CITATION:	*Nationwide News Pty Limited v Binsaris & Ors* [2019] NTCA 4
PARTIES:	NATIONWIDE NEWS PTY LIMITED (ACN 008 438 828) v BINSARIS, Josiah AND WEBSTER, Keiran AND O'SHEA, Leroy AND AUSTRAL, Ethan AND NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NOS:	AP No. 3 of 2017 (21513348); AP No. 4 of 2017 (21510204); AP No. 5 of 2017 (21508784); and AP No. 6 of 2017 (21508785)
DELIVERED:	7 June 2019

DELIVERED AT: Darwin

HEARING DATE: 27 May 2019

JUDGMENT OF: Southwood J

CATCHWORDS:

CIVIL LAW – APPLICATION TO SET ASIDE – SUPPRESSION ORDER – Appellants were youths at the time the proceedings commenced in the Supreme Court of the Northern Territory claiming damages for assaults and batteries allegedly committed by prison officers and youth justice officers while the appellants were serving periods of detention – Order made suppressing the names of the appellants – Whether there remains any reason for the suppression orders to continue under s 57(1)(b) of the *Evidence Act 1939* (NT) – A suppression order prohibiting the publication of the name of a party must be made in the furtherance of or in the interests of the administration of justice – Administration of justice to be given its widest meaning – Proofs must be cogent to displace the fundamental principle of open justice – No presumption in favour of a youth's name not being published – No material produced which requires the principles of open justice to be overridden – Suppression order set aside

Evidence Act 1939 (NT) s 57(1)(b)(iii)
Judicial Proceeding Reports Act 1958 (Vic) s 4
Supreme Court Act 1986 (Vic) s 18, s 19
Working with Children Act 2005 (Vic) s 534(1)
Youth Justice Act 2005 (NT) s 50(1)

Australian Broadcasting Corporation v L [2005] NTCA 7, 16 NTLR 186; *Calderbank v Calderbank* [1975] 3 All ER 333; *G v The Queen* (1984) 35 SASR 349; *GHJ v Secretary to the Department of Justice and Community* [2019] VSC 89; *John Fairfax & Sons Ltd v District Court of New South Wales* [2004] NSWCA 324, 61 NSWLR 344; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 456; *LO & Ors v Northern Territory of Australia* [2017] NTSC 22, 317 FLR 324; *MCT v McKinney & Ors* [2006] NTCA 10, 18 NTLR 222; *Nine Network Australia Pty Ltd v McGregor SM* [2004] NTSC 27, 14 NTLR 24; *R v Lennon* (1985)

38 SASR 356; *ABC v D1* [2007] VSC 480; *RN v Commonwealth* [2014] VSC 289, 41 VR 699; *Scott v Scott* [1913] AC 417 – referred to

REPRESENTATION:

Counsel:

Appellants:	K Foley
Third Party Applicant:	J.W Roper

Solicitors:

Appellants:	North Australian Aboriginal Justice Agency
Third Party Applicant:	Paul Maher Solicitor

Judgment category classification:	B
Judgment ID Number:	Sou1904
Number of pages:	31

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Nationwide News Pty Limited v Binsaris & Ors [2019] NTCA 4
AP No. 3 of 2017 (21513348); AP No. 4 of 2017 (21510204); AP No. 5 of 2017 (21508784) and AP No. 6 of 2017 (21508785)

BETWEEN:

NATIONWIDE NEWS PTY LIMITED
Third Party Applicant

AND:

JOSIAH BINSARIS

AND

KEIRAN WEBSTER

AND

LEROY O'SHEA

AND

ETHAN AUSTRAL
Appellants

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 7 June 2019)

Introduction

[1] In 2015 each of the four appellants commenced a proceeding in the Supreme Court of the Northern Territory claiming damages against the Northern Territory for assaults and batteries allegedly committed by prison officers and youth justice officers while the appellants were serving periods of detention at the Don Dale Youth Detention Centre, Berrimah Correctional Centre and Darwin Correctional Centre in 2014 and 2015. The four proceedings were heard together by her Honour Kelly J.[1]

[2] On 8 May 2015 the Master of the Supreme Court (as his Honour Associate Justice Luppino then was) made an order in each of the proceedings by consent suppressing the name of the plaintiff and the litigation guardian until further order. The orders were made after the writs naming the appellants as plaintiffs were filed but before they were served on the respondent.

[3] By interlocutory summons filed on 7 March 2019, Nationwide News Pty Limited ('Nationwide News') has applied to set aside the suppression orders made by the Master. Nationwide News submits that there is no basis to continue the orders of the Master suppressing the publication of the appellants' identities. In support of the application Nationwide News relies on an affidavit made by Mr Craig Dunlop on 7 March 2019. Paragraphs [9] to [17] of Mr Dunlop's affidavit and the documents annexed to those paragraphs establish the following.

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1 *LO & Ors v Northern Territory of Australia* [2017] NTSC 22; 317 FLR 324.

[4] First, on 23 February 2018 Josiah Binsaris pleaded guilty in the Supreme Court to 14 criminal offences he committed as a youth between 5 and 8 April 2017 when he was 17 years of age. He was sentenced to five years' six months imprisonment with a non-parole period of 18 months. Second, on 7 February 2019 Josiah Binsaris pleaded guilty to and was convicted of assaulting a prison guard at Darwin Correctional Centre. On 16 April 2018 Keiran Webster pleaded guilty in the Supreme Court to six offences he committed on 10 October 2017 when he was 18 years of age. He was sentenced to four years imprisonment with a non-parole period of two years. In December 2016 Ethan Austral committed a number of criminal offences including stealing a car, being a passenger in a stolen car and being involved in a police pursuit when he was 18 years of age. He was required to spend at least 18 months in prison as a result.

[5] The application is opposed by the appellants. The respondent did not seek to be heard and is content to abide the outcome of the application.

[6] In response to the application the appellants have filed two affidavits by their solicitor, Mr John Birrell, made on 4 April 2019 and 23 May 2019.

[7] The first affidavit made on 4 April 2019 and the documents annexed to that affidavit establishes the following. That on 21 August 2014 Josiah Binsaris, Keiran Webster, Leroy O'Shea and Ethan Austral were Aboriginal youths aged 15 years old, 15 years old, 17 years old and 16 years old respectively. The affidavit further states that each of the appellants were not charged with

criminal offences in relation to the events at Don Dale Youth Detention Centre on 21 August 2014.

[8] Paragraphs [9] to [22] of Mr Birrell's first affidavit and the documents annexed to that affidavit outline some of the media coverage and reporting of the events of 21 August 2014, and the subsequent Supreme Court proceedings. This includes footage and images of the events of 21 August 2014, including the deployment of CS gas into the exercise yard of the Behavioural Management Unit ('BMU'), one or more of the appellants being made to lie on their stomachs on a basketball court and washed down with a hose to decontaminate them from any chemical residue left by the CS gas, and one or more of the appellants being escorted by prison guards while handcuffed, shackled and wearing spit hoods. The documents annexed to the affidavit show results for searches conducted on the Dow Jones' Factiva global news database, which show that a number of articles remain publicly available relating to the incident on 21 August 2014 and the subsequent proceedings in the Supreme Court, including the costs proceedings and the appeals. For example, a search of the terms "Don Dale and 2014 and tear gas" produce 35 articles published by media outlets from 18 September 2016 to 17 April 2017. The annexure also includes copies of these articles.

[9] Paragraphs [24] to [27] of Mr Birrell's first affidavit and the documents annexed to that affidavit set out the practice directions issued by the Royal Commission into the Protection and Detention of Children in the Northern Territory ('Royal Commission') regarding the protection of vulnerable

witnesses involved in the incidents being investigated. The affidavit states that 'due to the Royal Commission's non-publication direction and practice guidelines, the identities of the appellants were not disclosed during the Royal Commission's hearings or in its *Final Report'*.

[10] The second affidavit of Mr Birrell dated 23 May 2019 was for the purpose of stating that on 15 March 2019, each of the appellants filed an application for special leave to appeal to the High Court of Australia from the judgment of the Court of Appeal of the Northern Territory in *JB & Ors v Northern Territory of Australia* [2019] NTCA 1.

The main issue

[11] The main issue in this case is whether there is a presumption in favour of the names of plaintiffs who are youths being suppressed in civil cases which involve their prior offending as youths. In my opinion, there is not, and the suppression orders made by the Master should be set aside. No cogent material was placed before the Court which established that it was desirable to prohibit the publication of the names of the appellants in furtherance, or otherwise in the interests of, the administration of justice in the Northern Territory.

Background

[12] The first incident which was subject to the appellants' claims occurred at Don Dale on the night of 21 August 2014. At that date, Josiah Binsaris was

15 years of age, Keiran Webster was 15 years of age, Leroy O'Shea was 17 ½ years of age, and Ethan Austral was 16 years of age.

[13] The first incident culminated in the release of CS gas into the BMU of Don Dale where the appellants were detained. The second incident involved the transfer of the appellants in a van while handcuffed from Don Dale to the Berrimah Correctional Centre on the night of 21 August 2014. The third incident involved three of the appellants (Ethan Austral, Josiah Binsaris and Keiran Webster) being taken to a medical appointment at the Berrimah Correctional Centre on 22 August 2014 while handcuffed, shackled and wearing spit hoods. The fourth incident involved an alleged assault and battery of Leroy O'Shea by a prison officer in a cell in Berrimah Correctional Centre on 23 August 2014. The fifth incident involved the appellants being taken from Berrimah to the Darwin Correctional Centre on 25 August 2014 handcuffed, shackled and wearing spit hoods. The sixth and seventh incidents involved Ethan Austral being ground stabilised and handcuffed by youth justice officers on 5 and 6 April 2015.

[14] Before the proceedings came on for hearing the parties made various offers and counter-offers to settle the appellants' claims. By letter dated 7 July 2015 each of the appellants offered to settle their claims against the Northern Territory on the basis that the Northern Territory pay them each $95,000 plus costs. They received no response to their offer. On 11 August 2015 the Master directed that the parties attend a settlement conference on 16 November 2015. At the settlement conference each of the appellants

offered to settle their claims on the same terms as their earlier offer. Their offer was declined by the Northern Territory.

[15] On 25 July 2016 the Australian Broadcasting Corporation's *Four Corners* television program aired images of the appellants and others in detention at Don Dale. On 1 August 2016, the Administrator of the Government of the Commonwealth of Australia signed the letters patent on behalf of the Governor-General, which set out the terms of reference for a Royal Commission. On 3 August 2016, the Northern Territory Government established a Board of Inquiry with almost identical terms of reference.

[16] By a *Calderbank*[2] letter dated 19 September 2016, the Northern Territory separately offered each appellant to settle the proceedings by paying each plaintiff $100,000 plus costs as taxed or agreed, subject to a deed of settlement and release in a form acceptable to the Northern Territory being executed by the appellants. The offer remained open until 5 pm on 22 September 2015.

[17] On 22 September 2016 the appellants rejected the Northern Territory's offer and made four separate counter-offers as follows.

[18] Leroy O'Shea offered to accept an offer of $350,000 plus costs, as taxed or agreed. His counter-offer was conditional upon: (i) *a public apology* (the precise terms of which, it was said, could be discussed at a later time); (ii) confirmation that children would no longer be permitted to be placed in the

2 *Calderbank v Calderbank* [1975] 3 All ER 333.

BMU at Don Dale; and (iii) for a commitment from the Northern Territory to disallow that form of 'punishment' in future. Keiran Webster offered to accept $350,000 plus costs, as taxed or agreed. The offer was conditional upon: (i) a written apology to Keiran Webster and his mother; and (ii) a commitment by the Northern Territory to improve the rules or policies of Don Dale *with Keiran Webster being consulted on any improvements*. The precise terms of the apologies and improvements to the rules and policies of Don Dale were to be discussed at a later date. Ethan Austral offered to accept $200,000 plus costs conditional on a *public apology* being made to him, the terms of which could be agreed upon at a later date. Josiah Binsaris offered to accept $250,000 plus costs to be taxed in default of agreement.

[19] On 11 October 2016 public hearings of the Royal Commission commenced. The Royal Commission received extensive coverage in the media.

[20] On 26 to 30 September and 4 to 5 and 17 to 18 October 2016 the four proceedings were heard by her Honour Kelly J. The claims arising out of the third and fifth incidents were admitted by the Northern Territory of Australia and the appellants received awards of damages for each of the relevant assaults and batteries. Ethan Austral, Josiah Binsaris and Leroy O'Shea each received a total award of damages of $12,000. Keiran Webster received a total award of damages of $17,000. The appellants' claims were otherwise unsuccessful.

[21] The trial Judge awarded judgment for the Northern Territory and against the appellants on the following claims by:

(a) all four appellants for battery arising out of the use of CS gas at Don Dale on 21 August 2014;

(b) all four appellants for assault (as distinct from battery) as a result of the deployment of a dog and the Immediate Action Team at Don Dale on 21 August 2014:

(c) all four appellants for assault and battery for being handcuffed behind their backs while being transported from Don Dale to Berrimah Correctional Centre on 21 August 2014;

(d) all four appellants for assault (as distinct from battery) for being placed in shackles, spit hoods and handcuffs at Berrimah Correctional Centre on 22 August 2014;

(e) Leroy O'Shea for assault and battery at Berrimah Correctional Centre on 23 August 2014:

(f) all four appellants for assault (as distinct from battery) for being placed in shackles, spit hoods and handcuffs to travel to Holtze Correctional Centre on 25 August 2014;

(g) Ethan Austral for assault and battery arising out of the incident on 5 April 2015; and

(h) Ethan Austral for assault and battery arising out of the incident on 6 April 2015.

[22] In her reasons for judgment, her Honour Kelly J made the following statements which the appellants relied on in their response to Nationwide News's application.[3]

> By this date EA had an extensive criminal history starting from when he was 11 years old. He had been found guilty of one charge of assaulting a female and one charge of property damage. He had also been found guilty of numerous offences of dishonesty: four charges of unlawful use of a motor vehicle, two charges of unlawful possession of property, six charges of trespass, seven charges of aggravated unlawful entry, and 14 charges of stealing. Up to that time he had also been dealt with five times for breaches of bail and four times a failure to comply with Youth Court orders. In addition, before 21 August 2014 he had committed one further offence of property damage, one of being armed with an offensive weapon, two offences of escaping from lawful custody/detention, four trespasses, five more aggravated unlawful entries, six more thefts, three offences of unlawfully use a motor vehicle, and two of receiving stolen property. However, he was dealt with for those matters after 21 August. The offences of being armed with an offensive weapon, escape from custody, trespass on enclosed premises, escape from lawful detention, stealing and aggravated unlawful entry were all committed during an escape from Don Dale on 2 August 2014 with the other plaintiffs or while he was at large following that escape.
>
> EA's behaviour during his detention at Don Dale can only be regarded as extremely problematical. In the period of approximately six months before the incident on 21 August 2014, he had committed five assaults against staff or other detainees (pushing, punching, kicking/stomping on someone's head, throwing a chair and a wheelie bin, in two separate incidents, in each of which the thrown object hit the victim); one act of property damage (smashing up lights) and six incidents in which he threatened to assault staff or other detainees (including threats to "smash" others, kick their heads in or hurt them). Three of the threats were accompanied by actual violence, others by aggressive posturing. He was also involved in one escape attempt and one successful escape along with the other plaintiffs and Jake Roper.

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3 *LO & Ors v Northern Territory of Australia* [2017] 317 FLR 324, 326 – 329.

JB too was a fit looking, well-built young man. On 21 August 2014, he was 15 years old and by that time he too had a lengthy criminal history. He had been found guilty of recklessly endangering serious harm, possessing or carrying a controlled weapon, and 10 charges of unlawful damage to property, as well as disorderly behaviour, resisting police and possession of cannabis. He too had been found guilty of numerous offences of dishonesty: two charges of receiving or unlawfully possessing property, seven charges of unlawfully using a motor vehicle, 17 charges of aggravated unlawful entry (and three of trespass) and 17 charges of stealing; as well as nine charges of property damage, eight breaches of bail and six failures to comply with Youth Court orders. Importantly for present purposes, by this time he had also been found guilty on two occasions of escaping from lawful custody or detention. In addition, before 21 August 2014 he had committed further offences of unlawful use of a motor vehicle, trespass, being armed with an offensive weapon, a further offence of escaping from lawful custody and a further offence of escaping from lawful detention. However, he was dealt with for these offences after 21 August 2014. The offences of escaping from lawful detention, trespass and being armed with an offensive weapon were committed during the escape on 2 August, or while he was at large following that escape.

While in detention at Don Dale before 21 August 2014, JB was involved in a series of planned, attempted, and actual escapes. On 24 March 2013, JB and 10 others broke out onto the roof of the facility in an attempt to escape, and during the attempt they caused damage to the facility. On 8 August 2013, another detainee reported that JB and others were planning an escape. Four days later, on 12 August 2013, JB got out onto the roof again in another attempt to escape and again property was damaged in the attempt. Police reported to Don Dale that while JB and the others were in police custody following the attempt on 12 August 2013 there had been a scuffle in the cells with police officers and JB and the others were overheard making plans to again escape from custody. On 17 February 2014, when he was appearing in the Court of Summary Jurisdiction (CSJ), JB jumped over the screen in the dock and ran out of the courtroom and then out onto the street. On 13 August 2014 a Youth Justice Officer (YJO) overheard JB and another detainee discussing escaping by attacking a staff member and taking her keys. On 30 May 2014 JB damaged the door of an escort vehicle in what was construed as an escape attempt. On 2 August 2014, all of the plaintiffs (JB, EA, LO, and KW) along with Jake Roper, successfully escaped from Don Dale.

On 21 August 2014, LO was 17 ½. Up until 2 August 2014, he had no history of violent offending but had been found guilty of numerous offences of dishonesty: 11 charges of stealing, six of aggravated unlawful entry, two of receiving stolen property, three of property

damage, one of trespass and one of unlawful use of a motor vehicle. He also had six breaches of bail, two breaches of Youth Court orders and one breach of a suspended sentence. In addition, he had committed a number of offences - breach of bail, escape from lawful custody, being armed with an offensive weapon, trespass and unlawful use of a motor vehicle - for which he was dealt with after 21 August. All of these, except the breach of bail, arose out of the 2 August escape and its aftermath.

Before the escape which led to the detainees being placed in the BMU, LO had one recorded incident of non-compliance and abuse of staff and two of non-compliance and abuse of staff in which he also threatened staff, but no incidents of actual violence.

On 21 August 2014, KW was 15 years old (due to turn 16 in early November). He too had no history of violent offending but by 21 August 2014 he had been found guilty of very many offences of dishonesty: 18 charges of unlawfully use a motor vehicle, 20 charges of stealing, 12 of aggravated unlawful entry, three of trespass and three of property damage. He also had three breaches of bail and six failures to comply with Youth Court orders. He had also committed a number of offences before 21 August which were dealt with after that date. These included one charge of escaping lawful detention, one of trespass and one of being armed with an offensive weapon arising out of the escape on 2 August and one charge of stealing, two of aggravated unlawful entry and two of unlawful use of a motor vehicle committed while he was at large.

There was no evidence that KW was involved in any incidents of violence, threats, abuse or non-compliance at Don Dale before taking part in the successful escape with Jake Roper and the other plaintiffs on 2 August 2014.

The successful escape occurred on 2 August 2014. The plaintiffs and Jake Roper got into the gym and armed themselves with long weight bars. They used these to try (unsuccessfully) to break the lock on one of the gates. They also brandished them to keep staff at bay. Still holding the bars they then went to the corner of the fence, climbed over it and ran off. EA, LO and KW were recaptured on 4 August. JB was recaptured on 6 August.

[23] On 3 December 2018, her Honour ordered the appellants to pay the Northern Territory's legal costs of, and incidental to, the proceeding in the Supreme Court on the standard basis to 22 September 2016 and on an indemnity basis

after 22 September 2016.[4] Her Honour's decision was largely based on the appellants' rejection of the settlement offer made by the Northern Territory on 19 September 2016.

[24] On 18 April 2017 all of the appellants appealed against the dismissal of claims (a) and (c) at [21] above, and Ethan Austral also appealed against the dismissal of his claim (g) at [21] above. All of the appellants with the exception of Josiah Binsaris were adults when the appeals were filed. There was no appeal against: (i) the other five claims in which judgment was awarded in favour of the Northern Territory; (ii) the quantum of damages awarded in favour of the appellants for the claims for which the Northern Territory admitted liability; and (iii) the costs order made by her Honour. The appellants were unsuccessful on appeal and were ordered to pay the legal costs of the Northern Territory of the appeal on the standard basis.

[25] On 15 March 2019 the appellants filed an application for special leave to appeal to the High Court in relation to claim (a) at [21] above only, which is the claim for the use of the CS gas.

[26] All of the appellants are now adults.

Subsection 57(1)(b) *Evidence Act 1939* (NT)

[27] The suppression of the names of the appellants in these proceedings is governed by s 57(1)(b) of the *Evidence Act 1939* (NT) which provides that:

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4 *LO & Ors v Northern Territory of Australia (No 2)* [2018] NTSC 86.

(1) Where it appears to any court:

(a) that application of any evidence given or used or intended to be given or used, in any proceeding before the court, is likely to offend against public decency; or

(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, the proceeding;

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

[…]

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

[28] As I stated in *Australian Broadcasting Corporation v L*[5], the exercise of the power granted to a court under s 57(1)(b)(iii) of the *Evidence Act 1939* to prohibit the publication of the name of a party to a proceeding before the court is constrained by the following:

1. The only court that may make the order prohibiting the publication of the name of the party to any proceeding before a court is the court in which the party is named as a party in a proceeding before the court.

2. The name of the party that may be forbidden from publication by a court is the name of a party to a proceeding before the court.

3. The purpose of making the order forbidding the publication of the name of a party to a proceeding before the court must be that it is desirable to prohibit the publication of the name of the party in the furtherance of,

5 [2005] NTCA 7, 16 NTLR 186, [54].

or otherwise in the interests of, the administration of justice in the Northern Territory.

4. The power must be exercised judicially.

[29] The power to make such an order is not limited by considerations of the interests of the administration of justice in respect of the proceedings before the court only. The phrase "the administration of justice" is to be given its widest meaning. The scope of the expression "the interests of the administration of justice" was described by King CJ in *G v The Queen*[6] in the following terms:

> 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.

[30] However, for it to be desirable to make an order suppressing the name of a party to a proceeding there must be good reason for displacing, or overriding, the fundamental principle of open justice. In *John Fairfax & Sons Ltd v District Court of New South Wales*[7] Spigelman CJ stated:

> It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public […] is an essential quality of an Australian court of justice.
>
> […]

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6 (1984) 35 SASR 349, 351.

7 [2004] NSWCA 324; 61 NSWLR 344, 352 – 353.

> The entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public. Nothing should be done to discourage fair and accurate reporting of proceedings.
>
> From time to time the courts do make orders that some aspect or aspects of court proceedings not be the subject of publication. Any such order must, in the light of the principle of open justice, be regarded as exceptional.

[31] Likewise in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*,[8] McHugh JA stated:

> The fundamental rule of the common law is that the administration of justice must take place in open court. The court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient.

[32] In *R v Lennon*,[9] King CJ stated:

> A court should not lightly, or as a matter of course, make an order prohibiting publication of the names of witnesses. It should only be done where the court perceives a real, and not merely a fanciful advantage to the administration of justice or hardship which can be properly regarded as "undue". There should be in each case a careful evaluation of the considerations in favour of publication.

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8 (1986) 5 NSWLR 465, 476 – 477.

9 (1985) 38 SASR 356, 361 – 362.

[33] In *ABC v D1*,[10] a case in which the female plaintiff claimed that she had been sexually assaulted by the four defendants, Forrest J stated that the following principles were applicable when considering whether to suppress the name of a party to a proceeding.

> First, that the principal rule is that judicial hearings should take place in open court: publicly and in open view, with no restriction on reporting. This is a fundamental precept underpinning the administration of justice.
>
> Second, that in certain circumstances the administration of justice requires a qualification of the general rule. There will be circumstances where modifications of the general rule are necessarily made to ensure that the administration of justice is not frustrated. These exceptions are many and varied and cannot be prescriptively identified.
>
> Third, that the test to be applied by the court in making a pseudonym order is, to use the words of the statute, whether it is necessary to do so in order not to prejudice the administration of justice.
>
> Fourth, that a court, in determining whether to make a pseudonym order, is entitled to take into account the individual considerations affecting the person seeking the order and balance those against the principal rule of open justice in determining whether the administration of justice warrants the making of the order. Relevant to these individual considerations is whether there is a real risk of the party or witness suffering psychological harm as a result of publication of his or her name or the names of other parties. Also relevant is the real risk of a party not proceeding with an action in the event that he or she or another person is identified.
>
> Fifth, that in certain circumstances, particularly those involving sexual assaults, it may be appropriate not only to suppress the name of the plaintiff but also to suppress the name of the defendant or defendants.
>
> Sixth, that in determining whether to make such an order, a court is entitled to take into account the fact that there will still be a reporting of the proceeding and that the hearing itself will be conducted in open court, subject to the restrictions imposed by the pseudonym order.
>
> Seventh, in determining whether it is necessary to make such an order usually the proofs must be cogent and will not be satisfied by mere belief on the part of a party that the order is necessary. However, in

10 [2007] VSC 480, [65] – [71].

certain cases the court can, in a practical sense, act on its own experience and draw appropriate inferences.

[34] *ABC v D1* involved consideration of s 18 and s 19 of the *Supreme Court Act 1986* (Vic) and s 4 of the *Judicial Proceeding Reports Act 1958* (Vic), which are in different terms to s 57(1) of the *Evidence Act 1939* (NT). Under the Victorian legislation a court must be of the opinion that it is necessary to make a suppression order in order not to prejudice the administration of justice; or endanger the physical safety of any person; or cause undue distress or embarrassment to the complainant in a proceeding that relates to specified subject matter. However, the decision of Forrest J assists in structuring a framework for considering the applicability of s 57(1) of the *Evidence Act 1939* (NT) in this case.

[35] The following principles are applicable in this case. First, the principal rule is that judicial hearings should take place in open court: publicly and in open view, with no restriction on reporting. This is a fundamental precept underpinning the administration of justice. Second, the principle of open justice must yield to the paramount duty of the court to secure that justice is done. Third, the administration of justice is to be given its widest meaning and is not confined to the administration of justice in the particular proceeding in which the suppression order is sought. It includes considerations of undue prejudice or undue hardship. Fourth, the purpose of making the order forbidding the publication of the name of a party to a proceeding before the court must be that *it is desirable to prohibit the*

publication of the name of the party in the furtherance of, or otherwise in the interests of, the administration of justice in the Northern Territory. Fifth, in determining whether to make such an order, a court is entitled to take into account the fact that there will still be a reporting of the proceeding and that the hearing itself will be conducted in open court, subject to the restrictions imposed by the order. Sixth, in determining whether it is desirable to make such an order, usually the proofs must be cogent and will not be satisfied by a mere belief of a party that the order is necessary. The question is by no means one which can be dealt with by the judge as resting on his or her discretion as to what is expedient. There must be some material placed before the court upon which the decision to make an order can be reasonably based. The burden lies on those seeking to displace the principle of open justice in the particular case to make out that it is desirable in the interests of justice for the ordinary rule to be replaced by a more paramount consideration. However, in certain cases a court can, in a practical sense, act on its own experience and draw appropriate inferences.

The appellants' submissions

[36] The appellants submitted two primary bases for maintaining the order of the Master. First, the appellants were aged between 15 and 17 years when the incidents the subject of their claims for damages occurred and they were youths when they committed the offences described by her Honour Kelly J at [22] above. Cases involving children are an established category at common law where orders are made suppressing the names of a party to a

proceeding. In the context of proceedings that would associate a person with criminal wrongdoing committed as a child, such orders are especially appropriate in recognition of "the fact now almost universally acknowledged […] that the publication of a child offender's identity often serves no legitimate criminal justice objective, is usually psychologically harmful to adolescents involved and acts negatively towards their rehabilitation".[11] The desirability of affording a person that protection does not disappear when the child the subject of an incident (or involved in a court proceeding) comes of age. If a court publishes a decision involving a child, using a pseudonym or a similar protective device, the courts do not revisit the publication once the child turns 18 and republish with identifying information. The protection afforded to the child, in relation to incidents occurring as children, continues. In effect counsel for the appellants sought to argue there was a presumption in favour of suppressing the names of the appellants in a civil case because the proceeding in part involved their prior criminal offending as youths, and their detention in Don Dale.

[37] Second, the appellants submitted that the Master's orders should continue because of the unusual amount of media attention given to the incidents the subject of the proceeding, and to the proceedings themselves. The events in question (in particular, the use of CS gas at Don Dale) received a significant amount of media attention. That media attention included showing footage of the incident, including footage depicting the appellants being removed

11 *MCT v McKinney & Ors* (2006) 18 NTLR 222, [20].

from the BMU, and in a state of partial dress, handcuffed and hosed down. The media attention included footage of several of the appellants being hosed and handcuffed. It was submitted that it is one thing to ask a litigant to accept some publicity may be attracted in the course of litigation. However, the publicity in this case is of a different order. The media interest commenced with the incidents the subject of the proceedings continued throughout the trial (with daily reporting on the trial, often at a national level) and has extended to the appeal and beyond. The appellants should not be expected to stand that level of media attention. While media attention (even significant media attention) may not be considered (without more) to justify a suppression order, the orders do not simply protect the appellants from embarrassment. By ensuring their names are not connected with criminal wrongdoing committed as children, they are protecting against the negative impact "naming and shaming" may have on the rehabilitation and reintegration of young offenders. The need for the orders is particularly acute in circumstances where the media attention has been significant.

Consideration

[38] There are a number of difficulties with the appellants' submissions. First, children per se are not an established category at common law where orders suppressing the name of a party to a civil proceeding are made. Indeed, in the Northern Territory they were not at common law in criminal proceedings. While some support is found for the appellants' submission in

RN v Commonwealth[12] at [19], her Honour Dixon J cites no authority for the proposition that at common law, pseudonym orders in particular have been made in cases involving children. The better view is that at common law there were three recognised categories of cases which were exceptions to the principle of open justice: suits affecting wards of the court, lunacy proceedings, and cases where secrecy is the essence of the cause – for example to protect a trade secret or invention.[13] The first two exceptions involved the jurisdiction of judges representing the Crown as parens patriae in respect of transactions that were truly intra familiam. The third exception depended upon the principle that the court would not allow judicial proceedings to be used to destroy that which the court's very protection had been sought to prevent.[14] At common law the courts also had inherent power to secure that justice was done, in which case it was necessary to establish that any suppression was strictly necessary for the attainment of justice.

[39] In any event, in the Northern Territory, the reporting or publication of criminal proceedings involving children in the Court of Summary Jurisdiction or the Supreme Court have been dealt with by legislation since at least 1939. The history of such legislation is usefully summarised in *MCT v McKinney & Ors* as follows.[15]

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12 [2014] VSC 289, 41 VR 699.

13 *Nine Network Australia Pty Ltd v McGregor SM* (2004) 14 NTLR 24 at [19]; *Scott v Scott* [1913] AC 417 at 482;

14 Ibid.

15 18 NTLR 222 [6] – [8], [10].

> There is nothing to indicate that s 23 of the *Juvenile Justice Act* was connected with or in any way subject to s 57 of the *Evidence Act*. Section 57 of the *Evidence Ac*t has been in existence since its commencement on 2 August 1939. At that time offences against children were dealt with by the Court of Summary Jurisdiction and by the Supreme Court in accordance with the provisions of the *State Children Act* 1895-1909 (SA) as amended by the *State Children Ordinances* 1934 and 1952. Under those provisions hearings of summary offences were required to take place either in a special room approved for that purpose or, if in a courtroom, outside the court's usual hours (s 31). Although the legislation did not then enable the courts to order the non-publication of the name of child defendants or other information relating to the charge, the courts had a general power to order that the proceedings be held in camera (s 114). An order in relation to the name of the child could have been made only under s 57 of the *Evidence Act*.
>
> In 1958 the *State Children Act* and the *State Children Ordinances* were repealed by the *Child Welfare Ordinance* 1958 (SA) which established special courts to be called Children's Courts (s 21). Under s 29(1) the Children's Courts were required to sit in camera. Section 30 provided that it was an offence for any person to publish a report of proceedings or the result of proceedings before a Children's Court without the courts authorisation.
>
> An amendment to the *Child Welfare Ordinance* (No 27/1965, s 12) removed the court's power to authorise publication.
>
> The *Child Welfare Ordinance 1958* (as amended) was repealed by the *Community Welfare Act 1983* (NT) which came into force on 20 April 1984. The *Juvenile Justice Act* came into force on the same date. […]
>
> The effect of the changes brought about by the *Juvenile Justice Act* removed the statutory requirement for proceedings against children to be heard in camera, provided for a power to exclude persons from the court where the ends of justice were best served by doing so and removed the automatic prohibition on the publication of proceedings and instead conferred power on the courts to make a non-publication order under s 23. It is clear that the power under s 23 is not subject to s 57 of the *Evidence Act*.

[40] Today the publication of information about criminal proceedings against children under the provisions of the *Youth Justice Act 2005* (NT) is subject to s 50(1) of that Act. Subsection 50(1) states:

> The Court may, in an order under section 49[16] or by a separate order, direct that a report of, or information relating to, proceedings in the Court, or the result of proceedings against a youth before the Court, must not be published.

[41] 'Court' in s 50(1) of the *Youth Justice Act 2005* means the Youth Justice Court and, if the context requires, includes the Supreme Court exercising its jurisdiction under the *Youth Justice Act 2005*. The subsection is limited in its application to criminal proceedings under that Act, involving a person who was under 18 years of age at the time he or she committed the offence.

[42] As to provisions such as s 50(1) of the *Youth Justice Act 2005*, the courts in the Northern Territory have held that *the court has a complete and unfettered discretion* as to the making of suppression orders.[17] There is no presumption in favour of a youth's name being published which can only be displaced if the circumstances are exceptional.[18] Further, in *MCT v McKinney & Ors*[19] the court stated the following:

> We think this passage in *Lee* correctly encapsulates the approach to be taken to s 23 of the *Juvenile Justice Act*.[20] The Legislature has chosen not to suppress automatically the identity of children who appear before the court and, recognising "the legitimate interest of the public" in knowing the identities of offenders, good reason must be demonstrated to justify suppressing the identity of a child offender. However, when a court is asked to exercise its discretion, it is important to weigh in the balance the fact now almost universally acknowledged by international conventions, State Legislatures and experts in child psychiatry,

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16 Proceedings to be in open court unless it appears to the Court that justice will be best served by closing the Court.

17 *MCT v McKinney & Ors* (2006) 18 NTLR 222, [17].

18 Ibid [18].

19 Ibid [20] – [22].

20 1984 (NT).

psychology and criminology, that the publication of a child offender's identity often serves no legitimate criminal justice objective, is usually psychologically harmful to the adolescents involved and acts negatively towards their rehabilitation. The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules) adopted by General Assembly resolution 40/33 of 29 November 1985, to which Australia is a party, states in clause 8, as follows:

> 8. Protection of privacy
>
> 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused by undue publicity or by the process of labelling.
>
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.
>
> Commentary
>
> Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatisation. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as 'delinquent' or 'criminal'.

[…]

In our opinion it is proper to take into account in a case such as the present where the juvenile has been found guilty by a court, the age and relative immaturity of the offender, the offenders prospects of rehabilitation and the likely impact which publicly identifying him or her as the offender will have on his or her psychological well-being and rehabilitation prospects; whether or not the offender represents a danger to the community such that the community's interests require that his or her identity becomes known (see *R v MJM and Ors* (2000) 24 SR (WA) 253); and any other relevant factors. It may be thought that the seriousness of the offence is one such factor. Whilst it is difficult to see how conviction for a single minor offence would be relevant, conviction of a series of offences, especially of serious offences against the person or property offences, would be relevant to an assessment of the level of danger to the community which the offender represents, as would the offender's prior criminal history (or lack of it), together with any other specific evidence relevant to such an assessment. The importance to be attached to the rehabilitation of juvenile offenders has been emphasised many times and needs no repetition: [citations omitted]. In *R v H* (a juvenile) (9 October 2001, unreported) Bailey J made such an order in the case of a 17 year old juvenile convicted of armed robbery in order to prevent damage to the juvenile's further rehabilitation prospects.

[43] Significantly for the purposes of this application, it is apparent that since 20 April 1984, the Legislature has chosen not to suppress automatically the identity of children who are subject to criminal proceedings and, recognising "the legitimate interest of the public" in knowing the identities of offenders, good reason must be demonstrated to justify suppressing the identity of a youth who is charged with criminal offences. Neither in criminal proceedings, nor in civil proceedings, is there a presumption in favour of suppressing the identity of youths where criminal offending is involved. This application falls to be dealt with in accordance with the principles set out at [35] above.

[44] Despite being accorded time to instruct their lawyers and prepare affidavits on their behalf, the appellants have not placed any material before the Court which requires the principle of open justice to be overridden. There is no evidence which establishes that the criminal proceedings involving the offences committed by the appellants to which her Honour Kelly J referred were subject to suppression orders in the Youth Justice Court or the Supreme Court. The proceedings before this Court involve the individual rights of the appellants and there is no evidence that they would not have pursued their claims if their names were not suppressed. It is apparent that the appellant's were not only motivated by the prospect of obtaining damages but wished to publically make a point about the way they were being treated in detention. Now that they are adults, there is no evidence that the appellants have been rehabilitated and that identifying them with

their prior offences will cause them undue hardship or prejudice. There is no evidence to suggest that publicly identifying the appellants as persons who committed offences when they were youths will harm their psychological wellbeing or their prospects of rehabilitation. There is no evidence that they have good prospects of rehabilitation. There is no evidence that they will not pursue their applications for special leave to appeal to the High Court if their names are no longer supressed.

[45] The only evidence presented to the Court about the impact that identification of the appellants may have on them is a hearsay report in Mr Birrell's first affidavit of an assertion by Keiran Webster, who is now 20 years of age and in prison, that: "the media attention on [these proceedings] causes [him] considerable concern." Further, the disclosure of his identity in connection with these proceedings would add to his concern because it would be: "(a) harder for him to change if his name is connected with this incident; and (b) make it harder for him to get a job on release from custody and reintegrate into the Darwin community". This evidence is far from persuasive.

[46] There is evidence before the Court that on 6 June 2018 Keiran Webster was sentenced by the Supreme Court for the following offences he committed when he was 19 years of age: aggravated unlawful use of a motor vehicle which was used in connection with the commission of an offence of stealing, damage to property at the airport Tavern, aggravated unlawful entry of a building with intent to commit the offence of stealing at night time while armed with an offensive weapon which carries a maximum term of

imprisonment of 20 years, and robbing a male person of a set of car keys while armed with a tomahawk and in the company of two other persons which carries a maximum penalty of life imprisonment, driving a motor vehicle dangerously, and another offence of damage to property. During the course of his published sentencing remarks, his Honour Barr J stated the following:

> I now want to say something about your record of prior offending. Exhibit P2 amounts to some 14 pages and indicates a significant offending history.
>
> It seems you started to offend in November 2012, when you committed two offences of stealing. You were 14 years old at the time.
>
> In the period August to December 2013 you committed 16 offences of unlawfully using a motor vehicle, all but two of them aggravated unlawful use. In the same period, you committed 14 offences of unlawful entry, some of them aggravated unlawful entry, and trespass on enclosed premises. You also committed 15 stealing offences. You committed one offence of driving in a manner dangerous.
>
> I note that you turned 15 in November 2013.
>
> You further offended in July 2014, another offence of unlawful use of a motor vehicle, aggravated by the fact that the value of the vehicle was over $20,000. You also committed the offence of resist police in the execution of their duty.
>
> Then, over a two day period in early August 2014, you committed two offences of aggravated unlawful entry of a building, one of trespass on enclosed premises, two of unlawful use of a motor vehicle, one of them aggravated, one of being armed with an offensive weapon and one of escaping from lawful custody.
>
> In September 2014, you committed two offences: one of damage to property and the other of obstructing an officer.
>
> You were sentenced to various terms of detention for the 2014 offending, but it is difficult to work out from exhibit P2 how long you actually spent in detention at that time.
>
> You then managed to stay out of trouble for almost three years, until July 2017 when you committed four offences, driving and motor vehicle regulatory offences. It would appear that you were not arrested

> for those matters and that the charges were heard in your absence. You were fined a total of $500 and ordered to pay a victims levy of $600.

[47] It would therefore appear that in relation to Keiran Webster most of the offences referred to by her Honour Kelly J have already been published with the appellant being clearly identified as the offender.

[48] On 28 June 2018 Josiah Binsaris was sentenced by his Honour Hiley J for a number of offences he committed in April 2017 when he was 17 years of age, that is, when he was still a youth. He was an adult when he was sentenced. During the course of his sentencing remarks his Honour Hiley J stated the following.

> You have an extensive criminal history and I will not go back to that in any length. In summary, you have previously been dealt with and punished for similar offending; unlawful use of a motor car on six occasions, criminal damage on six occasions, unlawful entry on five occasions, stealing on four occasions, resist police and some other offences.
>
> At the time when you committed the offences in February and April 2017 you were on a suspended sentence for offences of unlawful entry, stealing, criminal damage and unlawful possession of property.

[49] It is apparent that the offending history of Josiah Binsaris as a youth has already largely been published by the Supreme Court with him being identified as the offender.

[50] Leroy O'Shea and Ethan Austral have received media coverage for serious offences they have committed as adults. In the circumstances, it is difficult to see how identifying them in relation to the offences referred to by her

Honour Kelly J would cause them any undue harm or prejudice, and there is no evidence that it would do so.

[51] Unlike the circumstances in *GHJ v Secretary to the Department of Justice and Community Safety*,[21] this is not a case in which the Court can act on its own experience and draw appropriate inferences. *GHJ v Secretary to the Department of Justice and Community Safety* was a case in which the plaintiff sought judicial review of the defendant's decision to issue him a negative notice after he had applied for an assessment under the *Working with Children Act 2005* (Vic). The plaintiff was charged with two counts of 'Transmit Objectionable Material" on 8 June 2017, when he was 17. Such a charge damages a person's reputation and attracts considerable opprobrium. When the matter came before the Children's Court, it ordered that the charges be dealt with by youth diversion order. Following the plaintiff's completion of the steps required by that order the charges were discharged by the Children's Court. As the transmission of the objectionable material occurred when the plaintiff was a youth, s 534(1) of the *Children Youth and Families Act 2005* (Vic) applied. That section provided that a person must not publish or cause to be published, except with permission, a report of a proceeding in the Children's Court that contains any particulars likely to lead to the identification of a child or other party to the proceeding. Given the outcome of the proceeding in the Children's Court the identification of the plaintiff with such an offence would clearly cause undue prejudice, and

21 [2019] VSC 89.

would potentially cause further harm as the people to whom the material was sent may also have been directly or indirectly identified.

[52] The second basis on which the appellants submitted the suppression orders should be continued is also unsustainable. There was no evidence before the court to suggest that the plaintiffs had been harmed by the media coverage which has occurred to date. Further, when counsel for the appellants was asked to identify any media articles that specifically concerned the appellants she was only able to identify six articles.

Conclusion

[53] In the circumstances, I set aside the orders of the Master suppressing the names of the appellants. As these proceedings concerned very serious allegations which the appellants made against prison officers and youth justice officers, for which the appellants claimed exemplary damages, it is in the interests of justice that they be identified.
