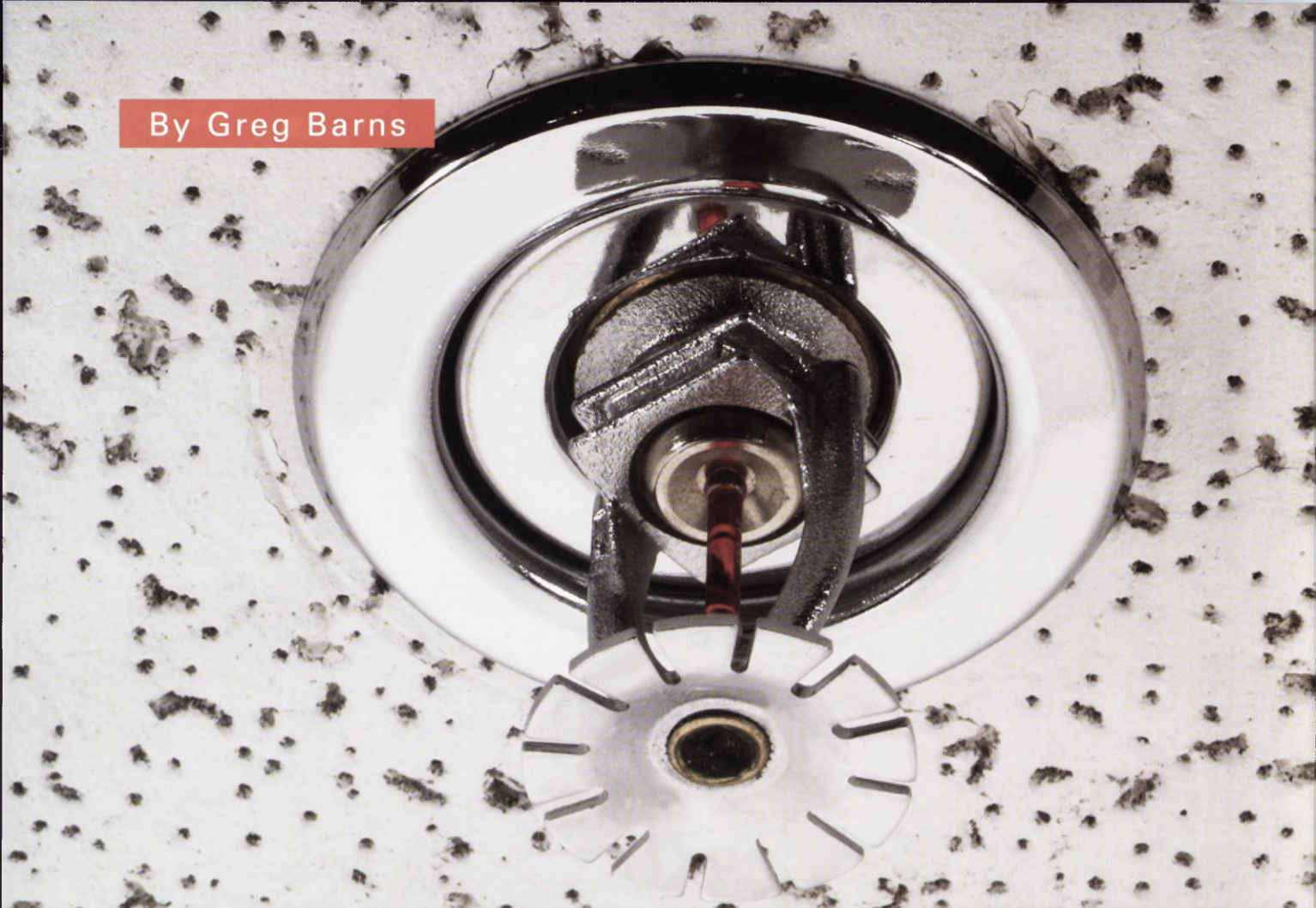
By Greg Barns



SUPPRESSION ORDERS

SOME RECENT DEVELOPMENTS

In the pre-internet age, suppression orders had real efficacy. Newspapers and the electronic media, by which was meant TV and radio, had to comply with orders made by courts and there were hefty penalties for those individuals and organisations that did not do so. But in the age of Facebook, Twitter and the suite of other online social media sites, can a suppression order do what it is intended to do for defendants in criminal trials – protect them against a jury being influenced by adverse commentary?

The case of Jill Meagher, an ABC employee who last year was sexually assaulted and murdered in Brunswick in Melbourne's inner north, illustrated the difficulty faced by lawyers and courts in the digital age. Ms Meagher's case generated a media frenzy and Facebook, in particular, became the host of a number of hate-filled, vile pages devoted to excoriating the man arrested over Ms Meagher's rape and murder. Victoria's Police Commissioner Ken Lay pleaded with Facebook to remove the sites but to no avail. The accused pleaded guilty and received a sentence of life imprisonment with a minimum term of 35 years, but had he gone to trial, an application for a stay on the basis of the level of prejudice endured would no doubt have been made.

The New South Wales Court of Appeal (Bathurst CJ, Basten JA, Whealy JA), in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim*,[1] has recently examined the issue of suppression orders in the digital age.

The respondents were parties in criminal proceedings in the New South Wales District Court. On 12 August 2011,

the Court made a non-publication order in respect of details of a related police investigation and the prosecution of the accused for conspiracy to murder, and in relation to certain, earlier proceedings. The appellants challenged those orders and raised the following issues before the Court of Appeal:

(a) there was an absence of 'necessity' as that concept is used in s8(1) of the *Court Suppression and Non-Publication Orders Act* 2010 (NSW) (the *Suppression Orders Act*);
(b) the order was made on the assumption that juries will not adhere to their oaths, whereas the courts routinely operate on the contrary assumption;
(c) if a juror were to disobey a direction not to view material on the internet, the order would be ineffective in preventing access to information concerning the accused;
(d) the order was excessively wide and uncertain in its operation; and
(e) the order imposed an undue constraint on free speech.

Section 8(1)(a) of the *Suppression Orders Act* provides that a 'court may make a suppression order or non-publication order on a number of grounds, including that the order " is necessary to prevent prejudice to the proper administration of justice".'

Basten JA examined the issue of whether an order can be 'necessary' in the context of information being available on the internet. His Honour observed that an order will fail the necessity test if it is futile. However, Basten JA observed that:

> 'an order will not necessarily be futile because material is available otherwise in cached form, from which it may be removed once the source page has been removed, or is available on websites overseas. The mere fact that a search has revealed many thousands of "hits" does not necessarily mean that offending material has been readily located. It is necessary to refer to items which have been given priority in response to the search.'[2]

The next issue on the question of necessity, Basten JA said, was to ensure that there is 'proper consideration' given to:

> 'whether a jury is likely to abide by the directions it will be given to decide a matter only by reference to the material called in evidence and without carrying out any investigations themselves. Circumstances may differ. A juror might be thought to be more likely to look for offending material, despite a direction, if such material is of recent origin and if he or she has some recollection of its existence, than in other circumstances. This is a matter for consideration by each judge asked to make such an order.'[3]

In other words, the question of the influence on a jury is the same whether or not the material is in the traditional media or on the internet.

However, Basten JA found that the orders made by the District Court were ineffective and therefore obviously not of necessity:

> 'The orders made in the District Court were ineffective for two reasons. First, to be effective they had to bind numerous parties who were not before the Court. Indeed, it is not possible to know, on the evidence, who those parties are. They will either include those in control of the content of websites throughout the world which may contain the offending material, or those who operate search engines, or both categories. Secondly, even if it were possible to identify all relevant parties, enforcement against any party not resident in or operating from New South Wales would be impracticable, if not impossible. Accepting the evidence that cached material might not provide a source of access once the original document were removed, it remains unclear as to how many websites containing the relevant information have it in cached form. Accordingly, the evidence failed to demonstrate that the orders would be effective.'[4]

To make suppression orders effective in cases where material is available on the internet, 'material must either be removed from any website globally to which access can be had from New South Wales or there must be an ability to prevent access by people living in New South Wales'.[5] In this case, Basten JA said the 'evidence did not disclose that either of these was a realistic possibility. Certainly the orders made no attempt to identify any such possibility'.[6]

Basten JA's judgment in *Fairfax Digital and Ibrahim* provides a useful process by which to determine whether or not the presence of adverse and prejudicial material against a defendant or plaintiff is of such a nature that an order for suppression and removal of that material ought to be applied for by those acting for that defendant and plaintiff.

The principles which can be distilled from Basten JA's judgment are as follows:

- The fact that an internet search engine reveals many thousands of hits for the prejudicial material is not of itself determinative of whether a suppression order is necessary;
- The issue is how accessible those items are on the Internet – are they stored in archives, have they been cached?
- The test for determining if a jury would be so influenced by the prejudicial material such that a direction from the judge to ignore such material would be ineffective, does not change because the material is available on the Internet.
- The capacity to enforce a suppression order is relevant. Factors include where the websites hosting the material are located, where the search engines are located and whether or not sites have the material in cached form.

Suppression orders are a very useful tool for lawyers in cases where their client has been subjected to adverse media. But if the material is primarily on the internet, which these days it invariably is, then simply because you can tender numerous website entries does not mean that there is such a level of prejudice that the principle of open justice must be curtailed. ■

Notes: **1** *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125. **2** *Ibid* at [76-78]. **3** *Ibid* at [77]. **4** *Ibid* at [78]. **5** *Ibid* at [79]. **6** *Ibid.*

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