ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING PARTICULARS OF PROPOSED WITNESS CW PENDING ANY FURTHER ORDER OF THE HIGH COURT.

ORDER THAT THE COURT FILE IS NOT TO BE SEARCHED WITHOUT THE LEAVE OF A JUDGE OF THIS COURT.

REMINDER: INTERIM HIGH COURT ORDER SUPPRESSING THE NAME AND IDENTIFYING PARTICULARS OF THE APPELLANT REMAINS IN FORCE UNTIL TRIAL.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA271/2015
[2016] NZCA 474

BETWEEN	Y Appellant
AND	THE ATTORNEY-GENERAL Respondent

Hearing:	26 April 2016 (further submissions 29 April 2016)
Court:	Stevens, Wild and Winkelmann JJ
Counsel:	S M Cooper and A L Hill for Appellant K P McDonald QC, C A Griffin and K G Stone for Respondent
Judgment:	4 October 2016 at 11 am

JUDGMENT OF THE COURT

A The application for leave to adduce fresh evidence on appeal is granted.

B The appeal in respect of name suppression is dismissed, save in respect of proposed witness CW.

C In respect of CW, the appeal is allowed. We make an order prohibiting publication of CW's name or identifying particulars pending any further order of the High Court.

D The appeal in respect of costs is allowed.

E The costs order in the High Court is set aside.

F Order that the Court file is not to be searched without the leave of a Judge of this Court.

REASONS OF THE COURT

(Given by Wild J)

Table of Contents

Introduction

[1] The Court heard this appeal together with the appeals in *X v Attorney-General* (CA741/2015)[1] and *X v Attorney-General* (CA742/2015).[2] All are

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1 *X v Attorney-General* [2016] NZCA 475.
2 *X v Attorney-General* [2016] NZCA 476.

appeals from interlocutory judgments given by Brown J in two related proceedings in which plaintiffs seek damages for wide-ranging abuse and ill treatment they claim they suffered while in the care of the Ministry of Social Development (or its predecessors) or YFT (the second respondent in CA741/2015 and CA742/2015), which provided services to the Ministry.

[2] As each appeal raises different issues, we are giving a separate judgment in each appeal, but delivering all three judgments together.

[3] This first appeal is against a judgment delivered on 28 April 2015 declining the appellant's application for suppression of the names and identifying particulars of fact witnesses who are to give evidence for the appellant in his claims against the Crown.[3] The costs order the High Court made against the appellant is also appealed, on the ground the appellant was and remains legally aided.

[4] Upon various causes of action, the appellant claims damages for abuse he alleges he encountered while a child under the care of the predecessors to the Ministry of Social Development. Relevant to this appeal, the appellant claims he was physically, sexually and psychologically abused, and also falsely imprisoned, during the Whakapakari programme on Great Barrier Island. He intends calling a number of witnesses who also attended the Whakapakari programme to give evidence of similar abuse they suffered during the programme.

[5] Brown J divided the prospective witnesses into two groups:

(a) those who had allegedly suffered sexual abuse; and

(b) those claiming they suffered non-sexual abuse — for example, physical abuse.

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3 *Y v Attorney-General* [2015] NZHC 844.

The Attorney-General consented to suppression orders in respect of the first group of witnesses and the Judge made those orders.[4] This appeal relates to the Judge's refusal to grant suppression of the names and identifying particulars of the witnesses in the second (non-sexual abuse) group.

[6] The principal issue for decision on this appeal is: did the High Court err in its interpretation and application of the test for name suppression applying to that second group of witnesses — those alleging non-sexual abuse?

[7] Ms Cooper, for the appellant, explained that the principal issue is framed in this way because the list of intended witnesses has changed since the hearing before Brown J, and is likely to change again. When Brown J gave judgment there were two plaintiffs and both appealed, but one has since withdrawn his appeal. Further, one of the prospective witnesses on the list put to Brown J was a police officer and the appeal is not pursued in relation to him. There have been further changes to the list of prospective witnesses since Brown J gave judgment and the list will almost certainly alter again before trial. Accordingly, Ms Cooper told us that what is sought is a judgment that will guide the parties in seeking, and the High Court in making, future decisions on suppression.

Background

Grounds of application

[8] The appellant applied to the High Court for name suppression for his witnesses on these grounds:

(a) The appellant and his witnesses allege they were victims of serious abuse.

(b) A suppression order is in the interests of the appellant and his witnesses, to ensure their participation in the trial.

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[4] Our understanding is that the Attorney-General consented on the basis these witnesses are in an analogous position to complainants in criminal proceedings where the defendant faces specified sexual charges — s 203 of the Criminal Procedure Act 2011 affords such complainants automatic suppression of identity in order to protect their welfare.

(c) The appellant and his witnesses may come to harm if their names and/or identifying details are made publicly available.

(d) Other grounds appearing in the affidavits of expert witnesses and intended fact witnesses.

The list of witnesses

[9] Ms Cooper provided us with a list of 15 proposed witnesses in issue on this appeal. This list differed significantly from the three overlapping appendices of prospective witnesses Ms Cooper had placed before Brown J.

[10] Eight of the proposed witnesses on the list are currently prison inmates (or were at the time of the hearing). Our analysis shows that two of the proposed witnesses (the tenth and eleventh names on the list respectively) are plaintiffs in their own right, claiming damages for alleged sexual abuse. The Attorney-General's consent to a suppression order will therefore apply to those two witnesses and they can be removed from the list. That leaves 13.

The proposed witnesses and their evidence

[11] The High Court had affidavits from only three of the 13 witnesses on the list provided to us. One of these was a prison inmate at the time he swore his affidavit (27 February 2015). A second deposed that he had recently been released from prison. Each of the three is to give evidence that he had suffered non-sexual abuse. The tenor of their proposed evidence is that they will name senior boys who were members of the "Flying Squad", which assaulted other boys on the instruction of the supervisors of the Whakapakari programme. These Flying Squad boys are now grown men, some with gang affiliations. Some of the supervisors also have gang affiliations. In relation to the three affidavits before him Brown J stated:

> [13] One witness deposes that, even though time has passed, he is concerned that he will face retaliation for "narking". A second states that he lived in constant fear of a staff member of Whakapakari, that he is still concerned about his safety if he gives evidence and that without name suppression he may not be able to be a witness. The third states that he fears for his own safety and the safety of his partner and child were he to disclose

> the conduct of Flying Squad members or their supervisors and that without name suppression he would not give evidence at the trial.

To clarify that summary, only one of the witnesses the Judge mentioned stated he would not give evidence in the appellant's trial without name suppression. Another witness (CW — dealt with in [39] below) asked for name suppression "so I can give evidence without feeling intimidated". The witness who is in prison deposed he "may not be able to give evidence" without name suppression.

The expert evidence

[12] The Judge had affidavits from three expert witnesses, whose evidence covered the impact of sexual as well as non-sexual abuse. The first of these is Dr Catherine Millichamp, a psychologist in the Department of Psychological Medicine at the University of Otago. The Judge noted that Dr Millichamp stated she was directing her evidence to both sexual and physical abuse, yet in the very next paragraph of her affidavit referred specifically to sexual abuse. And in other paragraphs it was unclear whether she was restricting her views to sexual abuse.[5] The Judge readily accepted Dr Millichamp's view that giving evidence can be a stressful and re-traumatising event for abuse victims. He noted Dr Millichamp's view that giving such witnesses name suppression is one way of reducing the trauma and stress.[6]

[13] The next witness was Dr Elizabeth Stanley, a reader in Criminology at Victoria University of Wellington. Dr Stanley has undertaken extensive research into the way societies respond to serious physical and sexual violence. The Judge noted her focus on four particular factors she considered underpinned the need for name suppression: disclosure, shame, gender and environment. The Judge set out this summary from Dr Stanley's affidavit:[7]

> I would highly recommend that the Court retain name suppression for complainants and witnesses who (i) have suffered sexual or physical violence as a child or young person, and (ii) have requested suppression. While some individuals may be happy to have their name within the legal or public domain as a "victim" of such assaults, there will be many others who

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5 *Y v Attorney-General*, above n 3, at [16].
6 At [17].
7 At [19].

> do not want such recognition. The Court should operate to attend to the needs of victims of serious assault, to ensure that it remains a "safe space" for complainants. Without attending to these needs, it is more likely that future victims will refrain from coming forward.

[14] Of the four particular factors identified by Dr Stanley, Brown J pointed out that only "environment" referred to the risks faced by the eight prospective witnesses who are prison inmates. He set out a passage from Dr Stanley's affidavit, which included this comment:[8]

> Coming forward as a victim of serious physical or sexual violence has a profound emotional impact on prisoners as it requires them to straddle two "identities" however it could also lead to degrading treatment or even attacks against them if their identities become known in prison.

[15] The Judge made two observations about Dr Stanley's evidence. The first was that it related to prisoners generally, and was "necessarily speculative in relation to former Whakapakari attendees", only one of whom had made an affidavit.[9] Secondly, the Judge observed that Dr Stanley did not specifically address what the Judge apprehended to be the more prevalent concern among the eight prospective witnesses who are prisoners, namely that they could be identified and perhaps attacked because they are "narks".[10]

[16] The third witness was Ms Finlayson, a secretary with the appellant's solicitors, Cooper Legal. Based on her contact with the intended witnesses, Ms Finlayson stated that almost all had voiced unease about the prospect of giving evidence that will be perceived as "narking".[11] Ms Finlayson expressed the view that all were very anxious and genuinely afraid of what might happen to them as a result of their giving evidence.

First issue under appeal — name suppression

The judgment under appeal

[17] Brown J recorded agreement on these points:[12]

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8 At [39].
9 At [40].
10 At [41].
11 At [20].
12 At [21] (footnote omitted).

(a) the power to suppress the names and identifying details of parties to civil litigation is found in the inherent jurisdiction of the High Court;

(b) the starting point in exercising the discretion to suppress identifying details is a general principle that proceedings should be conducted in public. Exception to this principle is only justified if it is necessary in the interests of the proper administration of justice; [and]

(c) the Court is required to balance the public interest in proceedings taking place in public against the effect on the party seeking suppression. Something more than the litigant's preference for anonymity is required.

Although those principles were sourced from the High Court's decision in *Clark v Attorney-General,*[13] the Judge noted that essentially the same principles had been recognised by this Court in *R v Liddell*,[14] a decision not cited in *Clark*.

[18] Next, despite the perception that the law governing name suppression in a civil proceeding is relatively well settled, Brown J noted that he had heard detailed argument, and he went on to summarise this. We need not. But, from what was agreed and what was put to him in argument, Brown J extracted the following principles:

(a) *Open justice*: The principle of open justice applies equally to civil and criminal cases and is reinforced by the right to freedom of expression in s 14 of the New Zealand Bill of Rights Act 1990: *Muir v Commissioner of Inland Revenue*.[15]

(b) *Onus*: Notwithstanding the view expressed in *ASB Bank Ltd v AB*,[16] the clear preponderance of authority recognises an onus on an applicant to rebut the presumption in favour of disclosure of all aspects of a court proceeding.

(c) *Threshold to displace the presumption of open justice*: Although there are conflicting decisions from the Court of Appeal as to any

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13 *Clark v Attorney-General* (2004) 17 PRNZ 161 (HC).
14 *R v Liddell* [1995] 1 NZLR 538 (CA).
15 *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 376 (SC) at [2]; see also *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA) at [29]–[30].
16 *ASB Bank Ltd v AB* [2010] 3 NZLR 427 (HC) at [12] and [14].

requirement to establish exceptional circumstances,[17] the applicant must at least establish a compelling reason to displace the presumption of open justice.[18]

(d) *Granting name suppression to prisoners as a class is wrong*: Although the Court of Appeal in *Taylor v Attorney-General* granted name suppression to a group or class of witnesses who were members of the Security Service,[19] the appellant here must confront the contrary conclusion subsequently expressed by the Court of Appeal in *Clark v Attorney-General (No 1)*:[20]

> We are also unpersuaded that prisoners and ex-prisoners alleging torture should form a class where name suppression is automatically given. There was no evidence put forward to support a submission that they should. Even had there been such evidence, we are by no means convinced that it would be appropriate for the courts to institute such a policy. In our view, any such change would be better left to Parliament … .

(e) *Witnesses have a stronger claim to name suppression than parties, particularly plaintiffs*: A witness who has no interest in a proceeding generally has the strongest claim to name suppression if the witness will be prejudiced by publicity. The High Court in *Clark v Attorney-General* cited this statement by Lord Woolf MR in *R v Legal Aid Board, Ex parte Kaim Todner*:[21]

> A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally

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17 Compare *Clark v Attorney-General (No 1)* [2005] NZAR 481 (CA) at [42] and *Brown v Attorney-General* [2006] NZAR 450 (CA) at [12]–[14] with *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [118].

18 *P v Attorney-General* HC Wellington CIV-2006-485-874, 23 July 2010 at [2], citing *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) at [41]–[43].

19 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA).

20 *Clark v Attorney-General (No 1)*, above n 17, at [44].

21 *Clark v Attorney-General*, above n 13, at [13], citing *R v Legal Aid Board, Ex parte Kaim Todner* [1999] QB 966, [1998] 3 WLR 925 at 978.

> conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. In general, however parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule.

[19] Applying these principles, Brown J found the evidence before him too general to establish the required compelling reasons for suppressing the names of the appellant's proposed witnesses as to physical abuse.

[20] The Judge addressed a number of other arguments put to him by Ms Cooper. He did not accept Ms Cooper's submission that it was oppressive to require an affidavit from each potential witness who was a prison inmate. He also took into account that several of the prospective witnesses had commenced their own proceeding against the Crown. The Judge considered this removed those witnesses from the category of disinterested witnesses with the strongest claim to name suppression.

[21] Brown J concluded:[22]

> [49] In my view to the extent that it does relate to individual witnesses the evidence is not sufficiently compelling to displace the presumption of open justice, a conclusion which is underscored by the fact that each of the three fact deponents in support of the application is a plaintiff in his own parallel proceeding. It is my understanding that no orders for confidentiality or name suppression are in place in those proceedings, one of which has been on foot since 2007 and another since 2010.

Suppression principles in civil cases

[22] The first and primary issue on this appeal is whether the High Court erred in its statement of name suppression principles applying to civil cases. In this appeal and *X v Attorney-General,*[23] counsel referred us to some 48 civil cases dealing with name suppression. In many of those cases the Court either granted or declined name

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22 *Y v Attorney-General*, above n 3.

23 *X v Attorney-General*, above n 1, which also deals with name suppression.

suppression without discussing the applicable principles. Such cases are of limited assistance. However, a review of this Court's previous decisions dealing with name suppression principles in civil proceedings discloses divergent approaches, and a need for clarification.[24] This need is the more pressing because there is limited guidance from the Supreme Court in this area.[25] Accordingly, what follows is an attempt to state and explain the principles that should guide the suppression of the names of parties or of witnesses, or particulars in civil cases.

[23] We stress this statement applies only to civil cases. Suppression in criminal cases is now controlled by ss 200–211 of the Criminal Procedure Act 2011. The jurisdiction to suppress in civil cases is an inherent, discretionary jurisdiction. The exception and distinction to that are the provisions in ss 11B–11D of the Family Courts Act 1980, which place restrictions on the publication of reports of proceedings in a Family Court. It is not subject to the constraints now imposed in criminal proceedings by the Criminal Procedure Act. There is the further distinction that civil proceedings, unlike criminal proceedings, do not have the element of community protection and the resultant predominant public interest in knowing the names of persons convicted of a crime.[26]

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[24] For example, in each of *Clark v Attorney-General (No 1)*, above n 17, *Jacks v Hastings District Court* [2005] NZAR 736 (CA), *Brown v Attorney-General*, above n 17, and *Denize v Stockco Ltd* [2011] NZCA 192, this Court considered exceptional circumstances were required to overcome the presumption in favour of disclosure. But in *Jay v Jay*, above n 17, and *A Ltd v H* [2015] NZCA 99 this Court disagreed, holding that extraordinary or exceptional circumstances are not required. A few months later in *Sax v Simpson* [2015] NZCA 222 at [10], the Court, citing *Clark*, above n 17, said the presumption in favour of disclosure was only overcome in "the most exceptional circumstances". But this Court's judgment in *McIntosh v Fisk* [2015] NZCA 247, [2015] NZAR 1189, delivered just a few days after *Sax v Simpson*, makes no reference to a need for exceptional circumstances, although it states at [1] that "the threshold is high" because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression.

[25] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, *Rowley v Commissioner of Inland Revenue* [2011] NZSC 76, (2011) NZTC 20-052, and *Muir v Commissioner of Inland Revenue*, above n 15, appear to be the only Supreme Court authorities and all are decisions declining applications for leave to appeal.

[26] See *ASB Bank Ltd v AB*, above n 16, at [17].

[24] The discretionary nature of the jurisdiction means an appeal against the making or refusal of a suppression order is subject to the principles this Court laid down in *May v May*.[27]

[25] The starting point is the principle of open justice and the related freedom of expression guaranteed by s 14 of the New Zealand Bill of Rights Act:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[26] Together, these two tenets create a presumption of disclosure of all aspects of civil court proceedings. They are exemplified by the latter part of the truism that "justice must not only be done, it must be seen to be done". So the courts administer justice in public, enabling public scrutiny and thus ensuring public confidence in the administration of justice.

[27] The fundamental importance of the principle of open justice has been repeatedly emphasised by the superior courts of this country and those of the United Kingdom. For example, in 1982 in *Broadcasting Corporation v Attorney-General*, Woodhouse P in this Court referred to the importance "of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases".[28]

[28] In 2014, the Supreme Court of the United Kingdom in *A v British Broadcasting Corporation* stated:[29]

> It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The

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[27] *May v May* (1982) 1 NZFLR 165 (CA) at 170. This approach was confirmed by the Supreme Court in *Rowley v Commissioner of Inland Revenue*, above n 25, at [5]. This approach differs from the position in the United Kingdom, where the courts treat the decision whether to order name suppression as an evaluative one on which an appeal court may consider the matter afresh (see *JXMX v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96, [2015] 1 WLR 3647 at [27], in which the Court adopted a position more akin to that applied by our Supreme Court in relation to evaluative decisions in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] and [35]).

[28] *Broadcasting Corporation v Attorney-General* [1982] 1 NZLR 120 (CA) at 123.

[29] *A v British Broadcasting Corporation* [2014] UKSC 25, [2015] AC 588 at [23].

> principle is an aspect of the rule of law in a democracy. … society depends on the courts to act as guardians of the rule of law. Sed quis custodiet ipos custodies? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.

As the media are the conduit through which most members of the public receive information about court proceedings, the Court considered "it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings".[30] More recently, the English Court of Appeal in *JXMX v Dartford & Gravesham NHS Trust* described the principle of open justice as one of the "utmost importance".[31]

[29] Given that importance, a court will need to have sound reasons for finding that the presumption favouring publication is displaced. But we do not consider there is an onus or burden on an applicant for suppression, in the sense an onus rests on a plaintiff in a civil claim. In that respect we agree with the approach taken in *ASB Bank Ltd v AB*, where Harrison J stated "there is no onus on an applicant … the question is simply whether the circumstances justify an exception to the fundamental principle".[32]

[30] Nor do we consider it correct to set any particular threshold for name suppression. In our view, previous decisions of this Court stating the threshold is "exceptional circumstances" or "extraordinary circumstances" have incorrectly stated the law, or no longer correctly state the law. We endorse this Court's judgment in *Jay v Jay*, that "'extraordinary circumstances' are not required to justify suppression in a civil case".[33] However, as this Court explained in *McIntosh v Fisk*, "[t]he threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression".[34] The aim of that passage was not to set any particular threshold.

[31] The correct approach requires the court to "strike a balance between open justice considerations and the interests of the party who seeks suppression". We

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30 At [26].
31 *JXMX v Dartford & Gravesham NHS Trust*, above n 27, at [5].
32 *ASB Bank Ltd v AB*, above n 16, at [14].
33 *Jay v Jay*, above n 17, at [118].
34 *McIntosh v Fisk*, above n 24, at [1] (footnote omitted).

have drawn that passage from the Supreme Court's judgment in *Hart v Standards Committee (No 1) of the New Zealand Law Society*.[35] The Supreme Court had earlier supported the same balancing approach in *Rowley v Commissioner of Inland Revenue*.[36] As this Court observed in *McIntosh v Fisk*, in the context of this balancing, "the open justice principle is not an article of faith, never to be departed from".[37]

[32] Given the almost limitless variety of civil cases and the fact that every case is different, the balancing exercise must necessarily be case dependent. Sometimes the legitimate public interest in knowing the names of those involved in the case (either as parties or as witnesses or both), or in knowing the detail of the case, will be high. *Hart v Standards Committee (No 1) of the New Zealand Law Society* was such a case. As this Court observed:[38]

> The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in *Rowley*.

Consequently, a professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure.

[33] But in other cases there may be little or no legitimate public interest in knowing the name or identifying particulars of the parties, or those of a witness, or in knowing particular details of the case. That is likely to be the position in cases involving information that is intensely private or personal, or information that is confidential, or commercially sensitive. In a case of that sort the balance between open justice considerations and the interests of the party seeking suppression may well tip in favour of suppression. This Court's judgment in *Jay v Jay* provides a good example of the balancing exercise — described at [31] above —in relation to

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35 *Hart v Standards Committee (No 1) of the New Zealand Law Society*, above n 25, at [3].
36 *Rowley v Commissioner of Inland Revenue*, above n 25, at [6]–[7].
37 *McIntosh v Fisk*, above n 24, at [20].
38 *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18] (footnote omitted). The Supreme Court declined Mr Hart's application for leave to appeal (*Hart v Standards Committee (No 1) of the New Zealand Law Society*, above n 25), observing at [3]: "We see no arguable error in the approach taken in the Court of Appeal".

suppression of the parties' names.[39] We also commend the discussion on this by Andrew Beck in his article "Privacy Rights in Courts".[40]

[34] Apparent from all of this is that it is neither possible nor desirable to attempt a definitive list of possible reasons for granting suppression. What can be said is that the more central is the information sought to be suppressed to an understanding of the nature of the proceeding and to what it is that the court must decide, the stronger is the presumption favouring disclosure. A court is unlikely to deliver a judgment so shorn of detail that the public cannot readily understand what the court has decided, and why. Relevant also, in striking the balance, is the timing, nature, extent and duration of the suppression sought — whether it is of the identity of a party or parties, or of the identity of a witness or witnesses, or the suppression of information in the case. Suppression is not all or nothing. Different considerations may apply depending on what is sought to be suppressed. Interim, rather than permanent, suppression is more likely to be granted at an interlocutory stage of a proceeding — at trial, the court will be better placed to assess any need for permanent suppression.

Error in the High Court's statement of suppression principles

[35] On the basis of the principles we have set out at [23]–[34] above, we consider Brown J's statement of principles was erroneous. His approach was not to strike a balance between open justice considerations on the one hand, and the private interests of the applicant's witnesses on the other.

[36] In particular, Brown J found there was an onus on the applicant to displace the presumption of open justice. As explained in [29] above, we consider the term "onus" is best avoided in considering name suppression. Rather, the applicant needs to point to factual material justifying the court departing from the presumption. That may require, but does not necessitate, the applicant adducing evidence.

[37] Secondly, the Judge held the appellant must establish a compelling reason to displace the presumption of open justice. We have said a court must have sound reasons for finding that the presumption of open justice is displaced. We describe

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39 *Jay v Jay*, above n 17, at [119]–[124].

40 Andrew Beck "Litigation Section: Privacy Rights in Courts" [2016] NZLJ 179 at 182.

the approach in that way to emphasise that it is a balancing exercise, not a matter of whether the applicant has discharged a threshold test. We are anxious to avoid a "compelling reason" threshold or any other particular threshold.

[38] We are also a little troubled by Brown J's acceptance of the Attorney-General's submission that the majority of the proposed witnesses "do not truly fall within the strongest claim category of a witness who has no interest in the proceedings", because they had commenced parallel proceedings of their own.[41] The Judge observed "it is fair to say that at least some of them hope that, if the plaintiff's claims are successful, then it may not be necessary for their own claims to be brought to trial".[42] Given that the nub of the respective witnesses' concern was the fear of retribution for "narking", we see little practical difference between the witness and party categories for the purposes of name suppression.

Application of principles to witness CW

[39] We deal first with the appellant's application, filed on 21 March, for leave to adduce fresh evidence in support of this appeal. The evidence relates to witness CW and is in an affidavit sworn by Dr Vesna Rosic on 14 March 2016. Dr Rosic is a consultant forensic psychiatrist with the Regional Forensic Psychiatry Services in Auckland. Having interviewed the intended witness CW on 5 May 2015 (that is, 10 months earlier), Dr Rosic deposed as follows:

(a) The purpose of her interview was to assess CW for various purposes relating to his own claim against the Attorney-General for damages.

(b) She was aware CW was a prospective witness in another proceeding relating to the Whakapakari programme. CW has significant post-traumatic stress disorder (PTSD) resulting from abuse while he was at the Whakapakari programme in March 2003.

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41 *Y v Attorney-General*, above n 3, at [45].
42 At [45].

(c) Contributing to that is CW's disrupted family background, both with his parents and then when he was mistreated while under state care in various programmes in the early 2000s.

(d) CW also has serious substance abuse problems stemming from his early childhood (both his parents were substance abusers) but that later "became instrumental in serving as dysfunctional self-medication for his emotional disturbances relating to the past trauma".

(e) CW should be further investigated because what he recounted to Dr Rosic is "suggestive of a possible brain injury".

(f) Having further explained PTSD, particularly as she had diagnosed it in CW's case, Dr Rosic concluded:

> … I am of the view that [CW] will suffer further psychological damage and distress if he is required to give evidence without name suppression. More broadly, I believe that people with a diagnosis of PTSD, regardless of the kind of trauma they have suffered, should receive the protection of name suppression to prevent further psychological harm.

[40] We are not unsympathetic to the challenge Ms Cooper faces in running this and the related proceedings. Nevertheless, Dr Rosic's evidence could and should have been put before Brown J. The fact that it was not means that we are asked to review a decision Brown J made without the benefit of Dr Rosic's evidence. That is unsatisfactory and inappropriate in every way.

[41] However, Dr Rosic's evidence is both credible and cogent and Ms McDonald QC does not suggest that its admission prejudices the Attorney-General. We therefore grant the application to admit Dr Rosic's evidence

[42] We turn now to the balancing exercise described in [31] above. First, as this case involves allegations that boys in the care of the state or its agents were abused, it is undoubtedly of public interest. But that public interest does not extend to knowing the identity of CW or the other boys who were allegedly abused.

[43] Second, there is also a public interest in ensuring that witnesses are prepared to come forward and give evidence in court proceedings. In CW's case, that may not be achieved unless his name is suppressed.

[44] Third, although it is argued publication of the name of the second respondent in the related appeal *X v Attorney-General* may encourage other complainants to come forward,[43] that consideration does not apply to CW or other witnesses who will give evidence that they were abused.

[45] Fourth, CW is the prospective witness referred to in [11] above who has deposed to concern that he will face retaliation for "narking" if his name is not suppressed. As also mentioned in [11], CW seeks name suppression so he can give evidence "without feeling intimidated".

[46] Fifth, Dr Rosic's affidavit provides a firm evidentiary basis for suppressing CW's name to avert "further psychological damage and distress if he is required to give evidence without name suppression".

[47] When these considerations are balanced, the presumption of disclosure is firmly displaced by the countervailing public and private interests. We will therefore make an order suppressing publication of CW's name or identifying particulars pending any further order of the High Court.

Application of principles to the other witnesses

[48] In respect of the other 12 witnesses on the list, we are not satisfied Brown J, on the information he had, erred in declining suppression. First, Ms Cooper advanced the application — and also this appeal — very much on the basis that all the proposed witnesses were victims of either sexual or physical abuse while in state care, and thus all are in a class needing name suppression. As Brown J observed, this Court's decision in *Clark v Attorney-General (No 1)* is against a "class" approach to name suppression, certainly in the absence of supporting evidence.[44]

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43 *X v Attorney-General*, above n (1/2).

44 *Clark v Attorney-General (No 1)*, above n 17, particularly at [44].

That "class" approach perhaps explains why there was no affidavit from 10 of the other 12 witnesses.

[49] We do not accept Ms Cooper's submission that providing a proper evidentiary basis for name suppression in respect of each individual prospective witness is oppressive. A first and minimum requirement is an affidavit from each prospective witness explaining any concerns he has about giving evidence without name suppression, and the reasons for those concerns. These affidavits can be concise, as are the three already filed. Something beyond a mere preference for name suppression must be made out.

[50] If one of the grounds for seeking suppression is similar to that advanced by Dr Rosic in respect of CW, then a supporting affidavit or affidavits from a suitably qualified expert will be needed. An affidavit in respect of each prospective witness may not be needed. Given that many of the other 10 prospective witnesses are plaintiffs in their own right, we assume those witnesses, at least, have been, or will be, referred to a psychiatrist and/or psychologist for assessment with a view to providing evidence supporting the witness' damages claim. If that is the case, obtaining an affidavit or affidavits comparable to that filed by Dr Rosic in respect of CW would not be an oppressive task. Dr Rosic interviewed CW to assess him in relation to CW's own claim against the Attorney-General for damages.

[51] We are not intending, by these observations, to be prescriptive as to the evidentiary requirements. What is sufficient will be a matter for the High Court, guided by the principles we have set out at [23]–[34] above.

[52] That leads to the next point. As outlined at [12]–[15] above, the focus of both Dr Millichamp's and Dr Stanley's evidence was the same — to ensure that the Court is a "safe" place for the appellant's witnesses giving evidence of physical abuse. However, as noted in [11] above, the nub of the concern expressed by the three prospective witnesses who made affidavits is that giving evidence without name suppression will mean they can be identified and perhaps attacked because they are "narks". That is a distinctly different concern. Conversely, none of the three deponents expressed — at least in any direct way — a concern about their ability to

give evidence in court because of the re-traumatising effects referred to by the two experts. There is an obvious mismatch here that Ms Cooper needs to address. It seemed to us that the focus of the argument put to Brown J was the fear of retribution, whereas the argument Ms Cooper put to us sought to shift the focus onto the re-traumatising effects of the appellant's witnesses giving evidence without name suppression. The application is thus still shifting and shaping in its focus and content.

[53] In summary, we consider any renewed application or applications to the High Court for name suppression need to be tidied up. The basis on which name suppression is sought needs to be clearly identified and needs to have evidentiary support. If properly supported applications are made, the Attorney-General may consent to name suppression as he did for those witnesses who are to give evidence that they were sexually abused.[45] In the meantime, the orders Brown J made, and the order we make in this judgment that the Court file may not be searched without the leave of a Judge, provide prospective witnesses with a level of protection. However, we accept Ms Cooper's point that some witnesses may not be prepared to give evidence (or, we assume, may not be prepared even to be briefed) unless they have the assurance of name suppression.

Second issue on appeal — costs

[54] As to the second appeal issue, whether Brown J erred in ordering costs against the appellant, we are satisfied the costs order ought not to have been made.

[55] As Ms Cooper points out, s 45(2) of the Legal Services Act 2011 provides no order for costs may be made against a legally aided person in a civil proceeding unless the court is satisfied there are exceptional circumstances. Ms McDonald informed us the respondent did not seek costs in the High Court. Further, there was no discussion in the judgment under appeal as to why the respondent was entitled to

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[45] In this respect we commend, to the Attorney-General, careful and critical consideration of the evidence of Dr Rosic summarised in [39] above. In paragraphs 15 and 16 of her affidavit, Dr Rosic expressed the view that there is no difference between the damage done to a person's emotional, cognitive and behavioural functioning, whether that person is physically or sexually assaulted. The determining factor is the severity of the traumatic event. It is only social convention that gives sexual abuse a different quality than physical abuse.

costs given the appellant is legally aided. It may be that the appellant's legal aid status was simply overlooked. In any case we are not satisfied there were exceptional circumstances so as to justify displacing the presumption that costs will not be ordered against a legally aided person.

Result

[56] The application for leave to adduce fresh evidence on appeal is granted.

[57] Save in respect of proposed witness CW, the appeal in respect of name suppression is dismissed.

[58] In respect of CW, the appeal is allowed. We make an order prohibiting publication of CW's name or identifying particulars pending any further order of the High Court.

[59] The appeal in respect of costs is allowed.

[60] The costs order in the High Court is set aside.

[61] As the appellant is legally aided, there is no order as to costs of this appeal.

[62] We make an order that the Court file is not to be searched without the leave of a Judge of this Court.

Solicitors:
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