

CITATION: *FG v Northern Territory of Australia* [2012] NTMC 044

PARTIES: FG

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: Interlocutory

FILE NO(s): 21113443

DELIVERED ON: 26 September 2012

DELIVERED AT: Darwin

HEARING DATE(s): 24 September 2012

JUDGMENT OF: J Johnson JR

CATCHWORDS:

SECTION 57(1) OF THE *EVIDENCE ACT* – whether it is in the interests of the furtherance of the administration of justice for the names of a party and an intended witness in this proceeding to be prohibited from publication.

REPRESENTATION:

Counsel:

Worker:	Mr O’Loughlin
Employer:	Ms Osborne

Solicitors:

Worker:	Priestleys
Employer:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2012] NTMC 044
Number of paragraphs:	30

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21113443

BETWEEN:

FG
Worker

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Employer

REASONS FOR JUDGMENT

(Delivered 26 September 2012)

Mr J JOHNSON JR:

1. This is an interlocutory Application by the worker for a “suppression order”, which is a shorthand way of describing an application to forbid the publication of certain names, and which is countenanced by section 57(1) of the *Evidence Act*. By her Application the worker applies for an order to have both her name and the name of an intended witness in the proceeding to be forbidden from publication except by the use of the pseudonyms “FG” and “PL” respectively.
2. On 17 September 2012 the worker filed her Statement of Claim in the substantive proceeding. That Statement of Claim pleads by use of the pseudonyms “FG” for the worker and “PL” for the intended witness. In effect therefore, I am being asked by this Application both to authorise the form of that Statement of Claim and to forbid publication of the full names represented by the pseudonyms.
3. For its part, the employer submits that the proper approach is for it to abide by the Court’s decision. However, in doing so, it stresses that all allegations by the worker against the intended witness “PL” are denied.

The Law

4. As Mr O’Loughlin points out, the starting point is this Court’s jurisdiction to make a suppression order, more particularly in its interlocutory jurisdiction. I take the Court’s power to determine this Application for a suppression order to found upon two central jurisdictional principles, both of which are statute based.
5. The first of these is Work Health Court Practice Direction titled “Powers of Judicial Registrars”. Pursuant to this Practice Direction a Judicial Registrar is authorised to exercise all powers of the Court save and except the power to hear and finally determine a matter; hear and determine an application for summary judgement; an assessment of compensation under Part 21 of the Rules; and consideration of a memorandum of agreement under section 108 of the Act.
6. In its turn, the source of power for this Practice Direction is section 31(1)(a) and 31(3) of the *Work Health Administration Act*.
7. The second jurisdictional principle is that contained in section 57(1) of the *Evidence Act*. For present purposes it will suffice if I recite the relevant parts:

Part VII Publication of evidence

57 Prohibition of the publication of evidence and of names of parties and witnesses

(1) Where it appears to any Court:

(a) ...

(b) that, for the furtherance of, or otherwise in the interests of, the administration of justice, it is desirable to prohibit the publication of the name of any party or intended party to, or witness or intended witness in, such proceeding,

the Court may, either before or during the course of the proceeding or thereafter, make an order:

(i) ...

(ii) ...

(iii) forbidding the publication of the name of any such party or witness.

8. As will be seen, the power to order prohibition of publication is given to “any Court”, and “Court” is itself defined in section 4 of the Act to include “any Court, Judge, Magistrate or Justice, and any arbitrator or person having authority by law or by consent of parties to hear, receive and examine evidence”.

9. With those two jurisdictional principles in mind, I will proceed to determine the worker's Application.
10. Mr O'Loughlin next referred me to *G v The Queen*¹. This was a case concerned with the circumstances in which an order should be made prohibiting publication of the name of a person in proceedings before a Court. The power to make such an order emanated from the then section 69 of the *Evidence Act* in South Australia which, whilst certainly not in identical terms to section 57 of the *Evidence Act* in this jurisdiction, is patently of similar object and intention and also uses similar wording by use of the term "in the interests of the administration of Justice" as grounds for the exercise of discretion. Importantly, section 69 of the South Australian Act also allows such orders "in order to prevent undue prejudice or undue hardship to any person", a phrase not a part of section 57(1) in this jurisdiction. However, as King CJ said²:

The first ground is the "interests of the administration of justice". The width of this expression requires no emphasis. It comprehends every aspect of the administration of justice and is obviously intended to confer on the courts the widest of discretions. The phrase is apt to encompass, in addition to wider considerations pertaining to the administration of justice, many situations which are more suitably considered under the ground of undue prejudice or undue hardship.

11. In other words, and notwithstanding that the grounds of "undue prejudice or undue hardship to any person" are not explicitly included in section 57(1), the use of the words "the furtherance of, or otherwise in the interests of, the administration of justice" is sufficiently wide to encompass them.
12. The above passage was cited with approval in this jurisdiction by the Full Court of the Supreme Court in *Nine Network Australia Pty Ltd v McGregor & Ors*³ and in *Australian Broadcasting Corporation v L & Tudor-Stack*⁴.

¹ [1984] 35 SASR 349

² *Supra* at 351

³ (2004) 183 FLR 44

⁴ [2005] NTCA 7, per Riley J as he then was at [23]

13. Lastly, Mr O’Loughlin referred me to *PPP v QQQ as the representative of the estate of RRR (deceased)*⁵, a decision of Dixon J in the Common Law Division of the Supreme Court of Victoria. In discussing the principles to be applied in determining an application to restrict publication by use of pseudonym, Dixon J said⁶:

Commonly, parties might be deterred from bringing or concluding proceedings unless public disclosure of their identities could be prevented or because part of the injury complained of may be exacerbated by public disclosure. Thus, it is regarded as being necessary in the interests of the proper administration of justice that orders be made to encourage such plaintiffs to litigate their allegations, seek redress through the courts and, in proper cases, do so without unreasonable risk of aggravation of their injuries.

Consideration

14. My largest concern in relation to the worker’s present Application is the quality of the evidence which she has adduced before this Court in support of it, and whether that evidence does, or does not, meet the “very heavy”⁷ onus placed upon an applicant seeking a suppression order.
15. The worker asserts that she was sexually assaulted by a fellow worker as a result of which she became pregnant and is now suffering from a significant and debilitating psychiatric injury. However, as I understand it, she has refused to press any charges or complaint against that alleged assailant or, indeed, to adduce any evidence about that in this Application.
16. On one view, suppression of the pursuit of serious criminal allegations in the criminal courts ought not be sanctioned by further suppression in the civil courts. I note, for example, that the *Victims of Crime Assistance Act*, a scheme similarly beneficial to the *Workers Rehabilitation and Compensation Act*, makes reporting of the offence from which victims compensation is sought a condition precedent to any award of such compensation⁸.

⁵ [2011] VSC 186

⁶ *Supra*, at [34]

⁷ See, for example, *Computer Interchange Pty Ltd v Microsoft Corporation* [1999] FCA 198 per Madgwick J at [16]

⁸ See sub sections (b), (c) and (d) of section 43 of the *Victims of Crime Assistance Act*

17. But perhaps that is too harsh an interpretation, and certainly not an explicit test imposed by section 57(1) of the *Evidence Act* or the scheme of the *Workers Rehabilitation and Compensation Act*. Whatever the reasons for the worker choosing not to pursue the assault allegations, and taking at its highest her averred fear of violence from the alleged assailant and his family⁹, it is arguably not in the interests of “the furtherance of the administration of justice” for this Court to effectively bar the worker from its jurisdiction. Ultimately, in my view a worker must be able to access the jurisdiction of this Court safe from the fear of intimidation or violence.
18. But my concern also goes to the quality of the evidence about that fear of intimidation or violence. The worker’s evidence is in the form of an affidavit of the worker’s solicitor, Ms Jacinta Johnson, sworn on 14 September 2012 and which deposes to instructions given to her by the worker in the following terms:
- (a) The alleged rapist is from a large, well-known family in Central Australia.
 - (b) The worker still lives in Alice Springs.
 - (c) The worker fears physical violence or retribution from the alleged rapist, his family, and his in-laws if *her* name was published in this proceeding.
 - (d) The worker fears physical violence or retribution from the alleged rapist, his family, and his in-laws if *his* name was published in this proceeding.
 - (e) The worker has been told that she may be able to have her name suppressed in this proceeding. The worker has stated that she would be most reluctant to bring these proceedings if she had to be named.
19. There is no direct evidence in support of the allegations of “physical violence or retribution” made therein: they are but untested assertions by affidavit of the worker’s solicitor. For obvious reasons the alleged assailant is not aware of this Application and has had no opportunity to respond to it.

⁹ See par 17 below.

20. Similarly, there is no direct evidence that the fear of “physical violence or retribution” averred to might exacerbate the injury complained of, albeit that one could readily infer that to be the case¹⁰.

21. I have become somewhat used to such paucity of evidence over my time in the interlocutory jurisdiction of this Court but, as a Judicial Registrar, I do have some background knowledge of this proceeding through case managing it. If I am permitted to peruse the documents filed by the parties for the initial Directions Conference on 30 June 2011¹¹, I find an expert medical report prepared for the employer by Dr Jules Begg, Consultant Psychiatrist, following his examination of the worker on 9 March 2011. Dr Begg diagnoses the worker as suffering from Post-Traumatic Stress Disorder in the following context:

As will be seen from reading the history reported above, there was considerable dissatisfaction with the workplace prior to the rape, and also dissatisfaction with the way in which the workplace has handled her rape allegations as well as dissatisfaction with how colleagues have also responded to her allegations. The issue here is not necessarily of factual matters but an indication to me of the manner in which there is significant anger and distrust of people, such could arise entirely from the traumatic rape or it could be that she was already a very dissatisfied worker who then unfortunately was raped. The psychiatrist is not in a position to offer opinion regarding the veracity of events reported.

At the present time [the worker] does describe a Post-Traumatic Stress Disorder characterised by avoidance of reminders of the trauma, elevated levels of anxiety (and probably also anger) as well as disturbance of sleep. This will cause changes in mood. Ability to trust people will be reduced. Of course these symptoms are exacerbated by the perception that she has been unsupported by the insurer.

22. At that time Dr Begg certified that the worker was not “in a position to work because of her level of distress”.

23. Similarly, I am also aware that there has been a long delay in the worker complying with an order made on 30 June 2011 to file and serve a Statement of Claim within 28 days. During the course of case management pre-hearing conferences I have been apprised of the difficulty which the worker’s legal advisers have had in obtaining cogent

¹⁰ See the expert report of Consultant Psychiatrist Jules Begg dated 14 March 2011

¹¹ See Part 7, Division 1 of the *Work Health Court Rules*

instructions to draft that Statement of Claim. This goes, I have been told, to the worker's psychiatric injury and its affect on her capacity to think independently and clearly and to provide cogent instructions. I think it would be fair to say that the employer has taken a generally sympathetic approach to that dilemma.

24. Finally, I remind myself that this Court is empowered only to "prohibit the publication of the name of any party or intended party to, or witness or intended witness in the proceeding" and to do more would be jurisdictional error. Given the still very early stages of preparing the substantive proceeding for hearing, the parties were not able to indicate to me with any certainty today whether or not the alleged assailant would be called as a witness. Nonetheless, in my opinion I think it is open for to conclude that the evidence of the alleged assailant would be the central plank of the defence and that I should consider him an "intended witness" for the purposes of this interlocutory Application.
25. It is also necessary in my opinion, and for obvious reasons, that any order I make should extend only to the time when the substantive proceeding becomes seized by a Magistrate for hearing.

Findings

26. I find, pursuant to section 57(1) of the *Evidence Act*, that for the furtherance of, or otherwise in the interests of the administration of justice, it is desirable to prohibit the publication of the names of the worker and an intended witness in this proceeding.
27. I do so on grounds that, on the balance of probabilities, the worker has a reasonable apprehension of exacerbation of her existing psychiatric injury, and a reasonable apprehension of physical violence or retribution by her alleged assailant and/or his family. It is my opinion that that such apprehension would deter the worker from pursuing a civil action in the Work Health Court for workers compensation, and it would thereby be contrary to the furtherance of the administration justice not to make a suppression order.
28. To the extent that it is necessary I also find on the balance of probabilities that the publication of the names of the worker and the intended witness would cause "undue hardship"¹² to the worker.

¹² *G v The Queen*, supra

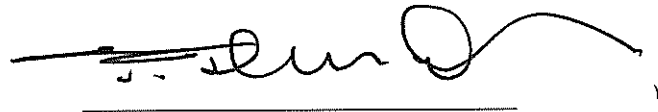
29. I retain concern with the quality of the evidence adduced by the worker in support of her Application. However, I rely on the expert report of Consultant Psychiatrist Dr Jules Begg, dated 14 March 2011, as a basis to conclude that the worker's symptomatology¹³ is such as to preclude her from directing the necessary clarity to, and focus on, her claim generally and this Application in particular. I think that it is reasonable in the circumstances of this case to so conclude.
30. I will exercise my discretion and order accordingly.

Orders:

1. Pursuant to section 57(1) of the *Evidence Act*, I order that the name of the worker and the name of the intended witness in this proceeding be forbidden from publication except by the use of the pseudonyms "FG" and "PL" respectively.
2. Order 1 above to remain in force until such time as the substantive proceeding becomes seized by a Magistrate for hearing.
3. The worker and the employer are to re-file all existing pleadings and documents on Work Health Court file numbered 21113443 with the worker's name redacted and substituted by the initials "FG".
4. All existing pleadings and documents on Work Health Court file numbered 21113443 which identify the worker by name be placed in a sealed envelope.
5. Leave to the worker to file and serve a Statement of Claim in the form filed on 17 September 2012.
6. Costs reserved.
7. Certified fit for Counsel.

¹³ Eg: recurrent panic attacks; agoraphobia; difficulty in prioritising tasks; avoidance; was suicidal; increased anxiety; and poor sleep

Dated this 26th day of September 2012

A handwritten signature in black ink, appearing to read 'Julian Johnson', written over a horizontal line.

JULIAN JOHNSON
JUDICIAL REGISTRAR