the interests of the pupils at the school.²⁰² In the case of *L v R*, suppression was ordered where *L*, who worked in the multi-media design industry was discharged without conviction after importing objectionable images. The Court said that publication would greatly impede her ability to pursue her occupation.²⁰³

In other cases, detriment to employment has been insufficient to tip the balance in favor of suppression. In the case of *Leef v Police*, the court accepted that the defendant may lose his job, but held that his future employment prospects was not a factor to be given major weight.²⁰⁴ In *R v Hennes*, the defendant was acquitted of the charges and suppression was refused.²⁰⁵ This was despite his employer writing a letter to the Court that stated that his employment would be terminated if publication occurred.²⁰⁶ The Court of Appeal in *Prockter* made it clear that harm to employment is a natural consequence of criminal proceedings and that something more than "extreme hardship" is required.²⁰⁷ Arguably, some of the decisions of the lower courts are inconsistent with this threshold.

The Court will examine the impact of publicity on the offender's family, but it has been said that: "anguish to the innocent family of an offender is an inevitable result of many convictions for serious crime. Only in an extraordinary case could it outweigh...the general principle of open justice."²⁰⁸ So shame or embarrassment is

²⁰⁰ *T v Police* (29 November 1991) HC AK AP 282/91 Tompkins J.

²⁰¹ *T v Police*, above n 200, 3 Tompkins J.

²⁰² *S v R* (1994) 12 CRNZ 290 (HC) Williamson J.

²⁰³ *L v R* (5 February 2004) HC AK A 82-03, para 15 Nicholson J.

²⁰⁴ *Leef v Police* (6 December 2000) HC AK A 246/00, para 31 Williams J.

²⁰⁵ *R v Hennes* (20 October 2000) HC WN T 840-00 McGechan J.

²⁰⁶ *R v Hennes*, above n 205, paras 5, 12 McGechan J.

²⁰⁷ *Prockter v R*, above n 71, 294 Thomas J for the Court.

²⁰⁸ *R v Liddell*, above n 28, 544 Cooke P for the Court.

insufficient to displace the presumption.²⁰⁹ The Court of Appeal in *Liddell* demonstrated how difficult it will be to show the requisite level of harm. In *Liddell* psychiatrists believed that publication of Liddell's name would have a devastating effect on his wife: "Publication could...if not destroy her, knock her down so hard that she wouldn't be able to help herself or her sons any longer."²¹⁰ This was coupled with the fact that the offender's two sons were students at the school where the abuse had taken place and would "almost inevitably have to leave [their] school because of extensive newspaper and television publicity...if their father's name was available for publication."²¹¹ The Court declined to suppress the offender's name, holding that suppression of the wife and sons' names would be sufficient to protect them.²¹²

Consistent with this approach is *Curran v Police*.²¹³ There, the defendant's wife was suffering from a history of recurrent major depressive episodes and agoraphobia.²¹⁴ The defendant's mother was also highly depressed and likely to be exposed to serious personal abuse upon publication of her son's name.²¹⁵ The Judge held that the damage was not sufficiently out of the ordinary and disproportionate to the public interest in open reporting.²¹⁶ Similarly, the fragile mental health of a businessman's wife convicted for trading and possessing objectionable material was insufficient to justify suppression of her husband's name. This was despite it being argued that publication could lead to "real tragedy"²¹⁷

The courts seem to be drawing a distinction between mental and physical illness, and giving greater weight to the latter. The Court of Appeal has recognised that if the defendant's physical safety or that of their family is in danger then this may

²⁰⁹ *Police v Pitman* [2000] DCR 356, para 22 Judge Tompkins.

²¹⁰ *R v Liddell*, above n 28, 544 Cooke P for the Court.

²¹¹ *R v Liddell*, above n 28, 544 Cooke P for the Court.

²¹² *R v Liddell*, above n 28, 546 Cooke P for the Court.

²¹³ *Curran v Police* [2005] DCR 604 (HC) Laurenson J.

²¹⁴ *Curran v Police*, above n 213, 613 Laurenson J.

²¹⁵ *Curran v Police*, above n 213, 613 Laurenson J.

²¹⁶ *Curran v Police*, above n 213, 616 Laurenson J.

²¹⁷ *Lerner v Department of Internal Affairs*, above n 174, para 25 Priestley J. A suppression order was given to prohibit publication of the wife's name but this was argued to be artificial by counsel, as publication of her husband's name would inevitably expose her.

justify suppression.²¹⁸ In the case of *T v Police*, an application for permanent name suppression was successful because of the offender's father's poor health.²¹⁹ The father's health was described as "extremely fragile". The court believed that publication could be described as a matter of life and death for the father, and so the public interest in disclosure was outweighed.²²⁰

In a similar vein, a suppression order was granted in *The Queen v M* because of the ill health of the defendants' wife.²²¹ She suffered from angina and a worsening cardiac condition. Harrison J said:²²²

There is no justification for imperiling the health of an innocent woman for the sake of the so-called wider public good, or at a more basic level nothing more than a masquerade for curiosity or prurience in knowing her husband's name.

Thus it can be detected that the courts are concerned about innocent people suffering through publication of their loved ones' names.²²³ But, it should be remembered that in order to constitute the least infringement on the right to freedom of expression, suppression orders can be made in respect of family members names in order to protect them, as they are connected with proceedings.²²⁴

The court must also consider possible ramifications in the community when name suppression is granted, with rumors escalating about innocent people. For example, a man received permanent name suppression after being convicted of attempting to procure sex with a young girl.²²⁵ The District Court Judge granted suppression because he was concerned about the effect of publication on the

²¹⁸ *Broadcasting Corporation of New Zealand v Attorney General*, above n 195, 135 Richardson J.

²¹⁹ *T v Police* (22 April 2005) HC DUN CRI200541212 Chisholm J.

²²⁰ *T v Police*, above n 219, para 12 Chisholm J.

²²¹ *The Queen v M* (10 September 2003) HC NWP T1/03 Harrison J.

²²² *The Queen v M*, above n 221, para 15 Harrison J.

²²³ It is concerning that courts seem more willing to accept suppression in cases where physical harm can be pointed to, as opposed to mental illness. This could be because the latter is more difficult to assess, but should be considered equally as serious given how devastating mental illness can be.

²²⁴ Criminal Justice Act 1985, s 140.

²²⁵ *Police v M*, above n 65, para 1 Panckhurst and Chisholm JJ.

offender's business and his employees. In addition the Judge thought publicity might affect the offender's rehabilitation.²²⁶

Rumours began circulating about the offender's identity with three innocent Christchurch businessmen being targeted.²²⁷ The High Court overturned the suppression order holding that the offence was a serious one, and neither the offending nor the personal circumstances of the offender justified suppression. The Court was concerned about such damaging speculation: "That such has occurred illustrates why open reporting of criminal proceedings is accorded such primacy in this country."²²⁸ The fact that name suppression orders can harm the innocent is one compelling reason for limiting their application to extraordinary circumstances. As Peter Jenkins notes, often the only antidote to scurrilous rumors is the truth, and not attempts to conceal it.²²⁹

C Conclusion

Scott Optican argues that "The case law does provide the criteria, but it is not being taken seriously enough in the lower courts."²³⁰ An examination of the case law does present some inconsistencies in the weight accorded to various factors. Overall, a more stringent examination needs to be undertaken of whether the harm from publication will truly outweigh the interests involved in disclosure and if the limits imposed on free expression are justified. Some inconsistency is possible inevitable in name suppression applications because it is a discretionary measure, to be exercised based on judgment rather than firm criteria.

²²⁶ *Police v M*, above n 65, paras 21-22 Panckhurst and Chisholm JJ.

²²⁷ "Child sex sting man identified" (6 March 2002) *The New Zealand Herald* Auckland National News.

²²⁸ *Police v M*, above n 65, para 37 Panckhurst and Chisholm JJ.

²²⁹ Peter Jenkins "Name suppression and why it has become an irrelevancy in the internet age"

<<http://www.safe-nz.org.nz/name.htm>> (last accessed 25 July 2005).

²³⁰ "Name suppression to easily granted-law expert", above n 9.

VII PREFERENTIAL TREATMENT

A The Law

The public will naturally have a degree of interest in those with a high public profile being involved in criminal activity. The leading case is *Lewis*, where an American billionaire was charged with importing cannabis into New Zealand during a visit to watch the American's Cup.²³¹ He pleaded guilty and made a substantial donation to charity. At sentencing, he was discharged without conviction and his name suppressed.²³² This was relatively unusual, statistics show that in the year of his conviction only 0.3% of offenders gained name suppression for a drug offence.²³³

The Court of Appeal reversed the order, finding that the man's status as a successful businessman, community leader and philanthropist was irrelevant, in the absence of him suffering special harm through publicity. The Court said to hold otherwise would be to suggest that "prominent members of the community should receive name suppression because there may be media interest in such people."²³⁴

The Courts have said they cannot enter into a discussion as to whether the degree of public interest in a case is appropriate:²³⁵

In the absence of identified harm from the publicity, which clearly extends beyond what is normal in such cases, the presumption of public entitlement to the information prevails. Any other approach risks creating a privilege for those who are prominent which is not available to others in the community and imposing censorship on information according to the Courts perception of its value.

²³¹ *Lewis v Wilson & Horton*, above n 8, 546 Elias CJ for the Court.

²³² *Lewis v Wilson & Horton*, above n 8, 546 Elias CJ for the Court.

²³³ Ministry of Justice, above n 51, Table 2.

²³⁴ *Lewis v Wilson & Horton*, above n 8, 563 Elias CJ for the Court. The Court also rejected the claim that the charities the billionaire associated with might be adversely affected by publicity, as these claims were unsubstantiated and wholly speculative: *Lewis v Wilson & Horton*, above n 8, 564 Elias CJ for the Court.

²³⁵ *Lewis v Wilson & Horton*, above n 8, 563-564.

This is a clear direction from the Court that those with a high public profile should not be treated favourably.

B Perceptions

It is important that the law does not discriminate against certain groups in society. For this reason it is disturbing that critics argue that those with a high public profile receive name suppression readily, in breach of the *Lewis* guidelines.²³⁶ Scott Optican argues that there is a correlation between the higher a person's standing in the community and the likelihood of name suppression. But, he believes that on appeal such orders are seldom maintained.²³⁷ Unfortunately the Ministry of Justice holds no statistics showing the number of suppression orders upheld or overturned on appeal, or even the number appealed, so this claim cannot be validated.²³⁸ Journalist and media law lecturer, Steven Price, argues that "name suppression...still works well most of the time-that is, when there aren't celebrities involved."²³⁹

There is also a discernible public feeling that name suppression is easily granted to the rich and famous.²⁴⁰ Philip Morgan, QC,²⁴¹ believes that a lack of information may be the reason for this perception: "If there is a perception that people only get name suppression because they are famous that is a bit misconceived because...most of the reasons for name suppression are suppressed as well because they are the identifying particulars."²⁴² The perception is disturbing because, "Public faith in the justice system depends on confidence that a person's status...is irrelevant to the treatment they receive from the court."²⁴³ It is appropriate to consider some of

²³⁶ "Name Suppression to easily granted-law expert", above n 9.

²³⁷ "Name Suppression to easily granted-law expert", above n 9.

²³⁸ Victoria Crawford, Policy Manager of the Crime and Criminal Justice Team at the Ministry of Justice, to the author, above n 79, Letter.

²³⁹ Steven Price "Speak no evil" (31 July 2005) *The Sunday Star Times* Auckland C6.

²⁴⁰ Boyes, above n 9, Mike Houlahan "Fame 'no guarantee' of suppression" (11 December 2004) *The Press* Christchurch Local News.

²⁴¹ Mr Morgan is the convener of the New Zealand Law Society's Criminal Law Committee.

²⁴² Mike Houlahan, above n 240, Local News.

²⁴³ Quote from Justice Minister, Phil Goff: "Asking who name suppression serves" (29 August 2004) *The Dominion Post* Wellington 6 (editorial).

the recent decisions involving celebrities so that allegations of preferential treatment can be evaluated.

C *The Reality*

Examples of celebrities gaining name suppression are abundant, such as the All Black who pleaded guilty to assaulting his pregnant wife and subsequently received permanent name suppression. The player was involved in a "technical assault" with his wife.²⁴⁴ Following an argument the player: "stopped her, grabbed her and pushed her...there was a struggle as the defendant attempted to pull his wife back home."²⁴⁵ It must be remembered that no matter how trivial the altercation was, it was thought serious enough to be prosecuted and the player did not contest the charge.

The player was brought before the Waitakere Family Violence Court, a court which attempts to strengthen and re-habilitate families following domestic violence.²⁴⁶ The Judge clearly believed that publication of the player's name would be inconsistent with the court's therapeutic operation. However, the Judge was concerned about the effect of publication jeopardising any reconciliation between the player and his wife.²⁴⁷ Importantly, the wife (and victim) did not want her husband's name published, a factor that the Judge must consider under section 140(4A).²⁴⁸

However, it is questionable whether the harm to the player's family clearly outweighs the public interest in disclosure.²⁴⁹ As the courts have repeatedly noted, an unfortunate repercussion of criminal proceedings is that the defendant's family will

²⁴⁴ Amanda Spratt, above n 178, 3. The author was unable to obtain a copy of the judgment from the Waitakere Family Violence Court.

²⁴⁵ Robert Stewart "Counsel Memorandum Post-Hearing" (17 January 2005).

²⁴⁶ Stewart, above n 245, 1.

²⁴⁷ Stewart, above n 245, 2.

²⁴⁸ Russell Brown "Lost in the line-up" (March 19-25 2005) Vol 198 *New Zealand Listener* Wellington. Criminal Justice Act 1985, s 140(4A).

²⁴⁹ *Lewis v Wilson & Horton*, above n 8, 563-564 Elias CJ for the Court.

suffer distress.²⁵⁰ It would be unfortunate to subject a young family to a compulsory public spectacle, but that is not sufficient for name suppression.

There is a clear public interest in knowing the player's identity because All Blacks act as role models for young New Zealanders. The "Kiwi kids are Weetbix kids" advertisement equates success with being an All Black. If such figures are not appropriate candidates for young people to look up to, then society has an interest in knowing this.²⁵¹ If an All Black is exposed and punished for assaulting his wife, children can be taught that this is unacceptable behaviour for anyone of any status. As Brian Gardner, Manager of the National Network of Stopping Violence Services said: "It can send a really powerful message to young men in New Zealand if people in those kind of positions stand up and say 'what I did was wrong.'"²⁵² His comments were supported by groups like Women's Refuge who were outraged by the decision, arguing that it sent the message that All Black players would earn special treatment.²⁵³ The Judge didn't seem to recognise this legitimate public interest or the need for free expression and open justice: "the non-publication order is not going to affect anyone outside this family" he said, when quite plainly it has.²⁵⁴

The unfortunate factor in this case is that the name suppression order does not really appear to have benefited the player, given the speculation surrounding his identity.²⁵⁵ Given the assault was not particularly serious, it may have been better for the player to come out and reveal his behavior, in which case the matter would have been resolved in days. However, this would not have been to the victim's advantage. The name suppression order has also not benefited the team, given that the reputation

²⁵⁰ *R v Liddell*, above n 28, 544 Cooke P for the Court.

²⁵¹ The counter argument is that children should not be exposed to such behavior, in case they attempt to emulate it. But, the public interest in knowing the true character of society's role models should override this concern.

²⁵² "Anger at All Black suppression", above n 1.

²⁵³ "Anger at All Black suppression", above n 1.

²⁵⁴ Bridget Carter "Judge grants name suppression to All Black who assaulted his wife" (9 December 2004) *The New Zealand Herald* Auckland A3.

²⁵⁵ Brown, above n 248, Louisa Wall "Come on out Mr X: You're Spoiling it for All" (19 March 2005) *The New Zealand Herald* Auckland Sports News General.

of other innocent players was called into question, particularly those who were married and residing in Auckland.²⁵⁶

It seems clear that the player's public profile was a concern for the Judge. As the Police Prosecutor noted, the only person to win a suppression order in these circumstances (that is, following a guilty plea) was another All Black in the seven year history of the court.²⁵⁷ While it might not have been the Judge's intention to treat people differently because of status, this is the end result. It is because of the player's profile in the community that the punitive publicity about the incident would have been intense, and this is consequently damaging to his family and his relationship with his wife.

However, these considerations wouldn't apply if an ordinary person had committed the same act. As one journalist notes: "Had he (the player) been an ordinary citizen this case would have passed without notice...but its precisely because he is an All Black that the attention and opprobrium would have been out of proportion to the crime"²⁵⁸ This is where the rub is, the player's fame gives him rewards that no ordinary citizen enjoys, but that fame also has the potential to completely undermine him. This results in celebrities being able to rely on their fame to gain suppression more easily, despite the courts' insistence that all are equal before the law.

The Dick Dargaville case is a further illustration of this point.²⁵⁹ Mr Dargaville, a National Party Maori Vice President, assaulted his partner by hitting her across her face.²⁶⁰ He was granted a section 19 discharge²⁶¹ like the All Black player,

²⁵⁶ 12 players heralded from Auckland in the NPC or played for "The Blues" in the Super 12 in 2004, indicating that they lived in Auckland at that time: All Blacks Official website <<http://www.allblacks.com/index.cfm?layout=teamArchive> > (last accessed 2 October 2005).

²⁵⁷ Carter, above n 254, A3.

²⁵⁸ "Tapu Misa: Sense of Perspective needed in name suppression debate", above n 190, A12.

²⁵⁹ This case precedes the Court of Appeal decision in *Lewis* where it was expressly articulated that public people should be treated the same as everyone else before the law. However, this position was present in the case law pre-*Lewis*: *New Zealand Police v Richard Dick Dargaville* (14 May 1999) DC Kaikohe, 1 Judge Everitt.

²⁶⁰ "Outrage over Mana Secrecy" (7 July 1999) *The Evening Post* Wellington Edition 3 3.

and received permanent name suppression.²⁶² Name Suppression was granted on the unique ground that publication of the fact that he had appeared in a criminal court and was discharged without conviction for assault “would lead people to start thinking what has gone on there and why.”²⁶³ The Judge is insinuating that people are only going to be interested because of the status of the person involved and that this is somehow inappropriate. Judging the public interest is not the Court’s duty. Again, we seem to have an order made based on who the person is, rather than why an order is a justified limitation of free speech.

The other reason for granting suppression was to ensure Dargaville did not lose mana.²⁶⁴ Mana is something that is earned: “Everybody from the moment of conception has mana, then we earn it from our actions...but as quick as you give it to your leaders it can be taken away.”²⁶⁵ If someone is not deserving of mana, the public and especially their people have an interest in knowing this. This case illustrates someone’s standing in the community aiding them in getting name suppression.

A further example is Hayden Roulston, an Olympic cyclist who received interim name suppression for an assault allegation. Interim name suppression allowed him to compete in the Olympics, without the allegations being made public.²⁶⁶ However, arguably there was a strong public interest in knowing that a representative of New Zealand had been charged with assault, given that such a person is seen as a role model.

²⁶¹ An interesting examination could be undertaken of the ability of celebrities to receive discharges without conviction for their misdemeanors, but this is beyond the scope of this paper.

²⁶² Dargaville received permanent name suppression but later revealed himself as being the man at the centre of this case: Helen Bain “Top Nat: I’m the ‘mana’ case man” (14 July 1999) *The Dominion* Wellington Edition 2 1.

²⁶³ *New Zealand Police v Richard Dick Dargaville*, above n 259, 4 Judge Everitt.

²⁶⁴ *New Zealand Police v Richard Dick Dargaville*, above n 259, 4 Judge Everitt.

²⁶⁵ *New Zealand Police v Richard Dick Dargaville*, above n 259, 4 Judge Everitt. This is a troubling point in itself given that mana is accorded to prominent figures in Maoridom, raising inequality issues.

²⁶⁶ Nathan Te Anga “The meaning of Mana” (17 July 1999) *Waikato Times* Hamilton Edition 2 15.

²⁶⁷ Dean Calcott “Olympian appear before judge” (11 December 2004) *The Press* Christchurch. The author was unable to obtain the judgment’s involving Hayden Roulston.

Roulston was then granted further name suppression, until the outcome of his trial was known. It was argued that publicity would damage Roulston's career, making it difficult for him to carry out a sporting contract overseas. It was felt that to jeopardise the contract was not advisable, given that Roulston could be found innocent.²⁶⁷ This is disturbing, because in so many cases negative employment repercussions are seen as a natural consequence of being charged with a criminal offence and have been held to be insufficient to justify suppression.²⁶⁸

At least in this case Roulston was not granted permanent anonymity for his behaviour, so could not shelter from punitive publicity forever. Hence, freedom of expression and open justice were not curtailed. Eventually, the public was made aware of Roulston's character, so no façade was indefinitely portrayed. But the bottom line is, name suppression was granted so that Roulston could compete in an Olympic sport and avoid negative publicity which could jeopardise his sporting career, considerations inapplicable to "Joe Average." The publicity is always going to be far less for "Joe Average", than if it's Roulston, or any other public figure, and consequently "Joe Average" is unlikely to receive name suppression.

There is the interesting case of the "high ranking foreigner" who was granted permanent name suppression.²⁶⁹ The man was charged with doing an indecent act with intent to offend and indecent assault.²⁷⁰ The man was eventually granted a section 347 discharge due to insufficient evidence.²⁷¹

Two factors were particularly significant in persuading Judge Tuohy to grant name suppression. Firstly, there was medical evidence indicating that the man was

²⁶⁷ John Henzell and Amanda Warren "Accused athlete to fight charges" (27 Oct 2004) *The Press* Christchurch Edition 2 4.

²⁶⁸ *R v Prockter*, above n 71, 299 Thomas J for the Court.

²⁶⁹ This was how the defendant was described by *The Sunday Star Times*: Wall and Watt, above n 3.

²⁷⁰ These are offences against the Crimes Act 1961, sections 126 and 135(1)(a). The man had engaged a young woman to live and work as his children's nanny. The Crown alleged that one evening the man entered the nanny's room, stood beside her bed and masturbated himself to ejaculation: *The Queen v X* (18 October 2004) CA299/04, paras 4-7 Hammond J for the Court.

²⁷¹ Crimes Act 1961, s 347.

suffering from depression as a result of the charges. Medical treatment was considered necessary.²⁷² Secondly, affidavit evidence considered that if the man's name was published in relation to the charges, albeit linked with the discharge order, his employment and career could be jeopardised, to the same extent as if he were convicted.²⁷³ As has been discussed above, in other cases these reasons have been insufficient to justify suppression.²⁷⁴

The Judge also believed that this was the type of case where odium will stick in the public's mind, despite the lack of conviction.²⁷⁵ This fails to give any weight to the public's ability to distinguish a conviction from an acquittal. The Judge was concerned that the likelihood of extensive publication was high.²⁷⁶ But, the Court of Appeal has already made clear that an inquiry into the degree of publication is not the court's duty.²⁷⁷

It can be gleaned from this decision that the Judge was concerned that the harm caused by publicity would have catastrophic effects for the man and his family. This harm is particularly significant given that the man was not convicted of the offence.²⁷⁸ For this reason it is arguable that Judge Tuohy came to the correct outcome in the case by suppressing the name of the man, given the dramatic consequences disclosure would have brought to his career and family. The key factor here is that the seriousness of the harm involved, exists only because of the man's high standing in the community. Despite the correct outcome, one aspect of the Judge's reasoning process is concerning. The judgment fails to give any consideration

²⁷² *Queen v X*, above n 146, para 5 Judge Tuohy.

²⁷³ *Queen v X*, above n 146, para 5 Judge Tuohy.

²⁷⁴ For employment see *Prockter v R*, above n 71, 299 Thomas J for the Court. For depression see *R v Liddell*, above n 28, 544 Cooke P for the Court.

²⁷⁵ *Queen v X*, above n 146, para 7 Judge Tuohy.

²⁷⁶ *Queen v X*, above n 146, para 7 Judge Tuohy.

²⁷⁷ *Lewis v Wilson & Horton*, above n 8, 563 Elias CJ for the Court.

²⁷⁸ Judge Tuohy's stance is consistent with the approach adopted by Baragwanath J in *R v H* (15 March 1996) HC AK T304/95. In that case, a man was discharged under section 347 of the Crimes Act 1961 on a charge of perpetrating gross indecencies on a young girl because it was felt that following the ordeal of a trial, a member of the public should not have to bear the burden of gossip when no case has been found to exist against them.

to freedom of expression; this Bill of Rights freedom is not mentioned, never mind balanced.

D Conclusion

The recent spate of cases involving celebrity name suppression can be explained with reference to the degree of harm which will eventuate. Those with a high public profile do get their names suppressed more readily, and this is justified by judges on the grounds that publicity will be harmful and will outweigh the crime committed. As Steven Price says "If judges treat celebrities leniently by giving them name suppression, it's because they're factoring in the likelihood that the media will treat them more punitively than anyone else accused of a similar crime."²⁷⁹ The media has one rule for celebrities and another for everyone else.²⁸⁰ The problem with granting name suppression to celebrities is that they allow maintenance of a public image which is at odds with a private reality. Celebrities maintain the benefit of a reputation which has not been earned.²⁸¹

Ironically, even though it appears that those with a high public profile are gaining suppression for their misdemeanors, it may not be in their interests to do so. This is because when suppression orders are given to celebrities, guessing their identities increases public interest in cases that may have otherwise slipped by largely unnoticed. The celebrity drug bust scandal and its associated furor is a case on point here.²⁸² As Steven Price notes:²⁸³

Celebrity guessing is hotter than Harry Potter... The forces of the law are outgunned by the power of public curiosity. Justice is blind, and gossip is nimble...celebrities may well be best advised to forego the suppression application and take a quick round of bad publicity on the chin.

²⁷⁹ Price, above n 239, C6.

²⁸⁰ Steven Price "Dialogue: Steven Price; Judges ought to explain their decisions" (21 January 2000) *The New Zealand Herald* Auckland A13.

²⁸¹ "Naming and Shaming" (28 February 2005) *The Dominion Post* Wellington Edition 2 6.

²⁸² This case is discussed further at page 59.

²⁸³ Price, above n 239, C6.

Overall, the courts' decisions result in a tension between their insistence that no-one receives special treatment before the law, and their constant suppressions for high-profile defendants. This is most troubling because it raises issues of equality before the law.

VIII FREEDOM OF EXPRESSION

The Court of Appeal has made it clear that when judges are determining suppression applications they should start by considering whether the restriction on the right to freedom of expression is demonstrably justified in a free and democratic society.²⁸⁴ To decide whether the intrusion is justified there must be identification of a clear and justifiable objective sought by suppression, the means sought to achieve that objective must be proportionate to that objective and there must be a rational connection between the two.²⁸⁵ There must be "as little interference as possible with the right or freedom affected."²⁸⁶ Applying the reasoning from *Drew*, freedom of expression can be departed from if the particular circumstances and particular people involved in a case make this justifiable.²⁸⁷

For example, in the case of *I v New Zealand Police* suppression was sought based partly on the fact that the defendant had been subjected to two physical attacks.²⁸⁸ The same person had been responsible for both attacks. Thus the object of suppression was to protect the defendant and his family. But suppression would not truly protect the family from this threat, since the attacker was already aware of the man's identity before publication.²⁸⁹ Hence, there was no rational connection between the object and the means sought to achieve it. Unfortunately, the Judge did not undertake this reasoning process.

²⁸⁴ *Lewis v Wilson & Horton*, above n 8, para 43 Elias CJ for the Court.

²⁸⁵ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, para 17 (CA) Tipping J for the Court.

²⁸⁶ *Moonen v Film and Literature Board of Review*, above n 286, para 18 Tipping J for the Court.

²⁸⁷ *Drew v Attorney General* [2002] 1 NZLR 58, para 66 (CA) Blanchard J. This case was about the denial of legal representation to prisoners, but the comments relating to exercising discretion make the case applicable.

²⁸⁸ *I v New Zealand Police*, above n 139, para 24 France J.

²⁸⁹ *I v New Zealand Police*, above n 139, para 25 France J.

An examination of the case law indicates that judges do not conduct this exercise.²⁹⁰ Judges often cite section 14, or the passage from *Liddell* that hails the media as “surrogates of the public”,²⁹¹ and then dispense with these matters when they consider whether to exercise their discretion. For example, it is common to see a whole host of personal reasons given in support of suppression, finished off with a concluding phrase dispensing with open justice and free expression: “I am satisfied that the personal matters raised outweigh the public interests in publication.”²⁹² No consideration is given to actually justifying the limitation on the right. More concerning is the fact that some judges see the right as insignificant: “It is the norm of openness which attaches to criminal proceedings which in my judgment should be emphasised in name suppression cases, rather than lofty appeals to section 14 of the New Zealand Bill of Rights Act.”²⁹³

A failure to consider whether suppression is reasonable and justifiable in the circumstances may lead to decisions which unduly limit section 14.²⁹⁴ In addition, it may be shown that narrower suppression orders could be given, so that there is truly the least infringement on the right. For example, in the All Black case, suppression was sought to protect the player’s family from harmful publicity.²⁹⁵ The means sought were suppression orders prohibiting publication of the player’s and his family’s names.²⁹⁶ There is a rational connection between the aim and method sought to achieve it, but whether there is as little interference as possible with the right to freedom of expression is questionable. An order could have been made allowing publication of the name of the player and the nature of the assault, given the strong

²⁹⁰ For example *I v New Zealand Police*, above n 139, France J; *D v New Zealand Police*, above n 144, Frater J; *The Queen v M*, above n 221, Harrison J; *T v Police*, above n 87, Panckhurst J; *The Queen v X*, above n 146, Judge Tuohy; *Regina v W*, above n 166, Panckhurst J. This is just a selection, many of the cases cited in this paper failed to consider freedom of expression appropriately.

²⁹¹ *R v Liddell*, above n 28, 546 Cooke P for the Court.

²⁹² *Lerner v Department of Internal Affairs*, above n 174, para 22 Priestley J.

²⁹³ *Lerner v Department of Internal Affairs*, above n 174, para 37 Priestley J.

²⁹⁴ By expressly articulating these considerations there is less likelihood of them being overlooked. See Burrows and Cheer, above n 15, 643.

²⁹⁵ Stewart, above n 245, 2.

²⁹⁶ Stewart, above n 245, 2.

public interest in the case. There could have been a prohibition of the circumstances of the assault, including the fact it was his wife who was the victim, in order to shield her from publicity and protect their marriage.

IX THE COLD HARD FACTS

While it may seem to the casual observer that name suppression orders are granted frequently to offenders, this is not the case. Statistics from the Ministry of Justice demonstrate that in year ending 2004, name suppression orders were granted in 0.5 per cent of cases concerning convicted persons.²⁹⁷ This indicates that generally, judges are granting suppression only in exceptional circumstances. There has been no dramatic growth in the number of name suppression orders given to offenders in the period between 1995 and 2004. However, there has been a slight increase from 2002-2004, from 0.3 per cent to 0.5 per cent of all convicted offenders receiving suppression.²⁹⁸

Defendants convicted of sexual offences made up 26 per cent of all orders given.²⁹⁹ This is unsurprising, given a large number of those would be automatic suppressions, or discretionary ones issued to protect the victim's identity. Interestingly, "other violent" offenders make up 26 per cent of all orders made.³⁰⁰ This is partially explainable because of the high number of violent offending cases coming before the Courts, which in turn leads to more suppression orders being granted.³⁰¹ Although violent offenders make up a large part of the total number of suppression orders given, orders are only granted in 1.3 per cent of all cases.³⁰² 1 per cent of those convicted of "Other offences against the person"³⁰³ receive name

²⁹⁷ Ministry of Justice, above n 51, Table 2.

²⁹⁸ Ministry of Justice, above n 51, Table 2

²⁹⁹ Ministry of Justice, above n 51, Table 1. All statistics given in the following discussion relate to the year ending 2004.

³⁰⁰ Ministry of Justice, above n 51, Table 1.

³⁰¹ Ministry of Justice *Conviction and Sentencing of all Offenders 1992-2001* (December 2002) Table 2.3

³⁰² Ministry of Justice, above n 51, Table 2.

³⁰³ Offences categorised as "other offences against the person" are mainly offences of obstructing or resisting police officers or other officials, and sexual, threatening and intimidation offences which are not included in the violent offences category.

suppression.³⁰⁴ In cases of property,³⁰⁵ drug, traffic or miscellaneous offending³⁰⁶ and in cases of offending against justice³⁰⁷ or good order,³⁰⁸ name suppression is given in less than 1 per cent of all cases.³⁰⁹

So, overall the statistics available demonstrate that only in very few cases is name suppression granted to offenders. The principles of open justice and freedom of expression are not being trammled over by the judiciary. While there might be questions about the appropriateness of name suppression in individual cases, the public should feel assured that the overall number of name suppressions granted every year is not significant.

X REASONS

The Court of Appeal has emphasized the importance of giving reasons for a suppression order, despite no invariable rule to that effect. In *Lewis* the judge failed to give reasons in court, which amounted to an error of law.³¹⁰ This requirement to give reasons is desirable as it forms an important part of openness in the administration of justice and is critical to the maintenance of public confidence in the judiciary. It ensures carefully rationalized decisions occur and enables appeal rights to be

³⁰⁴ Ministry of Justice, above n 51, Table 2.

³⁰⁵ This includes burglary, theft, fraud, arson, motor vehicle conversion, receiving stolen goods, and willful damage: *Conviction and Sentencing of all Offenders 1992-2001*, above n 301, 2.3.

³⁰⁶ All offences not included in one of the other categories are placed in the category "miscellaneous offences." For the most part, offences in the other categories are those defined in the Crimes Act 1961, Summary Offences Act 1981, Criminal Justice Act 1985, Land Transport Act 1998, and the Misuse of Drugs Act 1975. The miscellaneous category contains offences defined in an assortment of Acts and regulations including the Arms Act 1983, Dog Control Act 1996, Fisheries Act 1983, Income Tax Act 1994, Tax Administration Act 1994, Goods and Services Tax Act 1985, Postal Services Act 1998, and Sale of Liquor Act 1989: *Conviction and Sentencing of all Offenders 1992-2001*, above n 301, 2.3.

³⁰⁷ These are offences which are the result of a breach of a sentence awarded for an earlier offence (for example breaching periodic detention), failure to answer bail (that is a failure by a person on bail to appear in court at a specified time and place), breach of protection orders, or offences relating to court procedure: *Conviction and Sentencing of all Offenders 1992-2001*, above n 301, 2.3.

³⁰⁸ This includes disorderly behaviour, offensive language, carrying offensive weapons, trespassing, and unlawful assembly: *Conviction and Sentencing of all Offenders 1992-2001*, above n 301, 2.3.

³⁰⁹ Ministry of Justice, above n 51, Table 2.

³¹⁰ *Lewis v Wilson & Horton*, above n 8, 567 Elias CJ for the Court.

exercised. The absence of reasons means that a court exercising a supervisory jurisdiction cannot assess the lawfulness of what has occurred.³¹¹

However, despite these factors judges are not always giving reasons for their decisions. Permanent name suppression was recently given to a Member of Parliament's partner, following his conviction for assault on a female. Upon appeal, the decision was remitted back to the Trial Judge, because of concerns that no reasons were given for granting name suppression.³¹²

There are also concerns that judges are not making their reasons available to the public.³¹³ For example, a Christchurch businessman was recently given permanent name suppression following a conviction for the malicious use of telephone. The Judge took the extraordinary step of issuing a prohibition on publication of the reasons for suppression.³¹⁴ At least there were reasons given, meaning that a carefully rationalised decision did occur. However, by prohibiting publication of the reasons the public's ability to hold the justice system to account is hindered greatly. Presumably, the reasons for the order were so closely linked to the person's identity that one could not release the reasons without identifying the offender. However, the court did not even allow this to be released to the public. This is a great infringement on open justice. The public has a right to know why someone who has been convicted of an offence is not being subjected to publicity.

When reasons are not given for a decision or the public are denied access to reasons, questions are raised about the appropriateness of the decision. Is the absence

³¹¹ *Lewis v Wilson & Horton*, above n 8, 565-566 Elias CJ for the Court.

³¹² "MP, partner loses battle over name suppression" (5 December 2003) *Waikato Times* Hamilton General News.

³¹³ The author attempted to gain written decisions for a number of cases and was denied access. For example, in the All Black case the Court simply declined to issue the order. In a high profile rape case where two men were convicted the author was told that no written material existed of the decision, as it was given in open court. Hence, if a member of the public is not in court when the decision is given, the reasons for the order cannot easily be ascertained, a highly unsatisfactory outcome. In the case of *R v Police*, above n 129, the author was denied access to the decision because she was not a lawyer. This wrongly implies that only lawyers are capable of abiding by suppression orders and should be the only ones with sufficient interest in a case to warrant reading it.

³¹⁴ *Henzell*, above n 2.

of recorded, accessible reasons the result of busy Judges who are pressured for time, or a result of ad hoc decision making based on intuition rather than a careful balancing of the private and public considerations discussed?³¹⁵

XI THE MEDIA'S ROLE

A Media Standing

The media are obviously interested in name suppression decisions as such orders impact on their ability to report freely about court proceedings. Therefore it is appropriate that the media should be recognised as interested parties in name suppression cases. The Court in *R v L* held that "the news media does have and always has had the right to seek an audience and be heard on the question of suppression."³¹⁶ The Court held that its inherent jurisdiction allows it to hear submissions from the media.³¹⁷ The media's standing in suppression cases extends to an ability to apply for discharge, rescission or variation of suppression orders.³¹⁸

The Court of Appeal in *Liddell* left open the issue of whether the Court has jurisdiction to grant the media leave to appeal in name suppression cases, because the media's arguments in that case were amalgamated with the Solicitor General's application.³¹⁹ A recent decision of Panckhurst J challenges the media's standing, since the point was left unaddressed in *Liddell*.³²⁰ However, his statements ignore the fact that in other Court of Appeal decisions the media's standing has been accepted,

³¹⁵ Jones, above n 23, 24.

³¹⁶ *R v L* [1994] 3 NZLR 568, 570 (HC) Smellie J. Following *R v Clerkenwell Magistrates Court, ex parte Telegraph plc* [1993] 2 All ER 177; *Re Bromfield Stipendary Magistrate, ex parte West Australian Newspaper Ltd* [1991] 6 WAR 153.

³¹⁷ *R v L*, above n 316, 569 Smellie J. Although the District Court is not a court of inherent jurisdiction it appears to have been accepted in many cases that the media should be heard on a section 140 application: *Police v Pitman*, above n 56, Judge Tompkins; *Wellington Newspapers Ltd v XL*, above n 105, Judge Deobhakta.

³¹⁸ *R v L*, above n 316, Smellie J; *A v B* (11 May 1999) HC AK CP310/96 Young J; *Re Wellington Newspapers Ltd's Application* [1982] 1 NZLR 118 (CA) Cooke J and *Broadcasting Corporation of New Zealand v Attorney-General v AG*, above n 195, Richardson J.

³¹⁹ *R v Liddell*, above n 28, 541 Cooke P for the Court.

³²⁰ *T v Police*, above n 87, para 17 Panckhurst J.

without challenge.³²¹ One would have expected a challenge if their standing was truly at issue.

In the case of *Lewis*, the publishers Wilson & Horton challenged a suppression order by way of judicial review. The Court accepted that media organisations have standing to bring judicial review of an order, and that they do not have to have participated in the original determination of the order to seek review.³²² The Court in *Lewis* assumed the media's standing in summary proceedings.³²³ It would be most undesirable if media organisations were denied standing, as their role as the public's watchdog would be severely inhibited.

B Publishing a Suppressed Name

A breach of section 140 is an offence of strict liability.³²⁴ This means that prima facie liability is established by proving there was publication in contravention of a suppression order. The media organisation is liable unless they can prove a total absence of fault, on the balance of probabilities.³²⁵ In one case, a suppressed name was referred to in a court proceeding, with no mention of an earlier suppression order having been made. A reporter then innocently published the suppressed name and the defendant successfully relied on the total absence of fault defence.³²⁶

Common unintentional slips such as ignorance of a suppression order or accidental publication of a suppressed name will be insufficient.³²⁷ Despite the small fine³²⁸ for a breach of this section, and to the credit of media organisations, there are

³²¹ *Wellington Newspapers Ltd's Application*, above n 318, Cooke J; *Broadcasting Corporation of New Zealand v Attorney-General*, above n 195, Richardson J; *TVNZ v R* [1996] 3 NZLR 393 (CA) Keith J for the Court; *Re Victim X*, above n 56, Keith J for the Court.

³²² *Lewis v Wilson & Horton Ltd*, above n 8, para 52 Elias CJ for the Court.

³²³ *Lewis v Wilson & Horton Ltd*, above n 8, paras 69-70 Elias CJ for the Court.

³²⁴ *Karam v Solicitor General* (20 August 1999) HC AK AP50/98, 8 Gendall J.

³²⁵ A total absence of fault is shown by demonstrating that all reasonable care has been taken that a reasonable person would have taken in the circumstances: *Karam v Solicitor General*, above n 324, 8 Gendall J, or by the journalist having acted with honesty and due diligence: *Police v News Media Auckland Ltd* [1998] DCR 440 Judge Nicholson QC.

³²⁶ *Police v News Media Auckland Ltd*, above n 326, 440 Judge Nicholson QC.

³²⁷ *Police v Thames Star Co. Ltd* (1965) 11 MCD 343.

³²⁸ The fine is 1,000 dollars: Criminal Justice Act 1985, s 140(5).

few cases of deliberate infringement.³²⁹ A concerted attempt to flout the authority of the court could result in a contempt of court charge, in addition to a conviction under section 140.³³⁰ There is no authority for a contempt conviction under the current Act, but it occurred under previous legislation.³³¹

C Publishing Details

In suppression cases there is a prohibition on publishing particulars likely to lead to the identification of the suppressed name. The Court of Appeal in *R v W* held that "likely to lead" signifies an appreciable risk that publication will have that effect.³³² In *R v W*, a professional man, was found guilty of indecently assaulting a 15 year old boy.³³³ As the boy had worked for W it was felt that publication of his name could lead to the boy's identification, which had to be protected by virtue of section 139 of the Act.³³⁴

The prohibition on publication applies to any report or account relating to proceedings.³³⁵ "Report or account relating to proceedings" is given a wide interpretation by the Courts. For example, a book describing the murder of a Dunedin family revealed a suppressed name and was held to be an account of proceedings.³³⁶

There are some recent examples which show that media outlets are willing to publish a number of details about a person whose name is suppressed, arguably creating a real risk of identification. For example, in relation to the All Black case discussed above, *The New Zealand Herald* described the player as an "All Black" and revealed that he had appeared in the Waitakere Violence Court. The paper said the

³²⁹ See the discussion in Burrows and Wilson, above n 13, 21.

³³⁰ Criminal Justice Act 1985, s 140. If a conviction was sustained for contempt, the financial penalty on media organisations would be much greater than the fine for breaching section 140 of the Criminal Justice Act 1985.

³³¹ *Attorney-General v Taylor & Another* [1975] 2 NZLR 138 (SC) Beattie J.

³³² *R v W* [1998] 1 NZLR 35, 40 (CA) Richardson P.

³³³ *R v W*, above n 332, 35 Richardson P.

³³⁴ *R v W*, above n 332, 40 Richardson P.

³³⁵ Criminal Justice Act 1985, ss 139(1), 140(1).

³³⁶ *Karam v Solicitor General*, above n 324, 8 Gendall J.

player lived in West Auckland, was married and that his wife was 5 months pregnant at the time of the assault in October 2004.³³⁷ By giving so many details about the player's marital status, family circumstances and place of residence the paper has come close to identifying the player. The number of players that would fit this description is small, so arguably there is an appreciable risk that identification could occur.

Similarly, two celebrities were recently implicated in a drug scandal. Some media outlets described the individuals as "former sports stars"³³⁸ while others referred to them as "television celebrities."³³⁹ It was also noted in some publications that the pair were overseas.³⁴⁰ On the day the story broke, *Radio New Zealand* mentioned that the men in question were television celebrities and former sport stars, arguably creating a real risk of identification, as few people fit this description.³⁴¹

Even those outlets that just mentioned one of these key details may be treading too close to the line. This is because if these individual pieces of information are assimilated together, the number of people who fit this description is small, because of the size of New Zealand's population. It would be naïve of media organizations to assume that consumers will not put these descriptions together in order to try and ascertain identity. In the context of defamation, a defamatory meaning can be imputed to an otherwise innocent article, when read in light of other news media publications.³⁴² The same could apply to name suppression. The media should recognise that information put in the public domain by someone else may limit their own ability to publish further identifying information that, if put together with

³³⁷ Carter, above n 254, A3. As the unable was unable to get a written decision it cannot be specified what the terms of the order were but it is likely that the order prohibited publication of the defendant's name, the victim's name or anything likely to identify the family: Stewart, above n 245, 3.

³³⁸ "Sport Stars in Drug Bust" (20 July 2005) *The New Zealand Herald* Auckland General News.

³³⁹ Deborah Diaz "TV Stars' link to drug Ring" (20 July 2005) *The Dominion Post* Wellington Edition 2 1.

³⁴⁰ "TV Stars yet to contact Police" (21 July 2005) *The Dominion Post* Wellington Edition 2 3.

³⁴¹ Radio New Zealand Newswire (20 July 2005) 06.27.

³⁴² It has been recognised that a newspaper could be successfully sued in respect of a article that is defamatory when read in the light of prior news items published by other media. If such items can be regarded as part of the general knowledge of the community, they are arguably part of the context in which the latest contribution has been published: *Astaire v Campling* [1966] 1 WLR 34, 39 Sellers LJ, *Hyams v Peterson* [1991] 3 NZLR 648 (CA) Cooke P for the Court.

the former information creates an appreciable risk of identification of the suppressed name.³⁴³

In addition, by narrowing the pool of people with such a specific description, innocent people who hold the same characteristics become wrongly targeted, as occurred in this scandal.³⁴⁴ Such people have the option of pursuing a defamation claim against anyone who has wrongly accused them.

Many newspapers seem to have no hesitation in informing readers that suppressed names are available on the internet. *The Dominion Post* wrote in relation to the drug scandal "Anyone keen on figuring out the identities of the two men can turn to the Internet where several possibilities are offered."³⁴⁵ Arguably, this constitutes an attempt to evade an order under section 140(5) of the Act.³⁴⁶

D Consent

An interesting question arises around whether there is an offence committed if the person whose name is suppressed consents to publication of their name. Strictly speaking, the subject of the suppression order is bound, just like anyone else by the prohibition on publication. However, a person is entitled to waive the protection of a statutory provision passed solely for their own benefit.³⁴⁷ Nonetheless, consent is rarely a defence to a criminal charge, so it seems unlikely that a court will hold that a provision that criminalises conduct could be waived in this manner. According to commentators "consent does not decriminalise the conduct, although in practical terms the likelihood of prosecution may be low."³⁴⁸ Media outlets who have obtained consent should apply to the court to vary the suppression order.

³⁴³ See the discussion in Burrows and Cheer, above n 15, 40.

³⁴⁴ Former sportsman and television star Matthew Ridge was thought to be involved in the scandal (particularly in internet gossip) and was not.

³⁴⁵ Rebecca Palmer "Drug bust identities all over the net" (23 July 2005) *The Dominion Post* Wellington A3.

³⁴⁶ Criminal Justice Act 1985, s 140(5).

³⁴⁷ *Johnson v Moreton* [1980] AC 37.

³⁴⁸ Burrows and Wilson, above n 13, 22.

E Civil Remedies

A further issue is whether a person whose name has been published in breach of a suppression order could sue for damages.³⁴⁹ English authority has found against the existence of a civil remedy.³⁵⁰ To date, the matter has only been considered once in New Zealand at District Court level. Judge MacAskill found against the existence of a remedy arguing that the power to suppress names is to assist the justice system and that protection of privacy is merely a collateral effect.³⁵¹ This is unpersuasive, given that suppression orders are given when the harm to reputation and privacy outweighs the public interest in disclosure. Clearly privacy considerations are important.³⁵²

The Judge was also concerned that a damages award may send a false message to the community that the offending was being indirectly rewarded and that there was no detriment to compensate if the published information was true.³⁵³ These reasons are only applicable where it is a convicted person's name that has been suppressed, but may not apply in cases where it is the victim who has received suppression or if an accused is acquitted. In this situation a right to privacy is more obviously at issue. In addition, finding against the existence of a civil remedy fails to give any weight to a person's expectation that their name would remain anonymous

³⁴⁹ The action could be for breach of statutory duty or negligence.

³⁵⁰ The House of Lords has held that a breach of the non-publication provisions of mental health legislation confers no right to a civil claim. But, the Court said that publication of unauthorised information about such proceedings is "incapable of causing loss or injury of a kind for which the law awards damages": *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 420 per Lord Bridge. However, this case is only authority for this particular statute and it is no longer true in New Zealand that a breach of privacy (which this case involves) is not an injury for which the court does not award damages: *Hosking v Runting* [2005] 1 NZLR 1, para 77 (CA) Gault P and Blanchard J.

³⁵¹ *Harrington v Wellington Newspapers Ltd* (5 December 2001) DC WN 869/00 Judge MacAskill.

³⁵² MacAskill J also believed that the criminal sanctions for breach of a suppression order were sufficient to enforce compliance. There is a presumption that where the statute provides a remedy, the duty is to be enforced using only the remedy provided in the statute, but that presumption is displaceable: *Attorney-General v Birkenhead Borough* [1968] NZLR 383, 389 (SC) Richmond J. An inquiry is made into the purpose of the statutory provision. Questions are asked as to whether the plaintiffs clearly fall within the class of persons which the statute is designed to protect, and whether the loss they sustained was of the type contemplated by the Act: *MacEachern v Pukekohe Borough* [1965] NZLR 330 (SC) Gresson J. Clearly, suppression orders do protect their recipients. The harm of publicity is being avoided by a suppression order and publicity is what eventuates upon breach.

³⁵³ *Harrington v Wellington Newspapers Ltd*, above n 351, Judge MacAskill.

following the granting of a suppression order. Finding the existence of a remedy would also encourage journalists to act responsibly. The issue cannot be considered closed.

XII THE INTERNET

The Internet poses real problems for the practicality of suppression orders. For example, the name of the All Black who pleaded guilty to assaulting his pregnant wife was published on the internet, despite a suppression order prohibiting publication.³⁵⁴ The identities of the celebrities involved in the drug scandal were described as “New Zealand’s worst-kept secret”, due to the internet.³⁵⁵ However, the ease with which the correct names could be ascertained on the internet is debatable,³⁵⁶ but undoubtedly there was plenty of speculation.

When suppressed names are published on the internet the court’s authority is being flouted. Interestingly, the Head of the Police’s E-Crimes unit, Maarten Kleintjes, says that the police do not actively monitor the internet to search for name suppression breaches.³⁵⁷ So not only are suppression orders not being adhered to, but there is no enforcement of them to encourage compliance. This raises questions about whether suppression orders are fruitless in a technological age.

To date, some courts have rejected an argument that a suppression order should not be made because of the internet’s ability to render it futile.³⁵⁸ Strictly speaking, an order should prevent release into cyberspace, as a New Zealander would be in breach of an order if they published a suppressed name on a webpage. If a New Zealander leaks a suppressed name to a foreign newspaper, then this might not constitute “publication” of a suppressed name by the individual, as publication is by

³⁵⁴ Spratt, above n 178, 3.

³⁵⁵ “Drug bust identities all over the Net”, above n 355.

³⁵⁶ Price, above n 239, C6.

³⁵⁷ Although he concedes that if complaints were made they would be followed up: “Drug bust identities all over the Net”, above n 355.

³⁵⁸ *Lewis v Wilson and Horton*, above n 8 568 Elias CJ for the Court.

the newspaper. However, arguably such action does constitute evading or attempting to evade a court order, an offence under section 140(5) of the Act.³⁵⁹

If a suppressed person's name appears on a webpage it seems likely that any New Zealand media outlet who directed its listeners or readers to that website could be considered to be attempting to evade the order under section 140(5).³⁶⁰ It is questionable how specific the direction would need to be. For example, one New Zealand newspaper referred to "A mass selling tabloid style National British Newspaper" that had a suppressed name published on their webpage.³⁶¹ The number of newspapers who fit this description is small, and the paper's direction is specific so arguably there is an attempt to evade the court order.

If a suppressed name appears on an overseas website following the granting of an order by a New Zealand court, this will generally be insufficient to warrant revoking it. For example, the victim of a kidnapping plot in 2002 had their name published on an overseas website, in breach of a suppression order.³⁶² Hammond J held that as not all New Zealanders had access to the internet and would even know where to find the information, the order could stand. The Judge took the view that the Court should not let an otherwise appropriate order be entirely defeated by technology.³⁶³

³⁵⁹ Criminal Justice Act 1985, s 140(5). In theory, the overseas organisation could be in breach of New Zealand law because an act necessary for the completion of the offence, that is publication, occurs in New Zealand: Burrows and Cheer, above n 15, 39. Jane Clifton wrote an article for *The Times* in which she revealed the name of a victim who was the target in kidnapping plot. His name was suppressed. The article was put on the newspapers webpage: *Times Online* "Britons accused of kidnap plot" (26 July 2002) <<http://www.timesonline.co.uk/print/Friendly/0,,1-3-365730,00.html>> (last accessed 5 May 2005). An investigation was carried out as to whether to prosecute Ms Clifton, but no charges appeared to proceed, which indicates that enforcement of internet breaches is limited.

³⁶⁰ Criminal Justice Act 1985, s 140(5).

³⁶¹ Hank Schouten "Lawyers win gag on kidnap target" (25 July 2002) *The Dominion Post* Wellington Edition 2 1. The article opened as follows: "Millions of Britons know the identity of three men and the Wellington businessman they allegedly planned to kidnap but *The Dominion Post* cannot tell its readers. A mass-selling British tabloid newspaper not only named the suspected target, Mr X, but gave his financial details on its website."

³⁶² *Re Victim X*, above n 56, 228 Hammond J.

³⁶³ *Re Victim X*, above n 56, 228 Hammond J.

As a matter of principle it would be quite wrong if the relevant information could be placed on the internet overseas and it was then used as a device to avoid or have set aside an order for suppression which had properly been made in New Zealand.

To allow otherwise would mean that the law was bending to technology and could encourage other stratagems in the future. The courts have recognised that if the identity of a person is already in the public domain, then suppression may be declined, as the law will not engage in an exercise of futility.³⁶⁴

Commentators are divided on the impact of the internet on suppression orders. David Farrar, Vice President of the Internet Society argues that technology is outstripping suppression orders, leaving them redundant. He says "high-profile suppression cases can normally be found within hours of courts suppressing them."³⁶⁵ Warren Young argues that "many more people" could read something on the front page of a newspaper than on a website.³⁶⁶ Steven Price agrees that the courts are likely to recognise the difference between some lively internet gossip and nationwide media publicity, when deciding whether orders are pointless.³⁶⁷

Arguably, reading a paper headline is easier than having to research on the internet and find out someone's name. Many people may not be interested enough to invest time and money in discovering the suppressed name. In addition, internet chat rooms are often rife with speculation about the identity of the suppressed name. Therefore, the internet is less authoritative than a newspaper or television broadcast; people may think they know who the suppressed identity is, but may be quite wrong.

³⁶⁴ *Lewis v Wilson and Horton*, above n 8, 568 Elias CJ for the Court. One case where the Judge felt a suppression order was futile was in the recent "Berryman Bridge" collapse case. There, Judge Wild ended suppression on a report by an army engineer which gave information about the bridge's construction. Justice Wild believed it was fruitless to keep the document suppressed, once it was widely available on websites. The Judge said he did not believe the court was most effectively upholding the administration of justice by making "futile" and "stupid" orders. The Judge stated "I decline to be blind to the realities of the situation: David McLoughlin "Court orders futile-judge" (16 May 2005) *The Dominion Post* Wellington General News.

³⁶⁵ McLoughlin, above n 364, General News.

³⁶⁶ McLoughlin, above n 364, General News.

³⁶⁷ Price, above n 239, C6.

The number of people who have access to the internet is said to be close to 75%.³⁶⁸ As this number increases and information becomes more easily accessible, judges may refuse outright or decline to renew suppression orders, because they consider them futile. When the number of people who have access to the internet and can easily find the information dramatically outweighs the small number who do not know, there is a limited interest to be protected by suppression. This is really only going to occur in cases involving celebrities and is not applicable to the majority of suppression decisions, because there is little public interest in them.

XIII POSSIBLE REFORMS

A Discretion versus Uniformity?

Judges need to retain their discretion, given the importance of factual considerations in name suppression applications. The discretion is necessary so that a degree of flexibility may also be sustained. Feedback to the Law Commission on this issue did not indicate a need to legislate to prescribe criteria to be taken into account for name suppression and generally was in support of the continued availability of suppression for defendants.³⁶⁹ The necessary consequence of retaining discretion for judges is that a precarious balancing exercise occurs. As the facts of individual cases vary immensely, the combination of factors will produce different outcomes. Therefore, the appearance of inconsistency in suppression decisions to the casual observer may be explicable for this reason. This is enhanced by the fact that media reports do not usually canvass the complexities of a decision that a judge may well have considered.

So, rather than strictly codifying the law it may be more advantageous to invest resources into training judges in how to deal with name suppression

³⁶⁸ McLoughlin, above n 364, General News.

³⁶⁹ New Zealand Law Commission, above n 62, 313.

applications. At present, there is no formal system for training judges in this area;³⁷⁰ they are left to rely on case law. External vigilance may assist in gaining greater consistency in name suppression applications.

B Suppression During Trial Process

Of particular concern is the weight to be given to the presumption of innocence before conviction, as was seen above. Because of this, it may be advantageous to reform the law of name suppression in the process leading up to trial.

1 Before First Appearance

It is unclear what the situation is if a media organisation publishes the name of a person who has been charged with an offence, but not yet appeared in court. There can be no charge for breach of section 140, because no suppression order exists. The principle of open justice does not apply, because the matter has yet to reach court. Arguably, the privacy interests of the person charged should be considered paramount.³⁷¹ Pat Plunkett, an experienced journalist, states that he would publish a name before someone had appeared in court, even if he knew suppression was being sought.³⁷²

It is suggested that to publish a person's name in such circumstances may constitute contempt of court, because the media are effectively frustrating the court's ability to make an order and pre-empts a person's right to apply for one.³⁷³ Burrows argues that it may depend on the circumstances and the intent with which such a publication was made. If for example, "it was known that suppression was going to be applied for and there was a deliberate attempt to pre-empt any possible order that

³⁷⁰ The Judicial Studies Institute, who is responsible for training judges, has no training seminars concerning name suppression.

³⁷¹ New Zealand Law Commission, above n 62, 314.

³⁷² Mediawatch "Comment: Name Suppression" (9 September 2001) <www.mediawatch.co.nz/archive> (last accessed 10 July 2005).

³⁷³ *C v Wilson & Horton Ltd* (27 May 1992) HC AK CP 765/92 Williams J.

could well be held to be contemptuous.³⁷⁴ Conversely, the Law Commission says that although this conduct is undesirable it wouldn't be contemptuous, nor in breach of any code of practice.³⁷⁵

Because of the uncertainty for media organisations, the Law Commission believes there should be a prohibition on the publication of identifying details of a person charged with an offence before he or she appears in court.³⁷⁶ This would create certainty for both defendants and the media. The principle of open justice is not impeded and freedom of expression is only delayed. Friends and family can be informed of proceedings.

2 *Suppression until Conviction*

A further option would be to provide that an accused's name could not be published until conviction. This was the situation in New Zealand from September 1975 until July 1976.³⁷⁷ This treats the presumption of innocence principle as paramount. Gary Gotlieb, an Auckland lawyer, believes New Zealanders do not adhere to the innocent-until-proven-guilty principle and therefore supports this proposal: "All you have to do is listen to talkback-if a person is charged they're guilty."³⁷⁸

This approach also gives full weight to the reputation of the defendant and their family, and recognises the harmful consequences that merely being accused of a crime can have on an individual's livelihood. As Fisher J notes "the stigma associated with a serious allegation will rarely be erased by a subsequent acquittal."³⁷⁹ This stance also recognises that publicity of an offender's name should be used as a

³⁷⁴ Burrows and Wilson, above n 13, 22.

³⁷⁵ New Zealand Law Commission, above n 62, 314.

³⁷⁶ New Zealand Law Commission, above n 62, 314.

³⁷⁷ This approach lasted only until a change of government. The legislation provided exceptions to the prohibition on publication, such as if the accused did not desire suppression or if the public interest warranted publication: Criminal Justice Act 1954, ss 45B(2), (6).

³⁷⁸ "Name Suppression to easily granted-law expert", above n 9.

³⁷⁹ *M v Police*, above n 4, 16 Fisher J.

punishment for their behavior and as a deterrent against future similar offending. A further benefit of this approach is certainty; every person accused of a crime would be treated the same, whereas the present practice is inconsistent with only some people likely to gain the advantage of keeping their name suppressed.³⁸⁰

However, this approach has attracted little support here or overseas and the Law Commission is not in favour of it.³⁸¹ This is because it fails to give any weight to freedom of expression or open justice. It would inhibit other victims or witnesses coming forward to assist in criminal proceedings. The Commission also notes the logistical problems: "Giving the presumption of innocence such overriding force raises the considerable practical difficulty of making sure that the accompanying reporting of the trial process does not compromise the accused's anonymity."³⁸²

3 *Suppression until charges "gone into"*

A more moderate option would be to restrict publication until a certain point in the trial process. For example, the Law Commission believes that the current law relating to the pre-trial suppression of an accused's name gives insufficient recognition to the presumption of innocence.³⁸³ Consequently, it recommends that after a person is charged publication of their name or particulars should be prohibited until the substance of the case is "gone into" by the court.³⁸⁴ The rule of suppression would be presumptive only and the court could vary it if the interests of justice required it, such as if other innocent people were suffering because of speculation about the accused's identity.³⁸⁵

³⁸⁰ New Zealand Law Commission, above n 62, 317.

³⁸¹ New Zealand Law Commission, above n 62, 317.

³⁸² New Zealand Law Commission, above n 62, 317.

³⁸³ New Zealand Law Commission, above n 62, 316.

³⁸⁴ In a summary case, a case would be "gone into" when the prosecution presented its case or the accused pled guilty. In indictable cases it would occur at the time of depositions at a preliminary hearing: New Zealand Law Commission, above n 62, 317. The majority of the Criminal Law Reform Committee suggested this proposal in 1972: Criminal Law Reform Committee *The Suppression of Publication of Name of the Accused* (Wellington, 1972).

³⁸⁵ New Zealand Law Commission, above n 62, 317.

This would ensure that all persons appearing before the court are treated equally, so far as publication of their name is concerned. Publication of an accused's name under the present law often depends on matters of chance, such as whether the media are present court at the appropriate time.³⁸⁶ In small centers a local newspaper may publish the names of all those appearing in court, even those on minor traffic offences. In the larger cities, sheer volume means selective reporting takes place.

The Commission's approach would also avoid the dilemma that presently faces an accused seeking name suppression "knowing that the threshold to be met is a high one and the possibility that the application itself, if unsuccessful, may attract the very consequence it sought to avoid."³⁸⁷ This approach would give certainty for media outlets and defendants and would resolve the problems with the weight to be accorded to the presumption of innocence pre-trial.

There are disadvantages with such an approach. Only partial weight is given to the presumption of innocence, because suppression ends before conviction. An individual acquitted of a charge would be in the same position as they are under the present law.³⁸⁸ The limits placed on freedom of expression will have to shown to be demonstrably justified, but this is not an insurmountable challenge. The public's right to know the identity of a person appearing the court is simply postponed until the substance of a case is presented to the court. This approach gives a degree of certainty for those seeking interim name suppression and avoids many of the problems associated with the presumption of innocence.³⁸⁹

C Victims

There are also problems with the treatment of victims in criminal proceedings. Presently, there is an automatic prohibition on the publication of the names of victims

³⁸⁶ New Zealand Law Commission, above n 62, 316

³⁸⁷ New Zealand Law Commission, above n 62, 316.

³⁸⁸ New Zealand Law Commission, above n 62, 316.

³⁸⁹ If further name suppression was sought then the current high threshold should be met.

of sexual offences.³⁹⁰ In addition, the court holds discretionary powers of suppression for victim's names.³⁹¹ The Court of Appeal has held that the threshold for name suppression for victims is the same as for defendants. Victims must show "compelling reasons" to justify overriding the open justice presumption.³⁹² It has been held that circumstances warranting suppression may exist if the victims of an offence or their families are in physical jeopardy.³⁹³

The rationale underlying the open justice principle arguably does not apply with the same force to victims, as it does for the accused. The public has an interest in ensuring justice is dispensed fairly, a consideration which does not apply to victims. Defendants are said to have caused the criminal situation while victims voluntarily appear (or are sometimes subpoenaed). They are then forced to recount often painful and traumatic experiences.

The importance of victims participating in the New Zealand justice system is beyond question. It is undesirable that potential victims may be dissuaded from participating in court proceedings because of a fear of being publicly exposed. As the Law Commission notes:³⁹⁴

The comfort of knowing that particulars of their identity would not be published if there were reasonable grounds for such a request would indicate that the law recognised the value of their participation and had some flexibility with respect to their personal wishes as to name suppression.

Also, there should be some weight given to the privacy values of victims who may wish to remain anonymous for good reason.³⁹⁵

³⁹⁰ Criminal Justice Act 1985, s 139A.

³⁹¹ Criminal Justice Act, s 140.

³⁹² *Re Victim X*, above n 56, 238 Keith J for the Court.

³⁹³ *R v Koloï* [2004] DCR 128, 133 Judge Roderick Joyce QC.

³⁹⁴ New Zealand Law Commission, above n 62, 319.

³⁹⁵ For example, in *Re Victim X* the victim of an attempted kidnapping case desired suppression. This was understandable given the harm and distress caused to the victim and his family by the defendant's actions. However, the Court of Appeal agreed with the trial judge and refused continuing suppression: *Re Victim X*, above n 56, 242 Keith J for the Court.

The Law Commission believes that suppression for victims warrants reforming and argues for a new presumption in favour of suppression for them: "We (the Commission) propose such an order should be made at a victim's request unless the interests of justice require otherwise."³⁹⁶ In contrast, Burrows believes that victims should not receive suppression, because of the fact that it may make cases difficult to report and the publication of victims flushes out witnesses.³⁹⁷ This seems unpersuasive, given that descriptions of victims could still be published for the purposes of reporting cases and details of the crime could be published so that witnesses come forwards.

The Law Commission's approach seems appropriate, given the increasing developments in New Zealand to recognise privacy rights³⁹⁸ and the lack of justifications in treating victims the same as defendants. If it can be shown that suppression is necessary in order to encourage the public to participate in the justice process, the limits placed on freedom of expression may be shown to be demonstrably justified. It is worth remembering that under the Commission's recommendations the court may order the publication of a victim's name if rendered necessary.³⁹⁹

Unfortunately, the Commission's views are unlikely to be enacted in the near future. The current Government has recently rejected all of the Commission's suggestions: "The present laws are based on the assumption of open justice, with exceptions made where appropriate. The Government considers that the existing laws relating to name suppression are appropriate."⁴⁰⁰

³⁹⁶ New Zealand Law Commission, above n 62, 319.

³⁹⁷ Anthony Davies "Law Commission again fails to grasp media's role" (24 March 2004) *The Independent Auckland* 18.

³⁹⁸ Section 7 of the Victim's Rights Act 2002 recognises the victim's right to privacy. Section 139(1A) of the Criminal Justice Act 1985 states that the automatic suppression orders for victims of sexual offences are there solely for their protection. The majority of the Court of Appeal in *Hosking v Runting*, recently recognised the tort of privacy: above n 350.

³⁹⁹ New Zealand Law Commission, above n 62, 319.

⁴⁰⁰ Ministry of Justice "Government Response to Law Commission Report on *Delivering Justice For All*" (13 September 2004) 53.

XVIII CONCLUSION

While the Court of Appeal has laid out general principles that a judge must consider when suppressing a defendant's name, much is left to discretion. This is appropriate given the variable circumstances involved in suppression cases. However, judges need to receive greater training about name suppression to ensure consistency in their decisions; otherwise the public will lose faith in the judiciary. Chief District Court Judge Russell Johnson's comments that "Judges are human and humans can be fallible; that's why we have rights of appeal"⁴⁰¹ are unlikely to restore public confidence.

Overall, it does not appear that name suppression is granted too frequently, given that permanent name suppression is issued in under 1% of cases, the majority of which are automatic orders.⁴⁰² Instead, there are pockets of concern, such as the ability of celebrities to have their names suppressed, because of the likelihood of damaging publicity. This court's approach means that there is an inequality in how people are treated before the law. The inability of judges to reconcile the presumption of innocence with the principle of open justice also needs addressing, as different judges accord varying weight to this presumption, which leads to uncertain results for defendants and the media. By prohibiting publication until the charges have been "gone into" by the court some uniformity will be achieved.

The Court of Appeal's test that only when the harm from publicity will outweigh the offence involved and is disproportionate to the public interest that suppression should be granted is appropriate, but needs to be more firmly followed by the lower courts. More consideration needs to be paid to determining whether the limits placed on freedom of expression are justified. By granting name suppression the force of public opinion is being prevented from operating, so it should be only in

⁴⁰¹ Boyes, above n 9, A2.

⁴⁰² Ministry of Justice, above n 51, Table 2.

select circumstances that suppression should be granted. At all other times, the principle should be to name defendants and shame them.

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XVI APPENDIX

Table 1 shows the numbers of cases resulting in a name suppression order over the period 1995 to 2004, controlling for the type of offence that the offender was convicted for. Unfortunately we cannot distinguish between interim and final name suppression and it is likely that these figures include both types.

Table 1: Number of convicted cases involving an order for name suppression, 1995 to 2004, by type of offence⁽³⁾

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Sexual violence ⁽¹⁾	102	103	78	71	60	52	51	64	82	97
Other violence	192	199	144	146	128	116	113	69	86	128
Other sexual ⁽²⁾	52	32	42	37	16	23	17	18	27	31
Other against persons	22	12	8	9	10	6	8	7	9	16
Property	127	142	112	133	73	79	69	79	90	95
Drug	27	42	19	23	18	20	22	16	13	31
Against Justice	16	26	12	27	25	19	19	22	21	22
Good order	31	16	18	17	13	13	22	10	11	19
Traffic	25	22	33	20	13	13	17	17	13	22
Miscellaneous	13	21	14	22	16	16	17	14	25	22
Total	607	615	480	505	372	357	355	316	377	483

Notes:

- (1) Rape, unlawful sexual connection, indecent assault, and attempted sexual violation.
- (2) Sexual offences against the person for which it is not possible to know from the offence description whether they involved violence. These offences include: incest and doing an indecent act.
- (3) This data has been subject to revision due to things such as recording practice changes.

The percentage of convicted offences of each type which resulted in an order for name suppression is summarised in Table 2.

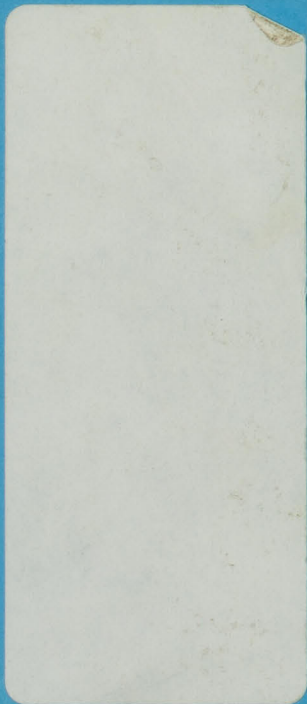
Table 2: Percentage Number of convicted cases involving an order for name suppression, 1995 to 2004, by type of offence⁽¹⁾

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Sexual violence	14.6	14.8	12.9	12.4	10.6	10.2	10.2	12.2	15.4	20.0
Other violence	1.8	1.9	1.4	1.4	1.3	1.2	1.2	0.8	0.9	1.3
Other sexual	18.3	11.8	17.5	16.4	8.0	10.7	8.1	9.2	13.0	16.4
Other against persons	1.7	0.9	0.7	0.7	0.8	0.5	0.6	0.5	0.6	1.0
Property	0.7	0.8	0.6	0.7	0.4	0.4	0.4	0.4	0.5	0.5
Drug	0.4	0.7	0.3	0.3	0.3	0.3	0.3	0.3	0.2	0.6
Against Justice	0.3	0.5	0.2	0.5	0.4	0.3	0.3	0.3	0.3	0.3
Good order	0.5	0.3	0.3	0.3	0.2	0.2	0.3	0.1	0.1	0.2
Traffic	0.1	0.0	0.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.1	0.2	0.3	0.5	0.4	0.5	0.5	0.4	0.4	0.4
Total	0.6	0.6	0.5	0.5	0.4	0.4	0.4	0.3	0.4	0.5

Notes:

- (1) This data has been subject to revision due to things such as recording practice changes.

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