CASE NOTE: *ASG V HAYNE* - A CASE OF PUBLISH AND NOT BE DAMNED

JEREMY FINN*

I. INTRODUCTION

The decision in *ASG v Hayne*[1] has significant implications for persons seeking permanent name suppression. This appears to have been the first time the Court of Appeal has been called upon to consider the meaning of "publication" under section 200 of the Criminal Procedure Act 2011. Unfortunately the decision raises at least as many questions as it answers. Some of these difficulties may reflect the fact that the case came before the Court of Appeal on appeal from the Employment Court, rather than from a criminal proceeding.

II. THE FACTS AND LOWER COURT PROCEEDINGS

ASG was employed by the University of Otago as a security officer. He pleaded guilty to charges of wilful damage and assaulting a female in relation to an incident unconnected with his work. The District Court Judge discharged him without conviction on both charges, on the basis that the fact of conviction would imperil his employment and such a consequence was out of all proportion to the seriousness of the offence. The judge further ordered permanent name suppression and suppression of other details under s 200 of the Criminal Procedure Act 2011. The Court of Appeal thought it probable that the order was made so that the identity of ASG would not be disclosed to his employer and no adverse consequences could ensue.

However, the persons present at the court hearing included an employee of the University who had been informed that ASG was to be sentenced for offending. That employee made notes of the matter and then made enquiries as to whether he could disclose the details of the offending and outcome to the University authorities. He obtained legal advice from the University's lawyer, who advised him that the suppression order would not prevent communication of the information as to the charges and guilty pleas to the University as an employer and therefore to a person with a legitimate interest in knowing that an employee had pleaded guilty to conduct of the kind he was supposed to prevent. Following that advice, disclosure was made to the appropriate University personnel and the University conducted an internal investigation which led to first the appellant's suspension from his duties and later to a final written warning.

The matter then went before the Employment Relations Authority and then, on appeal, to the Employment Court. ASG contended that the communication of information as to the hearing to the University was in breach of the suppression order and therefore the University was not entitled to have regard to it. When the matter came before the Employment Court, the court held that communication of the information did not breach the suppression order, relying principally on the High Court decision in *Solicitor-*

* Professor of Law, University of Canterbury.
[1] [2016] NZCA 203.

General v Smith[2] on the predecessor legislation which had held that communication of information to persons with a legitimate interest did not breach a statutory prohibition on publishing a report of court proceedings involving a young person.

III. The Court Of Appeal Decision

ASG appealed to the Court of Appeal arguing that *Solicitor-General v Smith* and a number of other cases on which the Employment Court had relied[3] did not govern the instant case, so that the statutory wording was to be read literally. The Court of Appeal then proceeded to give its own view. Unfortunately, instead of attempting to analyse and reconcile the different cases cited to it, the Court asserted at [43] that:

> ... what emerges from these few relevant cases is that "publication" refers to dissemination to the public at large rather than to persons with a genuine interest in or receiving the information.

It is necessary at this point to note that the cases cited by counsel or the Employment Court were all concerned with what was a "report of proceedings"; in none of them was the question of what amounted to publication squarely before the court.[4] The statement at [43] is therefore essentially unfounded. This is the more surprising as Wild J, who wrote the judgement of the Court, was one of the Judges who decided *Solicitor-General v Smith*.

The Court of Appeal then held that the University, as employer, was a person with a genuine interest and therefore the communication to it of information had not breached the suppression order. That decision was telegraphed earlier in the judgement when the Court commenced its discussion of its own views of the matter by emphasising that an employee had a duty to disclose relevant material to her or his employer and that ASG was in breach of that duty. It may be thought that this conclusion, something at least arguably irrelevant to the meaning of "publication", coloured the rest of the judgement. It certainly appears to have influenced a remarkable statement, at [46]-[47], as to the approach that District Court Judges are to take in dealing with name suppression cases in the future:

> ... Although we cannot be certain, we think the Judge discharged ASG without conviction and then suppressed publication of his name primarily to protect ASG from the University and the possible loss of his job there. Indeed, the Judge obviously thought it inevitable that ASG would lose his job if his name was published.
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> We consider that is a faulty basis for a s 200 order. The problem with that approach is well stated in this passage in the Employment Court's judgment:
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> > "[30] But a court considering the exercise of [the discretion to discharge without conviction] is usually only undertaking a risk assessment as to the consequences of a conviction on

[2] [2004] 2 NZLR 540.

[3] The cases cited were *Director-General of Social Welfare v Christchurch Press Co Ltd* HC Christchurch, CP31/98, 29 May 1998, Panckhurst J; *Slater v Police* HC Auckland CRI-2010-404-379 10 May 2011 and *Re Baird* [1994] 2 NZLR 463.

[4] While Master Kennedy-Grant in *Re Baird* [1994] 2 NZLR 463 did briefly discuss "publication" and noted the dictionary definition of it as meaning "[t]o make publicly or generally known; to tell or noise abroad", the case concerned the ability of the Official Assignee to use information gained in other proceedings and there is no reference to any general power to convey information to those interested in receiving it.

> the person's existing or future employment. Often, the Court will be carrying out that assessment without hearing from the employer. ..."

IV. The Court of Appeal's Interpretation Of s 200 Criminal Proceedings Act 2011

With respect, it is difficult to see how a lack of input from the employer is relevant to the exercise of the statutory power to suppress information. The statute sets out the matter to which the judge is to have regard:

> 200 *Court may suppress identity of defendant*
> (1) A court may make an order forbidding publication of the name, address, or occupation of a person who is charged with, or convicted or acquitted of, an offence.
>
> (2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—
> (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
> (b) cast suspicion on another person that may cause undue hardship to that person; or
> (c) cause undue hardship to any victim of the offence; or
> (d) create a real risk of prejudice to a fair trial; or
> (e) endanger the safety of any person; or
> (f) lead to the identification of another person whose name is suppressed by order or by law; or
> (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
> (h) prejudice the security or defence of New Zealand.
> ...
> (6) When determining whether to make an order or further order under subsection (1) that is to have effect permanently, a court must take into account any views of a victim of the offence conveyed in accordance with section 28 of the Victims' Rights Act 2002.

There is nothing in the wording of s 200(2)(a) which suggests that a decision on "extreme hardship" requires the court to have regard to the interests of the employer. In an earlier decision, *Robertson v Police,*[5] the Court of Appeal held that "hardship" means "severe suffering or privation" and "extreme" hardship requires something more, to the point of a very high level of hardship. The court also held judges should use a two-stage test in assessing name suppression applications.[6] The judge must first consider the threshold question whether any one or more of the grounds listed in s 200(2) has been established and then determine whether the necessary level of hardship has been established and finally make a decision as to the exercise of the statutory discretion after balancing:[7]

> ...the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the views of the victims and the public interest in knowing the character of the offender.

[5] *Robertson v Police* [2015] NZCA 7, at [48]–[49].
[6] *Robertson v Police,* above note 5, at [39]–[41]. This two-stage test was first set out in *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9].
[7] *Robertson v Police*, above note 5, at [41].

While the decision in *Robertson v Police* turned principally on other factors, the Court proceeded on the basis that publication of the applicant's name would lead to dismissal from her employment.[8]

Any application for name suppression on the basis of employment-related matters must necessarily involve the judge determining whether it is likely that publication will lead to any employment-related consequences and then whether those consequences are serious enough to amount to extreme hardship. The High Court has addressed that matter in a number of cases, including holding that suppression may be ordered to protect the employment position of a person facing charges.[9] It is also possible to draw an analogy with cases where self-employed persons have sought name suppression to protect the viability of their businesses. In such cases the court is making its own decision as to the likely consequences. In some, but not all, cases the Court has found that the right of the public to know the character of the persons with whom they are dealing overrides any hardship to the defendant so that the hardship cannot be described as "extreme".[10] It is most unfortunate that the Court of Appeal in *ASG v Hayne* was not presented with any argument which considered the application of s 200 in other contexts. Instead the court went on to add, at [50]-[51]:

> [50] That leads us to urge District Court judges, when framing an order under s 200(1), to be alive to the statutory obligations on employers, and to the Employment Court's view, which we share:
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> > "Ultimately, any decision about the consequences for employment of a prosecution with or without conviction of an employee will be for that person's employer."
>
> [51] We are very conscious that District Court Judges are routinely handling long case lists. But, where a s 200(1) order may affect the defendant's employment, time taken to stipulate clearly what may be published to an employer and between an employer's responsible staff will avoid uncertainty and any need for the employer to seek a variation under s 208(3) of the Criminal Procedure Act.[11]

V. Issues Left Unresolved By The Court Of Appeal's Decision

If that is correct, the judge's discretion under s 200(2) must be seen as very significantly fettered. It is to be hoped that the decision will be revisited by the Court of Appeal on some future occasion where the matter will receive the detailed argument and consideration that appears to have been lacking on this occasion. Until that happens, we may await some further consideration of a number of issues raised by the decision. Three may be raised in ascending order of importance.

Firstly, there is the potential tension between the interests of employers of offenders and victims. Judges who are considering permanent name suppression orders are required by s 200(6) to take into account the views of the victim of the offending. In the common case where charges followed a domestic violence incident, the victim

[8] *Robertson v Police*, above note 5, at [9].
[9] See for example *M v Police* [2012] NZHC 1242.
[10] *Rowley v Commissioner of Inland Revenue* [2011] NZSC 76, (2011) 25 NZTC 20-052; *K v Inland Revenue Department* [2013] NZHC 2426, (2013) 26 NZTC 21-034.
[11] The reference to s 208(3) is to the power of the court to review and to vary a suppression order at any time. It was common ground that the employer could have pursued this option but chose not to.

may not wish for the offender to lose his or her employment because of the financial consequences to the offender, and to the victim if the offender is providing financial support to the victim, and/or to any children or other dependents which the offender may have. Clearly in such a case the victim's interests are likely to be contrary to those of the employer. Which is to have primacy?

Secondly there is the question of whether the same employer-centred approach is to apply to suppression orders made under ss 202 or 205 of the Criminal Procedure Act. The former authorises suppression orders to conceal the identity of witnesses in criminal proceedings, victims of criminal offences and persons connected with the offending while the latter gives a power to prohibit the publication of any evidence used in the proceedings in respect of an offence or submissions made in those proceedings. Clearly there may be occasions where an employer would be interested, to use a neutral term, in information relating to an employee who was caught up in the proceedings. Let us suppose that in giving evidence in a case a witness discloses a matter which would be relevant to possible disciplinary proceedings by an employer (for example that a driver had deviated from a prescribed route to carry out some personal errands). Publication of the details and the identity of the witness might well mean that an employer would learn of the circumstances and initiate employment proceedings. The potential for employment consequences would appear to be contrary to the public policy interest in having witnesses come forward and give evidence.

Lastly, and most importantly, the decision leaves quite uncertain the scope of the apparent exception to suppression orders where communication is "to persons with a genuine interest in conveying or receiving the information". The court took it as almost axiomatic that communication of information to a lawyer for the purpose of gaining legal advice as to whether it could be further disclosed or communicated will never be in breach of a suppression order.[12] Beyond that it is clear from the decision that employers are considered to have a genuine interest in receiving information about offending which raises doubts about the employee's ability to perform his or her job. However that is the only point of clarity about publication in relation to an employment relationship. It is a reasonable inference that persons in the employment of the same employer and acting in the course of their own employment will have a genuine interest in conveying suppressed information of the kind in *ASG v Hayne* to the employer. It is not clear whether the court would or should recognise in the employment context a "genuine" interest in conveying or receiving information to the employer which is *not* relevant to the defendant's work roles. Nor is it clear that there should be protection for persons conveying suppressed information out of malice rather than any sense of duty.

The problems become even more acute in other contexts than employment. Who is to be considered to have a "genuine interest in conveying or receiving information" about an offender? In *Dunbier v R*[13] name suppression was refused because of an "overriding interest in the small community of which Mr Dunbier is a member knowing of his conviction for sexual offending against a child"; the community being a small

[12] *ASG v Hayne* [2016] NZCA 203 at [34].
[13] *Dunbier v R* [2011] NZCA 275.

community of hearing impaired persons. More broadly a public interest in knowing the identity of some offenders - those involved in sexual offending, dishonesty and drug use - has been recognised by the Court of Appeal.[14] However the Court has also held that such a public interest will not be decisive and the "weight to be accorded to the public interest will vary according to the particular facts of the case (including the nature and seriousness of the offending)".[15] It is highly likely that some members of society will regard themselves as justified in breaching suppression orders in the interest of warning the public about potential risks if the defendant re-offends; equally many members of the community would regard themselves as interested in receiving such information. The breadth of the test sketched in *ASG v Hayne* leaves a great deal of latitude which may be exploited by such persons. That risks undermining the whole statutory regime. It is surely far better to undertake a balancing test – as the case law mandates – before deciding whether name suppression or suppression of other details should be ordered. Once suppression is ordered, the expectation should be that publication of any kind in any circumstances is unlawful. It is to be hoped that the view taken in *ASG v Hayne* will be revisited at the earliest opportunity and a more logical approach, and one more consistent with the decisions made in criminal cases, is adopted.

Post-Script: Since this note was submitted to the Review, the Supreme Court has granted leave to appeal from the Court of Appeal decision: ASG v Hayne [2016] NZSC 108.

[14] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, at 558-559.
[15] *B (CA860/10) v R* [2011] NZCA 331, at [21].