LXJO JONES, K. The suppression discretion.

KATRINA JONES

THE SUPPRESSION DISCRETION

Name Suppression Law in New Zealand

Submitted for the LLB (Honours) Degree at

Victoria University of Wellington

1 September 1995

I INTRODUCTION

Since November 1990 Auckland Police have undertaken a major operation in the investigation of a persistent serial rapist. It was an investigation that received major publicity throughout New Zealand due to the number of attacks on generally teenage victims in South Auckland suburbs. On 17 July 1995, a 36 year old man appeared in the Otahuhu District Court charged with 24 counts of rape. Outside the court an angry and hostile crowd of several hundred people shouted abuse at the man, shrouded in a blanket, as he was led from prison cells to courthouse. Many in the crowd were family members of the victims. An order was made prohibiting publication of the accused's name, address, and any photograph or sketch likely to lead to his identification. Judge Robinson said this was in the interests of justice, emphasising the importance of a fair trial for the defendant and avoiding any prejudice to the police prosecution.[1]

What would the present situation be if the name of the man alleged to be the Auckland serial rapist was not suppressed? What difference would such absence of suppression make to the accused, the victims, the public? Would subsequent media reports be extraordinarily transformed by the inclusion of a name? What would public reaction be if the man received permanent name suppression on conviction? Would the crowd be angry and hostile to a man alleged to be the serial rapist but later acquitted? In this case the crown prosecutor requested name suppression, an order that generally benefits the accused. Does that make any difference to the public interest in knowing the names of people appearing in court? The former hypothetical questions demonstrate some of the practical issues that arise in the realm of name suppression law. The rationale underlying name suppression contain key considerations when addressing any practical issues.

This article essentially focuses on section 140 of the Criminal Justice Act 1985 - the power of the court to prohibit name publication of an accused or convicted person. In any

---

[1] "Crowd yells at rape accused" *The Dominion*, Wellington, New Zealand, 18 July, 1995, 1.

criminal justice system the importance of clear and coherent policies is well recognised for the proper and efficient operation of justice.[2] The policies and principles underlying name suppression involve fundamental propositions of criminal law with well-established histories. Part II will discuss the rationale for name suppression with further outline of the underlying principles which support or conflict with the concept of suppressing names. This will clearly show the topic of name suppression is fully intertwined with the private and public good, concepts that have proven complex and difficult to reconcile and assess.

Part III will comment on an illustration of the controversy surrounding name suppression by way of a short legislative history of section 45B of the Criminal Justice Amendment Act 1975.

The primary problem this article addresses in Part IV is the inconsistencies produced by the use of name suppression. This necessarily involves an analysis of recent name suppression cases in the New Zealand Courts detecting how judges translate principle into practice. Arguably the principles underlying the refusal of publication are generalised and clear though the implementation of such principles occurs in a haphazard way, common to the balancing exercise in a discretion, producing anomalies and inconsistencies.

Part V will raise the issue whether there is a need for reform or guidelines by the legislature to prevent or reduce inconsistencies and increase the control of the discretion. It is critical to remember that inconsistencies are a form of injustice.

---

[2] Sallmann and Willis *Criminal Justice in Australia* (Oxford University Press, Melbourne, 1984), 2.

II PRINCIPLES UNDERLYING NAME SUPPRESSION

Section 140 of the Criminal Justice Act 1985 (the Act) provides:

140. Court may prohibit publication of names -

(1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report of account relating to any 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.

(2) Any such order may be made to have effect only for a limited period, whether fixed in the order or to terminate in accordance with the order; or if it is not so made, it shall have effect permanently.

(3) If any such order is expressed to have effect until the determination of an intended appeal, and no notice of appeal or of application for leave to appeal is filed or given within the time limited or allowed by or under the relevant enactment, the order shall cease to have effect on the expiry of that time; but if such a notice is given within that time, the order shall cease to have effect on the determination of the appeal or the occurrence or non-occurrence of any event as a result of which the proceedings or prospective proceedings are brought to an end.

(4) The making under this section of an order having effect only for a limited period shall not prevent any court from making under this section any further order having effect either for a limited period or permanently.

(5) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who commits a breach of any order made under this section or evades or attempts to evade any such order.

Prior to the Act, provisions regarding suppression orders in criminal cases were sourced in two areas. First, orders suppressing information could be granted through a variety of statutes found unsystematically throughout legislation. Second, by virtue of the court's inherent jurisdiction judges had power to make any order necessary for the administration of justice. The Act clarified interpretation problems that developed when the two suppression sources conflicted by restricting the jurisdiction to a statutory base.[3]

---

[3] For example see s 138(5) of the Criminal Justice Act 1985 which specifically provides the inherent jurisdiction of the court has been replaced in the areas covered by s 138 to s 141. The courts have no powers other than those conferred by statute to make orders suppressing information.

LXJO JONES, K. The suppression discretion.

The dangerously wide powers previously found in the court's inherent jurisdiction were in no way limited by section 140. Concerns regarding draconian use and susceptibility to abuse, due to a scarcity of checks and balances, is still prevalent in the specific area of name suppression. Such concerns are fundamentally a result of section 140 empowering the court with an unfettered discretion. The section is silent on **when** and **how** judges should exercise such a wide and extensive discretion.

There are other areas in the Act where the legislature has seen fit to apply name suppression automatically or give judges the discretion of maintaining a reasonable and proper balance between the public and private principles underlying name suppression.[4] The focus now is on what principles underlie section 140.

A *The Public Interest - Principles Against Name Suppression*

The general presumption, derived from section 140, establishes that names will be published unless there are very good reasons to the contrary. Name suppression is granted only in an "exceptional case" and is considered an "exceptional order".[5] In a recent Court of Appeal case Cooke P, delivering the judgment of the court, stated that when exercising section 140 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".[6] The principles raised by Cooke P concern the public interest, an area well enunciated when the question of publication arises, and an area consisting of many facets.

---

[4] For example section 138 of the Criminal Justice Act 1985 provides provisions to limit publication of a complainant's, or any name or particular likely to identify the complainant, in certain sexual offences in the Crimes Act 1961.
[5] See *O'Malley* v *Police* Unreported, 12 February 1993, High Court, Christchurch Registry, AP 40/93, 2.
[6] See *The Queen* v *Liddell* Unreported, 22 December 1994, Court of Appeal, CA 318/94, 14.

The precise issue to consider is what the principles underlying the public interest are that give rise to such a strong presumption against name suppression, and whether such principles are justified. An important distinction to emphasise when considering the various principles is the effect of a pre-conviction or conviction situation. The validity for rejecting name suppression will be greatly affected when applied to an accused or convicted person.

1 *The publicity principle*

The publicity principle involves the concept of an open and public justice system. One purpose of the publicity principle is to ensure justice is not practised behind closed doors nor conducted in a star chamber fashion. Before analysing any conflict between name suppression and publicity it is important to clarify the exact rationale for the publicity principle.

Historically a court hearing is a public occasion and the New Zealand tradition is such that the courts are essentially open to the public.[7] The justice system is regarded as the public's justice system and a crime is an offence against the community. Subsequently the public has an interest in seeing offenders brought to justice which is manifested through access and open courts.

Public trials can have a therapeutic value by allowing people to vent their emotions and outrage, especially towards criminal offending. This rationale is limited in that the trial procedure is aimed to control and subdue emotions.[8] Consequently publicity may be important to prevent emotion by demonstrating to the public that the justice system will deal with offenders rigorously without the need for a public response.

---

[7] See C Baylis "Justice done and justice seen to be done - the public administration of justice" (1991) 21 VUWLR 177, 184.
[8] See above n7, 190.

Publicity can be viewed as an aid to justice, accentuating accountability and accuracy. Open trials are one of the checks and balances of the system, safeguarding against arbitrariness and ensuring that the judiciary acts under the public's gaze to produce public accountability. Publicity as a tool to further fact finding occasionally occurs through public proceedings producing new witnesses and evidence. Publicity enhances the accuracy of the adversarial process since people will be encouraged to tell the truth in a public hearing. However advocates of the inquisitorial system argue accuracy is increased when people know they are not subject to public scrutiny.[9]

The open administration of justice and the phrase "justice must be seen to be done" are central to the functioning of a democratic system. Publicity is crucial to reassure society that laws are applied and thereby encouraging trust in the public court system to increase the efficiency of justice. The fact that the courts themselves are also law-makers is another justification for public access and public judgments.[10] Public policy as the basis of judge's decisions should see such public policy being created in an open environment, free of draconian abuse.

The role of public interaction in the justice system is important for establishing and developing norms. Norms are expressed and generated in the long term through media and public criticism of the proceedings. As people can not criticise events from behind closed doors the creation of norms is therefore used to justify the publicity principle. The publicity principle is also an educator in the criminal context. Through open court proceedings and subsequent media reports the public is made aware of recent offending and methods to avoid becoming the next victim. For example, if violent attacks are occurring in certain areas of a city such places can be detoured, or if a particular item is being targeted by thieves people can organise improved security.

---

[9] See above n7, 186.
[10] See above n7, 189.

LXJO JONES, K. The suppression discretion.

It is clear a key concept involved in the publicity rationale is the right of public access to court proceedings. It is essential to note that section 140 does not limit access to the courts as compared to in camera proceedings.[11] Any member of the public has the opportunity to attend a trial and see an accused or convicted person visibly in the court room. When section 140 is put into operation the prohibition is on the **publication** of the name of the wrongdoer or alleged wrongdoer. Normally the charge will be made public, unless it would lead to the identification of the suppressed name, and if proven then also the sentencing measure.

It is contended that name suppression contravenes the publicity principle and limits the open administration of justice. Subsequently the question must be asked whether it is important for the public to know **who** has been charged or found guilty of offences as long as they know someone **has** been punished for their crimes. Does the principle of publicity and openness demand personal knowledge and pillory of the wrongdoer when in the majority of cases no one will ever meet or come in contact with Joe Smith the thief or Sally Brown the drug importer?

The rationale which underlies the publicity principle has been dismissed by one academic as of no general application to the suppression of an accused's name.[12] It was considered that reasons for the publicity principle, such as generating norms and the accountability of judges, did not require the publication of an accused's name for their continued operation. Stronger criticism can be found in the writings of Munday who argued against the findings of the Younger Report[13] which held the main objection to name suppression was that it would be contrary to the principle of open justice. He concluded that "the reporting of names is persistently mistaken for a direct onslaught on the openness of justice, and regrettably the Younger Report consecrated this fallacy".[14]

---

[11] For example, section 138 of the Criminal Justice Act 1985 contains provisions to hold proceedings in camera, excluding all members of the public.
[12] See above n7, 203.
[13] A British inquiry into defendant name suppression carried out in 1972 which focused on rape cases.
[14] R Munday "Name Suppression: an adjunct to the presumption of innocence and to the mitigation of sentence - 1" [1991] CrimLR 680, 761.

LXJO JONES, K. The suppression discretion.

The open administration of justice and the right of the media to report court proceedings fairly receives support from the principle of freedom of speech. The right of freedom to receive and impart information has been emphasised in the New Zealand Bill of Rights Act 1990 by section 14[15] and well promoted by the media. Prohibiting publication limits this right but it is critical to assess how much the suppression of a name actually limits the right. Freedom of speech is not an unrestricted right in New Zealand.[16] It may also conflict with other constitutional rights thus creating the problem of assessing which right is the more important democratic right.[17]

Obviously the functioning of publicity will involve the media in practice. The principle of open justice in practice depends almost entirely on the functioning of the media. This is recognised in Sir Ivor Richardson's paper:[18]

> Greater difficulties arise in meeting our responsibilities to the great bulk of the community who never come to the court in the ordinary course and who rely on media reporting for information as to particular cases and on the functioning of the courts in general.

Publicity of the courts has become a topical issue with the recent introduction of a three-year pilot programme of televising court proceedings. Televising proceedings is a way to increase access to the courts yet name suppression problems have been inherent in the trialing with essential arguments concerning privacy and right to a fair trial.[19]

Name suppression is an exception to the publicity principle but the destruction of the publicity principle does not necessarily follow. It is essential to remember it will only be in very rare cases the media will be physically excluded from court proceedings. Therefore

---

[15] Section 14 Freedom of Expression: 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.

[16] For example there are other interests to protect such as the law of defamation which protects people from false statements.

[17] See Part II (B) (4) which considers the conflicting right to the presumption of innocence.

[18] I Richardson "The Courts and the Public" [1995] NZLJ January 1995, 11.

[19] For example the high profile murder trial of Wellington businessman John Barlow if filmed would have had coverage mainly limited to filming shots of the trial judge and the back of the heads of both counsel. Restrictions imposed by Justice Neazor included prohibition of filming the accused. Several witnesses, including police officers and pathologists, had asked not to be filmed. See "Court restrictions limit coverage - TV stations" *The Dominion*, Wellington, New Zealand, 29 May 1995, 3.

they are still able to function a supervisory role over court proceedings. [20] Arguably the media will be little concerned with proceedings it can not report. Name suppression often produces difficulties for detailed media reporting, stories lose their news value and subsequently the public will receive limited coverage of court events. It is questionable whether name suppression actually limits reporting in any substantial way. In the case of interim name suppression many newspapers still manage to cover major stories. Even if interim name suppression does cause problems in reporting, for example in a case where publishing vital evidence is excluded due to revealing the accused's identity, it is highly likely that name suppression would be lifted on conviction enabling full reporting at the conclusion of the trial. The suppression of name still leaves considerable room for reporting the charge, sentence and the evidence presented at the trial itself. It was commented on in the High Court that: "publication of an accused's name is really only one facet of carrying out the Court's business in public and that it needs to be emphasised that the presence of the media with their freedom of access to Courtrooms is also an important safeguard".[21]

It has been posited by commentators that the public identification of suspects is not an essential requirement of a criminal justice system and anonymity need not signify the demise of a civilised and accountable justice system.[22] While the publicity principle has validity as a principle of importance in a justice system the use of name suppression does not hinder or limit the rationale. The publicity principle focuses on keeping trials open, maintaining public access and preventing secrecy. The secrecy captured by section 140 is the publication of a name while the ethos of the publicity principle continues.

---

[20] For example section 138(3) of the Criminal Justice Act 1985, the public may be excluded from the court room but not the media.
[21] Above n 5.
[22] Above n 14, 757.

2 *Publicity as a punishment*

Open justice is subject only to specific statutory exclusions. Such exclusions by statute are accepted without controversy in circumstances such as the Family Court and sexual abuse complainants but confront immense dissent from opponents of name suppression for an accused or convicted person. Some criticism is due to the naming of suspect/offender being considered integral to the criminal process.[23] Publicity in the criminal field can operate as a deterrent, a punishment or both.

Publicity can act as a deterrent to the community by demonstrating that criminals will be punished for their crimes, and more narrowly as a deterrent to the individual offender in showing that their misbehaviour will be made the subject of public scrutiny. Publicity has been viewed as "one of the chief deterrents to evil-doing; and one of the severest punishments that evil-doers have to face."[24]

There are problems with publicity as a form of punishment. First there is a question concerning the nature of punishment and the place of publicity within that framework. Various justifications for punishment, such as incapacitation, rehabilitation and retribution, can occur without the need for public exposure. For example as long as people are getting their "just deserts" punishment could take place in total secrecy to satisfy a basic retributive rationale. Justifications such as denunciation and deterrence, with the general public as the targeted audience, are more likely to require an element of publicity. Therefore how crucial the publication of a name is to punishment will depend entirely on the rationale for the punishment.

Whether publicity is an adequate form of deterrence is also questionable. Does the publication of an offenders name have any real deterrence value? Does the threat of name publication prevent crime? The consequences of having offending made public will often

---

[23] See above n 14, 754.
[24] Above n 14, 755.

come to late to the mind of an offender. Also the fact breaking societies rules will result in punishment can take place without knowledge of a name. Most criminals remain anonymous to the majority of the public where there is name publication unless the offender is of a high public profile limiting the deterrent effect in an individual and general way. It can still be clearly demonstrated to the community that its values are being upheld with law and order maintained without the need for publication of a name.

There is the problem that publicity can be a harsh punishment: "the pain inflicted by unaccustomed exposure to public gaze, by unwelcomed notoriety, by rejection and ostracism consequent upon revelation of charges, can grossly exceed what the gravity of an offence calls for".[25] Situations may arise where the adverse publicity will outweigh the nature of the conviction. Publicity as a punishment is therefore often unnecessary in the case of minor offending.

The case of a person charged or acquitted is vastly distinct. Here the crime has yet to be proven or is never proven yet the stigma and initial rejection from their peers will linger on. There are no logical grounds for punishment before a conviction yet such is the effect where name suppression is refused at the interim. The general faith of the public that the police do not prosecute innocent people and the cynical view that every acquittal is a "lucky escape" reinforces the practice of public condemnation before guilt.[26]

The punishment rationale is never applicable before guilt. It is understandable that there is generally little sympathy for unwanted publicity of a convicted person yet there may be some validity in the former argument when applied post conviction. The problem with publicity as a punishment is that it is used in an inconsistent way. The majority of publicity about an offence is derived from media sources. Reliance on the media for publicity has major problems in itself when addressing name suppression. The media function as an actor in the open administration of justice occurs in such an arbitrary and inequitable way

---

[25] See above n 14, 755.

[26] See Criminal Law Reform Committee *The Suppression of Publication of Name of Accused* (Wellington, 1972), see Statement of Views by Ms Webb, 2.

that doubts must be raised as to its use in punishment. Not all cases will receive the same amount of coverage or in the same depth. Publicity as a punishment is not applied on an equal basis as what crimes receive media attention often depends on newsworthiness which is influenced by the bizarre, unusual and horrific. The media is essentially a business where sensationalism will frequently outweigh the public duty to report court proceedings. Cases will be selected for reporting in an arbitrary way and the accused who receives adverse media attention may find limited coverage to a subsequent acquittal..[27] Subsequently people found convicted of similar offences with similar sanctions may suffer more depending on the publicity they receive. To some extent publicity and the ostracism from public exposure will depend on the quality of reporting which is unacceptable situation for an equitable penal system.[28]

3 *Community entitlement to knowledge*

Cases concerning the name suppression of an accused generally elucidate three special considerations rejecting suppression in favour of the community entitlement to know who appears before the court:[29]

(1) The absence of publicity might cause suspicion to fall on others. This is especially prevalent where the accused's occupation is rare and the community small or the crime is particularly notorious and will receive greater publicity and create much public anxiety.[30] Ill-founded rumours could arise through the grape vine causing considerable harm to people unrelated to the charge.

(2) Publicity itself may cause the discovery of additional evidence by encouraging further complainants or witnesses to come forward by having the charge brought to their attention by the media.

---

[27] See above n 7, 206.
[28] See n 7, 186.
[29] JB Robertson (ed) *Adams on Criminal Law* (Brooker and Friend, Wellington, 1992) 3 - 43.
[30] Above n 26, 4.

(3) The absence of publicity might present an accused with an opportunity to reoffend when they remain anonymous to the public.

The problem with the above justifications for not suppressing an accused's name is that they will not always be applicable and pertain only to individual cases. For example in the case of a person accused for the very first time, other factors in favour of name suppression may outweigh the possibility of reoffending. Ill-founded rumours are a possibility when a defendant remains anonymous and is certainly an undesirable result, but is local gossip a justified reason to deny name suppression prior to conviction? The effect of suspicion on others may be limited by suppressing publication of an accused's occupation or locality where it could cause suspicion to fall on others.[31]

B *Individual Interests - Principles For Name Suppression*

Obviously there are factors that outweigh the former public interest principles, because otherwise section 140 would be superfluous legislation. That section 140 operates as a discretionary exercise ensures that such factors in favour of suppression are inexhaustible and subsequently difficult to be definitive about.

1 *Impact on the accused and offender personally*

Any accusation that a person has committed a criminal offence, when made public, will produce an effect on the accused that will vary from embarrassment to ostracism.[32] The smaller the locality and more serious the crime, the greater the amount of adversity, suffering and distress to the accused. It appears a harsh society which allows such

[31] Such an order was enacted in *R* v *Police* Unreported, 9 March 1995, High Court, Palmerston North Registry, AP 8/95, 6.
[32] Above n 26, 1.

suffering prior to conviction. There is a general acceptance that people should face their crimes post conviction and accept any adverse publicity that such behaviour will receive from society.[33] Yet even the stigma attached to some criminal offences can outweigh the punitive impact required for an offender's crime.

Where adverse publicity may justify name suppression for the convicted is in the area of rehabilitation. For example in *C* v *Police*[34], a conviction for indecent exposure, there was support in the psychological material before the court that publicity might set back rehabilitation. Other factors influencing the decision were that the convicted person had sought professional treatment and there was an indication the offending was related to a psychological disorder.

First time offenders also have a greater chance of receiving name suppression because the majority of people who are convicted never reoffend and subsequently the public will not need knowledge to be protected. The interests of justice sometimes require that people be given a second chance before earning a criminal label in the community. This view was highlighted by McGechan J in *H* v *Police*: "If this was the first offence of this nature [indecent assault] I would have no hesitation in ordering final suppression".[35]

2 *The impact of publicity upon the defendant's family*

The publicity a defendant receives will frequently extend to his or her family because of their close association with the defendant. Such embarrassment or anguish to innocent family members is considered harsh and in exceptional cases will justify name suppression. For example, an Auckland man on a minor drug charge received name suppression

---

[33] Such a view was stressed in *Sanders* v *Police* Unreported, 20 September 1991, High Court, Christchurch Registry by Tipping J "People must realise that publication of their names is part of the penalty for the commission of crimes".

[34] Unreported, 12 October 1990, High Court, Timaru Registry. Note the fact the appellant was in poor health also was a factor in earning name suppression.

[35] Unreported, 3 October 1990, High Court, Wellington Registry.

because if his offending had become known to the church his children would have had to choose between seeing their father or remaining within the church.[36]

Cooke P commented on the effect of publication to the family in *Liddell*: [37]

> [A]nguish to the innocent family of an offender is an inevitable result of many conviction s for serious crime. Only in an extraordinary case could it outweigh the general principle of open justice and the open reporting of justice.

Considerations such as the health of members of the family and other special circumstances, such as the defendant teaching at his son's school,[38] will cross the threshold and especially so where the suppression order sought is only on an interim basis and a conviction is not yet established.[39] More than embarrassment to the family is required for suppression, otherwise name suppression would become the norm and not the exception in the majority of criminal cases.

3 *Effect of publicity on employers and employment*

Publicity of one's crimes can also have ramifications for a defendant's employer in that it could adversely effect the business or professional reputation. However this is not a persuasive factor in the courts where a deception as to the defendant's character will be effected on the public with suppression. For example such a deception on the public was considered inappropriate when it was argued that publicity of the accused's cannabis possession charge would effect the ratings of the television show he fronted.[40]

---

[36] See "Name suppressed" *The Dominion*, Wellington, New Zealand, 13 March 1995, 4.
[37] See above n 6, 10.
[38] See *H* v *Police* (1989) 4 CRNZ 215 where permanent name suppression was granted. The offence was one of minor shoplifting.
[39] See *H* v *Police* Unreported, 1 December 1994, High Court, Timaru Registry, AP 28/94. The case involved the possible adverse effects to H's mother who had a serious heart condition.
[40] See *Roberts* v *Police* (1989) 4 CRNZ 429.

LXJO JONES, K. The suppression discretion.

Publicity can have greater detrimental consequences to a professional person who is self-employed, depending for his or her livelihood on the goodwill of the public.[41] Nevertheless the courts discourage preserving public confidence in a profession or occupation especially where the job involves interaction with the public.[42]

Once again it can be argued that there is no justification for allowing innocent employers or careers to suffer prior to conviction.

4 *The presumption of innocence*

A predominant influence in granting name suppression for an accused as compared to a convicted person is their entitlement to the presumption of innocence. It is a right recognised in the New Zealand Bill of Rights Act 1990 by virtue of section 25(c).[43] Punitive considerations are irrelevant to an accused and the stigma associated with serious crimes will rarely be completely erased by an acquittal.[44] The distressing experience a court appearance can have on an innocent person is a major consideration for granting name suppression. Fisher J, in a High Court decision, introduced the broad principle that the presumption of innocence and the risk of substantial harm to an innocent person should be expressly articulated to avoid overlooking the presumption and that "when a Court allows publicity which will have adverse consequences for an unconvicted defendant, it must do so in the knowledge that it is penalising a potentially innocent person."[45]

---

[41] See above n 31, 6 where Greig J stressed it is not the case of a more lenient view in favour of those who are educated, affluent or in possession of a position of status or importance, but the fact that publicity of an accused can have irreparable effect on a professional's career or livelihood.

[42] For example in *Jones* v *Police* Unreported, Hamilton Registry AP201/89, 6 November 1989, 2, the appellant was employed in the debt collection business and was suspected of offending in relation to monies entrusted to him. It was held the public was entitled to know of the charge.

[43] The right to be presumed innocent until proven guilty according to law.

[44] See Part II(A)(2) regarding the commonly held view of acquittals.

[45] *M* v *Police* (1991) 8 CRNZ 14, 16. Williamson J reaffirmed the presumption of innocence as a principle in *O'Malley* v *The* Police Unreported, 12 February 1993, High Court, Christchurch Registry, AP 40/93, 3. See also *R* v Police Unreported, 9 March 1995, High Court, Palmerston North Registry, AP 8/95, 5, where Greig J stated; "I think it is a matter [the presumption of innocence] which it is important

The presumption of innocence is the crucial difference between approaches concerning name suppression prior to and after conviction. It is increasingly difficult to justify an entitlement to the presumption of innocence after being found guilty in a court of law. Nevertheless there is the problem of when the presumption of innocence should cease. The presumption could be continued while pursuing an appeal against conviction as the validity of guilt is being challenged.

Some doubts can be raised as to what the presumption affords to an accused. A misconception inherent in the presumption of innocence is that it is about factual guilt. The reality is that for the purposes of the legal process it is essential a defendant is treated as innocent. Therefore people are presumed legally innocent and it is argued that the presumption of innocence only applies during the trial and not throughout all other stages of the criminal process.[46] For example if the presumption of innocence always applied then it would follow that bail could never be denied and it would be wrong to remand people in custody.[47] The difficulties with the bail analogy is that once someone is charged, even though they are legally innocent, there may be a genuine need for remand to ensure that they appear at trial in the interests of due process and the criminal justice system. It is comprehensible to understand a departure from the presumption of innocence in bail situations where it is necessary to enforce an appearance at trial, yet difficult to reason why an accused should be denied the presumption by refusing name suppression.[48] To manifest the presumption of innocence with any real value it should always apply to an assessment of an accused's request for name suppression.

---

to refer to explicitly so that there can be no suggestion or feeling that it has not been taken into account". Note the presumption of innocence does not always receive as much weight as Fisher J has given it, see Part IV(3).

[46] See above n7, 203.

[47] See above n7, 204.

[48] See N Walker "Curiosities of Criminal Justice" (1975) XL VIII Police Journal, 9 where it was argued that "it is indefensible to allow even an adult accused to be identified - unless for some reason he wishes to be - until he is convicted...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 that the public does the opposite."

C *Balancing public and individual Interests*

One may be able to conclude that generally there is a legitimate interest in prohibiting name suppression for people found guilty of committing crimes against society. It is extremely difficult for people to feel sympathetic or compassionate towards people who are convicted offenders. Paying the price for your crime is an ethic entrenched in New Zealand society. It is questionable whether such an ethic extends to the extent where it is acceptable that publicity may punish more people than just the accused. It may be the situation that it is a consequence of publicity that people are prepared to tolerate. However publicity, and the punishment from such publicity is not equally distributed amongst offenders. The purpose of the publicity principle can also function adequately without publication of a name, provided that access to the courts is maintained, further weakening the argument for refusing final name suppression.

In the pre-conviction situation, where exactly the balance lies between public and individual principles is extremely complex and controversial. It is difficult to justify punishment to a person, who is entitled to the presumption of innocence and free of legal guilt, as a necessary consequence of ensuring openness and freedom of speech. Equally so it seems unfair to make an accused person, their family or employers suffer irrevocable damage by publication of the accused's name just to support traditional thought that name suppression will in some way prevent justice from being done.

What seems to swing the balance between the competing interests is the fact that name suppression only bans the publication of a name. In the case of an accused there is no validity in the argument that the absence of a name will prevent the principle of the open administration of justice. Maybe name suppression is disliked psychologically by the public because it appears to benefit the "bad people" or the potential criminals. Society's curiosity with names should not outweigh the individual right to the presumption of innocence. Equal emphasis can also be placed on the fact that section 140 provides a flexible discretion. Therefore it is only where the individual accused **can** demonstrate that

his or her individual factors outweigh the public interest that the scales will be tipped, thus maintaining public interest principles unless the interests of justice demands otherwise.

III CRIMINAL JUSTICE AMENDMENT ACT 1975

In 1972 the Criminal Law Reform Committee produced a report concerning the suppression of an accused's name. The committee of ten consisted of lawyers, police and a member of the Department of Justice. In summary the majority of nine recommended:[49]

> That when a person is accused of an offence publication of his name or any particulars that might identify him should be prohibited until the case is gone into by the Court, unless the accused does not want his name suppressed or the Court considers publication to be desirable in the public interest and orders accordingly.

The minority recommendation went further and expressed the view that there should be no authority to publish the name or identifying particulars of any person charged with a criminal offence unless and until a conviction was entered.[50]

In 1975 the Labour Government controversially introduced the Criminal Justice Amendment Act 1975 reforming name suppression law by adding section 45B to 45D into the Criminal Justice Act 1954. The controversy was primarily centred on s45B(1):

> s45B(1) Unless the Court by order otherwise permits, no person shall publish, in any report relating to any proceedings commenced in any Court after the commencement of this section in respect of any offence, the name of the person accused of the offence or any particulars likely to lead to his identification unless and until that person is found guilty of the offence with which he is charged, or of any other offence of which he is liable to be convicted in the proceedings, and a conviction is entered against him by the Courts.

There were exceptions to the section such as if the accused did not want name suppression,[51] or if the court held that it was in the public interest to permit publication.[52]

---

[49] See above n 26, 6.
[50] See above n 26, statement of views by Ms Webb, 4.

The prosecutor, or any member of the public who reasonably believes that any member of his or her family might be prejudiced if publication was prohibited, could apply for an order permitting publication.[53] Section 45D allowed publication where the Police requested it for people who had escaped lawful custody or failed to attend court.

The Labour Minister of Justice, the Hon Dr Finlay, considered that the Criminal Law Reform Committee was dissatisfied with the situation of name suppression and required change. He accepted that section 45B represented the minority recommendation but considered the majority view obscure in recommending name suppression "until the facts were gone into".[54] The Minister considered it important that the Bill was breaking fresh ground and fully establishing the hallowed precept that a person is innocent until proven guilty.[55] The whole purpose of the act was to ensure that a person accused of a crime is not incriminated until guilt is established.[56]

Rejection of the Bill by the Opposition consisted of arguments premised on the publicity principle and the principle that justice should not only be done but should manifestly and undoubtedly be seen to be done.[57] The Opposition also contended that the court already had the power to suppress names where required and the reform the Government proposed was therefore unnecessary.[58]

Whatever value section 45B had in promoting the presumption of innocence was lost a year later when National became the Government and kept their manifesto promise by repealing the provision and restoring the presumption of publication.[59] It was suggested that no real evidence was raised that the previous discretionary power of the courts was in any way being abused, and that there were technical and practical problems with

---

[51] Section 45B(2).
[52] Section 45B(6).
[53] Section 45B(3)(b) and (c).
[54] NZPD, vol 396, 676, 17 April 1975.
[55] See above n 54, 677.
[56] NZPD, vol 403, 129, 30 June 1976.
[57] See the speech of the Member for Karori above n 54, 679.
[58] See above n 54, 684.

mandatory blanket suppression.[60] The Government adamantly supported the publicity principle which is still the major underlying foundation for the presumption in favour of publication:[61]

> The fact remains that the amendment was bitterly unpopular and widely opposed. It was never properly thought out. It was a body blow to the freedom of the press; it was a body blow to the open working of the courts. I take great pleasure in participating at this early stage in wiping this iniquitous measure from the statute book.

IV TO SUPPRESS OR NOT TO SUPPRESS

It appears reasonable to conclude that the principles underlying name suppression are clear but generalised. The underlying principles can be translated into the starting presumption that the use of section 140 is appropriate where:[62]

> [T]he possible harm to the accused or offender or to those persons connected with him from the publicity outweighs the advantages to the public that accrue from publicity in the majority of cases.

This necessarily results in the discretion vested in the judges becoming a precarious balancing exercise. The judges are only guided by the generalised principles and policies underlying name suppression. There are no indications in section 140 as to when a judge should grant a suppression order leaving an air of unpredictability in such proceedings.

In the operation of a discretion it is not surprising that judges will be criticised for being haphazard, arbitrary and inconsistent.[63] Comments have been made by newspaper editors, who undoubtedly have a personal interest in what is suppressed, that the use or misuse of

---

[59] See above n 56, 113.
[60] See above n 56, 120. Practical problems included the limitations on reporting and increased speculation and rumour. Technical problems were such as what happens in the case of an appeal.
[61] See above n 56, 121 the speech of the Attorney General.
[62] See above n40, 431 citing Hall's *Sentencing in New Zealand*, 296.
[63] See R Neville "Judging the judges" (1991) 4 NZJR 12: "[S]ome of us believe that judges in this country are pampered, aloof, prone to inconsistencies, and sometimes inclined to shelter, if not from justice, certainly form the harsh glare of publicity, those of their own background in the professional world".

name suppression is causing great concern.[64] Subsequently it is important to identify where the inconsistencies lie and how judges confront the mammoth task of translating name suppression principles into practice.

A *Name Suppression for Convicted but not Accused*

Initially it appears extraordinary there are cases where an accused will be refused name suppression, yet a convicted person will be granted such an order.[65] This is especially so when one considers that the principle of "innocent until proven guilty", which is a major justification for name suppression, can only apply in a pre-conviction situation.

A factor appearing very persuasive in a final order for name suppression is where the offender has had no previous convictions.[66] Yet it is not the position that even people who have prior convictions will automatically be refused name suppression.[67] It could be concluded that the right of the public to know the convicted criminals in society is not as persuasive in practice as was first assessed as a general principle against name suppression.

---

[64] See above n 63, 12.

[65] For example see *M* v *Police* Unreported, 23 August 1993, High Court, Hamilton Registry, AP118/93, where M pleaded guilty to carelessly using a motor vehicle causing injury and *H* v *Police* Unreported, High Court, Dunedin Registry, AP 45/91, a shoplifting charge.

[66] See *C* v *Police* Unreported, 12 October 1990, High Court, Timaru Registry, AP 55/90, a charge of indecent exposure by a 55 year old man who was a first offender who had an earlier blameless life. Also *B* v *Police* Unreported, 5 February 1990, High Court, Christchurch Registry, AP 17/90, where B pleaded guilty to a the charge of discharging a firearm near a dwelling house without reasonable excuse.

[67] For example see *H* v *Police* n 35, where the offender received name suppression and it was his second offence. McGechan J appeared to be influenced by the importance of care for the sick and rehabilitation where offender is due in part to a sickness.

B *Inconsistencies in Implementation*

High Court Judges have commented with disapproval on the failure of judges in the Court below to record their reasons for refusing name suppression:[68]

> [I]t has been said before and I hope it won't have to be said again, that the absence of reasons on a matter of considerable importance such as this is really a denial of the judicial function and a denial of any right of appeal.

Are the absence of recorded reasons a result of the pressure for time on busy judges or a result of ad hoc decision making based on intuition rather than founded on the principles previously discussed?

In any society an individual's background will consist of factors that may have similar aspects to another's while simultaneously dissimilar in other ways. Such individualism raises two problems in the name suppression area. First, individual factors will dictate the weight attributed to the various principles. As the facts of individual cases vary immensely, the combination of factors will produce different outcomes. Therefore the appearance of inconsistency may be explicable for that reason. Secondly, individual factors create problems in assessing whether there actually is inconsistency and in establishing any guidelines to reduce inconsistency. Nevertheless the need for individualised decision-making should not be an available defence for blatant inconsistency between judgments.

Most judgments include an expression that a balance must be found between the public need for openness in the entirety of criminal proceedings and the adverse effects of publicity on an accused or offender. In relation to an accused person, judges have been inconsistent in the weight given to the presumption of innocence. Fisher J is a strong advocate of such a presumption and considers it a principle that should be expressly articulated to avoid the danger that it is overlooked.[69] Related to such a principle is the

---

[68] Tipping J's comment in *S* v *Police* Unreported, 17 September 1993, High Court, Timaru Registry, AP 66/93.

[69] See Part II(B)(4).

argument that an acquittal is a possibility in every case, and that a not guilty verdict will not necessarily remove the stigma of publicity at trial.[70]

Other judges have overlooked or considered the innocence factor insignificant in overriding the principle that the name of an accused should be public knowledge. For example Henry J made the comment: "That [the presumption of innocence] applies to all accused persons, and cannot of itself justify suppression".[71] In *Bickley* v *Police*[72] the Judge sympathised with the fact that the publication of the appellant's name would bring the stigma associated with criminal activity before guilt or innocence had been finally resolved, though considered that it would be for Parliament to say that people should have suppression until found guilty if such a position was desirable. It appears the judiciary has passed the resolution of a difficult issue onto the legislature. This should be an indication to the legislature that the controversial issue of name suppression principles demands debate in parliament for clarification as opposed to it remaining with an unwilling judiciary.

With judges relying on the need for "exceptional or special circumstances",[73] the adverse effects an accused receives from publicity are considered a normal consequence of the publicity principle so that something more is required to cross the threshold. Some judges consider that if the position was otherwise the floodgates would be opened with whole scale suppression as almost everybody's name would be suppressed for one reason or another. For example the harmful effects of publication on an appellant's daughter due to psychological factors were considered ones the appellant, as her father, had to face up to and deal with.[74]

---

[70] See *S & P* v *Serious Fraud Office* Unreported, 9 August 1993, High Court, Auckland Registry, AP 158/93, AP 159/93.

[71] See *Collie* v *Police* Unreported, 14 June 1993, High Court, Auckland Registry, AP 106/93, 3. Note the charge Collie faced was 18 sexually related charges allegedly committed between 1987 and 1992.

[72] Unreported, 3 October 1991, High Court, Christchurch Registry, AP 224/91, 4. Bickley was charged with importing into New Zealand a Class C controlled drug and a joint charge of possession of the drugs for the purpose of supply.

[73] See *Yogasakarn* v *Police* Unreported, 29 August 1988, High Court, Hamilton Registry, AP 132/88.

[74] See above n 5. Note interim name suppression was provided so the daughter had time to adjust before publication. In *Boyes* v *Police* Unreported, October 1992, High Court, Hamilton Registry, AP, Doogue J

Another factor taken into consideration is whether name suppression will cause deception. In post conviction cases the courts have been concerned that suppression can amount to practising a deception on the public by presenting the convicted as a person of unblemished character.[75] In *Kaminski* v *Police*[76] the employer was aware of Kaminski's conviction but was reliant on his credibility with other employees and therefore supported the suppression application. Tipping J refused the order and commented that he could not accept the proposition that employees have no greater rights to know than the general public: "employees might well feel some sense of grievance if he [Kaminski] is being painted by the employer whiter than white when he does not have in reality those attributes."[77]

Deception as an influencing factor in name suppression has been inconsistently applied in the balancing exercise. For example B, a school teacher, convicted of discharging a fire arm near a dwelling house so as to frighten the occupants, received final name suppression.[78] Counsel for B successfully argued that publicity would substantially affect B's occupation as a school teacher when dealings with his students, that "children as a class could be cruel",[79] and that in declining name suppression the District Court Judge had placed too greater weight on the desirability of informing the public. B's conviction was known to the Principal of the school, but suppression remained a deception to the children he taught and interacted with in a position of trust.

---

commented that the stress and embarrassment cause to the Appellant's wife and child, and the possible risk of losing his job, where disadvantages which are common to anyone accused of a crime. Also in *Heaven* v *Police* Unreported, May 1993, High Court, Auckland Registry, AP, Hillyer J agreed with the lower Court Judge that the mere fact the applicant was getting her life together and might lose her job if her Employer knew of the charges, was a ground available to hundreds if not thousands of defendants coming before courts each year, and therefore was not an adequate reason to deprive the public knowledge of what was happening in the Courts of law.

[75] See n 40. Wylie J considered it entirely inappropriate to attempt to legitimise a course of deception with a final order for name suppression.

[76] Unreported, 15 February 1991, High Court, Christchurch Registry, AP 28/91.

[77] See above n 76.

[78] *B* v *Police* Unreported, 5 February 1990, High Court, Christchurch Registry, AP 17/90.

[79] See above n 78.

LXJO JONES, K. The suppression discretion.

Underlying preventing deception is the principle that the public has a right to know what takes place in their courts. Arguably this extends to the right to know the people charged, as well as those convicted, though the public has a greater interest in protection from those proven guilty. This is reflected in *S and P* v *Serious Fraud Office*[80] where suppression was sought till the conclusion of the trial. It was submitted that the stigma from publicity would inhibit S and P's staff in conducting business activities and the 5,000 or more people who such represented in important negotiations. The judge held that such people had a very legitimate interest in not having negotiations prejudicially affected by a matter remote to them.[81] However if the principle is correct, as emphasised in many pre conviction cases, that the public have a right to know who accused people are, then inevitably *S and P* represents a classic case of deception.

The seriousness of an offence is also applied in conflicting ways in the exercise of the discretion. Suppression orders can be justified because the charge is so serious that any subsequent stigma will outweigh the public interest in favour of an accused's interests,[82] or the offence is so minimal the criminal stigma will also outweigh the public interest in publicity.[83] Therefore the seriousness of an offence does not necessarily result in a lesser or greater chance of name suppression.

In *H* v *Police*[84] Tipping J stressed, without any substantial explanation, that the Court is always very reluctant to suppress the names of people accused of any sort of serious crime, yet felt comfortable in ordering final suppression for an offence of indecent

---

[80] See above n 80, the charge was concealing documents for a fraudulent purpose.
[81] See above n 80.
[82] For example see above n 31, where the seriousness of allegations of indecent assault if made public could cause permanent and irreparable harm.
[83] An example of this is found in *M* v *Police* Unreported, 23 August 1993, High Court, Hamilton Registry, AP 118/93. There were two charges of carelessly using a motor vehicle and the risk of acute added punishment from publicity outweighed the general public interest even through to post conviction. Note there were additional factors such as the appellant was 86 years of age who had been driving since 1925 without blemish.
[84] Unreported, 24 May 1991, High Court, Dunedin Registry, AP 45/91, the charge was sexual violation by rape. Name suppression was mainly granted because there was a risk the complaint would be identified by publication of H's name in the small community they both lived.

exposure that was regarded as deliberate and disgusting.[85] In contrast, in a serious case of indecent assault on a fifteen year old girl Doogue J held: "the community at large are entitled to be aware of persons such as the appellant who have offended in this way",[86] evidently influenced by the seriousness of the crime in permitting publication.

A problem to address, mentioned previously, is whether the cases cited and compared are examples of inconsistency, or just the result of individualised decision-making based on relevant differences between the cases. Alternatively if the discretion was being exercised on the principles underlying name suppression this should theoretically produce consistency as every final name suppression is a deception on the public and every accused has the right to the presumption of innocence. The reality of the argument may be that what appears as inconsistency is the logical conclusion of individualised decision-making.

C *Discretionary Inequalities*

It is important that in a justice system the administration and practice of justice does not alienate or discriminate against some sections of society[87]. The corollary of this is that the administration of justice must also not appear to favour certain groups of society. In assessing the effect of publicity inevitably those in the public eye will suffer more because they will be extremely newsworthy prospects.

For instance, where a police officer is accused of a crime, it is often submitted that because of their position in dealing with the public there is a likelihood of serious harassment if their names are not suppressed.[88] Recently a police officer was granted

---

[85] See *G* v *Police* Unreported, 17 July 1990, High Court, Christchurch Registry, AP 166/90. Note Tipping J also considered the serious ramifications for G's employment on publication as persuasive.
[86] See *Disher* v *Police* Unreported, 25 February 1991, High Court, Hamilton Registry, AP 7/91.
[87] See above 21, 12.
[88] See *Dodunski* v *Mitchell* Unreported, 13 March, High Court, Hamilton Registry, AP 26/89. The name suppression order was rejected because Doogue J considered the charges most trivial.

interim name suppression prior to conviction.[89] Name suppression had first been refused by JP's. Tipping J in the High Court considered that there was the possibility that the JP's had adopted a harsh stance against T because he was a police officer. Having an occupation as a police officer can also work in the opposite direction in the pursuit of a name suppression order. The close contact the police have with the public will often influence judges against granting a suppression order. For example, in *Heyrick* v *Police*[90] Holland J stated that "public confidence will not be assisted by any suggestion of favoured treatment for a policeman in the Courts". Therefore in applying name suppression principles when a police officer is the accused there is an obvious inconsistency between the judiciary.

Most judges try to avoid prejudice towards professional or high profile people. In *Golightly* v *Police*[91] the High Court Judge agreed with the lower Court that persons cannot use standing in the community to justify suppression and persons who have reached a stage of standing in the community should know better than to get into a position where they undertake offending. This view was expressed similarly in *Kaminski*, a fraudulent white collar crime situation:[92]

> This is a man of intelligence, holding a senior position, with lots of advantages in life, a great difference from many people who come before the Courts. If anyone should know what is likely to befall them if they commit this sort of serious fraudulent crime such a person should know.

Unfortunately there are cases that raise doubts as to the motives for suppression orders and judges have consequently suffered criticism. A District Court judge who ordered final name suppression to a well-known public figure earned media comment that "it was hard not to escape the suspicion that here was an affluent, middle-aged, establishment gentleman being sheltered by an affluent, middle-aged establishment judge."[93] In *B* v

---

[89] *T* v *Police* Unreported, 1 December, High Court, Timaru, AP 31/94.
[90] (1989) 5 CRNZ 32, 33.
[91] Unreported, 28 July 1993, High Court, Timaru Registry, AP 63/93. Golightly was convicted of assault.
[92] See n 70. The conviction was obtaining a document with intent to defraud, Kaminski held a senior position at a share registry. He procured to be transferred into his own name shares in Brierley Investments Ltd having total value of some $30,000.
[93] See above n 63. The conviction was for failing to furnish GST returns.

Police[94] the fact the appellant was a well-known sports person ultimately influenced the name suppression order on a charge of importation of prescription medicine (anabolic steroids). The Auckland High Court also reversed a District Court ruling and ordered final name suppression for a 54 year old doctor as justified due his high public profile and the circumstances of his alleged offending.[95] It appeared to one journalist as a case of being "socially deferential" and an entitlement that was "over and above that enjoyed by the ordinary citizen".[96]

V GUIDELINES OR REFORM?

In recent times the Court of Appeal has dealt with section 140 on only two occasions. In *Dally* v *Police*[97] the Court of Appeal upheld the High Court order refusing interim suppression, though stated that the use of the word "most" was an exaggeration in the expression "only for the **most** compelling reason should a court interfere with those principles [public access to courts and freedom of speech] by way of suppression".[98] The charge was for a well publicised murder case.[99] It was stressed that when the court suppresses a name it is usually obeying higher constitutional principles which must be above personal hardship and pain. The presumption of innocence was not mentioned as a principle, though of some importance the decision was prior to the New Zealand Bill of Rights Act 1990.

---

[94] Unreported, 10 February 1995, High Court, Auckland Registry, AP 228/94.
[95] See above n 63. The appellant was alleged to have been involved in an incident on an airline flight, the charge related to his behaviour and he was apparently intoxicated.
[96] See above n 40.
[97] Unreported, 14 July 1989, Court of Appeal, CA 204/89.
[98] See above n 97, 5.
[99] The murder of Karla Cardno, a young Lower Hutt teenager.

Liddel, the second Court of Appeal judgment, did not require an account of the presumption of innocence due to the fact it was a post conviction case. The court made important *obiter* comments regarding the application of the section 140 power:[100]

> A case of acquittal, or even conviction, of a truly trivial charge, where the damage caused to the accused by publicity would plainly outweigh any genuine public interest, is an instance when, depending on all the circumstances, the jurisdiction could properly be exercised. ... The room the legislature has left for judicial discretion in this field means that it would be inappropriate for this court to lay down any fettering code. What has to be stressed is that the *prima facie* presumption as to reporting is always in favour of openness.

The Court of Appeal cases demonstrate that name suppression is the exception and the principle of openness will always weigh heavily in the balance against any competing individual interests. Judges regularly note that they find name suppression decisions difficult to make. This is inevitable when they have an infinite number of factors to consider within the bounds of established "constitutional" principles.

Any subsequent reform for name suppression can follow two general approaches. First it must be accepted that with a discretion there is always the potential for inappropriate approaches and decisions. A real effort must be made to work out basic criteria and guidelines in the specific area that the discretion governs. Controls are needed that will minimise the risk of error and abuse while still maintaining an adequate degree of flexibility. The flexibility element is a reason for containing name suppression as a discretionary measure.[101] In applying a statutory "checklist" for judges in name suppression decisions, the principles may be able to be clearly and coherently set out in a generalised way, yet it would be difficult to formulate any guidelines for the implementation of such principles due to individual factors in individual cases. For example, imagine a "first time offender" criterion where permanent name suppression was granted for minor first time offending where adverse publicity would outweigh the required punishment. Different judges would have differing opinions as to when publicity

---

[100] See n 6, 15.
[101] See n 2, 59. Guidelines for the discretion to prosecute was considered in the Australian criminal justice context.

would exceed punishment. While the principle may be clearly set out, the actual application remains difficult and further prone to inconsistencies. A list of guideline may be useful but to avoid controversy the resultant list would be too broad and would fail to address problems central to name suppression.

The second approach considers redrawing the name suppression line. Name suppression can be seen to apply along a continuum in that it is applicable at all stages in the criminal process from charge to conviction or acquittal. At each stage factors appropriate for suppression may not apply to a later stage. This is seen most clearly in the distinction between the stages prior to and after conviction and the influence the presumption of innocence has at the various stages.

The various scenarios for name suppression legislative positions are:

1) Total prohibition on name suppression at any stage
2) Section 140 of the Criminal Justice Act 1985
3) Name suppression until the accused has entered a plea
4) Name suppression until depositions
5) Name suppression until the accused's trial
6) Name suppression until the conclusion of the accused's trial
7) Name suppression until conviction (the repealed section 45B)

Position (2) is obviously the current state in New Zealand law. Is it the most desirable scenario? Could other scenarios provide consistent, fair and equitable orders? Position (7) once had the backing of the Labour government but has not yet resurfaced in any political manifestos. It could provide greater consistency in predicting name suppression if applied as a blanket provision. Nevertheless in certain situations justice will require exceptions, for example the accused might request publication. A blanket provision may not be acceptable where it is without any flexibility. Provisions to order publication may be a necessity where it can be demonstrated there is a need for publication before guilt is

established. Yet this would have the same inherent inconsistencies as the current section 140 as it is only reverses the presumption of publication to a presumption of suppression.

A possible reform could be interpreting "until the case is gone into" (the stage the Law Reform Committee majority considered name suppression should end) as position (3).[102] Though stage (3) may not be what the committee intended it has the benefits of allowing an accused valuable time in the interim before plea to accept the consequences of publication, consult other parties who may be affected publicly, and then publicly proclaim their innocence with a not guilty plea[103] or face the repercussion of a guilty plea.

Currently New Zealand's suppression provisions lie in between strict English law restrictions on suppression[104] and practices in Northern European countries where defendants in minor cases are simply not named. If reform initiates the latter practices this would resolve inconsistencies in minor offending by removing the operation of a discretion. There is the problem that what is regarded as "minor offending" may require legislative definition as the seriousness of an offence can be extremely subjective. For example, a convicted shoplifter will receive minor legislated punishment while the actual act is viewed morally as serious deceitful and fraudulent behaviour such that employers and the community would demand knowledge.

In conclusion the paramount issue for name suppression reform is whether the name suppression power should remain a discretion, fettered or unfettered, or whether some formulation can be produced to apply name suppression on objective values that would annihilate inequalities and inconsistencies. It should be noted that categorising name suppression could result in a situation where the underlying principles loose prominence in the attempt to categorise. Yet without reform, leaving name suppression in the power of a

---

[102] See above n 26.

[103] It is important to note while such reform would be of more benefit to an accused than current legislation it is still arguable that the reform would only give a brief time delay until the adverse effects of publicity followed a not guilty plea. Also in many cases accused will receive interim name suppression. The main difference is that in the case of the reform example the accused does not have to argue reasons for granting name suppression in the interim.

discretion, the balancing exercise of weighing private and public interests will dominate and a future of predicability and uniformity will remain the dream of an optimist.

[104] See above n 9, 760.

VI CONCLUSION

In assessing who should receive name suppression and when, section 140 provides little guidance for judges. Decisions will be driven by "promptings of humanity"[105] or favour publicity as the touchstone. There are problems in the rationale underlying name suppression. The public interest principles such as publicity and punishment contain flaws when applied to the name suppression context. The publicity principle can function adequately without the revelation of a name hindering the open administration of justice. The punitive consequences from publicity that an accused will suffer is also an unjustified practice. The suitability of publicity as a tool for the punishment of an offender also has limitations.

Balancing public against private interests requires finely tuned scales and while generally the principles underlying name suppression are clear and coherent inconsistencies can be found in the application of the principles. Three plausible conclusions for such inconsistencies are individualised decision-making, the inevitable result of implementing a discretion, or the haphazard approach of the judiciary in translating the name suppression principles into practice.

Whatever the source for the name suppression inconsistencies there are valid reasons which support a reform for the suppression discretion. The minority who appear in court and request name suppression will frequently have their interests placed inferior to the majority with the presumption in favour of publication. In pre-conviction situations the refusal of interim name suppression is harsh and largely unjustified. Mandatory name suppression for an accused person would be more acceptable to the general public, as compared to a convicted person, and is where reform should be directed. Such reform would at least be a start in a movement towards greater consistency in the name suppression process and would reduce some difficulties that the judiciary faces when confronting a name suppression application. Name suppression is a complex and

---

[105] See above n 6, 10.

demanding area and will remain so as offenders or suspected offenders compete against the tyranny of wider public interests for the protection of a name..

LXJO JONES, K. The suppression discretion.

BIBLIOGRAPHY

ARTICLES

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

R Munday "Name Suppression: an adjunct to the presumption of innocence and to the mitigation of sentence" [1991] CrimLR 680.

R Neville "Judging the judges" (1991) 4 NZJR 12.

I Richardson "The Courts and the Public" [1995] NZLJ January 1995, 11.

Criminal Law Reform Committee *The Suppression of Publication of Name of Accused* (Wellington, 1972).

CASES

B v *Police* Unreported, 5 February 1990, High Court, Christchurch Registry, AP 17/90.

Bickley v *Police* Unreported, 3 October 1991, High Court, Christchurch Registry, AP 224/91.

Boyes and Boyes v *New Zealand Police* Unreported, 13 October 1992, High Court, Hamilton Registry, AP 127-128/92.

C v *Police* Unreported, 12 October 1990, High Court, Timaru Registry, AP 55/90.

Campbell v *Department of Social Welfare* Unreported, 16 August 1991, High Court, Christchurch, AP 191/91.

Clark and Stewart v *Police* Unreported, 18 July 1991, High Court, Auckland Registry, AP 164/91.

Collie v *Police* Unreported, 14 June 1993, High Court, Auckland Registry, AP 106/93.

Dally v *Police* Unreported, 13 July 1989, High Court, Wellington Registry, AP 148/89.

Dally v *Police* Unreported, 14 July 1989, Court of Appeal, CA 204/89.

Disher v *Police* Unreported, 25 February 1991, High Court, Hamilton Registry, AP 7/91.

Dodunski v *Mitchell* Unreported, 13 March 1989, High Court, Hamilton Registry, AP 26/89.

G v *Police* Unreported, 17 July 1990, High Court, Christchurch Registry, AP 166/90.

Golightly v *Police* Unreported, 28 July 1993, High Court, Timaru Registry, AP 63/93.

H v *Police* 4 CRNZ 215

H v *Police* Unreported, 3 October 1990, High Court, Wellington Registry, AP 222/90.

H v *Police* Unreported, 24 May 1991, High Court, Dunedin Registry, AP 45/91.

Heaven v *Police* Unreported, 4 May 1993, High Court, Auckland Registry, AP 79/93.

Heyrick v *Police* (1989) 5 CRNZ 32.

Jones v *Police* Unreported, 6 November 1989, High Court, Hamilton Registry, AP 201/89.

Kaminski v *Police* Unreported, 15 February 1991, High Court, Christchurch Registry, AP 28/91.

M v *Police* (1991) 8 CRNZ 14.

M v *Police* Unreported, 4 November 1992, High Court, Christchurch Registry, AP 294/92.

M v *Police* Unreported, 23 August 1993, High Court, Hamilton Registry, AP 118/93.

Mitchell v *Police* Unreported, 13 February 1992, High Court, Christchurch Registry, AP 22/92.

NZ Van Lines v *Proceedings Commissioner* [1995] 1 NZLR 101.

O'Malley v *Police* Unreported, 12 February 1993, High Court, Christchurch Registry, AP 40/93.

The Queen v *Liddell* Unreported, 22 December 1994, Court of Appeal, CA 318/94.

R v *L* (1994) 12 CRNZ 1.

R v *Paterson* [1992] 1 NZLR 45.

R v *Police* Unreported, 9 March 1995, High Court, Palmerston North Registry, AP 8/95.

R v *Lee* (1993) 10 CRNZ 553.

Roberts v *Police* (1989) 4 CRNZ 429.

S v *Police* Unreported, 17 September 1993, High Court, Timaru Registry, AP 66/93.

S and P v *Serious Fraud Office* Unreported, 9 August 1993, High Court, Auckland Registry, AP 158/93.

S v *R* (1994) 12 CRNZ 290.

Saunders v *Police* Unreported, 20 September 1991, High Court, Christchurch Registry, AP 204/91.

T v *Richardson* (1985) 1 CRNZ 587.

W v *Police* (1984) 1 CRNZ 174.

X v *Police* Unreported, 9 October 1991, High Court, Auckland Registry, AP 253/91.

Yogasakarn v *Police* Unreported, 29 August 1988, High Court, Hamilton Registry, AP 132/88.

TEXTS AND DIGESTS

P Harris and S Levine (eds) *The New Zealand Political Source Book* (The Dunmore Press Ltd, Palmerston North, 1992.

T Freiberg *Sentencing - State and Federal Law in Victoria* (Oxford University Press, Melbourne, 1985).

JB Robertson (ed) *Adams on Criminal Law* (Brooker and Friend, Wellington, 1992).

Sallmann and Willis *Criminal Justice in Australia* (Oxford University Press, Melbourne, 1984).

STATUTES

The Criminal Justice Act 1985, s 138-140.

The Criminal Justice Amendment Act 1975, s 45B.

The Criminal Justice Amendment Act 1976, s 2(1).

The New Zealand Bill of Rights Act 1990, s 25.

HANSARDS

NZPD, vol 396, 675, 17 April 1975.

NZPD, vol 403, 113, 30 June 1976.

NEWSPAPERS AND MAGAZINES

"Court restrictions limit coverage - TV stations" *The Dominion*, Wellington, New Zealand, 29 May 1995, 3.

"Crowd yells at rape accused" *The Dominion*, Wellington, New Zealand, 18 July 1995, 1.

"Name suppressed" *The Dominion*, Wellington, New Zealand, 13 March 1995, 4.

"Open Season" *The Listener*, New Zealand, 28 January 1995, 94.

LXJO JONES, K. The suppression discretion.

EASTLIGHT

PUTTING PAPER IN ITS PLACE

MANILLA FOLDER
A4 220 GM
Kraft Pk 100
CODE 173-506

This Product is recyclable and made from a renewable resource.

"BUY N.Z. MADE"
& Keep Your Country Working