

The Court of Public Opinion¹

Andrew Boe

The session organisers have raised three specific questions to be addressed. The first two questions relate to public statements about criminal proceedings. Accordingly, they conveniently fall to be considered together.

Does the public have the right to know the full details of matters before the courts? What can the media legally report before someone is charged?

The short answer to the first question is a qualified “Yes”. The qualification needs detailed consideration. The second question is perhaps made more interesting if you exchange the word “*should*” for “*can*”. Some attempt will be made to expand on both issues below.

It is obvious that police and other law enforcement agencies can have a legitimate interest in releasing information as soon as it comes to them so that the information is widely published within the community about serious criminal conduct. It is not so much the public’s “*right to know*”, but rather the right and perhaps obligation, upon law enforcement agencies to publish this information in the interests of the community. Legitimate purposes of publication would include:

- assisting police in solving crime or apprehending an offender – a simple example is when there has been a serious offence committed and information about the offender that is known is published to attract information from potential witnesses to assist police in their inquiries.
- informing the community generally of the nature of the continuing threat that might exist – for example where there has been a prison escape or a public extortion.
- permitting the community to understand the processes that take place in the prosecution of offences and within the criminal justice system generally.
- deterring others from considering or continuing to commit like offences.
- demonstrating that police and prosecution resources are being effectively utilised.

It is perhaps not necessary in this discussion to resolve whether this is a “*right to know*” as such or whether it is better seen as an obligation or “*permission to inform*”. There are also the more esoteric questions of what are “*enforceable public rights*” and *who* can assert these so called “*public rights*”. The fact is that publication of crimes and court proceedings occurs on a daily basis in our newspapers, on our radios and television and on Internet news services and there is sometimes a legitimate basis for this. There are specific pieces of legislation that govern the closure of courts and otherwise restrict publication of court proceedings, however it seems unnecessary to descend to that detail for the purposes of this discussion.

More contentious issues arise when the police and the media go outside these legitimate purposes. The publication of this sort of information can impinge upon the rights of a person who may face those allegations at a future trial, whether the purpose of publication is legitimate or not.

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The purpose of newspapers, radio and television

It is clear that information about crime is used in substantial part to sell units of publication whether in numbers or ratings. This circulation correlates to the value of advertising space. The ABC² aside, most media outlets are, by charter, intended to generate profit from their publications. Serious criminal behaviour is thought to be media "sexy". Therefore 'crime stories' are often highlighted in our press to the exclusion of scientific research outcomes, medical emergency heroics, acts of compassion and generosity. In short, crime sells!

It becomes relevant then to look at the motivation of the various participants in the publishing of information concerning crime and the tensions caused by their conflicting agendas, especially in cases where the information is released before matters have been finalised by a court.

The police/law enforcement agencies

As noted above, there can be legitimate purposes for releasing this sort of information publicly. Sometimes however an information release³, may be motivated by a desire to publish details of macabre criminal acts, or criminal charges against notable figures, politicians, priests, media identities etc. This raises the grey area of rectitude. After all every news report, unless the cameraman or the photographer stumbles upon any event, is just a press release. It is clear that these press releases have the effect of:

- informing others of the standard of police investigation skills and 'strike rate';
- informing others of the evidence police are relying upon to support their contention that a person has been properly charged;
- outlining the seriousness of the criminal behaviour of an offender; and
- abating public fear.

There seems little need for police to ever publish the evidence they have relied upon to arrest someone by press release as distinct from the fact of the crime being committed or that a person has been charged. It meets none of the legitimate purposes outlined above. Press releases of this kind may not be regarded as acts of contempt but they all potentially affect the passage of a matter through to finality. Listening, reading, or watching news reports reveals that self-restraint is rarely exercised. There is a need for guidelines to be prescribed to ensure that this practice is checked.

It should also be appreciated by police that the mere publication of information can and does have an impact on the court proceedings themselves. Of all the participants in the criminal justice system, they have the greatest duty to act legitimately and within the law.

The media

The primary objective of most media organisations⁴ is to increase circulation and viewing numbers. This is of course a commercial imperative⁵. The more sensational the crime or the circumstances surrounding the crime, the greater likelihood that it will attract public attention and interest in details. It is reasonable to assume that editors err on the side of sensationalism.

² The ABC limits its advertising to attract more government funding.

³ Or the amount and type of information released.

⁴ As distinct from journalists who would say that their obligations are to publish the truth.

⁵ Corporate responsibility lies first and foremost to shareholders. CEO's of media companies are likely to indicate to editors and journalists of this fact in varying ways.

Of great concern, in a State such as Queensland with such a small population and where there are media monopolies, is the fact that most debate is generated by one editorial source, the daily newspaper⁶. This poses great restrictions on developing an informed debate on any issue. If an opinion sought to be cast does not align with the editorial view, it is very difficult to get that information out. If that newspaper is the source of the competing view, again, you are in the hands of the editors as to the rules of engagement. That makes the print media in Queensland omnipotent and thus potentially dangerous.

The “social justice spokespeople”

This group contains community based legal centres, rights groups, academics and professional bodies. Most are self-proclaimed speakers for others. It has to be said that many are publicly minded, however it cannot be escaped that personal aspirations, ambitions and agendas run adjacent to public mindedness. For example, whenever I write or make a public statement, I have one eye on the impact of what I am saying on other participants in the system as well as how a member of the potential client group might view what I am stating as well as the mere fact that I am doing so. There being a limited relationship between a lawyer’s ability and popularity, it is a necessary part of the business of being a lawyer that there be a degree of personal marketing.

With these various agendas and attributes acknowledged, the following are some matters that, in my view, need to be discussed about these press releases. They include:

- The timing of the publication - different issues arise as to pre-trial, post-trial and during trial publications.
- Accuracy - the information gathered by police at the initial stages of investigation must necessarily be less reliable than facts that have withstood the process of informed consideration by prosecutors and adversarial cross-examination.
- The purpose of the publication.

Timing

It is accepted within our laws that pre-trial publicity can prejudice a fair trial. In *R v Glennon (No.1)*⁷ the High Court held:

- that there is a difference between the criteria applied in deciding whether pre-trial publicity amounts to a contempt and the test to be applied in determining whether pre-trial publicity precludes a fair trial;
- that the mere possibility of a juror acquiring knowledge of the accused’s prior conviction was an insufficient basis for concluding that the accused did not have a fair trial;
- that other than the unique case of *Tuckiar*⁸, there has been no other instance in the judicial history of this country of an accused’s conviction being quashed and a verdict of acquittal being entered on account of the potential prejudice created by the pre-trial publicity.

In *Glennon*, the publicity was generated by a radio broadcaster who *inter alia* published the fact that Glennon had prior convictions for similar offences. The broadcaster was convicted of contempt and

⁶ It is accepted that talk back radio and editorials in radio and television have increasing currency.

⁷ (1992) 60 A Crim R 18

⁸ (1934) 52 CLR 335 where the accused’s own lawyer, made a public statement in open court after a conviction at trial that the confessional statements led at the trial were correct.

gaoled.⁹

Whether a contempt has been committed is determined at the time of the publication and not by reference to subsequent events. A finding of contempt depends upon proof that a publication has, as a matter of practical reality, “a real (or clear)” and definite tendency to interfere with the administration of justice. That is, to prejudice a fair trial. On the other hand, a permanent stay will only be ordered in an extreme case and there must be a fundamental defect “of such a nature that nothing a trial judge can do in the conduct of the trial can relieve against its unfair circumstances”.

Accuracy

In theory, an accused person does not suffer prejudice if the information released in the public domain whether before, or during, a trial is precisely the same as that presented in a courtroom. A juror is unlikely to be greatly affected, issues of prejudgement, displacement and reinforcement aside, by a precise depiction of the evidence. The fact is, however that the evidence led in a court is never likely to be properly portrayed in the media especially many months beforehand and there will necessarily be adverse prejudice. Context is difficult to predict. A very damning allegation might be dissipated by other contextual evidence which might not be revealed until the trial. A witness may, for very good reason, change his/her evidence, upon reflection and after cross-examination. Also, there are many evidentiary rules that might come into play and damning evidence might very properly be excluded from the jury's consideration. Where the published information goes to the descriptions and identity of offenders, it may have a significant effect on the trial if identity remains in issue.

Purpose

As identified above, there are both legitimate and illegitimate purposes for publication of crime reports. There is a dire need for all participants to understand the purpose of their publications and to meet their obligations to the community that they purport to service.

The practice of mounting criticism on specific decisions of the courts is becoming more frequent. These attacks are often personal and in many cases promulgated by ‘credible’ commentators which increases the seriousness and level of ‘public’ regard for these attacks.

Case example 1

Recently a District Court judge was hit from all sides with criticism about an award of damages in a criminal compensation case. He was accused of being out of touch, a misogynist, a racist and needing re-education on the legal meaning of “provocation” etc. His picture was on the front page. Due to some evidence as he had found it, of contribution, he slightly reduced the damages award. The appeal period has not expired for that decision.

Case example 2

Late last year a magistrate¹⁰ acquitted a man of several street offences. About 2 months later the police union spokesman labelled the decision in the these terms: “the Queensland Police Union condemned the acquittal as a disgrace and accused Attorney-General Matt Foley of appointing magistrates with

⁹ See *Hinch v. AG (1987) 164 CLR 15*

¹⁰ This magistrate is the author's spouse.

“anti-police” beliefs

The report also included: *“Lawrence Springborg said magistrates appointed recently by Mr Foley would leave an appalling legacy. You don’t appoint magistrates who are going to take their bigotry against police and defence lawyer (sic) to the bench”*

The appeal by police of this ruling was unsuccessful.¹¹ While the appeal was pending in the thrust of the attack upon the magistrate was reiterated when the defendant was arrested on a further charge. The magistrate’s picture was published on both occasions. The appeal finding by a District Court Judge was not published.

These attacks are intended to impose the opinions of the writers as being more correct and justified than those of the judicial officers involved. The appropriate forums for any attack on a judicial decision are the appeal courts. If the author of the opinion is not a party to the proceedings, then greater problems arise as to where, when and why they should be permitted to express a view. Ventilation of public sentiment as to an unduly harsh or light sentence, or ‘inappropriate’ judicial comment¹², is of course, understandable. It must, however, be balanced against the independence of the judiciary, the preservation of confidence in the rule of law and the entitlement of an accused to a *“fair trial”*¹³. If you are a party to the proceeding, it is quite ‘Slaterish’¹⁴ and to some, gutless, to not accept the umpire’s decision, or appeal in the appropriate way, then bleat in the public forums knowing that contempt, defamation and other laws do little to curtail your hubris.

These instances, which perturb many in the legal profession, largely go unchecked. There are good reasons why judicial officers should not speak publicly or litigate, however that bar perhaps emboldens these commentators.

Summary

Whether it is due to inaccuracy or timing, publicity can hamper the proper operation of the criminal trial process in the following ways:-

- An otherwise strong Crown case not being able to proceed or it might have to be moved or delayed
- Identification evidence at the trial could be tainted
- The mere callousness of a crime and community outrage might unwittingly make people more certain about identification than they were initially because of other information they might accumulate such as *“police confirm that the suspect made admissions”*, or perhaps more subtly put *“the person is assisting police with their inquiries”* coupled with footage of the person covering their face

As noted above, the law has attempted to provide some protections, including:

- contempt charges;
- stopping or delaying trials; and
- requiring warnings and directions to be given to juries to “hark upon the evidence”, ignore the news and not discuss the case with anyone including their own family members.

¹¹ *Poulton v. Daher* (unreported) Samios DCJ D1289 of 2001

¹² *“When a woman says “no”, she sometimes means yes”*

¹³ This is stated as a right of a person to not be convicted unless he/she receives a fair trial according to law, rather than a positive right to a fair trial. See e.g *Dietrich*

¹⁴ Reported refusal of an Australian cricketer to accept the umpire’s decision.

It is rare, if not unheard of, for any application to stop a trial because of publicity to be successful. It may be that this is because of the responsible restraint of our police force and intelligent media which have kept on the correct side of the line in their press releases and publications. It might also be because the test in these cases is very high.

In a recent decision of the Queensland Court of Appeal, *R v. Kalf*¹⁵, (where the news media had wrongly published during a trial that Kalf and his co-accused had made admissions to the offence and that the motive was revenge), it was held in dismissing the appeal:

“as ordinary members of the community, jurors are aware that the media can seriously misreport matters; the court can also expect jurors to follow the clear judicial directions which were given here. There is no reason to believe that the jury did not follow those firm directions and reach their decision solely on the evidence.”

This view, with respect, is more likely to be what lawyers and judges want to believe than it being based on any empirical evidence. While it is of course permissible to use logic to opine what jurors have done, and trial judges see much more juries than the rest of us, there has been very little information gathered in this country about what jurors actually do and how they approach their duties or even if it is possible to generalise their behaviour.

The resultant landscape

It is easy to see that subscription to the necessary restraints to inhibit improper pre-trial publicity would mean that crime reporting would become ridiculously “unsexy”. Instead it would reveal:

- ordinary people caught in the cycle of their ordinariness when challenged by extraordinary circumstances; and
- a sad and pathetic reality for most criminal offenders, no matter how heinous or morally lacking their crime might be.

The boring fact is that usually there is a woeful explanation that has led the offender to the crime. Without the excitement of a police chase, a dishevelled suspect carried by burly policemen into a car, the emotional outpourings of the victim’s families and the macabre details of the crime, people would be quite uninterested in crime. Newspapers and news reports would be far less interesting.

Case example 3

In the Courier-Mail on 10 March 2001 there was published a feature article with the headline:

“Queensland teacher,[X]’s wife has been missing for 19 years. A coronial inquiry has heard the former champion footballer was a dominant narcissist who had sex romps with students. Police now accuse him of killing his devoted wife to keep their assets, children and his teenage lover”

The article then went on to list the police allegations and theories as to how the killing occurred together with emotional information about how thankful the deceased’s family were for the efforts of the police officers involved. It published a picture of X. It also published many statements from people who know X who proclaim his innocence, but with the rider that they *“have not read the dozens of statements of witnesses interviewed by police”*.

¹⁵ (unreported) [2000] QCA 499 per McMurdo P, Williams & Douglas JJ concurring.

It is difficult to see any legitimate purpose in the publication of this article. X has not been charged. Yet, he was depicted as a person clearly guilty of murder. The article contains information that is unlikely to be admissible at any subsequent trial.

Instead of engaging in this public relations exercise, why does the police officer not simply charge X?

There has been no suggestion that the relevant Attorney-General has taken action against either the publisher, the police, the journalist or the family of the deceased, even though their statements are intended to cause prejudgment of X's guilt and thus potentially affect X's entitlement to a fair trial.

What are the options for the professional communicator in protecting a client's personal or business reputation?

It is assumed that this question is directed at how to respond to public allegations against your client, impacting on either his/her business or personal reputation. For example, a restaurant chain accused of hygiene breaches, a shoe manufacturer who is accused of child labour.

Before embarking on the specific question, it is appropriate to assess the ambit of the discussion. The so-called "court of public opinion" is comprised of the entire cross section of our society. It is fair to say that there are issues that are relevant locally but are insignificant internationally, or even nationally, and the converse is also true. Some would say that many people in first world cultures, like most Australians, are socially singular, xenophobic and selfish generally. Compared to the rest of the world most non-indigenous Australians live well and conduct their lives in order to live a better life or at least create one for their children. Therefore, seeking to alter public opinion on business practices, purchasing patterns and leisure activities is much different from seeking to inform them of the truths or essential aspects of the issues associated with criminal behaviour or how criminal justice operates.

From this cross section, and with a significant bias, juries are selected. You are unlikely to have professors, media giants, superstars or even professionals on these juries and certainly if they are jury members, they will be in the minority.

Therefore, talking about the court of public opinion as a distinct entity is limiting. Every communicator needs to understand his or her specific audience. If the communication is aimed at a general issue then it is necessary to be succinct and convincing. The issues that arise for a defence lawyer in addressing a jury and deciding whether the client should give an account to the jury probably have limited relevance for professional communicators in protecting the interests of their business clients. That said, and there being some analogous concepts, these are my suggestions for communicators in a general sense:

- make sure you have clear instructions as to the ambit of your responsibility;
- ascertain first hand all of the information available;
- determine the purpose of the information release;
- determine whose opinion you are attempting to affect;
- ensure that you have access to someone within the media who you can rely upon to publish your version with little editing or 'spin'¹⁶;
- where there is a lack of clarity about an aspect of the information seek verification from a quotable source;
- if some of the information is counter productive then assess the consequences of concealing it:
 - can it be explained in context?;
 - will non disclosure be noticed?;
 - could it mislead? etc.

¹⁶ Often, "off the record" information is more likely to assist your client's cause.

- if the counter productive aspects of the relevant information is significant then a decision has to be made whether any public statement should be made at all; and
- take advice as to whether your information release is in contempt;
- ascertain who is best placed to make any statements (sometimes it is more effective to brief objective experts with the information and for you to direct media inquiries to that person); and
- if the truth is complex, then a brief statement which preserves the dignity of your client's position, and recognises the importance of due process, is probably the safest course.

The tension between what needs to be done in the information system as opposed to the justice system will always attract debate. The challenge for communicators and public relations officers is to decide which system is likely to be more consequential for your client. Sometimes, if not most of the time, the best protection that can be afforded to a client is to say nothing at all. However, there will be occasions, albeit rare, where it is necessary to get on the front foot. Determining which approach to take must be assessed on a case-by-case basis. If in doubt, say nothing. There is some currency in the old saying "*Today's news (paper) is tomorrow's fish and chips wrapper*".

Andrew Boe
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