51/08; [2008] VSC 466

SUPREME COURT OF VICTORIA

ANON 2 v XYZ

Kaye J

28 October, 12 November 2008

PRACTICE AND PROCEDURE – SUPPRESSION ORDER APPLICATION TO SET ASIDE ORDER THAT DEFENDANT BE PERMITTED TO DEFEND ACTION BY USE OF A PSEUDONYM – PRINCIPLE OF OPEN JUSTICE – WHETHER SUCH PRINCIPLE APPLIES TO AN ACTION IN THE INTERLOCUTORY STAGES – WHETHER APPROPRIATE TO GRANT APPLICATION.

XYZ, a defendant in an action for damages for a sexual assault, applied to a judge for an order prohibiting publication of any report identifying the defendant and an order permitting the defendant to defend the proceeding by the pseudonym XYZ. The application was granted and the proceeding went into the interlocutory stage. During this period, an application was made on behalf of the Herald & Weekly Times Pty Ltd to set aside the prohibition order so as to permit publication of reports of the proceeding identifying the defendant by his name.

HELD: Application refused.
1. The appropriate starting point is the principle of open justice, namely, that subject to certain exceptions, it is well recognised that the proceedings of a court of justice should be open to the public. As part of that principle, it has been established that the media, as the eyes and ears of the public, must not be placed under any undue restriction in reporting and publishing the proceedings of courts of justice.

2. However, there is a strong body of authority for concluding that the principle of open justice does not apply with the same force and vigour where a proceeding has not been the subject of a genuine hearing in court, as it does to court hearings involving the exercise of judicial functions and determination. That authority is based on the justification and basis of the open justice precept, namely, the fundamental principle that the judicial process be open to public scrutiny and comment. That justification has diminished relevance to process filed in court, in respect of which the judicial function has not yet been engaged.

3. In the present case, there had been little, if any, judicial work undertaken which could, on any sensible view, be the subject of public scrutiny in accordance with the open justice principle. In those circumstances, the underlying justification of the principle of open justice, namely, the importance of scrutinising the work of the court, and the considerations outlined by Gibbs J in *Russell v Russell* (1976) 134 CLR 495 as the foundations of the open justice principle, have diminished application to this proceeding to date.

4. The present application involves the balancing, on the one hand, of the more limited requirements of open justice which apply at this stage of the proceeding, against an assessment that publication of the defendant's name may adversely affect him in proceeding to defend the case at trial. Any public interest in knowing about the directions "hearings", which have thus far taken place, and the content of the proceeding, must be limited. Any derogation from the vindication of that public interest, by the continued suppression of the defendant's name, would be materially outweighed by the risk that publication of the defendant's name at this point might deter or inhibit him in defending the proceeding. While that risk is not susceptible of quantification, it is realistic. It is of real importance to the proper administration of justice, and to the maintenance of the integrity of, and confidence in, our system of justice, that the defendant, at least until trial, is not subjected to another bout of publicity which might adversely affect or inhibit his defence of the proceeding. The balance, at this stage of the proceedings, favours continuation of the order previously made. However, that balance may alter, particularly when the case reaches trial.

KAYE J:
1. In these proceedings the plaintiff claims damages, including exemplary damages, for a sexual assault which she alleges was committed on her by the defendant on 15 March 2004. Before the issue of the proceedings, Bongiorno J made an order on 18 August 2006 prohibiting the publication of any report which might identify the plaintiff, and permitting the plaintiff to commence the proceedings by the pseudonym "Anon 2". Subsequently, on 1 September 2006,

Mandie J, on the application by the defendant, made an order prohibiting publication of any report identifying the defendant, and permitting the proposed defendant to defend the proceeding by the pseudonym "XYZ". The Herald and Weekly Times Pty Ltd ("the applicant") has made application to me to set aside the order of Mandie J, so as to permit the publication of reports of the proceeding identifying the defendant by name.

2. In the application made on his behalf to Mandie J, the defendant relied on an affidavit of his solicitor, Ms Jan Moffatt, sworn 31 August 2006. As part of his order, Mandie J directed that that affidavit be placed on the Court file in a sealed envelope, only to be opened on the order of a judge. In order to enable the applicant to make its submissions before me, I permitted Mr Justin Quill, the solicitor who appeared for the applicant, and the solicitor who assisted him, to read the affidavit, subject to an undertaking by them to keep the contents of that affidavit confidential. I note that, in fact, before this application was made, Ms Moffatt had advised Mr Quill of a summary of the contents of the affidavit in any event.

3. In order to avoid revealing facts which may lead to the identification of the defendant, it is sufficient for me to summarise the affidavit shortly. The affidavit describes the defendant as a prominent sportsman. There was a preliminary investigation into the allegations against him by the police, but no charges were laid. There was considerable media interest in the matter at the time. The allegations carry a serious stigma, and would cause him stress and anxiety if his identity were revealed. The defendant has already suffered from verbal abuse from other participants in his sport and from spectators. This has had an adverse effect on the defendant's professional performance. If the defendant's identity were revealed, that would occasion to him considerable stress, undue distress and embarrassment. It would seriously affect his future career in the sport. In paragraph 21 of her affidavit, Ms Moffatt states:

> "The likely stress and embarrassment that would flow from publicity in this matter is such that, the publicity itself may provide a deterrence for the defendant to fully defend the action commenced. The defendant would thereby be caused considerable injustice."

4. In support of its application, the applicant relied on an affidavit of Mr Matthew Windley, an editorial assistant of the *Herald Sun* newspaper. Mr Windley produced, as exhibits to his affidavit, a large collection of newspaper articles relevant to the allegations made against the defendant in these proceedings, which were published in 2004 by the *Herald Sun*, *The Australian* and *The Age* newspapers.

Submissions

5. On behalf of the applicant, Mr Quill commenced his submissions by referring to the fundamental principle that proceedings should be held in open court. That principle should only be departed from in wholly exceptional circumstances. He submitted that those circumstances are prescribed by ss18 and 19 of the *Supreme Court Act* 1986. Mr Quill did not concede that the Court has an inherent power to restrain the third parties from publishing material, but he did not argue against the existence of that power. However, he submitted that if that power were relied upon, its exercise should be guided by the criteria specified in s19 of the *Supreme Court Act*.

6. Mr Quill further submitted that it is well established that potential embarrassment and distress, or damage to reputation, is not sufficient to justify the making of a suppression order. He relied on a number of authorities to that effect, including *The Herald and Weekly Times Limited v Medical Practitioners Board of Victoria*[1] and *The Herald and Weekly Times Limited v The Magistrates' Court of Victoria & Ors*[2]. Mr Quill submitted that, in essence, the affidavit of Ms Moffatt does not establish anything more than that, as a consequence of the publication of his name, the defendant would suffer distress, embarrassment or damage to his professional reputation.

7. Mr Quill further relied on the affidavit of Mr Windley as demonstrating that the allegations against the defendant in this proceeding have already been made, on a widespread basis, in the public domain, in circumstances in which the defendant was identified in those allegations. He submitted that that circumstance is relevant in determining whether the orders of Mandie J should be continued.[3] Mr Quill also relied on the fact that the proceedings have progressed beyond the original issue of the writ by the Prothonotary. There have been a number of directions hearings in the Major Torts List, and orders have been made by judges of this Court, including myself, at

those hearings. He submitted that the public has an interest in any process issued out of the Court, and that it has an additional interest in the free publication of the interlocutory proceedings which have thus far taken place. In addition, Mr Quill referred to the media reports exhibited to Mr Windley's affidavit. Those reports related to the initial allegations against the defendant, their investigation by the police, and the decision by the prosecuting authorities not to lay criminal charges against the defendant. Mr Quill submitted that if the media were not permitted to publish the name of the defendant in the present proceedings, the public would be misled as to the status of the "court process" relating to the matters which are the subject of this proceeding. He submitted that there is a public interest in the public being informed as to the progress of allegations such as those made against the defendant in the media, and in ascertaining that they have been the subject of civil process brought on behalf of the complainant.

8. In response, Ms R Doyle, who appeared on behalf of the defendant, acknowledged the principle of open justice, but submitted that it is not an absolute requirement. In particular, it must, where appropriate, give way to the more fundamental principle that the prime object of a court of justice is to secure that justice is done.[4] She cited a number of recent decisions, in which courts have been moved by that consideration to make a pseudonym order. Ms Doyle referred me, in that context, to the decision of Coldrey J in *Re Proposed Proceeding by a Plaintiff as* "PPP"[5], in which his Honour, in ordering suppression of a plaintiff's name in a proposed proceeding, also ordered that the defendant be designated by initials, on the basis of the "dictates of fairness". Ms Doyle also referred me to the decision of Nettle J in *BK v ADB*[6], in which his Honour was particularly concerned with the prospect that publication of the names of the plaintiff or the defendants might deter one of the parties from participating in the proposed action. Finally, Ms Doyle referred me to the ruling of Ashley J in *AAA v BBB*[7]. In that case, Ashley J considered that, because the subject matter of the proceeding tended to raise strong emotions in sections of the community, there was a risk, inimical to the proper administration of justice, that either the plaintiff or the defendant might be diverted or distracted in participating in the trial before him, should their identity be disclosed during the trial.[8]

9. Ms Doyle submitted that, based on the affidavit of Ms Moffatt, there is a risk that publication of the defendant's name might deter him from participating fully in the defence of the proceeding. She submitted that the earlier media publications relating to the allegations of the defendant, referred to in Mr Windley's affidavit, were now stale. While there was a significant burst of publicity during March 2004, the allegations have not been aired in the media, at least for four years. Thus while at one time the defendant's name may have been in the public domain as the subject of the allegations which are made in the statement of claim, a significant time has lapsed in which the memory of the public would have faded. Ms Doyle submitted that the relevance of the potential stress, embarrassment, and damage to the defendant's reputation, by identification of his name, is that those considerations might deter the defendant from defending the proceeding, or from participating fully in the defence of it, if his name were identified. Ms Doyle submitted that the proceeding is still in its interlocutory stages, and that the principle of open justice, while relevant, is of less import at that stage than when the proceedings are at trial. The case has been referred to the listing master to be set down for trial, and there are no further interlocutory steps anticipated in it. It is expected that the trial of the proceeding will take place in the latter part of 2009, or, at the latest, early 2010. Accordingly, Ms Doyle submitted that identification of the defendant would not serve the public interest, but, conversely, may adversely affect the defendant's commitment to defend the proceeding.

Principles

10. It was common ground between the applicant and the defendant that the appropriate starting point, for my consideration, is the principle of open justice, namely, that subject to certain exceptions, it is well recognised that the proceedings of a court of justice should be open to the public. As part of that principle, it has been established that the media, as the eyes and ears of the public, must not be placed under any undue restriction in reporting and publishing the proceedings of courts of justice.

11. During oral submissions, I raised a question as to whether, and how, that principle might be applicable to the issue which is before me, namely, the issue whether publication of the name of a party should be prohibited, where the proceeding has not, in a material sense, been the subject of a hearing in court. However that question was not the subject of argument before me.

I note that in *Re a former officer of the Australian Security Intelligence Organisation*[9], Brooking J considered that the then *Supreme Court Rules*, which permitted public inspection of documents filed in the court, indicated a legislative intention that the broad principle of open justice should apply to those processes. I observe that the current rules, introduced in 1987, contain similar provisions[10]. Thus, for the purpose of determining the application before me I shall accept, and act on the basis, that the principle of open justice is the relevant starting point for determining the application. However, I shall return to the question whether the current state of the proceedings has any bearing on the manner in which that principle should be applied.

12. The principle of open justice is, of course, well known and long established. It was expressly recognised by the often cited decision of the House of Lords in *Scott v Scott*[11]. The rationale of the principle has been discussed in a number of authorities. In *Russell v Russell*[12] Gibbs J stated:

> "It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view'. This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial, as distinct from administrative, procedure'."[13]

13. However, it is also accepted that the principle of open justice is not absolute, but is subject to exceptions. Sections 18 and 19 of the *Supreme Court Act* contain express provision for the Court, in an appropriate case, to order that the whole or a part of its proceedings be heard in closed court, and to make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from that proceeding. Section 19 prescribes the circumstances in which such an order might be made. In this case s19(b) is relevant, empowering a court to make an order prescribed under s18, if the court is of the opinion that it is necessary to make such an order so as not to prejudice the administration of justice. In addition to the statutory power, it is recognised that the Supreme Court, as a superior court, also has an inherent power to restrict or prohibit publication of the whole or part of its proceedings.[14]

14. The ambit of the inherent jurisdiction, to restrict or prohibit publication of a proceeding, is similar to that set out in s19(b) of the *Supreme Court Act*. For the purposes relevant to this decision, the inherent power of the court to prohibit or restrict publication of a court proceeding derives from the power of the court to do what is necessary to protect and secure the proper administration of justice in proceedings which are before it. In that context, the exercise of the inherent power is guided by the countervailing consideration of open justice. Thus, in the exercise of the inherent power, the Court will only prohibit or restrict publication of part or whole of its proceeding where it is properly satisfied that it is necessary to do so in order to avoid prejudice to the due administration of justice.[15] In *John Fairfax & Sons Limited v Police Tribunal of New South Wales & Anor*[16], McHugh JA stated:

> "The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the court room. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient."[17]

15. It is for that reason that the courts have consistently held that potential distress, embarrassment and damage to reputation are an insufficient basis, of their own, to justify the making of an order prohibiting or suppressing the publication of proceedings.[18] The reason for that apparently harsh principle was explained by Kirby P, in his Honour's dissenting judgment in *John Fairfax Group Pty Ltd (receivers and managers appointed) & Anor v Local Court of New South*

Wales & Ors[19], in the following terms:

> "It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms ... A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interest must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported."

Application of principles to this case

16. In applying those principles to the circumstances of the current case, it is, I consider, important to bear in mind that, for all material purposes, the current proceeding has not yet been the subject of any hearing in court. It was submitted to me, on behalf of the applicant, that there have been a series of directions hearings in the case, so that, if it is necessary to do so, the applicant is able to point to court hearings in which the public have an interest. However, when the record of the proceedings is examined, that submission has about it an air of unreality. The proceeding was issued on 6 September 2006. On 3 November 2006, Bongiorno J, who was then the judge in charge of the Major Torts List, made an order containing a series of directions in respect of the interlocutory steps to be taken in the case. Those orders were made by consent, "on the papers", and without either party attending in court. In essence, the orders provided for discovery, interrogatories, answers to interrogatories, the service of medical reports, the service of particulars of loss, and mediation. The directions hearing was then adjourned to the first directions hearing after 15 June 2007.

17. The matter next came before Master Evans on 15 June 2007. Counsel appeared on behalf of the plaintiff, and there was no appearance on behalf of the defendant. The Master, on that occasion, made a series of orders by consent, which, in essence, adjusted the timetable for interlocutory steps previously set by Bongiorno J in his Honour's order of 3 November 2006. Master Evans adjourned the matter to 7 December 2007. On that date, by a consent order made "on the papers", Master Evans further adjourned the directions hearing to 22 February 2008. On that date, as the judge in charge of the Major Torts List, I made a further order by consent, "on the papers", adjourning the directions hearing to 30 May 2008. Unfortunately, due to an administrative oversight (I was absent on circuit), the matter does not appear to have come on for directions on that date. However, subsequently, on 24 October, I made further orders, by consent and "on the papers", that the matter be referred to the Listing Master for setting down for trial.

18. Thus, all of the directions "hearings", which have thus far occurred, have been by consent, and all but one was on the papers. The directions which were given by the Court were largely of an administrative type, setting a timetable for procedures, required by the Rules, to take place. Apart from the application which is now before me, there has been no application involving any controversy or contest before this Court. Thus, there has been no "hearing" in court of other than the most formal nature.

19. In reality, this case is, to all intents and purposes, in the same position as any other case which has proceeded, unremarkably, through its interlocutory processes, and is now about to be set down for trial. As I understand it, the trial of this case is likely to occur in the later part of 2009, or early 2010. The question which arises is whether, at this stage, the public interest in the open scrutiny of court proceedings requires that I should make an order setting aside the *ex parte* order of Mandie J of 1 September 2006, in order to permit the publication in the media of the name of the defendant to this proceeding.

20. As I have stated, it is accepted by counsel for the defendant that the principle of open justice applies, notwithstanding the current stage of the proceedings. Certainly that concession is in accord with the views of Brooking J in *Re a former officer of the Australian Security Intelligence Organisation*, to which I have already referred.[20] However, Ms Doyle submitted that the dictates of open justice must be assessed in light of the current stage of the proceedings, and in particular in light of the circumstance that, at present, the case will not come on for hearing in court for more than one year.

21. In my view, there is significant force in the submissions made by Ms Doyle. The principle of open justice has been expressed, and justified, on the basis of the requirement that court hearings should be conducted, so far as possible, in public, so as to be open to public scrutiny. That process is considered to be important to the maintenance of public confidence in the work of the courts, and particularly in the work of those responsible for the conduct, and determination, of court proceedings. It is no coincidence that the statements of the principles, contained in the authorities, regularly speak in terms of the requirement that court hearings be conducted in public.[21] In his comprehensive, and often quoted, statement of the underlying purpose of the principle, Lord Shaw of Dunfermline, in *Scott v Scott* stated[22]:

> "It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice'. 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guides against improbity. It keeps the judge himself while trying under trial'. 'The security of securities is publicity'."

22. Similarly, in *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal*[23], in their joint judgment, Winneke P, Ormiston JA and Vincent JA stated:

> "The principle of open justice is deeply entrenched in our law. It rests upon a legitimate concern that, if the operations of the courts are not on public view as often as possible, the administration of justice may be corrupted. A court is 'open' when, at the least, members of the public have a right of admission. From this it may be thought ordinarily to follow that the media, in their various forms, are also entitled to communicate 'to the whole public what that public has a right to hear and see'."[24]

23. Clearly, there is substantially less, if any, force in the underlying rationale of open justice, where, to all intents and purposes, a proceeding has been issued, and has not, in a real sense, been the subject of any hearing in court. While I accept, for the purposes of this decision, that the principle of open justice nonetheless applies to the current application, logic dictates that, in determining how that principle affects the rights of the defendant in this case, I take into account that the requirements of open justice are by no means as imperative as those which apply when a case is the subject of a contested hearing in court, whether at trial or in its interlocutory processes. Put simply, any work undertaken by any judicial officer of this Court in this case to date – whether Master Evans, Bongiorno J or myself – has been almost entirely of an administrative type.

24. There are a number of cases in which a distinction has been drawn between court proceedings, to which the principle of open justice applies, and process filed in a court registry, which is not subject to the same principle. In *Smith v Harris*[25], Byrne J held that s4 of the *Wrongs Act* (granting immunity to fair and accurate reports of proceedings in any court of justice), and the common law defence of qualified privilege, do not apply to the publication of process filed in a court, which has not been the subject of a court hearing.[26] In reaching that conclusion his Honour stated:

> "It seems to me ... that there is a significant distinction between a writ of summons filed in the registry and the hearing in open court and that this distinction touches the policy underlying the immunity in question (in section 4 of the *Wrongs Act*). It is necessary to emphasise that the immunity under consideration is absolute; it is available even to a malicious and unjustifiable statement harmful of a person's character. It means that that person's right to a good reputation is subordinated to some other right. This other right is not the right to litigate, for it has been beyond argument for centuries that defamatory statements made in the furtherance of litigation are absolutely protected ... The dominant right is that which says that the court's proceedings must be open to public, so that the public has confidence in their integrity. A document prepared for, filed and even served is not in that sense part of a court's proceedings, at least until it is deployed as part of the judicial process. A like distinction between documents filed and served and documents deployed in court is observed with respect to discovered documents ... This distinction may be applicable, too, to affidavits which are filed in court and which may be never be read or tendered. It may be that the parties have compromised the proceeding before their use in court, perhaps in order that their private dealings contained in the pleadings or other documents be not made public. What good purpose would then be served for them or for the public if some reporter were permitted to broadcast these matters for the gratification of the curious public? Public interest is not to be equated with public curiosity."[27]

25. As the judgment of Byrne J in *Smith v Harris* makes clear, there is an important intersection

between the principle of open justice on the one hand, and the rule that, in defamation, common law qualified privilege only applies to the fair and accurate report of proceedings which have taken place in court.[28] The principle of open justice is the primary reason why qualified privilege is accorded, at common law, to a fair and accurate report of court proceedings.[29] It is significant that that principle has been held not to justify or require the extension of qualified privilege to those aspects of court process, which have not been the subject of a hearing in court.

26. The distinction between the application of the open justice principle to court proceedings, and its inapplicability to process filed and not referred to in court, is demonstrated by the judgment of Slicer J of the Supreme Court of Tasmania in *R v Clerk of Petty Sessions, Court of Petty Sessions Hobart; ex parte Davies Brothers Ltd*[30]. In that case, an accused was charged on two complaints with a number of sexual offences. On his first appearance before a Court of Petty Sessions, no charges were read out in open court and he was not called upon to plead. Further complaints were subsequently laid against him. The accused again waived the right to have the further complaints read out to him, and he entered pleas of not guilty through his counsel. A daily newspaper sought details of the complaints laid against the accused. That request was refused. The newspaper then sought prerogative relief to gain access to the details of the complaint. Slicer J granted that relief on the grounds that the complaints had been the subject of a proceeding before the Magistrate, and that the proceedings, including the plea made by the accused to the complaints, attracted the principle of open justice. In order that that principle be vindicated, the particulars of the charge, which were the subject of the accused's plea, were therefore amenable to disclosure.[31] In reaching that conclusion, Slicer J rejected the preliminary contention of the applicant newspaper, that the making of the complaints against the accused, without more, entitled the applicant to disclosure of the contents of the complaints. His Honour stated:

> "The making of a complaint does not attract the requirement of 'open justice' unless and until it becomes an issue between the parties. It does not attract 'public interest' immunity unless and until it enters the public forum of a court. The issue has long been considered in relation to the privilege accorded publication of defamatory material comprised in pleadings filed but not judged upon."[32]

27. The limited relationship between the principle of open justice and documents filed, but not used, in court proceedings, is also well illustrated by the decision of the New South Wales Court of Appeal in *John Fairfax Publications Pty Ltd & Ors v Ryde Local Court & Ors*[33]. In that case, an interim apprehended domestic violence order was obtained by telephone against the "fourth opponent", a serving magistrate in New South Wales. Five days later, Keogh LCM made an order, by consent, continuing the interim apprehended domestic violence order. The claimant, a daily newspaper, sought access in the local court registry to the originating documentation in respect of those proceedings. That application was refused by Syme DCM. The claimant then made an application to the New South Wales Supreme Court for prerogative and declaratory relief in relation to that ruling. The New South Wales Court of Appeal rejected that application. Spigelman CJ referred to the reliance, by the claimant, on the principle of open justice in relation to the proceeding which had come before Keogh LCM. His Honour noted that that "hearing" consisted of the making by the magistrate of a consent order, in the course of which "nothing more than the fact of a complaint and the fact of a consent was deployed". Magistrate Keogh, who made the order, was not obliged under the relevant statutory provision to have a hearing in relation to that order.[34] Spigelman CJ observed that "the principle of open justice is not engaged at the time of the filing of the proceedings. It is only when relevant material is used in court that it becomes relevant".[35] His Honour referred to the decision of Byrne J in *Smith v Harris*, and to the observations by his Honour that a document filed, but not deployed for judicial process, is not subject to the principle of open justice. Accordingly, Spigelman CJ rejected the submission that Syme DCM had erred in giving weight to the private rights of the fourth opponent, and in particular her rights to privacy, in determining the application for access to the court file.

28. Thus, there is a strong body of authority for concluding that the principle of open justice does not apply with the same force and vigour, where a proceeding has not been the subject of a genuine hearing in court, as it does to court hearings involving the exercise of judicial functions and determination. That authority is based on the justification and basis of the open justice precept, namely, the fundamental principle that the judicial process be open to public scrutiny and comment. That justification has diminished relevance to process filed in court, in respect of which the judicial function has not yet been engaged.

29. The principal basis, upon which the defendant opposes the current application, is that publication of his name might deter him in his defence of the current proceeding. In my view, it is now well established that in cases in which the principle of open justice is truly engaged – that is, where there is a court hearing – the courts have been prepared to close part or whole of their proceedings, or to prohibit publication of those proceedings identifying the name of a particular party, where the publication of that party's name might deter the party from the proceeding, or might affect the manner in which that party exercises its rights in the proceeding.

30. In *Scott v Scott*[36], Earl Loreburn expressed the view that if publicity would reasonably deter a party from seeking redress, an order for hearing, or partial hearing, *in camera* may lawfully be made. That principle persuaded Malcolm CJ, in *"TK" v Australian Red Cross Society*[37] to make an order permitting three plaintiffs to commence proceedings in the name "TK". In that case the plaintiffs, who were each haemophiliac, contracted human immuno-deficiency virus (HIV) as a result of blood transfusions. Malcolm CJ accepted evidence, proffered on their behalf, that they might be deterred from prosecuting their action against the Australian Red Cross Society, if their identities were publicly disclosed.[38] His Honour noted that in a recent proceeding, Young CJ of this Court had made a similar order under such circumstances.[39] The same consideration has moved Forrest J in *ABC v D1 & Ors*[40], and Nettle J in *BK v ADB*[41], to make similar orders, permitting a potential plaintiff to issue proceedings using a pseudonym, and prohibiting publication of the plaintiff's name. Finally, in *AAA v BBB*[42] Ashley J, in the course of a trial, rejected an application by members of the media to set aside an earlier order, which his Honour had made, prohibiting publication of the identities of the plaintiff and the defendant to the proceeding. In that case, the subject matter of the proceeding had given rise to strong emotions in the community. His Honour was concerned that publication of the identity of either party, before completion of the trial, might deflect that party from their ability to best advance their case in the trial which was then on foot.[43]

31. For the purpose of completeness, I note that the majority of the Court of Appeal of Queensland, in *J v L & A Services Pty Ltd (No 2)*[44], considered that the permitted exceptions to the requirement of open justice do not include an instance where a party might be reasonably deterred from bringing or defending an action by publication of that party's identity. However, that view certainly does not reflect the state of the authorities in Victoria. Further, it is in conflict with *dicta* contained in two decisions of the Full Court of the Federal Court.[45]

32. It is significant that there have been a number of recent cases in which orders were made, permitting parties to prosecute or defend the proceedings using pseudonyms, and prohibiting the publication of the names of those parties, where the proceeding had not reached the stage at which the issues in the case had been agitated in court. In those cases, the courts have made such orders by reference to criteria which were wider than the criteria which are applied in determining whether an exception to the rule of open justice, at the hearing of a case, has been made out. In *ABC v D1 & Ors*[46], Forrest J held that one basis, supporting the making of such an order, is that a party would suffer psychological harm as a result of publication of his or her name in the proceeding. That decision was applied by Warren CJ in *AX & Anor v Stern & Anor*[47], in which her Honour made an order, permitting two parents to bring proceedings using pseudonyms, because the publication of their names might result in psychological harm to their children, where the proposed proceeding involved a claim for damages by the plaintiffs arising out of the birth of their children.[48] In the unreported case of *Re a proposed proceeding by a plaintiff as "PPP"*[49], Coldrey J permitted a plaintiff to commence proceedings using a pseudonym, on the grounds that publication of the applicant's identity might exacerbate the plaintiff's psychiatric condition.

33. While considering those cases, it is worth noting that in two of them, the Court was also moved, at least at an initial stage, to require that the proposed defendant also be designated by initials. In *PPP*, Coldrey J considered that, because the proposed proceeding might adversely affect the reputation of the defendant, the "dictates of fairness" required that, at least at the initial stage, the defendant also be described by initials.[50] In *BK v ADB*[51] Nettle J was concerned with an application made *ex parte* on behalf of the proposed plaintiff. In making an order in favour of the proposed plaintiff, Nettle J also made an order that initially the identity of the proposed defendant should also be kept confidential. His Honour noted that he had not heard from the proposed defendants, and observed:

> "All I can say for the present is that it does not seem to me that the public interest necessarily requires that the proposed defendants' names be published now or during the course of the proposed proceedings, although it might be different when the trial is concluded."[52]

34. The foregoing review of the authorities, and of the principles underlying the concept of open justice, satisfies me that the approach of the law, to prohibiting publication of the identity of parties to litigation, is by no means as rigorous before any contested court hearing has taken place, as it is when the parties to litigation are engaged in a court hearing which is either contested, or of some substance. While, as I have stated, it is accepted that, for the purposes of this judgment, the principle of open justice is relevant to my determination of the application, nonetheless I accept the proposition advanced by Ms Doyle that the requirements of that principle are less stringent at this stage of the proceeding than at the trial of the action.

35. Thus, while the current application is based on the principle of open justice, it is important to bear in mind the current stage of the proceeding. As I have already set out, there has not been any hearing, other than in the most limited and formal sense, conducted by any judge or Master in the proceeding. Each of the orders made in directions hearings has been by consent. All but one of the hearings was conducted "on the papers". In those circumstances, the underlying justification of the principle of open justice, namely, the importance of scrutinising the work of the court, and the considerations outlined by Gibbs J in *Russell v Russell* as the foundations of the open justice principle, have diminished application to this proceeding to date. There has been little, if any, judicial work undertaken which could, on any sensible view, be the subject of public scrutiny in accordance with the open justice principle. In this context, I note that the applicant did not contend that any of the directions given, or orders made, thus far in the proceeding, were of such a nature as to attract any particular public scrutiny or comment.

36. Furthermore, the stage which the proceeding has now reached is relevant to an assessment of the basis on which the defendant opposes the application by the Herald and Weekly Times Limited to be entitled to publish and identify the name of the defendant in this proceeding. The interlocutory steps in the case are now complete. The trial of the action will not take place for at least 12 months. During that period, no doubt, the defendant and his advisors will be involved in preparing the defence for trial. The voluminous exhibit to the affidavit of Mr Windley, which was filed on behalf of the applicant, reveals that, when the allegations, which are now the subject of these proceedings, were first made against the defendant in 2004, the defendant was subjected to an extraordinary barrage of publicity by the print media. Ms Doyle calculated that in a period of two weeks in early 2004, the *Herald Sun* published 22 articles in respect of the allegations, two of which were on the front page. The defendant's photograph featured in a number of those articles. In the same time period, the *Age* newspaper published sixteen such articles, and the *Australian* newspaper some seven. In the next two months there was some further, but decreased, publicity given to the issue. Finally, in May 2004 the newspapers reported that the Victorian Police had decided not to lay any criminal charges against the defendant in respect of the allegations, which are now the subject of this proceeding.

37. During the initial period of two or so weeks in which the allegations against the defendant were given publicity, they were the subject of almost daily focus, particularly by the applicant newspaper. The issues arising from them were discussed, debated and commented on exhaustively and in some detail. The progress of the police investigation was the subject of a number of articles. Having had the opportunity to peruse the articles, it is fair to describe the content, tone and prominence of the publicity given to the issue at that time as, in a real sense, a trial of the issue by the media. Indeed, one of the articles contained in the applicant's newspaper used that particular phrase to describe the nature of the then publicity to which the defendant was being subjected.

38. That background is relevant in assessing the basis upon which the defendant, at this stage, opposes the publication of his name as the defendant to this proceeding. In particular, it is relevant to determining whether the defendant has established that the due administration of justice might be prejudiced in any way by the public identification of the defendant's name in this proceeding.

39. As I have stated, the defendant relies on an affidavit sworn by his solicitor, Ms Jan Moffatt.

In that affidavit Ms Moffatt referred to the attention given to the allegations against the defendant in the media in 2004. She stated that the publicity surrounding the investigation and the allegations made against the defendant had a "profound impact" on the defendant's life and reputation, both personally and professionally. As a consequence, the defendant suffered "considerable stress and anxiety". In his sport he was subjected to taunts and verbal abuse from opponents and from spectators. The publication of the defendant's identity in this proceeding would continue to be a source of considerable stress, undue distress and embarrassment to the defendant and his family. I have already set out paragraph 21 of Ms Moffatt's affidavit[53], which states that the likely stress and embarrassment caused by further publicity "may provide a deterrence for the defendant to fully defend the action commenced. The defendant would thereby be caused considerable injustice".

40. In my view, given the extent and nature of the publicity generated by the initial allegations against the defendant in 2004, the defendant has a substantial foundation for his concern that, if I made an order in favour of the applicant, that might well precipitate a further barrage of publicity against him. In light of the nature, prominence and tone of the previous tranche of publicity given to the allegations, I accept that any further publicity of the same nature would place the defendant under genuine stress and pressure, not just in his personal and professional life, but, more importantly, in his role in defending this proceeding. It is not possible to predict, with any degree of certainty, in a case such as this, whether any such apprehended publicity might deter, inhibit, or affect, the defendant in defending the proceeding, when the case comes on for trial. Those matters lie in the future, and are, at the moment, hypothetical. However, given the nature, content and extent of the previous publicity, given the serious allegations made against the defendant, and given the understandable stress which would be occasioned to the defendant should he be publicly identified as the defendant to the proceeding at this stage, I accept that there is a risk, as deposed to by Ms Moffatt, that such publicity may deter or inhibit the defendant in defending the proceeding. In my view, that risk is not fanciful or far fetched.

41. In particular, I consider that there is a real risk that the defendant may be adversely affected, in his approach to defend these proceedings, if he were made the subject of another bout of publicity at the stage at which this case is to be set down for trial. In my view, there is a real risk that, having already been subjected to one blaze of adverse publicity in connection with the issue, a second such episode, at this stage of the case, might undermine the defendant's confidence in the judicial system, and might undermine his confidence that, when the case comes on for trial in 12 months or so time, he will be able to withstand the strain and pressures of a public trial of the issues which are the subject of the pleading in this case. It is all too easy to ignore, or underestimate, the stresses and pressures imposed on litigants, particularly where the subject matter of the case in which they are involved concerns issues such as those which are at the centre of the present proceeding. Bearing that in mind, and bearing in mind the content of Ms Moffatt's affidavit, I am therefore persuaded that there is a real, and not fanciful, risk that should the defendant, at this stage of the proceeding, be identified, he may be deterred from or inhibited in fully defending the proceeding.

42. It is in light of that risk that it is important to bear in mind the stage which the proceeding has reached. The case has not yet come on for trial. As I have already indicated, the dictates of open justice are not as imperative or prominent at this stage, as they would be at the time at which this case comes on for trial. I emphasise that I am only considering the application in relation to the proceeding in its current state. In a sense, the application involves me balancing, on the one hand, the more limited requirements of open justice which apply at this stage of the proceeding, against my assessment that publication of the defendant's name may adversely affect him in proceeding to defend the case at trial.[54] In my view, any public interest in knowing about the directions "hearings", which have thus far taken place, and the content of the proceeding, must be limited. Any derogation from the vindication of that public interest, by the continued suppression of the defendant's name, would be materially outweighed by the risk that publication of the defendant's name at this point might deter or inhibit him in defending the proceeding. While that risk is not susceptible of quantification, it is, in my view, realistic. It is of real importance to the proper administration of justice, and to the maintenance of the integrity of, and confidence in, our system of justice, that the defendant, at least until trial, is not subjected to another bout of publicity which might adversely affect or inhibit his defence of the proceeding. In my view, the balance, at this stage of the proceedings, favours continuation of the order made by Mandie J. I stress, however, as has been recognised in other cases, that balance may alter, particularly when the case reaches trial.[55]

43. In support of his application, Mr Quill made two submissions based on the publicity which had occurred in 2004. First, he submitted that, by reason of that publicity, the name of the defendant had already appeared in the public domain in association with the allegations which are the subject matter of this proceeding.[56] However, as pointed out by Ms Doyle, although there was a blaze of publicity identifying the defendant as the subject of the allegations in early 2004, the media attention to that issue had all but ceased by mid 2004. Thus, this matter had not been in the public arena for some two years before the proceeding was issued, and some four and a half years from the current date. While, no doubt, public memories can be revived, I agree with Ms Doyle that the issue is, currently, stale.

44. Mr Quill also submitted that, if his client were not entitled to publicise the name of the defendant in this proceeding, then the public would be misinformed as to the status of the allegations made against him in 2004. Mr Quill referred me to the collection of newspaper articles exhibited to the affidavit of Mr Windley. He submitted that those articles disclose that although serious allegations had been made against the defendant, they had not been the subject of prosecution. If the public were not informed that the allegations are now the subject of civil process issued against the defendant, then, he submitted, the public would be misinformed about that matter. Further, he submitted that the identification of the defendant to these proceedings would vindicate a public interest in educating the public, and in particular women, that civil process is available to them if they are the victims of sexual assault.

45. In my view, that argument is without merit. First, there are presently on foot a number of proceedings in this Court, and in the County Court, by plaintiffs claiming damages for sexual assault. One such proceeding, of some notoriety, was the subject of appeal from the County Court to the Court of Appeal, and then to the High Court. That case, alone, attracted significant publicity. In my view, it cannot be credibly suggested that members of the general public could be ignorant of the right of any person to seek civil redress in this Court, should that person be the subject of sexual assault.

46. Further, I do not accept the submission by Mr Quill that unless the public are informed of the identity of the defendant, they will be misled as to the status of the allegations which were made against him in 2004. The newspaper reports, which were tendered on behalf of the applicant, simply stated that the allegations made against the defendant would not, at that stage, be the subject of criminal prosecution. The fact that members of the public may not know that those allegations are, currently, the subject of civil process, would not in any material respect cause the public to be misled about the administration of justice in Victoria.

Conclusion

47. Thus for the foregoing reasons, I conclude that the application, at this stage, should be refused. I emphasise that the conclusion which I have reached is based on the current stage of the proceeding. At this stage, I do not consider that the requirements of open justice are sufficient to outweigh the risk that if the name of the defendant to this proceeding were identified, the defendant might be adversely affected or deterred in defending the proceeding when it comes on for trial. Different considerations may apply at that stage, and that will be a matter for the trial judge.

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[1] [1999] 1 VR 267, 294-5 (Hedigan J).
[2] [1999] 2 VR 672, 679 (Beach J).
[3] See, for example, *Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47, 59 (Kirby P).
[4] *Scott v Scott* [1913] AC 417, 437; [1911-1913] All ER 1; 29 TLR 520 (Viscount Haldane LC).
[5] (Supreme Court of Victoria, Unreported, 27 August 1993).
[6] [2003] VSC 129, [15] to [16].
[7] (Supreme Court of Victoria, Unreported, 26 August 2004, BC9406139).
[8] BC9406139, at 11, 15 to 16.
[9] [1987] VicRp 70; [1987] VR 875, 878 to 879; 85 FLR 364.
[10] *Supreme Court (General Civil Procedure) Rules* 2005, Rule 28.05(1).
[11] [1913] AC 417; [1911-1913] All ER 1; 29 TLR 520.
[12] [1976] HCA 23; (1976) 134 CLR 495, 520; [1976] FLC 90-022; (1976) 9 ALR 22; (1976) 24 FLR 399; (1976) 1 Fam LR 11; (1976) 1 Fam LN N4; (1976) 50 ALJR 594.
[13] See also, for example, *Scott v Scott* [1913] AC 417, 477; [1911-1913] All ER 1; 29 TLR 520 (Lord Shaw); *John Fairfax & Sons Limited v Police Tribunal of New South Wales & Anor* (1986) 5 NSWLR 465, 481 (McHugh JA).

[14] *Scott v Scott* [1913] AC 417; [1911-1913] All ER 1; 29 TLR 520; *Re a former officer of the Australian Security Intelligence Organisation* [1987] VicRp 70; [1987] VR 875, 876; 85 FLR (Brooking J); *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324; (2004) 61 NSWLR 344, [38] to [45]; 148 A Crim R 522; 50 ACSR 380 (Spigelman CJ); *John Fairfax & Sons Ltd v The Police Tribunal of New South Wales & Anor* (1986) 5 NSWLR 465, 471 (Mahoney JA).
[15] *Scott v Scott* [1913] AC 417, 437 to 438; [1911-1913] All ER 1; 29 TLR 520 (Viscount Haldane LC), 446 (Earl Loreburn); *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324; (2004) 61 NSWLR 344, 365 to 366 [94] to [99]; 148 A Crim R 522; 50 ACSR 380; *ABC v D1 & Ors; ex parte The Herald and Weekly Times Limited* [2007] VSC 480, [45] to [52] (Forrest J).
[16] (1986) 5 NSWLR 465, 476 to 477.
[17] See also *John Fairfax Group Pty Ltd (receivers and managers appointed) & Anor v Local Court of New South Wales & Ors* (1991) 26 NSWLR 131, 141; 26 ALD 471 (Kirby P, dissenting), 161 (Mahoney JA).
[18] See for example *Scott v Scott* [1913] AC 417, 439; [1911-1913] All ER 1; 29 TLR 520 (Viscount Haldane), 463 (Lord Atkinson); *Herald and Weekly Times Ltd v Medical Practitioners Board of Victoria & Anor* [1999] 1 VR 267, 294 to 295 (Hedigan J); *Herald and Weekly Times Ltd v Williams* [2003] FCAFC 217; (2003) 130 FCR 435; (2003) 201 ALR 489, 498 [34]; 76 ALD 72; 54 ATR 39 (Merkel J); *Herald and Weekly Times Ltd v The Magistrates' Court of Victoria & Ors* [1999] VSC 232; [1999] 2 VR 672, 679 (Beach J); *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45 (Fitzgerald P, Lee J).
[19] (1991) 26 NSWLR 131, 142 to 143; 26 ALD 471.
[20] [1987] VicRp 70; [1987] VR 875, 878 to 879; 85 FLR 364.
[21] See, for example, *Scott v Scott* [1913] AC 417, 445; [1911-1913] All ER 1; 29 TLR 520 (Earl Loreburn); *Dickason v Dickason* [1913] HCA 77; 17 CLR 50, 51; 19 ALR 400 (Barton ACJ); *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495; [1976] FLC 90-022; (1976) 9 ALR 22; (1976) 24 FLR 399; (1976) 1 Fam LR 11; (1976) 1 Fam LN N4; (1976) 50 ALJR 594, CLR 520 (Gibbs J), CLR 532 (Stephen J); *John Fairfax and Sons Limited v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 481 (Mahoney JA); *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450; [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342 (Lord Diplock); *Herald and Weekly Times Ltd v Medical Practitioners Board* [1999] 1 VR 267, 278-279 (Hedigan J); *Moularis v Nankervis* [1985] VicRp 40; [1985] VR 369, 376-377 (Ormiston J); *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 299 (Street CJ).
[22] [1913] AC 417, 477; [1911-1913] All ER 1; 29 TLR 520.
[23] [2004] VSCA 3; (2004) 9 VR 275.
[24] Ibid [25] (citations omitted).
[25] [1996] VicRp 69; [1996] 2 VR 312.
[26] Ibid, 341, 347.
[27] Ibid, 341.
[28] See also *Gobbart v West Australian Newspaper* [1968] WAR 113, 119 (Jackson J); *Lucas & Son (Nelson Mail) v O'Brien* [1978] 2 NZLR 289.
[29] *Webb v Times Publishing Co Ltd* [1960] 2 QB 535, 559-560 (Pearson J); *Taylor v Hawkins* [1851] EngR 169; (1851) 16 QB 308, 321; 117 ER 897 (Lord Campbell CJ); *Lucas & Son (Nelson Mail) v O'Brien* [1978] 2 NZLR 289, 302-303 (Richmond J); *Kimber v The Press Association Ltd* [1893] 1 QB 65, 68-69 (Lord Esher MR), 75-76 (Kay LJ); *Allen v John Fairfax & Sons Ltd* [1971] 1 NSWLR 773, 778-780.
[30] (1998) 8 Tas R 283.
[31] Ibid, 300.
[32] Ibid, 293.
[33] [2005] NSWCA 101; (2005) 220 ALR 248; (2005) 62 NSWLR 512; 152 A Crim R 527.
[34] Ibid, 525.
[35] Ibid, 526.
[36] [1913] AC 417, 446; [1911-1913] All ER 1; 29 TLR 520.
[37] (1989) 1 WAR 335; [1989] Aust Torts Reports 80-273.
[38] Ibid, 341.
[39] *Re a proposed proceeding between "TC" as plaintiff v Australian Red Cross Society as defendants* (Unreported, Supreme Court, Victoria, Young CJ, 4 August 1989).
[40] [2007] VSC 481, [82].
[41] [2003] VSC 129, [10], [13].
[42] (Unreported, Supreme Court of Victoria, Ashley J, 26 August 1994; BC9406139).
[43] Ibid, at 12, 16 to 17.
[44] [1995] 2 Qd R 10, 44.
[45] *Herald and Weekly Times Limited v Williams* [2003] FCAFC 217; (2003) 130 FCR 435; (2003) 201 ALR 489, 499 [36]; 76 ALD 72; 54 ATR 39 (Merkel J); *Johnston v Cameron* [2002] FCAFC 251; (2002) 124 FCR 160; (2002) 195 ALR 300, 319 [90] (Finkelstein J).
[46] [2007] VSC 480, [68], [73].
[47] [2008] VSC 400, [11].
[48] See also *AB v DI* [2008] VSC 371, [8] (Kyrou J).
[49] (Unreported, Supreme Court of Victoria, Coldrey J, 27 August 1993).
[50] Ibid, page 4.
[51] [2003] VSC 193.
[52] Ibid, [16].

[53] Para [3], above.
[54] *Australian Broadcasting Commission v Parish* [1980] FCA 33; 43 FLR 129; (1980) 29 ALR 228, 236 (Bowen CJ); *ABC v D1 & Ors* [2007] VSC 481, [68] (Forrest J); *Reynolds v Panten* [2000] WASCA 412; (2000) 23 WAR 238, [41] and following (Wallwork J).
[55] Compare *BK v ADB* [2003] VSC 129, [16] (Nettle J); *AAA v BBB* (Unreported, Supreme Court of Victoria, Ashley J, 26 August 1994) BC9406139, at 14.
[56] *Herald and Weekly Times Limited v Medical Protection Board* [1999] 1 VR 267, 294-5.

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