ARTICLE:

MORE ON SUPPRESSION AND THE INTERNET IN NEW ZEALAND

By **Ursula Cheer**

In the previous issue, I analysed a New Zealand case known as the 'cyber memory' case, which restricted court reporting on the internet and attracted world-wide media coverage and interest. In this note I report on the final outcome of that case, and on a prominent retrial in the High Court in which the judge has been very concerned about media using live streaming on the internet to report the on-going trial.

In the 'cyber-memory' case, Judge Harvey initially made a partial non-publication order which allowed the publication of reports about the particular proceedings in contemporaneous broadcasts or publications, but prohibited accounts on the internet, or by way of placing stored audio, video or text files on the internet.[1] In reviewing the decision, he affirmed it for reasons detailed in my previous note.[2] These decisions were not well received, particularly by New Zealand media and overseas commentators such as American bloggers who suggested such orders restricted freedom of expression and were unenforceable.

In the original two decisions, the judge was attempting to pre-empt a 'cyber memory' effect which he considered would turn harmless contemporary publication of material about the early trial proceedings into prejudicial publication a year later during the actual trial. However, as he completed the reasons for the second decision, Judge Harvey received late submissions from media interests. He agreed to hear further argument, and on 12 September 2008, APN Holdings, Fairfax, TVNZ, Mediaworks, RNZ and NZPA applied for an order that the original non-publication order be set aside. I noted previously that it seemed likely that any third decision would have to deal directly with arguments relating to the Bill of Rights, with the scope of the order and once again, with enforceability and effectiveness. This proved to be the case.

The application to set aside the original order was granted, for several reasons.[3] First, the judge appeared to recognise that his reasoning might not pass scrutiny under the New Zealand Bill of Rights Act 1990. Under that Act, any decision which might limit freedom of expression must balance the competing interests at stake, to ensure that any limitation which results is not disproportionate to the harm it is attempting to cure. Counsel for the media interests argued that the judge had not done this previously, in that the earlier orders had been made to deal with concerns which were merely hypothetical.[4] An alternative argument was made that any Bill of Rights balancing should favour publication, and suppression should be based on specific prejudice or truly extreme circumstances from which prejudice can be inferred.[5] Here the judge acknowledged the harm he had identified was only potential – in fact it was insufficiently identified.[6] This was because any prejudice to a later fair trial was simply a vague unclarified one that had not yet crystallized. The judge did not find any prejudice in releasing the names of the offenders to mainstream media at the initial stages, and so was simply guessing about the later effects of this information, or indeed any other information, on a later trial.

Second, Judge Harvey accepted that his theory about 'documents that do not die' because of the internet was mitigated by clear evidence he received that media

[1] *Police v PIK [2008] DCR 853.*

[2] *New Zealand Police v PIKOrs, Unreported, Youth Court, Manukau, CRI 2008-292-000378, 3 September 2008, Judge Harvey. See Ursula Cheer, 'Suppression and the Internet: The 'cyber memory' case – a New Zealand response', Digital Evidence and Electronic Signature Law Review 5 (2008) 58 – 61.*

[3] *New Zealand Police v PIKOrs, Unreported, Youth Court, Manukau, CRI 2008-292-000378, 19 September 2008.*

[4] *Ibid, [30].*

[5] *Ibid, [31]-[32].*

[6] *Ibid, [52]-[53].*

would be well-able to remove stored information on the internet if it was found later to be prejudicial to an impending trial – in fact, he thought it could be removed for a particular purpose or for a particular period of time. This ability would have a subsidiary or indirect effect on third party search engines which update their indices, although the judge acknowledged that all instances of the material would not necessarily be eliminated from the internet, as it could be retained in archived sites or on social networking or blog sites. However, the judge's main concern, that relating to the retention of threads from mainstream media on-line coverage, would be removed.[7]

The judge did not accept that making an order apply to a particular medium such as the internet was discriminatory, however. He thought that assumptions about non-publication orders based on pre-digital information forms of control which could be enforced against centralised organisations have been displaced and now require a different approach. The judge referred to the internet as a 'new paradigm for the availability and dissemination of information.'[8] He concluded that there may be cases in the future when orders will be made based on differentiation between media in relation to non-publication. Judge Harvey was satisfied that 'the solution posed by a problem arising from the technology has a solution within the technology.'[9]

He acknowledged that partial orders suppressing aspects of reporting on the internet will never remove all worrying material from circulation, but in his view, they will be effective enough if they remove most of the material from most of the relevant audience group. The judge thought that any information retained in the system would be likely to be harder to retrieve and content may be 'buried in the noise' with the average juror lacking the technical skill to retrieve much.[10]

Therefore Judge Harvey concluded that although a partial order was inappropriate in this case, they remain a valid weapon in the arsenal available to judges to protect the right to a fair trial. In the general course of such cases, defence counsel may apply for partial suppression orders as a trial approaches or during it, and it would be expected that the trial judge would also give clear instructions to the jurors not to search the internet if such concerns exist. This sort of practical approach is becoming the norm.

The retrial

The internet has also been a concern in relation to media reporting a prominent three-month murder retrial in the High Court at Christchurch. *R v David Cullen Bain*[11] is the retrial of a now notorious murder case which resulted in Mr Bain being imprisoned in 1995.[12] The judge in this case, Justice Pankhurst, has been maintaining a meticulously cautious approach to applications by the media to cover the retrial in various forms. It is not hard to understand why. The venue has already been moved to ensure a fair trial for Bain. There is enormous public interest, and considerable public funds have been expended on the case. It is currently New Zealand's most famous retrial.

As is often the case now, it was the issue of internet coverage which caused some difficulty. As in the cyber-memory case detailed above, it is clear that the media need to fully inform the court what and how they intend to publish and how technology is being used. In Bain, the judge has had to deal with a court where the members of the media attending have overflowed into the public galleries. Applications for television, radio and still photography were granted, subject to the In-Court Media Coverage Guidelines 2003.[13] The media has had to cooperate, by sharing images to support decisions of the judge to limit the number of cameras allowed in the court and to restrict where filming may occur. The large numbers of the public wishing to attend the trial have been accommodated in an additional room in which CCTV footage of proceedings has been made available.

Additionally, print, television and on-line media applied to provide video coverage on their websites. The judge initially declined, because the media guidelines do not currently deal with internet coverage. Justice Pankhurst was not prepared to step outside these when the effects and implications of the new technology have not yet been considered. However, on hearing from the media, he granted approval for delayed internet coverage. This meant streaming could occur with a 10 minute delay and providing the relevant guidelines are applied as well. A day later, it became apparent to the court that TV3 was providing delayed streaming on its website, after it had ceased to pursue an application for

[7] *Ibid, [54]-[57].*
[8] *Ibid, [49].*
[9] *Ibid, [56].*
[10] *Ibid, [68].*
[11] *High Court, Christchurch, CRI 1994-012, CRI 2007-412, Panckhurst J.*
[12] *R v Bain High Court, Dunedin, T1/95, 21 June 1995, Williamson J. See also Karam v Solicitor General Unreported, High Court, Auckland, 20 August 1999, AP 50/98, Gendall J, which involved breach of a suppression order in the original trial by Mr Karam, who wrote and published a book about it (Joe Karam, David and Goliath (1997, Reed Publishing)). Mr Karam has strongly advocated Mr Bain's innocence and is assisting the defence in the current retrial.*
[13] *References to the application decisions cannot be published at this point in the trial.*

live streaming. The court revised the previous ruling and limited any internet coverage to conventional news coverage. Streaming was not permitted. Justice Panckhurst made it clear that the main reason for the decision was to prevent any coverage which would allow witnesses to observe the trial in advance of giving evidence.

Examination of mainstream media websites at this time revealed a wealth of video footage that could be downloaded about the Bain retrial while it was taking place. These do not give the full picture of the trial which live streaming would supply. However, arguably a witness who has not yet given evidence could build up a small or large, but rather disjointed, picture of the trial by looking at such websites. Such witnesses would be required to give evidence uninfluenced by any coverage they have seen, and to speak the truth as they know it to be. Clearly prohibiting live streaming can prevent some information being available to potential witnesses, but much video material is available in any event, and arguably live streaming would in fact give a more accurate picture than the extensive video coverage currently available on-line. It may be that a robust instruction to witnesses is the best approach in any event.

Questions about on-line coverage will continue to arise in relation to court reporting. In such cases, the courts, as they are required to do, must attempt to come to grips with new technology. However, they also rely on media for important information about how technology is affecting the industry. At the least, it seems clear the In-court Media Coverage Guidelines will need amendment to give assistance to the judiciary on the matter of on-line reporting.

Postscript

David Bain was acquitted on 5 June 2009. The blogosphere is alive with discussion both supporting and challenging the verdict.

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