47/07; [2007] VSC 480

SUPREME COURT OF VICTORIA

ABC v D1 & ORS; ex parte THE HERALD & WEEKLY TIMES LTD

J Forrest J

9, 12, 30 November 2007

PRACTICE AND PROCEDURE – SUPPRESSION ORDER – MATTERS TO BE TAKEN INTO ACCOUNT WHEN CONSIDERING THE MAKING OF A SUPPRESSION ORDER – THE USE OF PSEUDONYMS.

J FORREST J:

Analysis

64. I think that the following principles, in the context of this case, can be distilled from the authorities I have referred to:

65. First, that the principal rule is that judicial hearings should take place in open court: publicly and in open view, with no restriction on reporting. This is a fundamental precept underpinning the administration of justice.

66. Second, that in certain circumstances the administration of justice requires a qualification of the general rule. There will be circumstances where modifications of the general rule are necessarily made to ensure that the administration of justice is not frustrated. These exceptions are many and varied and cannot be prescriptively identified.

67. Third, that the test to be applied by the court in making a pseudonym order is, to use the words of the statute, whether it is necessary to do so in order not to prejudice the administration of justice.

68. Fourth, that a court, in determining whether to make a pseudonym order, is entitled to take into account the individual considerations affecting the person seeking the order and balance those against the principal rule of open justice in determining whether the administration of justice warrants the making of the order. Relevant to these individual considerations is whether there is a real risk of the party or witness suffering psychological harm as a result of publication of his or her name or the names of other parties. Also relevant is the real risk of a party not proceeding with an action in the event that he or she or another person is identified.

69. Fifth, that in certain circumstances, particularly those involving sexual assaults, it may be appropriate not only to suppress the name of the plaintiff but also to suppress the name of the defendant or defendants.

70. Sixth, that in determining whether to make such an order, a court is entitled to take into account the fact that there will still be a reporting of the proceeding and that the hearing itself will be conducted in open court, subject to the restrictions imposed by the pseudonym order.

71. Seventh, in determining whether it is necessary to make such an order, usually the proofs must be cogent and will not be satisfied by mere belief on the part of a party that the order is necessary. However, in certain cases a court can, in a practical sense, act on its own experience and draw appropriate inferences.

Application of the principles to this case

72. As I follow the argument on behalf of the plaintiff, it relied upon two propositions in supporting the order:–

> (a) That the plaintiff would suffer a deterioration in her psychiatric state if the defendants' names were published; and/or
>
> (b) That the plaintiff would not proceed with her case if the defendants' names were published.

73. It is not sufficient, as Mr Tobin argued, that an order should be made merely if the appellant holds a genuine belief that identification of the defendants might lead to her identification and thereby inhibit her in bringing the proceeding. In this case the correct question is whether the evidence establishes that there is a real risk that the publication of the names of the defendants would be productive of the plaintiff –

(a) suffering psychological damage herself as a result of such publication; and/or

(b) being deterred from continuing with the proceeding.

If these matters are established then they need to be balanced against the principle of open justice.

74. I turn now to the relevant considerations in carrying out this exercise.

75. On the one hand I take into account the importance of the general principle. I also take into account the fact that if I do not vary the order given the proposed settlement it is likely that the defendants' names will not be revealed in open court. Apart from this consideration the fact of the settlement is irrelevant – it matters not what agreement the parties may have reached about confidentiality.

76. I also note that other than identifying the singularly important principle of a court conducting its business in open court, no other consideration was pointed to by Dr Collins as to why the identity of the defendants should be revealed.

77. On the other hand, in determining this issue it is important, as Mahoney JA pointed out in *Local Court* (1991) 26 NSWLR 131, 163; 26 ALD 471, that one not lose sight of the individual who resists the publication. The evidence discloses that the plaintiff is in an extraordinarily fragile psychological state which has led not only to suicidal ideation, but actual attempts at self-harm. It is not to the point that she has not self-harmed for six months – rather the question is, what risk, if any, is posed to her by the identification of the defendants.

78. The report of the treating general practitioner, Dr P. contained the opinion that naming the "defendant", as well as the plaintiff, was likely to cause further psychological distress and worsen her psychological condition. I infer that the doctor's reference to "defendant" refers to all those involved in the alleged sexual assault. Despite my invitation, Dr Collins did not wish to cross-examine the general practitioner. Rather, he criticised the report on the basis that there was no logical connection between the naming of the defendants and the worsening of her psychological condition. I disagree. Given the plaintiff's fears in the past, that she was "very frightened" that she may be found and harmed again, the naming of the defendants could only, rationally, raise the real prospect of such fears being reignited. Her actions in leaving the town and then returning but with a feeling of paranoia in terms of her security leads, in my view, logically to the proposition that the public naming of the defendants will necessarily affect her fragile psychological state; this is particularly so when one takes into account her attempts at self-harm in the past.

79. The opinion of the general practitioner is confirmed by that of the consultant psychiatrist, Dr D. Dr Collins criticised the psychiatrist's opinion as being unsubstantiated insofar as it was based on the proposition that if the defendants are identified, the plaintiff was fearful that she may be identified. He may well be right when he says that there is no logical connection. But logic does not always intrude into the psyche, particularly in a case such as this. The reality is that this is the plaintiff's view as to what will happen and this is in the context of a psychologically damaged person. It is also significant that in terms of assessing the reality of the risk that Dr D. concludes that identification could lead to the risk of suicide or the need for inpatient care.

80. I repeat, at this point, that one must not lose sight of the fact that the risk which has to be considered is that posed to the plaintiff's psychological condition – whilst there may well be some force in Dr Collins' submissions as to logical connection (indeed he questioned why logically the plaintiff would be concerned as to identification of the defendants), one cannot lose sight of the fact that on the face of the material before me the plaintiff is in a highly vulnerable psychological condition which could lead to tragedy if she is tipped over the edge. She has a right to pursue a claim without that occurring, particularly if that can be ensured by the prohibition of publication

of the defendants' names. Her treating general practitioner and the psychiatrist, in differing ways, confirm that there is a risk she will be psychologically harmed by such identification.

81. In my view, the opinions of the general practitioner and the consultant psychiatrist lead to the conclusion that there is a real risk of psychological deterioration in the plaintiff if the defendants are identified. The plaintiff may ultimately be wrong as to whether she can be tracked down as a result of their identification. However, as I have previously said, this is not the test. The correct test is whether there is a real risk of the plaintiff's suffering a worsening of her psychological condition as a result of that identification, bearing in mind her pre-existing condition. I am satisfied that there is such a risk.

82. I also accept that the material adduced supports the proposition that there is a real risk that she will not proceed with the proceeding in the event that the defendants are named. As I pointed out earlier, it is not a question of determining whether her belief is genuinely held or otherwise. It is a question of determining whether, given her psychological state, I am persuaded that there is a real risk that she will not prosecute the action if the defendants are named. Dr Collins again pointed to the lack of logical connection within her affidavit; i.e. no exposition as to the basis upon which she would not proceed with the action merely because of identification of the defendants. With respect, I think this misses the point. The true point is that she states that it will be very difficult for her to prosecute the action, and this is in the context of what has allegedly occurred to her in the past. She is supported, in an elliptical way, by the psychiatrist, Dr D. Given her psychological background, the events she describes, her fear of those who were allegedly involved in the assault and her concerns about her security, I think it quite understandable that she would express a view that she would not prosecute the action if the defendants are named. In my view, there is a real risk of her adopting such a course.

83. Although it may be hypothetical, I also take into account that this case would not be conducted *in camera*. The media will be able to report the evidence as long as the plaintiff and defendants are not identified.

84. I think that the considerations personal to the plaintiff that I have set out outweigh the general principle of open justice. I have carefully considered that fundamental principle and the countervailing considerations favouring maintaining the order. I have ultimately come to the conclusion that it is necessary to maintain the order of Osborn J. By doing so, the administration of justice will not be prejudiced.

85. In light of my conclusion it is not necessary for me to address the arguments put on behalf of the defendants D1, D2 and D3 by Mr Holdenson and adopted by Ms Warwick. I should say, however, that I am not persuaded on this basis alone that the order suppressing the names should be continued. Indeed, the order was not made by Osborn J on this basis.

Conclusion

86. For the reasons I have set out I am not persuaded that the order made by Osborn J should be varied. I will dismiss the application by HWT. I will determine any question of costs upon application by the parties.

APPEARANCES: For the plaintiff ABC: Mr T Tobin SC and Mr M Schulze, counsel. Ryan Carlisle Thomas Lawyers. For the defendants D1, D2 and D3: Mr OP Holdenson QC, counsel. Tony Hargreaves & Partners, solicitors. For the defendant D4: Ms O Warwick, counsel. Minter Ellison, solicitors. For the Herald & Weekly Times: Dr M Collins, counsel. Corrs Chambers Westgarth Lawyers.