ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF AO PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA473/2023
[2023] NZCA 635

BETWEEN	AO (CA473/2023) Appellant
AND	THE KING Respondent

Hearing: 31 October 2023

Court: Miller, Brewer and Osborne JJ

Counsel: D P Hoskin for Appellant
J M Pridgeon for Respondent

Judgment: 11 December 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We make a permanent order for the suppression of AO's name in connection with the death of C.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] On 9 July 2022 AO killed his mother, C. He suffers from schizophrenia, which had not been diagnosed at the time, and acted in the delusion that C was not his mother

but an evil presence. He was found to be insane and detained as a special patient.[1] He is in the very early stages of a long treatment process and still lacks the capacity to experience emotion about what he did.

[2] AO sought permanent suppression of his name on the grounds that publication would cause extreme hardship to him, endanger his safety and cause undue hardship to his family, as victims of the offence.[2] The family supported suppression.[3] So did the Crown.

[3] Downs J declined the application, finding that while AO is at risk of suicide, that is a consequence not of publicity but of his eventual orientation to the fact that he killed his mother, and nor is the family's miserable situation a consequence of publicity.[4]

[4] AO appeals. Events have moved on a little. C's name was published in news media following the decision. The family still support suppression on the ground of extreme hardship to AO. They also say that the family themselves could do without the additional emotional burden of publicity. There is concern for his maternal grandmother, who is 89 and is still being introduced to what happened. The Crown now takes the proper position that it should support the Judge's reasoning.

AO's circumstances

[5] Reports were prepared by a consultant psychiatrist, Dr Mhairi Duff, on 22 January and 1 July 2023. In these reports she presented a detailed and unusually urgent case for suppression. She explained that AO is now largely free from delusions but is still in the relatively early stages of remission of his illness. His capacity to process and express emotions is still impaired:

> 23. [AO] is in the relatively early stages of partial remission of a severe psychotic mental illness after a very long probable period of untreated illness in the community. He is described by his treating clinician as

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1 *R v [AO]* [2023] NZHC 1893 [judgment under appeal] at [7]; and Criminal Procedure (Mentally Impaired Persons) Act 2003, s 24(2)(a).

2 Criminal Procedure Act 2011, ss 200(2)(a), 200(2)(e) and 200(2)(c).

3 The family did not seek suppression in their own right under s 202 of the Criminal Procedure Act (as victims and connected persons).

4 Judgment under appeal, above n 1, at [22], [28] and [32].

> being largely free now from the acute symptoms of delusions and hallucinations but he continues to show an impaired capacity to process and express emotions. He is relatively isolated from peers within the inpatient forensic setting. This has recently prompted a trial of Clozapine, a potent antipsychotic medication reserved for treatment resistant cases.

[6] There is likely to be a very high risk of suicide when AO is able to process what he has done:

> 24. [AO] is isolated from the support of many family members having been advised he must not make contact with them as many of his maternal relatives are witnesses in the proceedings. His treating team reported that his father has reached out to [AO].
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> 25. [AO] talks about the events in a manner that clearly demonstrates his current lack of 'normal' emotional awareness and expressivity. His narrative has the quality of describing events that occurred with an unrelated victim and by an unrelated person although he is aware of his involvement in the acts. He reads his legal information in a blunted and disconnected manner. This is a well known and accepted feature of schizophrenia and at present may also be protective of [AO] in reducing the emotional impact of the events. This presentation was also commented upon within the s.38 Fitness to stand trial, health assessor reports and is noted by his clinical treatment team.

[7] AO is described as relatively isolated from peers in the inpatient forensic setting but it appears he has access to media, and publicity may also expose him to comments from peers and staff. These events which may trigger an adjustment to reality before he is clinically ready for it:

> 26. At some point, as treatment progresses, it is likely that the enormity of what has occurred will be felt emotionally by [AO] and, at that point, [AO] is likely to be at very high risk of suicide. [AO] is not yet at this point in his rehabilitation.
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> …
>
> 28. The loss of identity suppression is likely to result in awareness by peers and staff of the nature and form of the events and to expose [AO] to the sudden and full force of comments by others which may be anticipated to precipitate a degree of reality orientation ahead of his clinical progress and before he is in a position to engage fully in a protective therapeutic rehabilitation programme.

[8] Dr Duff considers that the likely consequence is a relapse in psychosis and a significantly increased risk of suicide. In her subsequent report she said that publication would "potentially" increase suicide risk.

The Judge's reasoning

[9] Downs J found that the risk of harm was not out of the ordinary for a defendant in AO's situation:[5]

> [21] … every defendant in your frankly sad situation must, at some point, confront what they have done. The path to recovery and reintegration is, necessarily, long, difficult, and fraught with risk. The prospect of relapse is ever present. These aspects are inherent to cases like yours…

[10] The Judge accepted that there may be a risk of suicide but not that it is attributable to publication; rather, it arises independently because it is a consequence of AO coming to terms with what he has done.[6] Nor was the risk high enough to be considered appreciable; Dr Duff had found only that publication "potentially" increases suicide risk, not that it is "likely" to do so.[7]

[11] The Judge added that were he to reach the discretionary stage he would not suppress AO's name, reasoning that there is "significant public interest in the identification of those who take another's life, even when they did so because of insanity".[8]

[12] The Judge delayed the lapsing of name suppression for five weeks, until 24 August 2023, to allow AO to adjust and to allow clinicians to prepare.[9] The order did not lapse because on 21 August the Judge extended it pending disposition in this Court. We do not know how media came to publish C's name.

[13] So far as hardship to the family is concerned, the Judge acknowledged the family's fear of media interest and talk within the community, and the risk of stress for AO's maternal grandmother. But:

> [28] … the miserable situation confronting your family arises by virtue of what has happened, not risk of publication. Furthermore, there is no adequate evidence of an appreciable risk of undue hardship to the family.

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5 Judgment under appeal, above n 1.
6 At [22].
7 At [23].
8 At [29].
9 At [31].

The hardship thresholds

[14] We have explained above that the application was brought under s 200 of the Criminal Procedure Act 2011, which provides so far as relevant:

> **200 Court may suppress identity of defendant**
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> (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—
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> (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
>
> …
>
> (c) cause undue hardship to any victim of the offence; or
>
> …
>
> (e) endanger the safety of any person; or
>
> …

[15] It will be seen that as a defendant AO may seek suppression of his own name on the ground that publication will likely occasion extreme hardship to him or to his family, or undue hardship to a victim, or endanger the safety of any person. As the Judge noted, the grounds of undue hardship to AO and endangerment of his safety raise substantially the same point.[10] In this case his family are both connected persons and victims.[11] Suppression of AO's name would have the practical effect of protecting the family to the extent that their names are information the publication of which would tend to identify him.

[16] The starting point is always the protected right to free expression,[12] the importance of open judicial proceedings, and the right of the media to report

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10 At [14].

11 Victims' Rights Act 2002, s 4 definition of "victim" includes "a member of the immediate family of a person who, as a result of an offence committed by another person, dies…"; and *Pond v R* [2019] NZCA 555, (2019) 32 FRNZ 453 at [42].

12 New Zealand Bill of Rights Act 1990, s 14.

proceedings as surrogates of the public.[13] There is a two-stage inquiry, as this Court explained in *Robertson v Police*:[14]

> [40] At the first stage, the judge must consider whether he or she is satisfied that any of the threshold grounds listed in 200(2) has been established. That is to say, whether publication would be likely to lead to one of the outcomes listed in subs (2). The listed outcomes are prerequisites to a court having jurisdiction to suppress the name of a defendant. It is "only if" one of the threshold grounds has been established that the judge is able to go on to the second stage.
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> [41] At the second stage, the judge weighs 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.

[17] Although the applicable hardship threshold must be crossed before the court can exercise the discretion to suppress, the inquiry is contextual: all the circumstances of the case may be taken into account at both stages.[15] As the Court explained in *Lewis v Wilson & Horton* it is necessary to consider the public interest in publication *in the particular case* and balance that interest against harm from publication.[16]

[18] The general policy rationales for publication of court proceedings are that openness sustains public acceptance of processes and outcomes, and publication reinforces community norms about offending and its consequences.[17] These policy preferences extend to the treatment of those charged with and convicted of offences. They underpin the general rule in s 200 that the names of defendants may be published unless there are grounds for a suppression order. A secondary general rationale is that publication relies on the media, who may find cases less newsworthy, or more burdensome to report, when the defendant cannot be named.[18]

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13 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [41], citing *R v Liddell* [1995] 1 NZLR 538 (CA) at 546–547. These cases were decided under former legislation but remain leading authorities because, as the Court explained in *DV (CA451/2021) v R* [2021] NZCA 700 at [33], the Criminal Procedure Act provisions were designed to ensure that the approach adopted by the Court of Appeal in these cases was applied consistently at first instance.

14 *Robertson v Police* [2015] NZCA 7 (footnote omitted).

15 *DV (CA451/2021) v R*, above n 13, at [34], citing *X (CA226/2020) v R* [2020] NZCA 387 at [54] where this Court held that the "realities" of social media were relevant to both stages of the suppression analysis.

16 *Lewis v Wilson & Horton* Ltd, above n 13, at [42]–[43].

17 Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at [2.1].

18 The Law Commission has acknowledged that suppression orders "can have significant implications for the ability of the media to report on the administration of justice": Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at [6.52].

[19] Other rationales for publication may arise on a case-by-case basis, and where present they usually assume prominence in name suppression decisions. There is a strong public interest in publication where the defendant is said to present a risk to others,[19] or where publication may cause other complainants or witnesses to come forward.[20] Sometimes there is a public interest in knowing the defendant's character; in *Lewis v Wilson & Horton* this Court instanced cases involving sexual offending, dishonesty and drug use,[21] but this consideration extends generally to all very serious offending.[22] Against that, there may be a countervailing public interest in the defendant's rehabilitation, as with youth offenders for example,[23] or the privacy of connected persons.[24] The victim's attitude must be taken into account when considering a permanent suppression order.[25] Acquittal may reduce the public interest in the defendant's identity.[26]

Extreme hardship in this case

[20] Downs J took account of the limited public interest in AO's identity, but he did so when addressing the second stage in the analysis, the exercise of discretion.[27] We find that approach too narrow. It risks artificially circumscribing the jurisdiction. As we have just explained, the public interest in publication may also inform a court's assessment of whether hardship is extreme (or undue, as the case may be) in the particular circumstances.

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19 See *Dean v R* [2021] NZCA 293 at [12] where this Court acknowledged the strong public interest in naming violent offenders as being primarily a public safety consideration, allowing those dealing with the offender in future years, such as new partners, to be able to access information about them.

20 *R v Liddell*, above n 13, at 545–546.

21 *Lewis v Wilson & Horton* Ltd, above n 13, at [42] citing *R v Liddell*, above n 13; *M v Police* (1991) 8 CRNZ 14; and *Roberts v Police* (1989) 4 CRNZ 429.

22 See for example *Bangera v R* [2022] NZCA 451, in particular at [29], where this Court considered that despite not being morally culpable for the killing of his parents, the offender's background should not be concealed from those who will have close contact with him in the future. *R v New Zealand Police* [2019] NZHC 2901 concerned a doctor who had been charged with doing an indecent act with intent to offend: in declining name suppression, Palmer J considered the interests of possible future patients who have a right to know the character of those they entrust with their personal health and wellbeing (at [63]).

23 See for example *DP (CA418/2015) v R* [2015] NZCA 476, [2016] 2 NZLR 306, in particular at [42]; and *R v Q* [2014] NZHC 550 at [43].

24 For example in cases where identifying the defendant will result in identification of victims, who themselves have suppression and/or would suffer undue hardship on publication of the defendant's name: *Stuff v R* [2021] NZCA 86.

25 Criminal Procedure Act 2011, s 200(6).

26 *Lewis v Wilson & Horton* Ltd, above n 13, at [42].

27 Judgment under appeal, above n 1, at [29].

[21] We agree with the Judge that there is a public interest in publication of AO's name; he killed his mother in circumstances which would have been murder had he been sane. But the public interest in this very serious offending is mitigated because he was not morally responsible for his actions and there is no public interest in knowing his character. There could be a public interest in his identity at the point where he eventually returns to the community, to the extent that he may present a risk to others at that time. However, Dr Duff's opinion is that he is not likely to present a risk on release. She notes that he has no prior criminal history and was alone in his mental illness, which had not been identified and treated, at the time. He will remain subject to restrictions as a special patient. There is also a public interest in his rehabilitation. Overall, the public interest in his identity is moderate.

[22] The Judge recognised that it is necessary to compare hardship in the instant case with that which normally attends publication.[28] We consider, however, that he took too narrow an approach by comparing AO to mentally ill defendants whose path to recovery is long, difficult and fraught with risk.[29] As this Court held in *Pond v R* and *Bangera v R*, applicants who have been found not guilty by reason of insanity do not fall into a special class.[30] We think the appropriate comparator class is defendants accused of very serious offending. The combination of severe, partially treated mental illness and a family tragedy which complicates treatment do not, without more, justify suppression but they do place AO in a different position from most offenders in that class.

[23] It is implicit in the Judge's reasons that the only hardship which might qualify as extreme is the risk of suicide. We respectfully disagree. Dr Duff's opinion is that AO is at risk of relapse in his condition. His treating clinicians advise that he has made limited gains in social interaction but he continues to show impaired capacity to process emotions and his mental stability is at risk. We consider that these consequences would qualify as extreme hardship in the circumstances.

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28 At [21]. The Judge noted that every defendant in AO's situation would at some point have to confront what they had done.

29 At [30]. The Judge considered that AO's situation was not dissimilar those in the cases of *Pond v R,* above n 11 and *Bangera v R*, above n 22.

30 *Pond v R,* above n 11, at [53]; and *Bangera v R*, above n 22, at [21].

[24] The Judge found that the risk of suicide is attributable not to publication but to AO coming to terms with what he has done.[31] He is still in the early stages of a partial remission of a psychotic mental illness. Dr Duff explained that during his recovery process he is likely to experience the emotional impact of what he has done, and at that point he is likely to be at very high risk of suicide. To that extent, we accept the Judge's point that the risk arises independently of publication. But Dr Duff's concern is with an abrupt orientation with reality that results from publication and happens before treatment has readied him for it. In that case publication would be the immediate cause of any setback in treatment and risk of self-harm, which is sufficient to constitute extreme hardship.

[25] That brings us to the likelihood that publication will cause these risks to come home. The Court must be satisfied that publication would be "likely" to result in these risks, meaning there must be "a real and appreciable risk" or a "real risk that cannot be readily discounted".[32] We have noted that C's name was published in national media after the decision below. So far as we know, that was not drawn to AO's attention. But as explained, it appears he has access to media. And Dr Duff's reports explain that other patients regularly come and go from the forensic unit as part of their vocational reintegration and mental health rehabilitation. The clinicians think it likely that publicity will come to his attention either directly or through the agency of another patient. It is a decision for us, but in this case we see no reason to doubt their assessment.

[26] This case is distinguishable from both *Pond* and *Bangera*, in which suppression was declined for applicants who had killed or attempted to kill and been found not guilty by reason of insanity. In both of those cases the applicant's condition allowed them to understand the consequences of publicity and express opinions about it; AO is more vulnerable because he is not yet in that position. In *Pond*, the degree of hardship faced by the appellant was uncertain and the application was based in part on harm to the victim, who opposed suppression.[33] In *Bangera*, expert evidence about

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31 Judgment under appeal, above n 1, at [22].

32 *EP v R* [2023] NZHC 1573 citing *Wallis v Police* [2015] NZHC 2904 at [22]; *Beacon Media Group Ltd v Waititi* [2014] NZHC 281 at [17]; and *Huang v Serious Fraud Office* [2017] NZCA 187 at [9]-[10].

33 *Pond v R,* above n 11, at [58]–[59].

the effects of publication was quite generic and it did not link publication to a real risk of suicide.[34]

[27] We are persuaded that, in the particular circumstances of this case, AO is likely to experience extreme hardship should his name be published.

Exercise of discretion

[28] We turn to the second stage of the analysis. The Court must start with the open justice principle. But we have found that extreme hardship is likely, and the public interest in AO's identity is materially less than it would normally be for a defendant facing so serious a charge. Media interests have not sought to be heard, either in the High Court or here. C's death was a family tragedy and the family, who are the victims, support permanent suppression of AO's name. Their views must be taken into account. In the circumstances it is a short step from a finding of extreme hardship to the exercise of discretion in AO's favour. We are satisfied that permanent suppression of his name is warranted.

Undue hardship for the family

[29] It is not necessary to consider whether undue hardship to the family as victims of the offending justifies suppression of AO's identity.[35] We note for completeness that most of them are on the maternal side of the family and do not share the same surname, so there is no reason to think that publication of AO's name would identify the family to people who do not already know of the circumstances. AO's father does share AO's surname and has indicated in an email that he seeks suppression for AO, but he lives overseas and appears to have little connection with New Zealand. There is no reason to think he will experience any hardship from publication.

Decision

[30] The appeal is allowed.

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34 *Bangera v R*, above n 22, at [22]–[23].

35 As noted, AO's family have not applied under s 202 for suppression of their own names.

[31] We make a permanent order for the suppression of AO's name in connection with the death of C.

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