'Suppression Orders: A Fine Balance'

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Introduction

The courts constantly play a delicate balancing act between the rights of the accused and the greater interests of the community. This is certainly the case in the granting of suppression orders, where the public interest in open and transparent justice is weighed against the fundamental right of the accused to a fair hearing.

However, in recent years too many judges have been striking an unfair balance. The frequency with which suppression orders are granted in Victoria is disturbing. Jason Bosland, a senior lecturer at the University of Melbourne, has done a lot of work analysing the orders made. He says there were 1502 suppression orders over a five year period, with a substantial rise in the granting of orders between 2008 and 2011.

The interplay between open justice and the media

A central tenet of the common law is the notion that judicial proceedings will occur openly, where the public can not only attend but can also report the activities of the court to a wider audience.

The importance of this principle is grounded in a number of considerations. Firstly, open justice ensures the judiciary is accountable, improving the performance of judges and preventing them from abusing their power. This accountability also extends to litigants and their witnesses, with the public exposure often encouraging witnesses to come forward with probative evidence.

As McHugh J. said in *Fairfax v. Police Tribunal NSW*, 'The Publication of fair and accurate reports of court proceedings is ..... vital to the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice.'

The problem is that too many judges then go onto to say that 'but' and suppress reporting of the case or some aspect of it.

Gina Rinehart made multiple applications for suppression orders. The applications went to the New South Wales Court of Appeal and even to the High Court. The

Court of Appeal (Bathurst CJ and McColl JA) held that suppression orders should only be made in exceptional circumstances.

The comments made by Mr Justice McHugh appear so obvious. However, our system of open justice is under threat. An accused, worried by potential media interest in his or her trial, desperately looks for arguments to put to the Judge, to suppress any reporting. Judges, focused on a fair trial and getting on with the trial, sometimes agree to such orders. The media, under financial pressure, do not oppose as many of these applications as in the past.

The accused has a fundamental right to a fair trial. The public has a right to know what is going on in our Courts. The Judge has the often difficult task of balancing these two rights. Where they clash, the right to a fair trial should take precedence, but there are very few cases where such a clash cannot be remedied by a proper instruction by the Judge, to the jury. Even if there is a perceived risk of prejudice to a fair trial, it has to be substantial to justify the issue of a suppression order.

Open Courts

It is pleasing to note that the *Open Courts Act (Vic) 2013* and the *Court Suppression and Non-Publication Act 2010 (NSW)* reinforce the notion of open justice and freedom of communications. The Acts have a number of positive impacts for the media. Firstly they provide a higher threshold for the creation of suppression orders by implementing a general presumption in favour of disclosure of information and of holding hearings in open court. The Acts provide that these orders can only be made in specified limited circumstances where there is a strong and valid reason for doing so.

Secondly, the Acts ensure the standing of media organisations to appear to argue against a suppression order or to apply for its reviews. The difficulty is that the rivers of gold have disappeared for the media and they are not opposing as many applications for suppression orders as they did in the past.

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The Act also require an end date for the operation of orders. A positive development. They however allow the court to make Australian wide orders.

Trends

Granting of suppression orders

While the introduction of these Acts is a significant step toward quelling the frequency with which suppression orders are granted in Victoria and New South Wales, I must say that I have not noticed a drop in the number of orders being made.

I still receive multiple notifications every week from Victorian courts and what seems to be an increasing number from New South Wales, alerting me to the application or granting of yet another suppression order.

Suppression order notice requirements

While the Victorian Act requires that the media be provided with three days notice of an application to suppress material, I have found the notice requirements are rarely complied with in practice. This essentially prevents the media from effectively opposing such orders.

Online publications and the jury

An argument often advanced for a suppression order is that the jury will be influenced by what they have seen or heard in the media and frequently, what they see online.

As the High Court said, 'there is nothing remarkable or singular about extensive pre-trial publicity especially in notorious cases such as those involving heinous acts'. The Court added that the 'unfair consequences of prejudice or pre-judgment arising out of extensive adverse pre-trial publicity, was capable of being relieved against by the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury.'

In addition, many States and Territories now have legislation making it an offence for a juror to engage in independent enquiries such as on-line searches. Thus any judge who contemplates making an order that the media take down historical internet material would be assuming that jurors were going to deliberately themselves break the law.

The New South Wales Court of Appeal in Ibrahim and the Victorian Court of Appeal in Mokbel have set the ground rules. I have expanded them below:

(i) Historical archived articles are not displayed on the face of the newspaper website as available and contemporaneous material;
(ii) They lay passively in the newspaper electronic archive until they are accessed;
(iii) They need a positive act of searching by a third party;

(iv) A third party would be more likely to search using a recognised search engine such as Google or Yahoo, rather than going directly to a newspaper site;
(v) There should be proper instruction to the jurors by the presiding Judge;
(vi) Many Australian jurisdictions have a statutory provision making it an offence for a juror to access the internet researching an issue relevant to a trial that the juror is sitting in;
(vii) Jurors should be referred to that statutory provision; and
(viii) The New South Wales Appeal in Ibrahim and the Victorian Court of Appeal in Mokbel made it clear that Courts should not make orders that they cannot enforce (where the online publisher is outside the jurisdiction) or that are ineffective (where local media take out articles but there are still many online from foreign website).

In Victoria the Chief Justice compared searching on the internet with searching in a library and stated that 'it has never been suggested that a suppression (non-publication) order should be made requiring libraries that held newspaper article to embargo those articles or references in some other way, stopping the searches from having access to them'.

In New South Wales in the Ibrahim decision the Court said that 'as a matter of principle, to make the order effective, material must either be removed from any website globally to which access can be had from New South Wales or there must be an ability to prevent access by people living in New South Wales. The evidence did not disclose that either of these was a realistic possibility.'

Urgent Injunctions pre-publication

A related area to suppression orders is that of injunctions.

Injunctions have become notorious in the United Kingdom where celebrities have obtained injunctions to stop the media publishing and even an order that the media cannot publish that an injunction had been granted. Australia has seen a number of cases where high profile and high wealth individuals seek urgent injunctions when contacted for comment prior to the publication of a story. By granting such injunctions, the courts put journalists in an ethical quandary over whether it is worth seeking comment of the individual pre-publication with the risk that the individual will then seek an ex-partia injunction. Injunctions limited to defamation are few and far between. The plaintiff needs to establish a prime facie case of defamation, that damages would be an inadequate remedy and that the balance of convenience favours the granting of the injunction. In setting this principle the courts recognise the public interest in free speech. A greater challenge is where there is an allegation of breach of confidentiality.

Extension of Suppression Orders

Another worrying trend has been the willingness of the courts to expand the effect of suppression orders. For example, earlier this year a Victorian court granted a suppression order that will not expire until the death of the applicant. The media cannot report that this witness had been linked to a number of murders, cannot report his prior criminal history or the fact that he had been in jail.

The court found the order was necessary to protect the safety of the applicant as a witness in a complex trial. However, I would have thought that all of the facts would have been known by the underworld.

Prejudicial Publication?

The Law Council of Australia, Media and Communications Committee submission to the Attorney General's Department in this area made the following point: 'Very little research has been conducted into the actual risk that media reports can prejudice the administration of justice in particular cases. In cases were orders are made, there tends to simply be an assumption that media reports carry or would carry an unacceptable risk of prejudice and that juries will not be able to exclude from their deliberations matters they have read in newspapers, heard on radio or seen on television. A good illustration is the prohibition on the broadcast of the first series of the Underbelly television series in Victoria. It was assumed that a partly fictionalised dramatisation of crimes, some of which were yet to reach trial, would have a prejudicial affect on potential jurors, with the consequence that the whole of the Victorian community should be prevented from seeing the series. Little consideration was given to whether the matter could be adequately dealt with by directions to the jury. No weight was attached to the legitimate interests of the public in Victoria of seeing the television series, which was both critically acclaimed and Australia's highest rating program at the time. In fact, it is strongly arguable that the orders made in the Underbelly case were futile in a practical sense. The DVD series of Underbelly became the highest selling DVD of all time, and many Victorians simply circumvented the orders of the court by downloading the series ordering copies of the DVD on line or buying copies while interstate.'

Lawyer X

In April on this year we saw the Victorian Police Commissioner obtain an interim order restraining the Herald Sun from publishing any information that would identify a lawyer, identified only as 'Lawyer X'. Victoria Police then sought to extend that order to encompass all media. Again the order was surprising. Many lawyers and certainly those gangland figures would know exactly who Lawyer X is.

Rolf Harris

In March this year a court in the United Kingdom ordered that material about Australian entertainer Rolf Harris be suppressed to avoid influencing a jury. While the online and tablet formats of the Age refrained from publishing the story , Fairfax newspapers published in breach of the order. For the first time in Australia, a disclaimer was placed on the front page of the paper warning readers that mentioning the story on their twitter account or any other online medium may leave them in breach of the British order.

The disclaimer on the front page of the Fairfax papers is important for a number of reasons. It demonstrates the need for flexibility between print and online within the media industry to ensure a fair balance is struck between the rights of the accused and the role of in the media in informing the public of what occurs within the courts.

Perhaps most interestingly, it demonstrates the growing role of electronic media and the increased risk that accompanies publishing material online.

In the pre online era the Age published an article in breach of a suppression order in Perth. The article was to be deleted from the WA addition and published up the East Coast. By error it went to WA and was deleted from the East Coast edition. The Age was charged with contempt. We flew to Perth and apologised to the Court and were lucky to get out of it with a wrap across the knuckles.

With these Rolf Harris articles, we even deleted the by-line of the reporter. The reporter was sitting in court in London and could have been subject to contempt proceedings.

Mobile Devices and the Court Room

This growing role of electronic media is also presenting challenges for the courts, forcing them to tackle some unchartered legal waters. For example, cases involving high profile individuals such as Rolf Harris, Julian Assange and Oscar Pistorius attract significant public interest. With social media enabling the instantaneous dissemination of material, online news mediums are being used by journalists to provide the public with live updates from the court room through social media sites such as Facebook and Twitter.

Just as a court balances competing interests in granting a suppression order, so to do the courts in determining how these new forms of technology can be used in the court room. In the United Kingdom the Julian Assange bail hearings forced the courts to consider this question. A significant win for the media, and a recognition of the UK's faith in modern forms of communication, it was determined that

applications to use mobile reporting devices in court will be determined on a case-by-case basis.

Meanwhile, in Australia the use of mobile reporting devices in court is usually determined on a case by case basis.

Challenges

The media obviously respect suppression orders and take considerable steps to ensure that they do not publish in breach of an order. However, the area of suppression orders is often a minefield. With the Victorian gangland murder trials there were many many suppression orders. Similarly in relation to the New South Wales and Victorian terrorism trials. Even Gina Rinehart had at least six separate orders at one time. There has been this trend of late for high profile individuals to seek suppression orders in order to circumvent embarrassment or damage to their individual or corporate reputations.

Solomon Lew, for example, sought an order to restrict medical coverage of a bitter legal stoush by the ex-spouses of his children, who were seeking access to $621M family trust fund. The Victorian Supreme Court held that the price of litigation may be embarrassing and cause unwanted publicity, but that these are not reasons for the court to make a suppression order. They sighted with approval *John Fairfax Group Pty Limited v Local Court of New South Wales*, in which Kirby J. stated that 'otherwise, powerful litigants may come to think that they can extract from the Court protection greater than enjoyed by ordinary parties whose problems come before the Courts and maybe openly reported'. While initially successful, the Court of Appeal sighted with approval the proposition that 'in general .... parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. '(*R v Legal Aid Board: Expartia Karm Todner*)

These multiple orders are a nightmare for editors, news directors and pre-publication media lawyers, always faced with deadlines.

Conclusion

Our legal system is based on the principle of open justice. Justice must not only be done but must seem to be done. Far too many Judges mention the principle of open justice but then say 'but'.

Where there is a risk of prejudice to a criminal trial there are many cases in which a strong direction to the jury will suffice. The media must be vigilant in continuing to oversee the work of the courts and oppose the granting of suppression orders in appropriate cases.

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