IN THE DISTRICT COURT
AT AUCKLAND

CRN 004028329 - 9833

THE POLICE
Informant

v

CAMERON JOHN SLATER
Defendant

Hearing: 25 August 2010

Appearances: Mr. Burns and Ms Brown for the Police
Mr. Thwaite for the Defendant

Judgment: 14 September 2010

DECISION OF JUDGE DAVID J HARVEY

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Introduction and Summary of Findings

[1] This case is about whether or not a person behaved in a manner that breached the law and in doing so utilised some of the communications technologies associated with the Internet. It is not a case about whether or not the law should allow non-publication orders. That debate must take place in another forum. This is not a case about regulating the Internet. That is a vastly more complex subject that involves considerations of Internet Governance, the nature of the technical infrastructure and the manner in which the various organizations that administer that technical infrastructure are amenable to domestic regulation.[1] Furthermore there is a

[1] I have written elsewhere about the characteristics of the internet that differentiate it, and its associated protocols, from other communication technologies and the way in which those qualities impact upon our expectations of information and associated behaviours. For a discussion of Internet Governance and associated issues including historical and background information and governance theory see Lee A, Bygrave and Jon Bing (eds) *Internet Governance: Infrastructure and Institutions*

significant difference between technical and infrastructural regulation on the one hand and content regulation on the other. In some respects there are elements of content regulation that lie within this case. The real essence of the case is about human behaviour. It is a case about the law speaking in the light of changing technologies.

[2] The behaviour alleged was that the defendant Mr Slater breached non-publication orders made in the course of various cases which were before the District Court and, in one case, the High Court. He also faces one charge which alleges that as part and parcel of one of the breaches of s 140 of the Criminal Justice Act he breached a statutory prohibition contained in s 139 of the Criminal Justice Act in that he published a name or particulars which were likely to lead to the identification of a person upon whom an offence under the relevant section of the Crimes Act was alleged to have been committed.

[3] This case raises some novel issues. The allegations of publication arise not from a publication in a newspaper, magazine, book or on a radio or television broadcast. The alleged publication was made on the internet by means of a website allegedly operated by Mr Slater known as a blog, of which I shall have more to say later.

[4] Section 140 of the Criminal Justice Act 1985 states as follows:

> **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 or 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.

(Oxford University Press, Oxford 2009) Milton L. Mueller *Ruling the Root: Internet Governance and the Taming of Cyberspace* (MIT Press, Cambridge Mass 2002) For discussion of some of the architectural issues as they pertain to internet governance see Lawrence B. Solum and Minn Chung "The Layers Principle: Internet Architecture and the Law" University of San Diego Public Law and Legal Theory Research Paper 55 June 2003 available from Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract=416263 (last accessed 2 September 2010)

(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 on 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.

(4A) When determining whether to make any such order or further order in respect of a person accused or convicted of an offence and having effect permanently, a court must take into account any views of a victim of the offence, or of a parent or legal guardian of a victim of the offence, conveyed in accordance with section 28 of the Victims' Rights Act 2002.

(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.

[5] The prohibition is contained in s.140(1) and the offence is created by s. 140(5)

[6] Section 139 of the Criminal Justice Act 1985 provides:

139 Prohibition against publication of names in specified sexual cases

(1AA) The purpose of this section is to protect persons upon or with whom an offence referred to in subsection (1) or subsection (2) has been, or is alleged to have been, committed.

(1) No person shall publish, in any report or account relating to any proceedings commenced in any court in respect of an offence against any of sections 128 to 142A of the Crimes Act 1961, or in respect of an offence against section 144A of that Act, the name of any person upon or with whom the offence has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person, unless—

(a) That person is of or over the age of 16 years; and

(b) The court, by order, permits such publication.

(1A) However, the court must make an order referred to in subsection (1)(b), permitting any person to publish the name of a person upon or with whom any offence referred to in subsection (1) has been or is alleged to have been

committed, or any name or particulars likely to lead to the identification of that person, if—

(a) that person—

(i) is aged 16 years or older (whether or not he or she was aged 16 years or older when the offence was, or is alleged to have been, committed); and

(ii) applies to the court for such an order; and

(b) the court is satisfied that that person understands the nature and effect of his or her decision to apply to the court for such an order.

(2) No person shall publish, in any report or account relating to proceedings in respect of an offence against section 130 or section 131 of the Crimes Act 1961, the name of the person accused or convicted of the offence or any name or particulars likely to lead to the person's identification.

(2A) However, a court must order that any person may publish the name of a person convicted of an offence against section 130 or section 131 of the Crimes Act 1961, or any name or particulars likely to lead to the person's identification, if—

(a) the victim (or, if there were 2 or more victims of the offence, each victim) of the offence—

(i) is aged 16 years or older (whether or not he or she was aged 16 years or older when the offence was, or is alleged to have been, committed); and

(ii) applies to the court for such an order; and

(b) the court is satisfied that the victim (or, as the case requires, each victim) of the offence understands the nature and effect of his or her decision to apply to the court for such an order; and

(c) No order or further order has been made under section 140 prohibiting the publication of the name, address, or occupation, of the person convicted of the offence, or of any particulars likely to lead to that person's identification.

(2B) An order made under subsection (2A) in respect of the name of a person, or of any name or particulars likely to lead to the identification of a person, ceases to have effect if—

(a) the person applies to a court for an order or further order under section 140 prohibiting the publication of his or her name, address, or occupation, or of any particulars likely to lead to his or her identification; and

(b) the court makes the order or further order under section 140.

(3) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who publishes any name or particular in contravention of subsection (1) or subsection (2) of this section.

[7] Section 139(1AA) states the purpose of the section. This provides assistance when the section is to be interpreted in that it identifies what the section is designed to do, enabling an interpretation that fulfils that purpose. Section 139(1) defines the prohibited behaviour. Section 139(3) creates the offence.

[8] The hearing on 25 August 2010 addressed the issue of whether or not there was a case for Mr. Slater to answer. It was not a hearing to determine whether or not Mr. Slater committed the offences alleged. The purpose of the hearing was to determine whether or not there was some evidence (not inherently incredible) which, if accepted as accurate, could establish each element of the offence.

[9] Much of the argument advanced on behalf of Mr Slater addressed the interpretation of the language of ss. 140 and 139 and in particular the nature of "publishes" and "report or account relating to proceedings in respect of an offence".

[10] The manner of "publication" in this case was by way of "blog". I have made the following findings regarding blogs. These findings also appear in the detailed reasons for my decision.

[11] The internet allows everyone to be a publisher. Anyone who has an opinion can post it on the internet either on a webpage, in a news group, on Facebook or a social networking site or on a Weblog – known as a "blog". A blog is a type of website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video. Entries are commonly displayed in reverse-chronological order.

[12] Many blogs provide commentary on a particular subject. Some function as personal online diaries. A typical blog combines text, images, and links to other blogs, web pages and other media related to a particular topic. Most blogs are

interactive, allowing visitors to leave comments and even messages to each other. This is a characteristic of Mr Slater's blog which allows interactivity by way of posting a comment to the blog or alternatively by leaving a message utilising Twitter. It is this interactivity that distinguishes blogs from other static websites and this is an important part of many blogs. Most blogs are primarily text based although some focus on specific media such as photographs, videos, music and audio.

[13] One feature, however, that differentiates a blog from say, a newspaper, is that a blog occupies a continuum of comment where a particular posting or item may start on one day but may continue and develop over a period of time. In many respects this continuum may have an impact upon the context of the publication or posting. It is also to be noted that postings on a blog may come from a number of sources and usually include the administrator or supervisor of the blog site. However most administrators or supervisors of blog sites must hold some responsibility for the comments that are posted.

[14] Blogs can be part of mainstream media or may be separate from it. Many journalists and news commentators maintain blogs where they may expand upon stories that they have written or interact with others who wish to comment upon them. In this respect the blog facilitates a "conversation" between the journalist or reporter and other individuals. However the "conversation" differs from that which may take place over a cup of coffee or across a dinner table. The first difference is that the material that is posted upon the blog is posted primarily in the form of text. Thus, unlike a conversation, the blog becomes a record which is preserved and available on the blog site until such time as it is removed by the person responsible for administering it. For some blogging is seen as a way of getting around the restrictions that are normally imposed upon mainstream news media. Unlike newspapers which are subject the oversight of the Press Council or advertisers who are subject to the Advertising Standards Authority or radio and television which is subject to the Broadcasting Standards Authority, there are no similar regulatory organisations in place in the "blogosphere." Of course, subject to issues of jurisdiction, bloggers are subject to their domestic laws. Bloggers may be liable in defamation if they post defamatory comment or alternatively allow defamatory

comment to remain upon their website once they have been advised of its defamatory nature in which that case they can no longer rely upon the defence of innocent dissemination.

[15] Conceptually a blog is no different from any other form of mass media communication especially since it involves the internet which anyone who has an internet connection is able to access. It fulfils the concept of "publishing" and "publication". It makes information available to a wider audience. That is why people "blog". Although a blog may be no more than a personal diary or may contain expressions of opinion it is no different from a private citizen who gives an account together with his or her opinion of a court case including the name of a person who is subject to an order under s. 140 and posts it into private letterboxes or pastes it up on a billboard for all to see. It is publication. It is made to a wide audience. It goes beyond a private conversation over the telephone or, a coffee table or at a dinner party. It is the mass media element that accompanies the internet that places the blog within the same conceptual framework as any other form of mass media publication. Even if the blog were to be accessible by means of subscription with a login and a password it could well in my view be subject to the same constraints.

[16] The word "publish" must be considered because it has an impact upon the manner of dissemination of the "account" or "report". The Oxford English Dictionary defines the verb "to publish" as "To make public or generally known; to declare or report openly or publicly; to announce." Within the context of defamation, the publication of defamatory material involves the communication thereof to a person or persons other than the one defamed. "Publish" has an ancient etymology grounded in Anglo-Norman and Latin. The concepts of announcing and making that announcement to a wider audience are present. The modern meaning enhances these concepts and within the current context publish could mean "to communicate to an audience." This is wider than the meaning within the context of defamation which encompasses publication to one person. However, the concept of the "audience" is consistent with the approach of Hammond J in case of *Re Victim X* which is discussed in more detail below.

[17] Thus the element of communication to an audience is implicit. How may that take place? The statute states "in a report or account". These words do not stand alone. The report or account must relate to any proceedings in respect of an offence. Given that the purpose of a non-publication order is to prevent the name, details or information that may identify the person being made public or generally known, the means by which that information may be made available cannot be limited to a record of "what happened in Court today". A report or account should be interpreted, within the context of the section and having regard to its purpose, as any narrative or information relating to proceedings in respect of an offence. If, in the course of the narrative or the disclosure of such information, the name, address or occupation or any particulars likely to lead to any such person's identification are disclosed, an offence may be made out. Narrative can include commentary or opinion about a case. Information need only go so far as the disclosure of the name, details or identifying particulars, but should probably be within a context of a continuum of other information available about a proceeding.

[18] The limited interpretation of the words of s. 140 advocated on behalf of Mr Slater cannot be sustained in light of the provisions of s. 5 of the New Zealand Bill of Rights Act 1990. Furthermore, if that is not correct, the interpretation advanced based on s. 6 of the New Zealand Bill of Rights Act 1990 results in an absurdity which defeats the purpose of ss. 139 and 140. In the final analysis s. 4 means that the specific provision and purpose of ss. 139 and 140 of the Criminal Justice Act cannot be overridden by ss. 14 and 25(a) of the New Zealand Bill of Rights Act 1990 as advanced on behalf of Mr. Slater.

[19] The Court has jurisdiction notwithstanding the fact that the server hosting Mr. Slater's website is located in San Antonio Texas in the United States of America. This is because publication of information takes place where the material is downloaded and comprehended. The technical reality of the internet is that one does not "go" to a website apart from sending a request by way of entering the URL of the desired site in one's browser. The website "comes" to the user because the encoded information is downloaded onto a user's computer. In addition the evidence is that Mr Slater posted material to the Whaleoil site from New Zealand thus performing an

act necessary for the commission of an offence pursuant to s. 7 of the Crimes Act 1961.

[20] Mr. Slater faces a total of 10 charges. Some of the charges involve the use of "coded" information. The charges contained in informations CRN 09004028329-30 and 09004028343-44 involve the use of a pictogram which, when interpreted phonetically reveals the suppressed name. The charge contained in information 100040283301 identifies the suppressed name using binary code. "Particulars" is a very wide word. In some respects it may have the interpretation of "details". Within the context of s.140 it may mean pieces of information which, when taken together, identify a person. There may be sufficient pieces of information to identify a person by way of a process of elimination. The fact that the information is in code matters little and to say that encoding information in binary does not constitute particulars is a distinction without a difference. Similarly with the pictogram. The information can be decoded in the same way that an aggregation of information may lead to the identification of a person by way of a process of elimination – another form of interpreting a particular code or solving a puzzle.

[21] Of the 10 charges faced by Mr Slater I found that there was a case to answer and thereafter that the evidence satisfied me that the prosecution had proven 9 charges beyond a reasonable doubt. Mr. Burns conceded that the charge contained in information 09004028344 alleging an offence on 15 December 2009 in respect of an alleged breach of an order made on 6 November 2009 cannot be sustained and that information is dismissed. My detailed reasons for my findings on the no case submission and liability follow.

Preliminary Matters

[22] Prior to the commencement of the hearing on 25 August there had been applications by various news media organisations for leave to have cameras in Court and to record the proceedings. Leave was granted subject to the restrictions that broadcast or publication was not to be made until 10 minutes had elapsed from the time of the event being recorded.

[23] Mr Slater himself made an application for permission to "live blog" or use the internet communication protocol known as "Twitter" to place information on the internet, presumably upon his blog, as the trial proceeded. Because this was communication of an instantaneous nature I was not prepared to allow what was effectively a "live" or "real time" form of reportage of the case when news media organisations had been subject to the 10 minute restriction.

[24] Before the hearing got underway I made inquiry of news media representatives as to whether laptops that they had in Court were connected to the internet. It was indicated that they were and I requested that those computers be disconnected from the internet so as maintain the integrity of the "no-live feed" rulings that were inherent within the media guidelines. I indicated that as long as the 10 minute rule was adhered to reportage could be made of the progress of the hearing and I indicated to Mr Slater that he was perfectly free to make whatever communications he wished to take during adjournments and the luncheon break.

[25] At the end of the hearing on 25 August 2010 I requested from Mr Thwaite an indication as to whether or not he wished me to proceed to determine liability in the event that I held there was a case to answer given his indication that he was not going to call evidence for the defence or whether he wished me to determine the issue of whether or not there was case to answer and leave liability for further argument.

[26] On 26 August 2010 Mr Thwaite filed a memorandum with the Court stating that in the event that there was a case to answer the defendant advised that he proposed arguing the issue of liability at the resumed hearing. Such argument was concluded on 14 September 2010.

[27] On 14 September when the hearing resumed Mr. Thwaite filed a memorandum itemising the charges and the reasons why he said that a conviction could or should not be entered.

The Charges

[28] The table that follows sets out the allegations that had been made against Mr Slater and summarise the charges that he faces.

	CRN	Section	Date	Charge
1.	28331	140(1)	28 Nov 09	Breached an order of the District Court at Auckland made on 6 November 2009 under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification
2.	28329	139(1)	10 Dec 09	Published a name or particulars likely to lead to the identification of a person upon whom an offence under a. 128 Crimes Act is alleged to have been committed
3.	28330	140(1)	10 Dec 09	Breached an order of the District Court at Auckland made on 7 October 2009 under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification
4.	28343	140(1)	15 Dec 09	Breached an order of the District Court at Auckland made on 7 October under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification
5.	28344	140(1)	15 Dec 09	Breached an order of the District Court at Auckland made on 6 November 2009 under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification
6.	03298	140(1)	31 Jan 10	Breached an order of the District Court at North Shore made on 29 January

				2010 under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification
7.	3299	140(1)	1 Feb 10	Breached an order of the District Court at North Shore made on 29 January 2010 under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification
8.	3300	140(1)	7 Feb 10	Breached an order of the District Court at Palmerston North made on 5 Feb 2010 under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification
9.	3301	140(1)	11 Jan 10	Breached an order of the District Court at Nelson made on 7 January 2010 under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification
10.	9833	140(1)	19 May 10	Breached an order of the District Court at Wellington made on 17 M ay 2010 under s. 140 Criminal Justice Act 1985 prohibiting publication in any report or account relating to proceedings in respect of an offence of the name, address or occupation of the person accused of the offence or likely to lead to that persons identification

The Hearing

[29] Four witnesses were called by the police. Three were permitted to read their briefs of evidence. The first witness, Constable Traviss, gave evidence about enquiries that he conducted in December 2009 into the internet website

http://whaleoil.gotcha.co.nz as well as details of the registration of the domain name associated with that website, a Facebook page in the name of the defendant and a Twitter page for Mr Slater.

[30] Facebook is a well known social networking website where individuals or organisations may create a "page" and post information (written, audio or visual) to that page and share that information with "friends." Depending upon the settings that one employs upon one's Facebook page access to the page may be limited or open.

[31] Twitter is another social networking service, described as a "micro blog" service, enabling users to send and read each other's messages which are called Tweets. Tweets are text based messages or "posts" of up to 140 characters that are displayed upon the author's profile page. By default Tweets are publicly visible but senders can restrict message delivery to their friends' list. Users may also subscribe to the Tweets that are posted by other authors. Mr Travis also gave evidence about identifying the location of a person using a GPS location noted on the Twitter page.

[32] Constable Traviss also gave evidence of a "posting" on Mr Slater's blog which is known by his "nom d'internet" of Whaleoil. The posting that Mr Traviss accessed on 16 December 2009 relates to the charges numbered 2, 3, 4 and 5. Those charges related to the publication of the name of a person whose name had been suppressed by Order of the Court and who, it is alleged, Mr Slater identified by the use of a "pictogram" rather than by the use of text information. Mr Traviss also produced evidence of the source code of the website which identified the file name of the pictogram (which was a composite of a number of images) together with copies of pages from the Whaleoil blog of 15 December 2009.

[33] The second witness for the prosecution was from a digital forensic technician, Gareth Antony Jacobs. His evidence related to a posting on the Whaleoil site for 11 January 2010 where the name of a suppressed person was rendered in binary code which is rendered as a list of ones and zeros. The interpretation of this code can be undertaken utilising software tools described by Mr Jacobs as well as by a mathematical process. Utilising both means Mr Jacobs was able to decode a

message which identified a person whose name had been suppressed by order of the District Court. He produced written material supporting his findings together with a copy of the posting in binary code.

[34] The third prosecution witness was Detective Mark Greaves who was the officer in charge of the investigation of the person whose name was suppressed and is the subject of charges 2 – 5. He confirmed that the case had gone to trial, that there was to be a retrial and that High Court suppression orders subsist in respect of the accused. He also confirmed that the complainant in the charges faced, which are of a sexual nature, is the wife of the accused.

[35] The fourth and final witness for the prosecution was Detective Sergeant Marsha Murray. She gave evidence of an interview conducted with Mr Slater on 15 December 2009 which was recorded on DVD and also produced a large amount of documentary evidence supporting the suppression orders the subject of the charges, printouts of some of the posts from the Whaleoil blog and some photographic evidence.

[36] At the end of the prosecution evidence Mr Thwaite submitted that there was no case to answer. He also indicated at that time that it was not the intention of the defence to call any evidence.

[37] Before I embark upon Mr Thwaite's submission and discuss the argument that he advanced together with Mr Burns' answer I shall consider the nature of Mr Slater's activity in a general way.

The Nature of Blogs

[38] The internet allows everyone to be a publisher. Anyone who has an opinion can post it on the internet either on a webpage, in a news group, on Facebook or a social networking site or on a Weblog – known as a "blog". A blog is a type of website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video. Entries are commonly displayed in reverse-chronological order.

[39] Many blogs provide commentary on a particular subject. Some function as personal online diaries. A typical blog combines text, images, and links to other blogs, web pages and other media related to a particular topic. Most blogs are interactive, allowing visitors to leave comments and even messages to each other. This is a characteristic of Mr Slater's blog which allows interactivity by way of posting a comment to the blog or alternatively by leaving a message utilising Twitter. It is this interactivity that distinguishes blogs from other static websites and this is an important part of many blogs. Most blogs are primarily text based although some focus on specific media such as photographs, videos, music and audio.

[40] The word "blog" is a shortened form of the term "weblog" which was coined by Jorn Barger in 1997. Barger used the term to describe a list of links on his robot wisdom website that "logged" his internet wanderings.

[41] The Oxford English Dictionary defines a "weblog as" "a frequently updated website consisting of personal observations, excerpts from other sources, etc, typically run by a single person, and usually with hyperlinks to other sites; and online journal or diary."

[42] That the word "blog" is an abbreviation of the term "weblog" is validated by the Oxford English Dictionary which also defines the verb "to blog" as "to write or maintain a web log. Also; to read or browse through weblogs, especially habitually."

[43] The Oxford English Dictionary also defines a "blogger" as the author of a weblog, blogging is the activity of writing or maintaining a weblog and "blogosphere" as "the cultural or intellectual environment in which blogs are written and read; blogs, their writers, and readers collectively, especially considered as a distinct online network."

[44] Blogs have resulted from the various changes in the way in which software developers and end users used the World Wide Web. The various applications that

underlie a blog site that facilitate interactive information sharing interoperability and user centre design and collaboration are referred to as Web 2.0.[2]

[45] Blogs can be part of mainstream media or may be separate from it. Many journalists and news commentators maintain blogs where they may expand upon stories that they have written or interact with others who wish to comment upon them. In this respect the blog facilitates a "conversation" between the journalist or reporter and other individuals. However the "conversation" differs from that which may take place over a cup of coffee or across a dinner table. The first difference is that the material that is posted upon the blog is posted primarily in the form of text. Thus, unlike a conversation, the blog becomes a record which is preserved and available on the blog site until such time as it is removed by the person responsible for administering it. For some blogging is seen as a way of getting around the restrictions that are normally imposed upon mainstream news media. Unlike newspapers which are subject the oversight of the Press Council or advertisers who are subject to the Advertising Standards Authority or radio and television which is subject to the Broadcasting Standards Authority, there are no similar regulatory organisations in place in the "blogosphere." Of course, subject to issues of jurisdiction, bloggers are subject to their domestic laws. Bloggers may be liable in defamation if they post defamatory comment or alternatively allow defamatory comment to remain upon their website once they have been advised of its defamatory nature in which that case they can no longer rely upon the defence of innocent dissemination.[3] However it is the argument of Mr Thwaite that because of the nature of the blogosphere and the type of activity that is carried by bloggers that the provisions of s 140 and s 139 do not apply if one is to interpret the provisions of those sections in a manner consistent with the provisions of the New Zealand Bill of Rights Act 1990.

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[2] The person who is credited with developing the protocols that underlie the World Wide Web Sir Tim Berners-Lee takes issue with the term Web 2.0 suggesting that it is a piece of jargon for what Web 2.0 claims to do was always available and that the Web has always been about interaction between people – a collaborative space where people can interact. - Interview between developerWorks podcast editor Scott Laningham and Tim Berners-Lee 22 August 2006 – see http://www.ibm.com/developerworks/podcast/dwi/cm-int082206txt.html (Last accessed 1 September 2010)

[3] See *Godfrey v Demon Internet* [2001] QB 201

[46] Many bloggers prefer to differentiate themselves from mainstream media and rather than post what may be described as "hard news" prefer to post comment or articles that put a "spin" upon a particular story or alternatively offer an opinion (which may be of considerable strength and sometimes of pungent articulation). A blog therefore can occupy a number of different spaces. It can be commentary. It can contain news. It can contain opinion. It can contain multimedia. It can contain comments from others. It may be an amalgam of news whereby bloggers post a quote from a new story and then insert their own commentary, opinion or views on a particular statement.

[47] One feature however that differentiates a blog from say, a newspaper, is that a blog occupies a continuum of comment where a particular posting or item may start on one day but may continue and develop over a period of time. In many respects this continuum may have an impact upon the context of the publication or posting. A blog may also comprise a number of continuing narrative. Mr Slater's "Whaleoil" blog emphasises this by an indexing and archive system. It is also to be noted that postings on a blog may come from a number of sources and usually include the administrator or supervisor of the blog site. However most administrators or supervisors of blog sites or those occupying the position of Mr Slater must hold some responsibility for the comments that are posted. Mr Slater in his DVD interview indicated that he exercised such supervisory power over his blog site. He would allow comments or postings of material with which he agreed. This indicates that he is able to delete or remove material or posts from the blog site. This would put Mr Slater in the position of a person of responsibility similar to that of the moderator in the case of *Stratton Oakmont Inc v Prodigy Services Co.*[4]

Mr. Thwaite's No Case Submission

[48] I shall now turn to Mr Thwaite's no case submission which has two limbs. The first limb deals with the scope of the offence under s 140(5) of the Criminal Justice Act 1985. The second limb argues that given that interpretation that he advocates, the elements of the offences alleged are not present. The second limb of

Mr Thwaite's submission is dependent upon whether or not he is able to satisfy me as to the first limb. In the event that he is not it will still be incumbent upon me to consider whether or not there is evidence to support the consideration of each of the elements of each charge applying the test articulated in the case of *R v Flyger*[5] and *Parris v Attorney-General*.[6]

[49] In summary Mr Thwaite's starting point lies in the rights contained in ss. 14 and 25(a) of the New Zealand Bill of Rights Act. Section 14 relates to the right to free expression, s. 25(a) relates to the right to a fair and public hearing. His argument is that any consideration of the language of s. 140, especially insofar as it relates to a publication in a report or account relating to any proceedings in respect of an offence must be given a restrictive interpretation consistent with the rights contained in ss. 14 and 25(a) of the Bill of Rights Act. Similarly what is published about a person whose name has been suppressed must also be strictly construed in terms of name, address and occupation (which are clear) or particulars likely to lead to identification, which, according to Mr Thwaite, must be given a very strict interpretation consistent with the rights contained New Zealand Bill of Rights Act 1990.

Freedom of Expression and the Open Trial

[50] Mr Thwaite has cited in support of the general propositions the cases of *R v Burns*[7], *Re Victim X*[8], *Television v R*[9] and *Lewis v Wilson & Horton Ltd*[10]

[51] Mr Thwaite reminded me of the limitation imposed by s. 5 of the New Zealand Bill of Rights Act and referred to in *R v Burns(Travis)*:

> "As fundamental rights, these principles are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" : see Bill of Rights s 5. In this case it has been said that limits on the media's freedom to publish what they like about Mr Burns can be "demonstrably justified." The limits relied on are:

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[4] (1995) 23 Media Law Reports 1794
[5] [2001] 2 NZLR 721
[6] [2004] 1 NZLR 519
[7] *R v Burns(Travis)* [2002] 1 NZLR 387 (HC) [2002] 1 NZLR 402(CA); *R v Burns(Travis(No2)* [2002] 1 NZLR 410
[8] [2003] 3 NZLR 220
[9] [1996] 3 NZLR 393
[10] [2000] 3 NZLR 546.

a)Fair trial consideration; and
b)The need to protect police informers.[11]

[52] The freedom of expression right contained in s 14 (referred to by Mr Thwaite is the freedom of speech right in his written submission) is a starting point. He submits that the comment by Chambers J in *R v Burns* is apposite"

> "The starting point in this case is the general principle that everyone in New Zealand has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. That general principle is now enshrined in s 14 of the New Zealand Bill of Rights Act 1990, but it was a strong principle of the common law long before the enactment of the Bill of Rights. And other general principle which marches in step with the first is the principle that criminal justice is open justice. That principle, again of ancient origin, was codified in the International Covenant on Civil and Political rights, binding on New Zealand since 1978. It is a principle for the benefit of the accused and the people and finds expression in our domestic law in s 25(a) of the Bill of Rights and s 138(1) of the Criminal Justice Act. It is well recognised that the media have a crucial role in this area as "surrogates of the public"; see *R v Liddell* 1995 1 NZLR 538(CA) 546."[12]

Non-publication Orders and the Open Trial - Principles

[53] The Court of Appeal rearticulated the principles relating to suppression orders in *R v Burns* (*Travis)*[13] where it was stated

> "The principles relating to suppression orders are well established. Such orders are discretionary but "the starting point must always be the importance in 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['" see *R v Liddell* 1995 1 NZLR 538 per Cooke P at page 546. Section 14 of the New Zealand Bill of Rights 1990 is an essential consideration. Nevertheless the making of a suppression order involves another important consideration, the equally fundamental right of an accused to receive a fair trial. This right is affirmed in s 25(a) of the Bill of Rights.

[54] The statements were underpinned by Hammond J in the first instance in the case of *Re Victim X*[14] where he stated

> "...It has routinely been remarked by courts at the highest authority that two fundamental pillars of our constitutional order are freedom of expression and the open administration justice."

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[11] High Court para 11 (Chambers J)
[12] High Court para 10 (Chambers J)
[13] Court of Appeal, pge 403 para 7 (Thomas J)
[14] Para 31

[55] These were described as

> " other kinds of rights which go to the existence of New Zealand society as a system of ordered liberty. Two of those rights a freedom of speech in open trials and these are general and fundamental rights based on "deep" social policy and political considerations. To put it shortly, they go to the very existence and health of our political and legal institutions."[15]

[56] He expressed the importance of the freedom of expression, relating it to

> "An informed citizenry who is critically important to the just institutions of democracy such as we have in New Zealand. Generally speaking therefore, any inroad into the "openness" principle will turn on necessary restraints to protect those underlying fundamental rights themselves."[16]

[57] As far as freedom of speech is concerned Mr Thwaite went to some pains to emphasise the importance of the debate on issues of justice involving the free exchange of information and opinions referring to *R v Burns(Travis)* at first instance.[17] As part and parcel of that debate was the importance of the discussion of judicial findings. Chambers J stated[18]:

> "In the absence of a justifiable restriction on freedom of information and open justice, the public are entitled to know what we ruled and why. After all, commentators may wish to argue that a particular ruling was wrong or that, on the assumption a particular ruling was right under current law, the absurdity of the ruling (if that be their view) suggests that the law should be changed."

[58] Furthermore a Court should not impose censorship on qualitative and subjective standards to be adopted by the Judge. In *Lewis v Wilson & Horton Ltd* the Court of Appeal stated:

> "The Court cannot enter into assessment of whether media or public interest is appropriate or "undue." The right to receive and impart information is not limited in the present context according to qualitative and subject standards adopted by the Judge. It is a right to receive information "of any kind in any form." In cases where some real harm is identified, it may be necessary for the Judge to decide whether the harm which would be caused is disproportionate to the public interest in open justice and the freedom to receive information "of any kind." In such cases it may be necessary for the Judge to waive the public interest in receiving the particular information. But 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

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[15] Para 51
[16] Para 53
[17] Paras 50 and 54
[18] Para 67

> privilege for those who are prominent which is not available to others in the community and imposing censorship on information according to the Court's perception of its value."[19]

[59] Another aspect of open justice and the importance of the need for open debate on the justice system is an element of a democratic society is public confidence in the Court system. In the case of *Television New Zealand Ltd v R* Keith J writing for the Court of Appeal stated:

> "Before we turn to apply the principles to the facts in this case, it is helpful to recall reasons and purposes underlying both the principle of public justice and the supporting right to freedom of expression. In an earlier case in this Court, Woodhouse P put the reasons for public justice persuasively and succinctly; the Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possibly, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that will always be. It is a matter as well of maintaining a system of justice which requires that the Judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes."[20]

[60] Confidence in the justice system was articulated by the Court of Appeal in *Lewis v Wilson & Horton Ltd* in the following way:

> "The principle of open justice serves a wider purpose than the interest represented in the particular case. It is critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority is being used in a particular way. The public is excluded from decision making in the courts. Judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined."[21]

[61] In *R v Victim X* Hammond J made the following comment:

> "That the fact remains that crimes of this character, kidnapping for ransom" attract both public interest and real concern as to how they are dealt with. To put it at its shortest, the public is entitled to know and form its own views

[19] [2003] NZLR 546 at paragraph 68
[20] [1996] 3 NZLR 393 at 396
[21] Para 79

> on what happened and how the case was dealt with. That can only be properly done in a public forum."[22]

[62] He then went on to make the following remark concerning the so called "right to know" but articulated it as an aspect of more fundamental proposition. He said:

> "The media, as such, have no "right to know" anything, any such argument must be dismissed on a number of grounds and is simply "nonsense on stilts" to be borrow a phrase from Bentham. The media is simply the beneficiary of the more fundamental rights to which I have referred, and which exists precisely because they increase the probability that individual rights of the Kantian sort will be respected."
>
> An informed citizenry is critically important to the just institutions of the democracy such as we have in New Zealand. Generally speaking therefore, any inroad into the openness principle will turn on necessary restraints to protect those underlying fundamental rights themselves."[23]

[63] The Court of Appeal in *R v Victim X* addressed the interlocking provisions of s. 138 (empowering the Court to clear the Court and forbid a report in the proceeding) and ss. 139 and s 140.[24] The Court of Appeal made the following remark:[25]

> "The provisions elaborate on the basic principle of open justice, especially in criminal cases, reflected at the beginning of that set of provisions in s 138(1)
>
> **138 Power to clear court and forbid report of proceedings**
>
> (1) Subject to the provisions of subsections (2) and (3) of this section and of any other enactment, every sitting of any court dealing with any proceedings in respect of an offence shall be open to the public.
>
> [5] The principle is long and well established, as Joseph Jaconelli demonstrates in his *Open Justice: A Critique of the Public Trial (2002)*. He discusses the important reasons and values supporting the principle. They include the discipline placed by publicity on the participants in the justice process, including the Judges, counsel and witnesses and particularly the accuser in criminal trials; the possibility that further witnesses will come forward; the facilitating of the attendance of the public with advantages in term of observing the law being properly applied and administered, be a legitimate interest in seeing charges of alleged offences against the whole community being authoritatively determined, and a deterrent thrust of the criminal law; and more broadly in the words of Lord Atkinson in the leading case of *Scott v Scott* [1913] AC 417 at page 463, that, although the hearing of a case in public may be and often as painful and humiliating, "all this is tolerated and endured, because it

[22] Para 38
[23] Paras. 52-53
[24] All of the Criminal Justice Act 1985
[25] Para 4

> is felt that in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect." The principle is of course not absolute, as the introductory words to s 138(1) indicates. Some of the limits provided for in s 138(2) are mentioned later in these reasons."[26]

[64] In light of these very strong pronouncements which come from high authority Mr Thwaite argues that the publication prohibition must be construed narrowly. He argues that a narrow definition of a report or an account must be preferred. He elaborated upon the submission but in essence his argument was that commentary or opinion is not covered by the publication prohibition contained in s 140.

Publication and Jurisdiction

[65] Mr Thwaite then in his written submission addressed the issue of no publication in New Zealand.

[66] In *Lewis v Wilson & Horton Ltd* the Court of Appeal, discussing the futility of an order for suppression made the following comment:

> "We do not accept the contention on behalf of Wilson & Horton that the order is made was futile because it was inevitable that that identity of the appellant would be publicised. There was no inevitability about the scope of information simply because the appellant was resident in another jurisdiction. The order related to disclosure in the course of a report about the New Zealand proceedings. S 140 is to be treated as affected to prevent that occurring where an order is made."[27]

[67] That comment seems to suggest that the effectiveness of an order made pursuant to s 140 is limited to publication in New Zealand. That is perfectly correct. To suggest that a non-publication order pursuant to s 140 would have extra territorial effect is nonsense.

[68] Thus Mr Thwaite developed his submission in writing as follows:

> "The internet introduces an element of communication not as wide spread in 1985 as now. The Commission Report (the Law Commission Report on suppression) recognises the phenomena of the internet. The evidence is that the server is based in the United States. This was clear from the evidence of Mr Traviss."

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[26] Court of Appeal p. 231 para 4-5
[27] Para 93

[69] Mr Thwaite then went on to develop the argument to suggest that if there is a publication it does not occur in New Zealand. A person in New Zealand may choose to access it by unilateral choice. Hence there is no publication in New Zealand.

[70] I found it necessary to remind Mr Thwaite of the case of the *Dow Jones v Gutnick*[28] which was tentatively approved in the case of *Nationwide News v University of Newlands.*[29] It was noted in that case:

> "to my mind, if a defendant chooses to upload information on the internet, being aware of its reach, then they assume the associated risks, including the risk of being sued for defamation. If it were held otherwise, namely the publication occurred at the place of uploading, defendants could potentially defame with impunity by uploading all information in countries with relaxed or no defamation law." [30]

When the matter went to the Court of Appeal the Court said it would proceed on the basis that *Dow Jones v Gutnick* stated the law in New Zealand without necessarily specifically deciding that point.[31]

[71] *Dow Jones v Gutnick* was a defamation case in Australia involving an online news magazine known as Barrons which is published by Dow Jones and was disseminated via the internet from servers in New Jersey. Barrons magazine was available by way of subscription and a number of subscribers resided in Australia. Electronic copies of Barrons magazine were available to them and could be downloaded by them in Australia. The argument for the publishers was that the publication in fact took place in New Jersey and therefore jurisdiction for the proceedings rested in the United States courts. The High Court of Australia held otherwise. Publication took place where the material was downloaded and comprehended.

[72] The reality of the situation therefore is that Mr Slater's blog is available free of charge to internet users in New Zealand who may and do access it from time to time and therefore publication takes place in New Zealand. From a criminal law jurisdiction point of view the approach of s. 7 of the Crimes Act 1961 is also

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[28] (2002) HCA 56 10 December 2002; [2002] 210 CLR 575
[29] (2004) 17 PRNZ 206 (HC)
[30] Para 135
[31] CA202/4 9 December 2005 paragraph 22

instructive. The starting point is s. 6 of the Crimes Act which states that nothing done or omitted outside of New Zealand can be tried as offence in New Zealand and is based upon the common law principle that statutes are not to be construed as giving extra territorial jurisdiction unless there are clear words to that effect. Crime therefore is local in nature. Jurisdiction over crime belongs to the country where the crime is committed.

[73] Section 7 provides a certain measure of extra-territoriality. Where any act or omission which forms part of an offence or any event which is necessary for the completion of the offence occurs in New Zealand, the event shall be deemed to being committed in New Zealand whether the person charged with offence was in New Zealand nor not at the time of the act, omission or event.

[74] The act or omission in s. 7 refers to the acts or omissions which together compromise the *actus reus* of the offence. The event refers to any occurrence necessary to complete the offence. It is sufficient for one act or omission forming part of the offence or any event necessary of the completion of the offence to occur in New Zealand.[32]

[75] The case of *R v Walsh*[33] involved the utilisation of distribution of forged documents by means of facts by Mrs Walsh who was overseas at the time. The Supreme Court considered that what she did in reproducing in New Zealand what she represented was a genuine document must be regarded as uttering a forgery in New Zealand. Her intent was to lead the victims to act upon the forged letters as if they were genuine. In causing them to act on the copy she was causing them to act on the underlying forgeries. The *actus reus* of the offence therefore occurred in New Zealand and the Court made the following observation:

> "Any other view would overlook the realities of modern communication technologies, which enable a simultaneous reproduction of spurious documents on an immense scale to any part of world from any part of the world. The mischief is done, intentionally, where the receiver acts upon the reproduction, leaving it to replicate the terms or qualities of a genuine document."

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[32] *R v Sanders* 1984 1 NZLR 636
[33] [2006] NZSC 111

[76] In the present case the availability of the material from a server located in San Antonio, Texas in the United States has little relevance. The evidence before me is that the material was able to be read and comprehended in New Zealand (thus constituting a publication) and the material was uploaded on the Whaleoil blog by Mr Slater present in New Zealand at the time. Thus acts necessary for publication – the creation of the material, the posting of the material and the availability of the material to be comprehended by readers in New Zealand - all took place within the jurisdiction.

[77] After discussion Mr Thwaite chose not to pursue that line of argument.

Off-Shore Publication of Suppressed Names

[78] There can be no doubt that the internet poses challenges to the effectiveness of suppression orders. The position of a person in New Zealand who posts a name the subject of a non-publication order on the internet is clear for the reasons that I have given. But what of the person (A) who makes a suppressed name available to a person (B) beyond the jurisdiction, and B posts the name on a his or her blog or website in a country other than New Zealand? Without specifically deciding the point, according to the decision of Hammond J in *Re X* the communication between A in New Zealand and B overseas could fall within the concept of a private conversation between individuals and may therefore would not fall within the scope of s. 140(1). Furthermore, the act of posting to a blog or a website by a person overseas (B) could not in those circumstances be caught by s. 7 of the Crimes Act 1961.

[79] The fact that the information is available on the internet and accessible to people in New Zealand who may subscribe to the blog or know of the webpage does not present any element of novelty. In 2000 the day after the non-publication order was made in the *Lewis Case*, Mr. Lewis' name was published in the *Australian* newspaper which, a couple of days later, was available in newspaper rooms in New Zealand and probably on the *Australian* website of the day.

[80] Whether one knows that the information is available in the *Australian* or on another blogger's website depends very much upon the individual internet user's utilisation of the internet. The concept of partial obscurity applies to the internet as much as it does to newspaper information except that once the information is identifiable and searchable it may be recalled in all its freshness of first publication. The other difference is that once the presence of the suppressed information becomes known in the jurisdiction where the suppression order has been made, it may spread "virally" for the internet enables that enhanced disseminatory quality.

[81] Much may depend upon the state of mind of person A in communicating the information to person B. Such behaviour could well mean that A could fall within the second limb of s. 140(5) – "evades or attempts to evade any such order." As I have said, this point is not decided and much would depend upon the detailed facts of the case.

[82] Following from that is the New Zealand based blogger who may embed a link to the off-shore blogsite which contains the suppressed name. One should be cautious in such circumstances that one does not become involved in "publishing" by way of hypertext link. In the case of *Universal City Studios v Reimerdes and Corley*[34] a Court made an order that the defendant's website was prohibited from directly providing files which contained the DeCSS code which enabled the circumvention of copy protection algorithms on DVDs. When the defendants posted links on their websites to other sites that provided DeCSS either by way of direct download via the link or by means of an extra few websites, the Court held that utilising this device was a "distinction without a difference" to offering a direct download. I have no doubt this point or something like it will fall to be decided in this country in some future case.

Report or Account

[83] Mr. Thwaite went on to develop his argument relating to the interpretation of a report or an account – words which are used in s. 140 and s. 139.[35] He argued that

[34] 111 F. Supp. 2d 294 (S.D.N.Y. 2000), aff'd, 273 F.3d 429 (2d Cir. 2001)

[35] The context of the two words in s. 140 is as follows: "a court may make an order prohibiting the publication, in any **report** or **account** relating to any proceedings in respect of an offence, of the

for there to be a report or an account there must be an eye witness to the event. A person who prepared a report or an account had to be present in Court to make such a report or account. Furthermore Mr Thwaite argued that s 140 is directed towards the news media who would be involved in preparing a report upon the appearance and that the "reportage" of what took place in Court was undertaken by the news media as surrogates of the public.[36] In addition because of ability to report the news, news media organisations have a right of intervention to contest suppression orders as they did in the case of *Lewis v Wilson & Horton Ltd*. Mr Thwaite observed that in its report *Suppressing Names and Evidence*[37] the Law Commission recommended that members of the media who were subject to a code of ethics in the complaint procedure of the Broadcasting Standards Authority or the Press Council should have standing to appeal against a decision to make or refuse a suppression order, or a decision varying, revoking or reviewing a suppression order. This, argued Mr Thwaite, lends weight to the suggestion that a restrictive interpretation of s 140 must be limited to the news media. Only the news media were responsible for reporting an account or report of the proceedings.

[84] Furthermore he argues that the words "report" and "account" must be given a restrictive interpretation. The words are not used as verbs in s. 140 and so their definitions as nouns must be considered. Mr Thwaite referred to a number of dictionary definitions. In the *Encarta World English Dictionary* "account" is defined as "1. report: a written or verbal report of something; 2. explanation: an explanation of something that has happened, especially one given to somebody in authority." The *Chambers Concise Dictionary* defines "account" as 1.a description or report. 2. An explanation, especially of ones behaviour". The *New Penguin English Dictionary* defines " "account" as "9a a statement explaining one's conduct. B. A statement of facts or events; a relation: *newspaper account.* 10 (*usu in pl*) hearsay, report...11. a version or rendering." Similar definitions appear in other dictionaries referred to by Mr Thwaite including *Collins English Dictionary, The New Shorter Oxford English Dictionary* and the *New College Merriam-Webster English Dictionary.*

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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.

[36] *R v Liddell; R v Burns(Travis)*

[85] He has offered me from those sources definitions of the word "report". This has been defined as 1. account of something: an account of an event, situation, or episode 2. news item: an account of news presented by a journalist, in a print or broadcast medium 3. document giving information: a document that gives information about an investigation or a piece of research, often put together by a group of people working together 4. unconfirmed account: a widely-known account of something that may be true but has not been confirmed.[38] There are other definitions of similar meaning. Without wishing to engage in a "battle of the Dictionaries" the online version of the authoritative Oxford English Dictionary gives the noun "account" as its 16th meaning "A particular statement or narrative of an event or thing; a relation, report, or description" and "report" as follows:

> I. Information provided or conveyed, and related senses.
> 1. a. An account of a situation, event, etc., brought by one person to another, esp. as the result of an investigation; a piece of information or intelligence provided by an emissary, official investigator, etc.; a notification of something observed....
> c. An evaluative account or summary of the results of an investigation, or of any matter on which information is required (typically in the form of an official or formal document), given or prepared by a person or body appointed or required to do so.
> 2. a. A descriptive account or statement; the action or an act of giving such an account.....
> c. A written account, often verbatim, of the statements made by a speaker or speakers at a debate, lecture, public meeting, etc., esp. as prepared for publication.

[86] Effectively, argued Mr Thwaite, the words "report" or "account" must be restricted to a factual record of what took place in the courtroom regarding a particular case even although some of the definitions allow more than that. Notwithstanding, according to Mr Thwaite this meant that commentary, discussion or observations about a case that may be made available by some means or another be it by way of broadcast in a magazine or on the internet are not subject to s 140. Mr Thwaite argued that the starting point must be that ss 139 and 140 do not apply to private disclosure.

[87] The next step in Mr Thwaite's argument relied upon a comment that was made in the case of *R v Victim X* by Hammond J where he said:

> "A public trial, which is also being televised and widely reported in the New Zealand press and overseas, is underway. There is a respectable public

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[37] NZLC Report 109 October 2009New Zealand Law Commission, Wellington 2009 at pages 57-60
[38] *Encarta World English Dictionary*

> gallery every day with persons coming and going from the gallery. Who those persons are and what they do outside the Court is no business of the Court. These are private citizens exercising their perfect right to come into Her Majesty's Court, and then go away and talk to any other citizen about they hear, saw and heard. The practical reality is as it should be and cannot be ignored."[39]

[88] It is important to note that Hammond J does not expressly say a person who attends Court and sits in the public gallery is ***entitled*** to reveal the suppressed name of the person before the Court or of a witness. He is recognising the reality of the fact that individuals will make private communication of information which has come into their hands and the Court is unable to stop them from doing so. From a technical point of view "publication" can involve communication of information by one person to another and that is certainly the case within the area of defamation law. It seems to me that s. 140 is more aimed towards the wider dissemination of information by means of mass communication media.

The Futility of Non-Publication Orders

[89] Mr Thwaite also addressed the issue of the futility of suppression orders where the information is already in the public domain or has become available via the internet. In the case of *Television New Zealand Ltd v R* it was observed that:

> "The Court should be reluctant to leave an order in effect if it is already, or is likely to be, ineffective in practice because of actions which are not themselves in breach of the order."[40]

[90] That statement of course must be taken in the context of the particular case where some information had already become available and was in the public domain and had not been the subject of a suppression order. Certainly the passage referred to makes it clear that there should not be any pre-existing suppression or non-publication order. In *Lewis v Wilson & Horton Ltd* it was noted that where the identity of someone appearing before the Court is already in the public domain it will not generally be appropriate to grant name suppression.[41] It was noted that

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[39] Para 45
[40] Pge 398
[41] Para 94; see also para 8

> "In the present case there is no evidence that the fact that the appellant was appearing on charges in the Otahuhu District Court was publicly known at the time the s 140 order was made. The order was not futile."[42]

[91] The Court then went on to observe that once a s. 140 order had been quashed on judicial review the issue of re-hearing of the application for a non-publication order will generally not be appropriate if the identity of the person is entered the public domain in the meantime. How that information became available – be it by way of breach of the Court order or otherwise – is not of significance.

[92] It would seem from these authorities to which Mr Thwaite has referred that the issue of futility may only be relevant:

a) Where information is in the public domain prior to the making of the non-publication order.

b) Where information becomes available despite a non-publication order where that non-publication order has been quashed on review and there is a fresh application for a renewed non-publication order.

[93] Mr Thwaite argued that the case law indicates that the discussion about Court decisions is to be protected as part and parcel of the principle of open justice, scrutiny of Court proceedings and debate about the justice system. That discussion anticipates that information will become available to the public notwithstanding a suppression order. In some respects this anticipates an argument that suppression orders have no place in the age of the internet where information may be distributed and disseminated widely, quickly and anonymously although the last proposition is something of an internet myth. In *Lewis v Wilson & Horton Ltd* the Court of Appeal made the following observation:

> "The High Court rejected a contention by Wilson & Horton that the name suppression order should be quashed on the grounds of subsequent publication of the appellant's name overseas and through the internet. It held that the quashed order on those grounds which would condone the breach of the order by which publication occurred and would be contrary to public policies."[43]

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[42] Para 95
[43] Para 24

[94] Up until such time as the legislature decides to repeal or amend s 140 of the Criminal Justice Act 1985, orders made by the Court for non-publication are expected to receive compliance and the assumption is that citizens will abide by Court orders. If they do not they may expose themselves to possible prosecution or Contempt of Court proceedings.

Mr. Thwaite's Concluding Remarks

[95] In essence Mr Thwaite's argument fell back to the issue of the restrictive definition of an "account" or a "report" and, given that the application of s 140 must be limited to that, a commentary is not included.

[96] If Mr Thwaite's argument is to be accepted it means that the following situation could occur: An interesting point of law arises from the conduct of a criminal case involving a defendant whose name has been suppressed. A member of the academic staff of the University Law School wishes to write a case note discussing the interesting point of law. According to Mr Thwaite he is not writing an account or a report of the proceedings but a commentary thereon. That being the case argues Mr Thwaite the law school academic is entitled to publish the name of the accused notwithstanding the non-publication order.

[97] Similarly, argues Mr Thwaite, any person who is making some form of comment upon a court case or is offering some opinion about the conduct of a hearing is entitled to publish or reveal the name of a person involved in that hearing notwithstanding that a non-publication order has been made.

[98] *Mutatis mutandis* Mr Thwaite argues that a similar approach must be applied to s 139. Where a person publishes a commentary or statement of an opinion about a case that may contain facts that leads to the identification of the victim of a certain offence (generally of a sexual nature) that person has not committed an offence against s 139 (notwithstanding that it imposes a statutory and not a discretionary non-publication procedure) because the provisions of s 139 – narrowly scoped according to Mr Thwaite – allow the publication of such opinion or commentary and therefore the identification of the complainant or victim.

Submissions by the Prosecution

[99] Mr Burns in reply essentially argued that ss. 6, 5 and 4 of the Bill of Rights Act must be read together. Section 6 provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights that meaning shall be preferred to any other meaning but by the same token s. 5 (which is subject to s. 4) states that the rights and freedoms contained in the Act are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Thus the rights are not absolute. Section 4 provides

> "No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights."

[100] Mr Burns argues that a principled approach to the application of s 6 must be adopted otherwise there will be occasions where the law will become unworkable. He submitted that one must invest arguments under the New Zealand Bill of Rights Act with an air of reality and referred particularly to the case of *Brooker v Police*[44] which is the leading case on the issue of freedom of expression and offensive behaviour. In that case it was noted:

> "Under s 6 of the New Zealand Bill of Rights Act, s 41(a) of the Summary Offences Act must be given a meaning consistent with the right to freedom of expression in s 14 of the New Zealand Bill of Rights Act, if it can be given such a meaning. The right to "impart information and opinions of any kind in any form" affirmed in s 14 is not however unqualified. By article 19(3) International Covenant on Civil and Political Rights it is subject to reasonable restrictions prescribed by law which are necessary to protect other important interests including public order and the rights and reputations of others. S 41(a) is such a restriction. Its scope depends on its meaning and purpose."[45]

[101] Mr Burns therefore submits that in light of that dictum it is clear that the s 14 right is not an absolute one.

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[44] [2007] NZSC 30
[45] Para 4

[102] In *Brooker* the following observation was made by Elias CJ:

> "Many provisions of our law are designed to protect interests and values which qualify the scope of the rights contained in the New Zealand Bill of Rights Act. Thus s 21D of the Summary Offences Act (under which Mr Brooker was first charged) protects against unlawful interference with the home, an aspect of privacy interests recognised in article 17 of the International Covenant as permitting the restriction of the scope of freedom of movement and freedom of expression. In *Hosking v Runting*, Gault P and Keith J reviewed the statutory provisions which provide protection for privacy interests in New Zealand. So, the Trespass Act 1980 makes it an offence to trespass after being warned to leave by the occupier of premises or after being warned to stay off. The Harassment Act 1997 recognises that behaviour which may seem trivial in isolation may amount to harassment when seen in context. It provides protection through criminal offences and civil remedies including restraining orders. Acts capable of constituting harassment include loitering near or watching a person's place of residence or making contact in any way with a person. To constitute harassment the specified conduct must occur on at least two separate occasions within a period of 12 months. In addition as the judgment in the Court of Appeal in the present case notes, civil remedies under the general law of defamation are available to those who are defamed. This framework of legal protection is part of the context in which s 4 of the Summary Offences Act falls to be considered. It suggests that an expansive meaning of s 41(a) unconnected to public order is unnecessary.[46]

[103] Blanchard J noted:

> "But when the behaviour in question involves an exercise of the right to convey information or express an opinion which is protected by s 14 of the New Zealand Bill of Rights Act 1990, or engages some other guaranteed by that Act there is a further and most important consideration. The characterisation of the behaviour of the defendant as disorderly then cannot be made without an assessment against the overriding requirement of s 5 of the Bill of Rights that the exercise of any guaranteed right may be subjected only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The value protected by the Bill of Rights must be specifically considered and weighed against the value of public order. The Court must ask itself whether treating the particular behaviour and the particular circumstances as disorderly constitutes a justified limitation of the defendant's exercise of the right in question. As a result, public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion other than by other forms of behaviour. The manner in which the defendant chose to exercise the right and the time and place are relevant to that enquiry."[47]

[104] As I have observed the issue in Brooker was whether there should be a limit upon a protester's right of free expression. McGrath J made the observation that:

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[46] Para 37
[47] Para 59

> "[T]he offensive of disorderly behaviour must be restricted to conduct that amounts to a sufficiently serious and reprehensible interference with the rights of others to warrant the intervention of the criminal law. At that point the protester's legitimate exercise for the freedom of expression ends."[48]

[105] I would make the observation that the difficulty that was faced by the Supreme Court in that case involved issues of freedom of expression by way of protest on the one hand and disorderly behaviour on the other. The problem was at what extent did the behaviour have to go for it to come within the concept of disorderly and override freedom of expression.

[106] In the case before me the lines are more clearly drawn because s 140 involves the imposition of a non-publication order which is a clear interference with the right to freedom of expression. It is not a question of the extent or the quality of the publication for it to warrant the intervention of the criminal law. The ambit of the publication is clear. Mr Burns argues that a proper and principled analysis of the competing interests must be undertaken and it is his argument that when that is done Mr Thwaite's argument cannot be sustained.

[107] Mr Burns concedes that s. 6 of the New Zealand Bill of Rights Act must be taken into account but in terms of the publication of Court proceedings the right is not unqualified as he has already argued and that there are a number of other competing interests including the rights of victims and the right of an individual to a fair trial. There are many reasons, he argues, for name suppression and in some cases a non-publication order may be made where a person with prior convictions may have his or her free trial right prejudiced (the presumption that a person appears before Court without prior convictions unless propensity evidence is admissible) and publication of that person's name may prejudice that right.

[108] Mr Burns then referred to the proper analytical path that must be followed as articulated in the case of *Hansen v R.*[49] There the Court of Appeal held that the role of s. 5 of the New Zealand Bill of Rights Act 1990 relative to ss 4 and 6 it is as follows:

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[48] Para 130
[49] [2007] 23 CRNZ 104

> "If the natural meaning of a statutory provision appears to limit a guaranteed right the appropriate next step is consider whether that limit is justified in terms of s 5 New Zealand Bill of Rights Act 1990. It is only when the natural meaning fails the s 5 test that it is necessary to consider whether another meaning could legitimately be given to the statutory provision under s 6. If the words of the provision are not capable of supporting a different Bill of Rights consistent meaning s 4 requires the Court to give effect of the provision in accordance with its natural meaning."

[109] Mr Burns submitted that s. 140 fell within the parameters of a justified limitation. Section 140 provides for circumstances where publication of a name may be prohibited by the Court. Section 5 may be engaged if the limit placed by the meaning on the right is demonstrably justified and its adoption will not result in inconsistency with the Bill of Rights or if that fails the provision may not be reasonably capable of bearing any other meaning.[50] The Court stated:

> "To begin casting around for other potential meanings of the provision as soon as a prima facie incursion upon a guaranteed right is identified does not give adequate recognition to the role of s 5 and the interpretative process. Nor would such an approach recognise that a meaning dictated by the application of standard interpretation principles should be adopted unless the Bill of Rights actually precludes it.
>
> Although s. 6 directs the Court to prefer a meaning consistent with the rights and freedoms contained in the Bill of Rights, the scope of the individual rights and freedoms enumerated in part 2 must be seen as constrained in context by other sections in the Bill of Rights, and in particular the provision for justified limits in s. 5. It would surely be difficult to argue that many, if any, statutes can be read complete consistency with the full breadth of each and every right and freedom in the Bill of Rights. Accordingly it is only those meanings that unjustifiably limit guaranteed rights or freedoms that s 6 requires the Court to discard if the statutory language so permits.
>
> If the natural meaning of the statutory provision does appear to limit a guaranteed right the next appropriate step is to consider whether that limit is a justified one in terms of s. 5. If it is the meaning is not consistent with the Bill of Rights in the sense and visage of s. 6 and should be adopted by the Court. It only when that natural meaning fails the s. 5 test that it is necessary to consider whether another meaning will legitimately be given to the provision in issue. If the words of the provision in their context are not capable of supporting a different Bill of Rights consistent meaning, s 4 requires the Court to give effective provision in accordance with its natural meaning notwithstanding the result in the consistency with the Bill of Rights."[51]

[110] Essentially Mr Burns is arguing that Mr Thwaite has not carried out the analysis required to determine whether or not the provisions of s. 140 constitute a

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[50] *Hansen* para 57

justifiable limitation but rather has assumed that the limitation is unjustified and has jumped straight to the interpretative process that has been the main thrust of his argument. The problem with that, argues Mr Burns, is that the result, if one takes Mr Thwaite's argument to the end of the logical path that he suggests, is an absurdity and effectively renders s. 140 unworkable. In any event Mr Burns argues in such a situation if an interpretative outcome is unworkable it does not fall within the provisions of s. 6 and therefore one is cast back upon s. 4.

[111] Mr Burns then turned to the issue of publication and the case of *Solicitor General v Smith.*[52] In that case there was an allegation of a breach of the non-publication provisions contained in s 27(a) of the Guardianship Act 1968 which provided:

> "No person shall publish any **report** of proceedings under this Act (other than criminal proceedings, except with the leave of the Court which heard the proceedings. (*my emphasis*)

[112] The allegations against the defendant involved what he allegedly said in telephone calls he made to a caregiver and comments that he made in two media releases about the case and contributions when interviewed by Radio New Zealand and TV3 for programmes about the case."

[113] Counsel for Dr. Smith submitted that he did not publish any report of the proceedings as prescribed by s 27(a). The Court noted that at paragraph 62:

> "We do not accept that. Judges have disagreed as to the scope of the words "report of the proceedings" and *Television New Zealand v Department of Social Welfare* 1990 NZFLR 150 Holland J confined them to a report of what took place in the courtroom, and as excluding the fact that proceedings had been commenced or the result of the proceedings. Pankhurst J respectfully disagreed and *Director General of Social Welfare v Christchurch Press Limited* (High Court, Christchurch CP31/98 29 May 1998) he regarded the phrase as covering the reporting of the initiation of the case and all stages of it. He did not consider that the difficulties presented to him and raised again by Mr Upton in this case, as to the communication of information about a custody case to genuinely interested people, for example social workers and teachers, arose, even on that wider interpretation of s 27(a). We respectfully agreed and adopt Pankhurst J's approach. As he pointed out s 27(a) focuses upon the publication of reports, and its wording is not "apt to capture the bare communication of information to genuinely interested people."

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[51] Paras 58 - 60
[52] [2004] 2 NZLR 540

[114] However it was quite clear that the communication by Dr. Smith was to a much wider audience. Comments and publications in the news media went beyond a private interest in communication. It is also interesting to note that the comments that were made by Dr. Smith were in the form of commentary or opinion.

[115] Mr Burns also argued that there was no basis to suggest that the provisions of s. 140 were restricted to accredited news media organisations. In his view publication applied to anyone who had the ability to disseminate information in a public forum. Because of the nature of a blog (which I have already discussed) and its qualities including its semi-permanent nature, its particular dynamic and the ongoing nature of communication of a particular topic it goes beyond the concept of the informal conversation envisaged by Hammond J in the case of *Re Victim X*.

[116] Mr Burns also argued that the suggestion by Mr Thwaite that the words "report and account" are synonymous does not stand scrutiny because the two words are separated by the disjunctive "or" in the legislation. Mr Burns argued for a broad definition which encompassed any disclosure of a name in connection with criminal proceedings. The suggestion that s 140 was restricted to a factual account of what took place in Court and did not extend to commentary or opinion was rejected.

[117] Mr Burns argued that one had to look at the context of the various postings as they related to the allegations before the Court. Clues and tags were given. Indications were made that the name was being published and the fact that it was in the form of a pictograph or binary code made no difference. It was still a form of publication that was capable of being understood. It was merely an extension of publishing the name using a different language or perhaps Greek or Cyrillic script. The information was made available and information is that which informs. The fact that it may need some intermediate steps such as translation be it from binary or by phonetically interpreting a pictogram matters little.

[118] Some of the charges have a name published under the heading "Interesting Name." Mr Thwaite argues that this means nothing. Mr Burns responds by arguing that one must look at the context of that particular publication taking into account that further information is available on the blog site relating to the case involving the

particular name which has been displayed in another place on the blog site. Mr Burns argues that because the blog is in the nature of a continuum that it is clear to the reader that the name relates to another article on the site and it is merely a matter of marrying the two.

[119] In one case there can be no doubt that the suppressed name is referred to within the context of the blog posting (charge 10).

[120] Mr Burns argues that if I reject Mr Thwaite's interpretation of the scope of s 140 it must follow that the charge relating to information disclosing the name of a victim under s 139 (charge 2) must be established.

[121] The narrow interpretation argued by Mr Thwaite is rejected by Mr Burns. The law must continue to be seen to be speaking. It must be adaptable to new circumstances and to new technologies. I recalled the comments of Anderson J in the case of the *R v Misic*[53] where he said, in determining the meaning of the concept of "document" in the digital age,

> "Putting to one side any relevant implications of the enactment of s 263, we have no difficulty accepting that the computer program and computer disc in question are each a "document" for the purposes of s 13 229(a). Essentially a document is a thing which provides evidence or information that serves as a record. The fact that developments in technology may improve the way in which evidence or information is provided or a record is kept does not change the fundamental purpose of that technology, nor a conceptual appreciation of that function. Legislation must be interpreted with that in mind. As Lord Hoffman said in *Birmingham City Council v Oakley* 2001 1 ALL ER385 at page 396: "the words must be construed as always speaking in the scenes used by Lord Steyn in *R v Ireland, R v Burstow* 1997 4 ALL ER225 at 233 1998 AC147 at 158, 159. I quite agree that when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the same. The meaning of the statutory language remains unaltered.
>
> It is unarguable that a piece of papyrus containing information, a page of parchment with the same information, a copperplate or a tablet of clay are all documents. Nor would they be otherwise if the method of notation were in English, morse code, or binary symbols. In every case there is a document because there is a material record of information. This feature, rather than the medium, is definitive."[54]

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[53] [2001] 3 NZLR 1
[54] Para 31- 32

Finding on The First Limb of Mr Thwaite's Argument

[122] My conclusion is that applying the proper and interpretative approach as set out in *Hansen* Mr Thwaite's argument cannot be sustained. He has failed to address the issue of whether or not s. 140 given its natural meaning can act as a justified limitation of the provisions of ss. 14 and 25(a) of the Bill of Rights Act.

[123] My conclusion is that the limitation is indeed justified. It is quite clear both from a reading of the Bill of Rights Act, the authorities that have been cited and indeed the underlying provisions of the International Convention on Civil and Political rights that the rights are not absolute and are subject to restrictions based on other rights which must be taken into account.

[124] The purpose of non-publication orders both at the discretion of the Court under s. 140 or within their statutory context under s. 139 are to provide protections within the wider context of the Court process. Over the years and since the case of *R v Liddell* and *Lewis v Wilson & Horton* regular pronouncements from higher courts have made it abundantly clear that the exercise of the discretion to impose a non-publication order in respect of a person's name should be circumscribed and exercised with great care. Certainly *Lewis v Wilson & Horton* emphasises the importance of the articulation of reasons which make it clear why a non-publication order is put in place.

[125] On a number of occasions non-publication orders may be made out of compassion and subsist for a short period of time to enable an accused person to inform family members personally of his or her plight rather than have them find out from the harsh glare of television or radio publicity. On many occasions non-publication orders will be made to ensure that fair trial rights are protected and as Baragwannath J said in *R v B*[55] "a fair trial trumps all."

[126] In considering a prosecution for a breach of s. 140 one is not required to look behind the order or the reasons why it was made. If it is proven that an order has been made that element of the charge is satisfied. Thus within the meaning of s. 5

the free expression right and open trial right are circumscribed to a limited extent by the provisions of s. 140 and constitute in my view a justified limitation of those rights. A purposive interpretation supports that conclusion.

A Purposive Interpretation of s. 140

[127] A purposive interpretation must be accorded to s. 140. A court is obliged to give effect to Parliament's intentions. Parliament has said that in certain circumstances, Courts may make a non-publication order. The grounds for such an order are not stated in the section. A wide discretion is accorded to the Judge. That recognises the variety of circumstances that may justify a non-publication order. However, the authorities which have been discussed in this decision make it clear that one must take into account a number of competing interests in making a non-publication order among them the interests of the news media as surrogates of the public to report upon and inform the wider public of the proceedings before the Courts as a part of the openness that must be accorded to Court proceedings and to the Court as part of the governmental process.

[128] At the risk of repetition but for the purposes of the analysis I am about to undertake the provisions of s.140(1) state:

> Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or 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.

[129] The principal prohibition contained in s.140(1) is against publication – "a court may make an order prohibiting the publication." The subsection goes on to define the nature of the publication envisaged. Publication may be prohibited "in any report or account relating to any proceedings in respect of an offence." Mr. Thwaite has fastened upon "report" or "account" as being limited to traditional news media, presumably because in 1985 it was to the media that the provisions of s.140 were addressed. Thus, according to Mr Thwaite, those words must be limited to the factual reporting of events that news media undertakes. However, in the age of mass communication and the internet, where everyone may be a publisher, that approach

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[55] [2008] NZCA 130 para 2

cannot be sustained. The law must continue to speak. Having said that, is an "account" or a "report" relating to proceedings in respect of an offence limited to a factual record of what took place in Court?

[130] The words must be viewed within the context of the entire subsection and with regard to the overall purpose of the section. The purpose of the subsection is to allow the Court in certain circumstances to make a non-publication order in respect of certain information – that is information that may identify a person appearing before the Court. The thrust of the subsection is directed to a prohibition against the publication of that information in the first instance.

[131] Therefore the word "publish" must be considered because it has an impact upon the manner of dissemination of the "account" or "report". The Oxford English Dictionary defines the verb "to publish" as "To make public or generally known; to declare or report openly or publicly; to announce." Within the context of defamation, the publication of defamatory material involves the communication thereof to a person or persons other than the one defamed. "Publish" has an etymology that announcing or proclaiming (Anglo-Norman) as well as elements of public property or placing something at the disposal of the community (Latin). The modern meaning enhances these concepts and within the current context publish could mean "to communicate to an audience." This is wider than the meaning within the context of defamation which encompasses publication to one person. However, the concept of the "audience" is consistent with the approach of Hammond J in *Re Victim X.*

[132] Thus the element of communication to an audience is implicit. How may that take place? The statute states "in a report or account". These words do not stand alone. The report or account must relate to any proceedings in respect of an offence. Given that the purpose of a non-publication order is to prevent the name, details or information that may identify the person being made public or generally known, the means by which that information may be made available cannot be limited to a record of "what happened in Court today". A report or account should be interpreted, within the context of the section and having regard to its purpose, as any narrative or information relating to proceedings in respect of an offence. If, in the course of the narrative or the disclosure of such information the name, address or occupation or

any particulars likely to lead to any such person's identification are disclosed an offence may be made out. Narrative can include commentary or opinion about a case. Information need only go so far as the disclosure of the name, details or identifying particulars, but should probably be within a context of a continuum of other information available about a proceeding.

[133] The analysis that I have undertaken has an impact upon the conclusion advocated by Mr Thwaite as he developed his argument and the way in which he considers the scope of s. 140 applies. Earlier in this decision I gave an example of an academic commentator who, according to Mr Thwaite may be entitled to publish the name of a person who was subject to an order under s. 140. Mr Burns argues that this essentially is taking the logic to the point of absurdity and is making the law unworkable. Such an interpretation cannot be available under the New Zealand Bill of Rights Act for it would make the law unworkable. It effectively would mean that only accredited news media giving a factual account of what transpired in Court were bound by non-publication orders. That is clearly not the case either in terms of the purpose of the section, the natural meaning of the words or in terms of logic or in terms of common sense. Indeed the decision in *Smith* indicates that the similar language of 27(a) of the then Guardianship Act contemplates more than a mere factual account of something that took place and encompasses an expression of opinion or commentary. Both logic and authority are against Mr Thwaite's argument.

[134] Furthermore I accept Mr Burns' argument that the law must be seen to be speaking and must embrace and encompass new technologies and give recognition to them. Conceptually a blog is no different from any other form of mass media communication especially since it involves the internet which anyone who has an internet connection is able to access. It fulfils the concept of "publishing" and "publication". It makes information available to a wider audience. That is why people "blog". Although a blog may be no more than a personal diary or may contain expressions of opinion it is no different from a private citizen who gives an account together with his or her opinion of a court case including the name of a person who is subject to an order under s. 140 and posts it into private letterboxes or pastes it up on a billboard for all to see – similar to the Liberty Trees in Boston and

other American colonies so popular prior to the American Revolution. It is publication. It is made to a wide audience. It goes beyond a private conversation over the telephone or, a coffee table or at a dinner party. It is the mass media element that accompanies the internet that places the blog within the same conceptual framework as any other form of mass media publication. Even if the blog were to be accessible by means of subscription with a login and a password it could well in my view be subject to the same constraints given that a similar device was employed by Barrons in the case of *Dow Jones v Gutnick*.

[135] Orders of the Court are to be given effect. Mr Thwaite's argument means that the law would be discriminatory in that it would apply only to the news media such television, radio and newspapers but not to "alternative" media such as blogs. Earlier in this judgment I made the observation that the internet enables everyone to become a publisher and if one wishes to take advantage of that opportunity one must necessarily be prepared to fall within the responsibilities that accompany it.

[136] I can conclude therefore that there is no room for the interpretation that Mr Thwaite has placed upon the concepts of publication, account or report, that those words do not exclude commentary and that the scope of s. 140 is significantly wider than that suggested by them. To hold otherwise would be to make a nonsense of the law and to render the section unworkable.

[137] Although I have held that I consider that the provisions of s. 140 and s. 139 constitute justifiable limitations it is also my view that if that were not so the provisions of s. 4 of the Bill of Rights Act would apply for it is quite clear that the specific provisions of s. 140 run up against the general provisions contained in the freedom of expression right expressed in s. 14 of the Bill of Rights Act.

Mr. Thwaite's Second Submission

[138] Mr Thwaite's second line of attack is that the information that was contained on the websites do not identify by name, address or occupation or do not constitute particulars likely to lead to any such persons identification. The various pictograms referred to in charges 1, 2, 3, 4 and 5 cannot, according to Mr Thwaite, lead to identification. As far as Count 6 which refers to a Mr Michael Dobbyn whose name

was suppressed but in respect of whom the suppression order has been lifted falls within the category of the "Interesting Names" to which reference has been made. The person referred to in Count 8 again is subject to the "interesting names" category and the person the subject of Count 9 is expressed in form of binary code which according to Mr Thwaite does not lead to his identification.

[139] "Particulars" is a very wide word. In some respects it may have the interpretation of "details". Within the context of s.140 it may mean pieces of information which, when taken together, identify a person. There may be sufficient pieces of information to identify a person by way of a process of elimination. The fact that the information is in code matters little and to say that encoding information in binary does not constitute particulars is a distinction without a difference. Similarly with the pictogram. The information can be decoded in the same way that an aggregation of information may lead to the identification of a person by way of a process of elimination – another form of interpreting a particular code or solving a puzzle. The use of phonetically coded information (which is how the pictogram resolves the name) is not unknown to Mr. Slater. I venture to suggest that the words "Whaleoil Beef Hooked" on the "masthead" of his homepage provides an example.

[140] Count 10 involves a posting that was made on 19 May 2010 entitled "Strange Name Suppression. In the third paragraph it is clear that the person whose name is suppressed is identified in fact by name. The person is clearly named in the body of the commentary and I am satisfied in respect of that charge that there is sufficient evidence for there to be a case to answer.

Is there a case to answer in respect of charges 1-9?

[141] The test is articulated in the case of *R v Flyger.*[56] A Judge sitting alone has to determine whether there is some evidence (not inherently incredible) which, if accepted as accurate, would establish each element of the offence.[57] That approach has been approved in the case of *Parris v Attorney General.*[58]

[56] [2001] 2 NZLR 721
[57] Flyger para 16-18, para 25
[58] [2004] 1 NZLR 519

[142] I am satisfied that there is evidence which if accepted as accurate would establish the following:

a) In respect of each of the nine charges involving allegations of breach of s 140 that an order was made pursuant to s 140 in respect of non-publication of the name of the defendant.

b) That those orders were in full force and effect on the date of the alleged offence.

c) That there was a publication by means of the post of the Whaleoil blog site which put the material in the public arena.

d) That that publication amounted to a report or an account relating to proceedings in respect of an offence.

e) I am also satisfied, for reasons that will become apparent, that there is evidence to support the contention that the name, address or occupation of the person in respect of whom the non-publication order was made was disclosed or that particulars were published which were likely to lead to the identification of such person.

f) In summary therefore, what was published in respect of charges 1, 3, 4, 5, 6, 7, 8 and 9 was information which could lead to the identification of the person in respect of whom the order was made. In respect of charge 10 I find that there is evidence to indicate that the name of the person was published. In respect of charge 2 I am satisfied that there was information made available which could lead to the identification of a person upon whom an offence under s. 128 of the Crimes Act has alleged to have been committed. There is a case to answer in respect of those charges.

Liability

Mr. Thwaite's Further Submissions

[143] When this case was recalled before me on 14 September 2010 Mr. Thwaite presented a memorandum of submissions in respect of liability. I might observe, as I did to Mr. Thwaite, that many of the matters should properly have been raised in his no case submission, for they go to the elements rather than to the existence of proof.

[144] Mr. Thwaite has carefully gone through each charge and identified matters which are in his submission contestable and which fail for want of proof or strict compliance with the law.

[145] Underlying all his submissions is the argument that a criminal statute must be strictly construed in favour of the defendant and that ss 139 and 140 of theCriminal Justice Act 1985 need to be construed narrowly and apply to activities that are covered clearly by the wording.

Jurisdiction – No Publication in New Zealand

[146] Mr Thwaite's first substantive submission is that the Internet introduces an element of communication not as widespread in 1985 as now. The evidence is that the server is based in the United States and if there is publication it occurs there.

[147] I am concerned that Mr. Thwaite should once again advance this argument. It was addressed in his no case submission. I made it clear to Mr. Thwaite that his submission could not succeed on the basis of the realities of the Internet and the provisions of s. 7 of the Crimes Act 1961 and the decided authorities. My detailed reasoning may be found at paragraphs [65] and following of this decision.

Orders Not Validly Made

[148] Mr Thwaite's next submission was that the orders that were made by the various Judges on the dates the subject of the charges were not validly made. In summary his argument is that when a Judge makes an order pursuant to s. 140 he or she must use the precise wording of the section. Thus the use of the commonly used

shorthand "suppression order" does not comply with the language of the section, and thus the order has no validity.

[149] Mr.Burns' answer to that proposition contains several limbs. The first and general argument that he advances in answer to the overall thrust of Mr Thwaite's argument is that the legislation must be given a purposive interpretation, a submission with which I agree. I have already addressed the matter of purposive interpretation at paragraph [126] and following of this decision.

[150] Mr. Burns' second point is that the term "suppression" is a commonly used shorthand by Judges to indicate that a non-publication order is made and not just at District Court level. In the case of *Fairfax New Zealand v C*[59] the Court of Appeal made the observation "if publication of the defendant's name is not suppressed" demonstrating the use of one word that encapsulates the concept of a non-publication order. In the criminal jurisdiction there is no requirement for a perfected order – unlike the civil jurisdiction. To argue otherwise, says Mr. Burns, would mean that the slightest deviation from the wording of the Statute would render the order nugatory or invalid and that would bring the law into disrepute.

[151] Furthermore, when an order is made, at the time that it is made, it has no criminal consequences. If a person is aware of the effect of the order clearly he or she is aware of its intent and consequences. Mr. Burns says that a reading of Mr. Slater's blog site makes it clear that he understood the effect of the orders and he understood what was involved in their breach. Indeed, throughout the evidence that has been presented, Mr. Slater refers specifically to "suppression orders".

[152] In essence Mr. Burns is arguing, correctly in my view, that we have moved on from the Fifteenth and Sixteenth Century days when cases were won or lost upon an incorrect form of pleading or the use of the wrong wording when advancing a cause of action. To require the precision that Mr. Thwaite suggests would be an unduly restrictive interpretation of a statute whose purpose is clear.

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[59] [2008] NZCA 39

[153] I agree with Mr. Burns' analysis and reject this argument advanced on behalf of the defendant.

Non-Publication Orders Where There is a Discharge Without Conviction Invalid?

[154] Mr Thwaite's further argument on order validity goes to whether or not a Court may make a non-publication order when a person is discharged without conviction. This is especially relevant to the charge contained in information number 090040228331 alleging an offence on the 28th November 2009. The defendant in that case was discharged without conviction pursuant to s. 106 of the Sentencing Act.

[155] The argument is that an order can only be made upon accusation or conviction. Mr Thwaite fastens upon the words "of the person accused or convicted of the offence" in s.140(1). However, once again that strains the language of the section as a whole. The report or account referred to in the section may relate to "any proceedings in respect of an offence" thus widening the scope of s.140. Furthermore, once the proceedings have concluded with a discharge without conviction, the fact of an accusation remains. That the accusation was not proven or was resolved by a discharge without conviction does not mean that the accusation has not been made. To hold otherwise would be to ignore reality.

[156] Mr Burns referred to the case of *Fairfax New Zealand v C*[60] which dealt with the issue of non-publication orders and diversion. The outcome of diversion frequently is that the prosecution will seek leave to withdraw the information. The effect of that is similar to a discharge without conviction. The Court of Appeal made it clear that there was jurisdiction to make a non-publication order in such a case.[61]

[157] I reject Mr. Thwaite's argument that a non-publication order cannot be made upon a discharge without conviction

[60] [2008] NZCA 39
[61] The Court's words were "if publication of the defendant's name is not suppressed" – see above

Publication Did Not Contravene Precise Orders

[158] Mr. Thwaite's next line of argument is that the publication did not contravene the precise orders that the Judge made. For example, in the charge the subject of information 090040228331 the person the beneficiary of the non-publication order had a stage name and a proper name. The publication, using a combination of words and pictures, revealed the stage name but that there was no evidence linking the stage name with the "real name" of the person. Given, argues Mr. Thwaite, that the non-publication order related to the name in the information, the change cannot be made out.

[159] This submission overlooks two things. The first is that people are often known by other than their given names. Mr. Slater himself provides an example. A name is no more and no less than an identifier, although in days gone by it was thought that the revelation of a proper or given name to another gave that other power over one. The real enquiry is whether or not the information is sufficient to identify an individual be it by stage name or proper name. In the case of the individual the beneficiary of the non-publication order in the charge 090040228331, the publication of his stage name – in these days of the cult of celebrity – was sufficient identifying information and the use of the words and pictures amounted to particulars.

[160] This argument is advanced in another guise when it comes to the identification of other beneficiaries of non-publication orders – see informations 100040283299 and 10004003298-9.[62] That the name published by Mr. Slater does not match the name on the information, or that it is an abbreviation of a full name, or that it is a full name of an abbreviated name that was used in Court matters not at all. What is sufficient is that there is sufficient information given to identify a particular individual. "John Smith" is still "John Smith" even although his full name may be "John Aloysius Smith" or he may be entitled to be known by an honorific such as Doctor, Judge or Sir John. The reference is still to the same person. As Mr. Burns put it, using the immortal words of Gertrude Stein "A rose is a rose."[63]

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[62] The latter two information relate to Michael Dobbyn

[63] Gertrude Stein *Sacred Emily* – in the poem, ironically enough, Rose was the name of a person

[161] I reject this submission.

Publication Not in An Official Language

[162] Mr. Thwaite also advanced the novel argument that in the case of the pictograms and binary code, publication was not in a language that was official – being other than English, Maori or sign – and therefore was not properly copmprehensible.

[163] I asked Mr Thwaite if he was suggesting that publication of a name in its French equivalent or in cursive Arabic script would amount to a non-publication. He argued that conclusion was correct.

[164] Without going into a lengthy dissertation about the nature of written language as a form of communication by symbols, this submission simply ignores reality. Publication does not demand that a particular language or idiom be used. The statute does not say that. Information can be conveyed by means of a recognised language, by way of pictograms or by way of binary. Information may be conveyed in a way that is comprehensible. It is the informing quality of the communication that is important. Abbreviated "text-speak" communicates information just as effectively as a carefully crafted and grammatically perfect sentence.

[165] I reject this submission

Expiration of Order

[166] In respect of Informations 090040282329-30 and 83483 Mr. Thwaite argues that the non-publication orders that were made were interim only and were not in full force and effect. He refers to s. 140(2) which relates to the effect of the order – "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."

[167] Mr. Thwaite's argument is that an interim order may be made for a fixed time – say to expire on a date specified in the order – but if no such expiry date is specified, the order comes to an end by operation of law when the case is next called unless it is renewed on such subsequent date. That may be so if the interim order is

stated as subsisting until the next court day, and I have made such orders in the past. But if no such precise time is set the interim order remains in force until further order of the Court. It allows the Court making the order to revisit the issue of non-publication at a later date. If the order is final then the Court making it is *functus officio* and the order can be revisited only by way of appeal or review. In the case of the information before me, the interim order was not cancelled and it is open to me to draw the inference, in the absence of evidence to the contrary, that the order remained in full force and effect.

[168] I reject this submission.

Information in the Public Domain

[169] Mr. Thwaite argues further that in respect of two of the informations there was sufficient information available in the public domain to identify the beneficiary of the non-publication order and by making further details available. In the case of Informations 090040282329-30 and 83483 the New Zealand Herald report provided certain particulars that could start a person upon a line of enquiry to ascertain the identity of the individual, although I would observe that any conclusion from such information would probably be speculative and not very precise.

[170] As far as the beneficiary of the order was concerned Mr Thwaite argues that the name would already have to be known to the individual decoding the pictogram for it to have any sense. This reverses the reality of the communication. It matters not that the name may be familiar or unfamiliar. What matters is whether or not there is identification of a person by name or particulars. If I follow Mr. Thwaite's logic, there can only be meaningful communication of information of which I am already aware or recognise. Taken to its logical conclusion the progress of knowledge must stop because A cannot communicate to B what that B does not know or recognise, and for communication to be meaningful there must be pre-existing knowledge on the part of B of the information to be communicated.

[171] A similar argument was advanced in respect of Information 100040282299 and Mr. Thwaite went to a considerable amount of effort to demonstrate that in respect of that beneficiary of the non-publication order there was a wealth of

information available for a person to identify that beneficiary by a process of deduction. That ignores the fact that Mr. Slater provided the answer to such an exercise by publishing the name. It is no justification that because one person commits an offence, another is justified in doing so.

[172] A similar argument was made in respect on information 10004009833. In that case there had been publication of the name of the beneficiary of a subsequent non-publication order. The first issue is, notwithstanding that, was an order made. The answer is that there was, by Judge Harding on 17 May 2010. That order was made pending the end of the trial. Once the order was made, publication within the ambit of s.14o(5) was prohibited and was an offence. The fact that the order may not have the effect of a total "blackout" of identifying information makes little difference, although, as I have observed elsewhere in this decision, the Courts have indicated that non-publication orders will be rare if the information is already in the public domain. That then leads to Mr. Thwaite's final and somewhat radical submission

The Order was Invalid and Made for Improper Reasons

[173] Mr Thwaite argues that the relevant order was invalid as it was made for improper reasons. Mt Thwaite expresses the argument in the following way. "

> The Order was based upon improper considerations such as:
> a) presumption of innocence\
> b) threat to career [4] which is hardly plausible
> c) speculation about the prospect of family reconciliation [6]
> d) attempts to steer the course of public debate [5] and [6]
> Hence it should not have been made, and is not a proper restriction on the right of free speech and the right to an open trial.

[174] In essence Mr. Thwaite was asking me to revisit Judge Harding's decision and declare that it was invalid. That is an untenable proposition. There is no authority for a Judge to declare a Judge's order invalid in circumstances such as this. The only way that can be accomplished is by way of appeal or review. I cannot go behind an order of the Court in the manner suggested by Mr. Thwaite, nor will I. I said at the beginning of this decision that this is not a case about whether or not the Court should make non-publication orders. It is a case about whether or not there has been non-compliance with those orders. Once it is proven that the orders have been

made and subsisted as at the date of the allegation, that is the end of the enquiry in that regard.

[175] Accordingly I reject this submission.

[176] I am grateful to Mr. Thwaite for the very detailed analysis that he has put before me. He acknowledged that most of the material he put before me was repetitive in nature and I have identified the underlying themes present in his argument and dealt with them. As I have stated I reject his arguments.

Finding on Liability

[177] I shall now proceed to consider whether the prosecution have established each element of each charge beyond a reasonable doubt.

[178] In his interview with Detective Murray, Mr. Slater acknowledged that he used the name "Whaleoil" as his "nom d'internet" (my term), that he was the owner of the Whaleoil domain name and that he posts articles that he himself has written or that are submitted to him for posting by others. As the person who enables the posting of content by both himself and others, Mr. Slater maintains control of the content of the blog and is the publisher of such material even although he may not have written some of it. I am satisfied that he was in fact the author of all the material to which I shall refer. Mr. Slater also maintains a certain amount of control over the content that is published. He was asked "You'll just publish it anyway?" He replied "If I agree with it. I won't publish something I don't agree with" – an ironic answer in light of the freedom of expression argument which his counsel has advanced.

[179] I am further satisfied that Mr. Slater was well aware of the "reach" that his blog had. Despite his protestation to Detective Murray that "I post things for my own pleasure not for anybody elses" it is clear that when he commenced his campaign about name suppression that he was writing to inform others of an issue that he thought was important. He wasn't writing just to amuse himself.

[180] I am satisfied that Mr Slater as the administrator and principal contributor to the Whaleoil blog decided that he would oppose the use of non-publication orders by

the Courts. He said so in a post on the Whaleoil blog dated 9 November 2009 and he acknowledged that to Detective Murray – "I don't agree with name suppression laws and am running a campaign to have them changed." It was clear that he would use the medium of his blog for that purpose. That is a perfectly legitimate form of activity. Political and protest activity are enhanced by the fact that the properties of the Internet extend and enable wide dissemination of information and allow everyone to become a publisher and express their views. He was exercising his freedom of expression right.

[181] The evidence is also clear from some of the posts by Mr. Slater that his campaign was going to go beyond legitimate protest and criticism and was going to enter the realm of "electronic civil disobedience" by the publication of certain names that were the subject of non-publication orders. He seems to have acted in the mistaken belief that for some reason such behaviour utilising the Internet was beyond the reach of the law, and that the Internet introduced an element unanticipated by the law when the Criminal Justice Act was enacted in 1985. He also seems to have employed a number of devices for communicating the names of persons who were subject to non-publication orders again in the mistaken belief that the only sort of rendering of a suppressed name could be in text, without being aware that the fact that information may be communicated in a number of ways that may still achieve a result prohibited by law and which may amount to identification by name, address, occupation or be particulars that identify such a person. Finally he seems to have been unaware of the dynamic of a blog which allows information to be communicated in a dynamic and cumulative form, along with enhancing information provided by links. Such information can amount to particulars or it may lead to identification by name, address or occupation. That cumulative property means that such disclosure may be by way of a running commentary, preserved on the blog.

[182] I shall now address each of the charges:

Charge 1 CRN 0900402833 - 28 November 2009

[183] I am satisfied beyond a reasonable doubt that a non-publication order was made by Judge Paul on 6 November 2009 and was in full force and effect as at 28 November 2009

[184] I am satisfied beyond a reasonable doubt that on 28 November 2009 Mr Slater posted an article on the Whaleoil blog entitled "Oh for Goodness Sake". In the course of that article Mr. Slater linked some of the text to a New Zealand Herald article of 6 November 2009 making it clear that the information that followed was related to that information. Mr Slater admitted to Detective Murray that he was the author of the article. He said "Yeah, I think I posted that one up."

[185] In this case particulars and the name were published. The particulars comprised a photograph with a caption describing that photograph together with another photograph with a caption describing the second photograph.

[186] Read together the photos and captions clearly revealed the stage name of the entertainer whose name had been suppressed by Judge Paul. In there the addition the the hypertext link to the article in NZ Herald of 6 November 2009 which provided a continuum of information using the linking properties of the internet. Bloggers commonly use information generated by others to enhance the content of their blog site.

[187] It matters not that the information and particulars were rendered in the form of illustrations which, when examined along with the caption information, disclosed the name. The wording under the second photo discloses the stage name of the entertainer in reverse order. I am therefore satisfied beyond a reasonable doubt that all of the elements of that charge have been made out.

Charge 3 CRN 09004028330 – 10 December 2009

[188] I shall deal with this charge before charge 2, because my findings in respect of this charge are related to the elements of the charge alleging a breach of s. 139. In saying that I remind myself that I must (and will) deal with each charge separately.

[189] In this case a non-publication order was made on 7 October 2009 by Judge Holderness and was of a continuing nature. It was in full force and effect on 10 December 2009. On 10 December there was an article published in the NZ Herald headlined "Olympian accused of rape gets ongoing suppression." Of those facts I am sure.

[190] On 10 December 2009 Mr Slater posted an article to the Whaleoil blog entitled "Another high profile name suppression." I am sure that Mr Slater made that post as part of his ongoing campaign against non-publication orders.

[191] The article reads as follows:

> "There are two stories in the media at the moment about alleged criminals and both have name suppression. One is a socialite but largely unknown woman and the other is a thug with form. I know the name of the woman but looking at the case and circumstance of her history this year I will not publish her name even though the name suppression will be lifted tomorrow at 5pm.
> The other piece of shit though I will name mainly because he is a piece shit of previous form. He faces a raft of charges including four charges of raping his wife, unlawful sexual connection with his wife and abduction for sex. This sportsman whose name and occupation also cannot be revealed also faces five charges of assault, assault with intent to injure and threatening to kill. He has been remanded on bail after being ordered to surrender his passport and not to contact any Crown witnesses. He will next appear in January when he will face the assault charges, in the Family Violence Court. The man is also scheduled to appear in the Auckland High Court in February for the more serious charges.
> I see no reason why this criminal, and he is a criminal being previously convicted and sentenced to four years imprisonment 1995, should have name suppression until at least January. Women especially are at risk from this guy. He has a history of violence towards children and towards women. If they are going to name a businesswoman drug dealer on Friday why isn't this prick being named name. In order to complete his first name you need to be a person familiar with bars in the viaduct and know Chinese (pictogram follows) this man was convicted and served four years for a violent offence in 1995."

[192] In this case the posting comprised both a full report, again a link to an article in NZ Herald for 10 December 2009 and a pictogram. Interpreting the pictogram reveals the suppressed name – it is a phonetic exercise and not a spelling one. It is made clear that an interpretation of the pictogram reveals the suppressed name and comprises particulars leading to the identity of the person. It provides details of previous convictions and indicates the offending was against his wife.

[193] Mr Slater was questioned about this report by Detective Murray and was asked about the interpretation of the pictogram. The interview was recorded on DVD

and I had the advantage of seeing and hearing the interview as it progressed and of observing Mr. Slater as he gave his explanations. I found them naive and evasive. He suggested that he posted the picture because "I thought they were interesting pictures". When asked what they meant his reply was "I don't know, you tell me " and that they could mean anything. He also made it clear that from his perspective the person should not have had name suppression because he was a violent criminal.

[194] The explanation that was given by M r Slater completely overlooks the article and its context when related to the pictogram as well as the link to the Herald article. The refutation of Mr. Slater's claim that the picture was "interesting" and that he did not know what it meant is made clear from the text which reads "In order to complete his first name you need to be a person familiar with bars in the Viaduct and know Chinese." By saying this Mr Slater is making the meaning of the pictogram clear. I am satisfied beyond a reasonable doubt that Mr. Slater published the name of the person in the pictogram and provided aids for interpretation for his audience.

Charge 2 – CRN 09004028329 – 10 December 2009

[195] In this case the charge is under s. 139 of the Criminal Justice Act 1985. It an offence to publish the name of or particulars likely to identify a person against whom a crime against s. 128 of the Crimes Act has been committed. This is a statutory protection for victims of certain crimes.

[196] I am satisfied beyond a reasonable doubt that on 10 December Mr Slater post an article to the Whaleoil blog entitled "Another high profile name suppression". That article (which is reproduced above) identified a person whose name was suppressed by way of a pictogram.

[197] The article also identified the victim of the offending in the following way. "He faces a raft of charges including four charges of raping his wife, unlawful sexual connection with his wife and abduction for sex."

[198] The particulars provided by the pictogram and the reference in the article to wife of the accused person make it clear who the victim was – the person upon whom the offence was committed. Decoding the pictogram reveals the name of the

accused which identifies the surname by which the complainant is known. Therefore the publication of the name and particulars in the article of 10 December leads inexorably to the identification of the person upon whom the offence was committed. I am satisfied beyond a reasonable doubt that this charge has been made out.

Charge 4 CRNS 090040228343 - 15 December 2009

[199] This charge alleges a breache of the order the subject of charge 3. I am satisfied beyond a reasonable doubt that as at 15 December 2009 the suppression order made was still in full force and effect.

[200] The breach upon which the charge relies is the continuing publication of the material and pictogram on 10 December 2009. The date of 15 December has been crystallised because that was the date of the interview with Detective Murray. That the posting was still present on 15 December 2009 (the printout of the webpage was taken by Detective Taviss on 16 December) is clear from comments that were posted by visitors to the website on that date. The posting was finally removed on 23 December after a letter from the Police was delivered to Mr Slater. He subsequently published the name as an "interesting name" on 24 February 2010 but that publication is not the subject of a charge.

[201] I am satisfied beyond a reasonable doubt that the charge has been made out for the reasons that have already been given. The fact that the identifying information was provided by a pictogram makes it no less information than by way of text or in a foreign language.

Charge 5 – 090040228344 – 15 December 2009

[202] The Crown has frankly conceded that there is a discrepancy in the date stated as the date of the non-publication order and Mr. Burns has stated he does not seek a conviction. Given the state of the information that is a proper concession to make. Information

Charge 6 CRN 1000400298 – 31 January 2010 and 7 CRN 10004003299 – Between 30 January 2010 and 1 February 2010

[203] Both Charges 6 and 7 rely upon the continuum nature of the blog to sustain them. Charge 6 relates a posting made by Mr Slater on 31 January. That posting stated the name Michael Dobbyn under the heading "Interesting Names". That was the name the subject of a non-publication order made by Judge McNaughton in the North Shore District Court on 29 January 2010 and which was in full force and effect at all relevant times. I can refer to the name because the non-publication order has lapsed.

[204] The continuum associated with Mr Dobbyn's case begins, however, on 30 January when Mr Slater posted an article entitled "Another kiddy-fiddler with Name Suppression." That article contains a hyperlink to an article which appeared in the NZ Herald of the same day with the headline "North Shore primary school teacher accused of paying boys for sex". The post on the Whateoil blog reads as follows:

[205] The article of 30 January 2010 reads as follows:

> "**Another Kiddie-fiddler with Name Suppression**
> A North Shore Primary School teacher appeared in Court yesterday accused of the sexual grooming of two young boys. He has been given name suppression. So now all North Shore middle aged male primary school teachers are smeared with these heinous accusations. If you think that isn't bad then just consider how few male teachers there are on the North Shore, then consider how many are middle aged."
> If I was an innocent middle aged primary school teacher on the North Shore I would be ropeable. Not only that, given the nature of the offending I would almost guarantee that this teacher has been told to stay away from children. Though with his name suppression no-one can possibly know who he is in order to report him if he is seen hanging around playgrounds or schools.
> Worst still the Teachers Council has said neither the man nor his school had informed them of the charges and only became aware of the charges after they were contacted by repeaters (sic) from the Herald.
> Children are at risk here from a sexual predator and the Judge thinks his name should be suppressed.
> THE PROSECUTION ALLEGES... (involving two male victims)* two charges of indecent assault on a boy under 16 *two charges of entering a monetary arrangement with a boy aged 16 to allow the teacher to perform sexual acts on him. *Two charges that he arrange for a boy under 16 to travel with him with the intention of committing an indecent act on the boy. So not only was he molesting them himself, he was also pimping them out to other sickos. It disgusted me that the Judiciary is protecting the name of this man and at the same time making every other male teacher on the North Shore suspects as well.

[206] As at 30 January 2010 there was nothing unremarkable about Mr. Slater's post. At that stage it could be seen as part of his legitimate campaign against suppression orders. However, the postings continue.

[207] On 31 January 2010 a lengthy post appeared on the Whaleoil blog entitled "School says name him". The article suggested that there was concern on the part of the school Principal and the Board of Trustees who were concerned at the suspicion that may fall on all male primary school teachers on the North Shore. I am satisfied that the posting was made by Mr. Slater. It reads as follows:

> "**School Says Name Him**
> The school at the centre of the storm around all male teachers on the North Shore being branded vicariously through the action of a Judge granting name suppression for a kiddie fiddling teacher want the man named so that they can inform parents."
> There is significant New Zealand and overseas research that says by naming the offender it is likely to bring more victims forward and enabling a slam dunk prosecution. For someone to reach the age of this offender is he will have form at previous schools. Unfortunately the teaching fraternity operates is that any time some unsavoury details emerge they quit quietly, resign and move with a glowing reference tucked in the pocket from a relieved principal who doesn't have to deal with it.
> Luckily the principal of this school in this case is not prepared to stay quiet and neither is the BOT. Good on them. They should name him, they post a letter to all students not just for their peace of mind but for the hundreds of other parents who right now are contemplating whether to send their kids to school.
> I have already fielded dozens of calls from worried parents. Name this man, he will have committed other offences, other victims may come forward. Give the parents of the North Shore peace of mind. The Government must act. If they can change under urgency the defence of provocation because of one case adopt a private members bill about animals (well done Simon) then they sure as hell can move on this. The public aren't going to tolerate much more of this and I would bet I can find a suitable story every week from now until the election about inappropriate name suppression.
> My suggestion to North Shore residents concerned about the safety of their child at school on Tuesdays call their local MP and lobby them to change the law so more victims aren't created. If Simon "just-in" Bridges a newbie backbencher can get the ear of the PM about horrible treatment of animals to get an urgent law change then why can't Simon "fig jam" Power do the same.
> Right now it appears that the Government cares more about animals and the rights of paedos than they do about potential victims of kiddie fiddling teacher sickos."

[208] So Mr. Slater answered the call in the headline and on 31 January he posted Mr. Dobbyn's name as one of his "Interesting Names" which, I am satisfied, was often used by Mr Slater as a means of alerting his readers to the fact that this was a name which was subject to a non-publication order. Within the context of his post of 30 January 2010 with the enhanced Herald content available via the link, together

with the posting recording the desire of the school to have Mr. Dobbyn named, the juxtaposition of those pieces of information makes it clear that the "Interesting Name" identifying Mr. Dobbyn relates to the name of the person the subject of Judge McNaughton's order as well as the posts and articles of 30th and 31st January 2010. It is more than mere co-incidence that the "Interesting Name" should be published against a background of such a context. Postings on blogs are not necessarily made in isolation. Continuing threads become apparent. I am satisfied beyond a reasonable doubt that Mr. Slater published the name of Mr. Dobbyn whilst it was subject to a non-publication order.

[209] Charge 7 also relies on the "continuum" nature of blog posting and the interrelationship between the various posting between 30 January and 1 February.

[210] As I have observed, the first article in the sequence was published on 30 January 2010 and is linked to New Zealand Herald article of the same day with headline "North Shore Primary School Teacher Accused for Paying Boys for Sex." On 31 January was a further post which in brief contains comment from the school which supported the revelation of the identity of the teacher. Under the heading "Interesting Names" is the name Michael Dobbyn.

[211] The next day Mr Slater took the matter even further and on 1 February 2010 there appeared a photograph entitled Interesting Names and Photos. There was a photograph of Mr Michael Dobbyn with a caption underneath identifying his name.

[212] Although the caption and the photograph are exhibited without further comment it is my view that making this information available falls within the nature of a narrative that commenced on 30 January and continued until 1 February and is inherent within a blog.

[213] As I have earlier said a blog is essentially a continuum and what one must do is look at information that is provided on a blog in terms of context. Much material on blogs is cross-linked to other materials. This has been clearly demonstrated in respect of other charges faced by Mr Slater and indeed this charge where a comment upon the suppression of the name of a teacher was linked to an NZ Herald article.

Because the blog enables earlier material to be accessed it is clear that the provision the name and photograph within the context and continuum of the blog can only be linked to the earlier narratives on the case that have been provided by Mr Slater. Had there been no earlier commentary on the case in question and the posting were isolation, even within the context of a blog it would be difficult to describe such a posting as a report or account of the proceedings before the Court given the earlier definition that I gave of that in my decision on the no case submission. However publication of the material in a continuum and within the context of a blog is an entirely different situation.

[214] A blog has different qualities from a daily newspaper. Although it could be argued that a publication of a commentary on one day and the publication of a photograph on the next are isolated in time and space and within the context of a newspaper that may well be the case, the qualities and properties of a blog present a continuum of information which when read all together in this particular case reach a climax with the revelation of a name and photograph of Mr Dobbyn.

[215] I am satisfied beyond a reasonable doubt that for those reasons there was publication of Mr. Dobbyn's name and photograph which was in breach of Judge McNaughton's order and which was still in full force an effect at the time.

Charge 8 CRN 10004028329 - 7 February 2010

[216] On 5 February 2010 Judge Fraser made a non-publication order in respect of a person and which was in full force and effect during the continuum of this offending

[217] The publication in this case once again relies upon the continuum nature of a blog. On 7 February 2010 the name which had been suppressed with details describing his profession as that of "Doctor" was posted on the Whaleoil site as an "Interesting Name." I have already made an observation about Mr. Slater's penchant for puzzles and encoded or hidden messages and once again this was a means of alerting his readers to the fact that this was a name which was subject to a non-publication order. On the same day an article about Judge Grant Fraser, the Judge

who made the non-publication order, appeared on the Whaleoil blog. The article reads as follows:

> "**Judge Grant Fraser**
> Judge Grant Fraser is the Judge who thinks that 300,000 pornographic images help by the convicted man is on the light side of offending, he also wants the man to continue on his career uninterrupted by the this little scrap with the law and so has sentenced him to home detention (so he can continue his personal habit in comfort) and he also fully suppressed his name. The Manuwatu Standard has come out swinging against judicial meddling by Judge Grant Fraser (this sentence contains a link to the Manuwatu Standard).
> If there were any lingering doubts that the guidelines for suppressing names when this country needed strengthening, the case detailed in today's Manuwatu Standard should shatter them.
> The creeping secrecy pervading our justice system has long since passed what the public should accept as a reasonable restriction on their freedom of expression in order to safeguard the administration of justice.
> The decision to suppress the name of a prominent Manuwatu man convicted of downloading pornographic images of children is a salient example of how the principle of open justice has been reduced to little more than a passing mention before a Judge abdicates his or her duty to ensure our public court system belongs to the people.
> Judge Grant Fraser's reasons for banning publication of this man's name and occupation are breathtaking in their flimsiness, placing too much weight on the interests of the offender, and too little on the interest of the public.
> For Judge Fraser to say publication of the man's identity was not required because none of the thousands of children pictured were New Zealanders is logically outrageous. Such an argument requires one to believe this man investigated the background of each of his young victims to determine they were not from this country. Thus Judge Fraser believed that had the man known the children were New Zealanders he would not have downloaded the images? But what is most alarming about Judge Fraser's decision was his view that the offender's status in society should have afforded him special protection from publicity."

That is tough stuff and wholly accurate. Judge Fraser said:

> "The punitive consequences are more extensive for you than for others, particularly in light of your position, your achievements and the consequential outcome."

It is this statement above all others, that exposes the Judge's decision not only as poor, but as an insult to the central tenant of justice – that it applies to everyone equally. Publicly revealing an offender's name will have different consequences for individuals depending on their life situation. It is not the Court's to attempt to manipulate those consequences to make them equal for everyone. It might sound paradoxical, but justice isn't always fair.

Those who hold a high social status must accept that with it comes greater scrutiny when they behave in a manner unbecoming that status. There cannot be one set of rules for them and another for everyone else.

The Law Commission has recommended the Government raises the threshold for name suppression and sets clearer guidelines on how it should be applied. What happened in the Palmerston North District Court yesterday might not have exposed

the identity of a sexual deviant, but it has revealed how important it is for the Government to adopt those recommendations.
Yeah Simon "FIGJAM" Power. Pull your finger out. We have a situation in New Zealand now where the Government seems to care more about dogs and animals than victims of crime.
THIS IS NOT the first time Judge Grant Fraser has meddled with the intent of the law. A quick google reveals a crim-hugging liberal menace to the people of Manuwatu.
A Massey University student who accidentally shot a friend while out hunting possums has escaped conviction in what a Judge called a unique and unprecedented case.
Judge Grant Fraser also prohibited publication of the student's name when he appeared before him in Palmerston North District Court on Friday. The student was ordered to pay the victim, whom Judge Grant Fraser said had made a "miraculous" recovery, $5,000 for emotional harm...
... He added that publication of the defendant's name would hamper his ability to "move forward" and would impact upon his rehabilitation.
So why does this Judge like placing name suppression on cases so people can get ahead. They have committed crimes and have been convicted and the one thing missing is shame. They can carry on as if nothing bad had happened. This is the liberal elite at its worst, cosseting criminals in cotton wool, so they don't feel bad about what they had done.
Judge Grant Fraser is not a stranger on the other side of the bench either; a man who suffered a broken leg and cracked ribs when a District Court Judge collided with his moped has described the $1,800 reparation ordered in the case as an insult. Judge Grant Fraser, of Palmerston North, who admitted a charge of careless driving causing injury, was disqualified from driving for six months and ordered to pay reparation. While driving in Tauranga in January the Judge collided with moped rider Selwyn Parker who suffered a broken leg, cracked ribs and bruising.
He was sentenced in the Wellington District Court on Friday. Chief District Court Judge Russell Johnson said it was clear Fraser remorseful at what had happened.
The Judge was ordered to pay $1,800 in reparation for emotional harm.
So Judge Grant Fraser got a nice little helping hand from fellow Judge Russell Johnson who pinged him just $1,800. Compare that to the other case where above where Judge Grant Fraser decided that similar injuries warranted $8,000 in compensation. It does seem that if you are a celebrity, a Judge, a doctor, a lawyer or accountant that you get special treatment before the Courts and the boy clubs look after their own, not to mention that the Judiciary seem to have taken a rather simple but flawed law and applied it rather liberally in order to give criminals carte blanche with access to name suppression.
The Judiciary can't be trusted. It is time for minimum sentencing and removal of Judges' discretion as they have demonstrated without a shadow of doubt that they can't be trusted to follow the wishes of the people. Judges have lost touch with society.
Cross posted at shame.co.nz.

[218] The "interesting name" post of 7 February when cross referenced with the criticism of Judge Fraser for suppressing a name of a person involved in pornography links the two cases.

[219] The post, although purporting to be a critique of Judge Fraser's performance on the bench again links back to the "interesting name" in the paragraph relating to celebrity Judges, lawyers, doctors, accountants and allegations of special treatment.

[220] The continuum of dialogue that is a quality of the blog is evidenced by subsequent posts dated 8 February and 9 February 2010. On 9 February there is a post entitled "Random Impertinent Questions." The first three questions certainly link the article about Judge Fraser with the "interesting name." They read as follows:

> Do the Judge and Doctor belong to the same lodge?
> Do the Judge and Doctor play at the same golf club?
> Does the Judge share an interest with the doctor?

[221] It may well be said that these posts are subsequent to that of 7 February 2010 but it must be remembered that there were two posts of 7 February 2010 – the "interesting name" post and the post about Judge Fraser. The continuum of commentary through subsequent dates which continue through 11 February along with other posts on 10 February together with a subsequent post on 24 June 2010 make it abundantly clear that the "interesting name" is linked to the name that was suppressed by Judge Fraser.

[222] I am satisfied beyond a reasonable doubt that the continuing posts about Judge Fraser and the "Doctor" read together with the "Interesting Name" of 7 February clearly identify the person by name and the offence has been made out.

Comments on Charges 6, 7 and 8

[223] In all of these charges I have referred to the continuum of information made available on Mr Slater's blog. I gave consideration to amending the charges pursuant to s. 43 of the Summary Proceedings Act to reflect that the offending took place, in the case of Charge 6 between the 30th day of October and the 31st day of October, in the case of charge 7 between the 30th day of October and the 1st day of February and charge 8 between the 7th day of February and the 11th day of February.

[224] I decided against that course of action for the following reasons:

a) Each of the charges relates to disclosure of the name the subject of the suppression order and, in the case of Charge 7 the photograph on a particular day.

b) To state a charge as occurring between one date and another, while having a certain attraction in these charges because of the developing nature of the information, generally is employed when there is some issue or concern about the precise date or time of the offending. The date upon which the publication of the name or identifying particulars took place is certain.

c) The context of the offending – the continuum quality of the blog postings, the developing narrative and the predictable way in which Mr. Slater signalled that the name that followed "Interesting Names" was a name the subject of a suppression order makes it when associated with other posts on the same subject on the same day or the day immediately preceding makes it unnecessary to state that the offending took place between certain dates. The second publication of Mr Dobbyn's name together with his photograph on 1 February 2010 links back to the disclosure of his name on 31 January 2010 and the information that accompanied that publication.

Charge 9 CRN 100040283301 – 11 January

[225] On 7 January 2010 Judge Davison made a non-publication order in respect of a person's name. I am satisfied beyond a reasonable doubt that the order was in full force and effect as at 11 January.

[226] This charge relates to the name that was posted on the Whaleoil blog on 11 January 2010 and which was posted in binary code.

[227] News articles in the Nelson Mail for 10 January and NZ Herald for the same date headline the fact that an ex-MP was before the court facing sex assault charges. On 12 January the NZ Herald published an article about Mr Slater making reference

to the fact that he had revealed the name of the former MP in binary code. The article contained commentary by Mr. Slater but that is not admissible.

[228] The binary code posted is, as one would expect, a number of lines of 1's and 0's. There is also an encoded heading in text and a comment at the end of the binary code which reads "And so the farce continues" – a clear reference to Mr. Slater's concerns about the effectiveness of suppression orders.

[229] There can be no doubt that the publication of this "encoded message" is similar to the publication of the pictogram. Although the identification of the person whose name is suppressed requires some decoding, the evidence of Mr Jacobs makes it clear that there are tools on the internet that enable a decoding of the message to be achieved in short order. It is made clear that the information relates to a person's name who is suppressed.

[230] I am satisfied beyond a reasonable doubt that the publication of the name in binary code constituted a breach of the non-publication order, albeit that it may take a little longer than it may take to read the name in text to uncover the name.

Charge 10 – CRN 10004009833 – 19 May 2010

[231] On 17 May 2010 in the Wellington District Court Judge Harding made an order suppressing the name of a person facing charges. I am satisfied beyond a reasonable doubt that the order was in full force and effect on 19 May 2010

[232] On 19 May a positing appeared on the Whaleoil blog. I am satisfied that it was made by Mr. Slater. He entitled the posting "Strange Name Suppression." The article contains an account of the case and the identification of the person the subject of the non-publication order is made in the following paragraph:

> "There is every reason that we should have concern that there is name suppression in this case since the complainant is the son of Wellington [Occupation Details] [Forename and Surname] who is on leave with full pay. This was all reported in the DomPost(hypertext link to article) and the Otago Daily Times (hypertext link to article) more than a year ago. Why the name suppression now."

[233] I cannot go behind the orders that were made. The case requires me only to find that the orders subsisted as at the date of the alleged offence and I have held that it was.

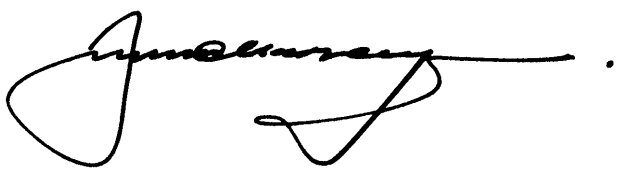
[234] There can be no doubt that there was publication of the name of the person in respect of whom the order had been made not only in the text of the post, but also by means of links to the newspaper articles. The charge is made out

[235] It is notable that in this case there were a number of other occasions when Mr. Slater disclosed the name of the person whose name was suppressed following the 19 May. The prosecution has chosen to bring the allegation in respect of one date only.

[236] That being the case I find that all the remaining nine charges have been proven beyond a reasonable doubt.

Conclusion

[237] The remaining nine charges having been proven to the standard required by law, the defendant will be convicted.



David J Harvey
District Court Judge