

**JOURNALISTS AND JUDGES:  
TENSION AND DISTORTION**

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## I. INTRODUCTION

The topic of the tension between judges and journalists is not one which should be explored through the refracting lens of my self-interest, either as a journalist or as someone who currently represents the Courts Service with the media. The balance in this article, however, is swayed towards an examination of the media and its environment, as the majority of my readers are very familiar with the workings of the courts.

To begin with, it might be prudent to see what the impression of the role of the media is amongst the judiciary. It is perceived by some in the media, that judges have a suspicion and intolerance of journalism. Whilst there may be little or no evidence to support this, it is a perception which can colour attitudes. When researching for this article it came as a surprise to find that, over the past twenty years, there exists a very positive seam of thought about the media amongst judges.

An examination of this area must include the role of reporting, the distortions of stories and the risk of remedies. Her Honour Judge Yvonne Murphy, in her guide to the law for members of the media, states quite rightly, "There is an increasing public interest in the working of the courts and

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legal affairs in general. For most people, journalists are the principal source of information on these topics.”<sup>1</sup>

In doing their job many reporters face a mine-field of dangers in gathering the facts – it is manifestly easy to get it wrong. This is never more acute than in reporting on the courts. Reporting in essence is an imprecise trade (as I will discuss later) and can lead to a distortion of the facts, even when no desire to do so exists. However, we have been cautioned in responding to this by O’Flaherty J. when he describes the important role of the media and the imperfections in reporting: “[t]he press are in effect the eyes and ears of the public. The risk that there will be distortion in the reporting of cases from time to time is one that has to be run. The administration of justice must be neither hidden nor silenced to eliminate such a possibility”.<sup>2</sup>

Journalism and the judiciary are both inherent to the cultural and societal apparatus, through which the community seek information, clarification and redress. These institutions have evolved simultaneously with the modernity that is the nation state. Freedom of speech and of the press exists, necessarily to promulgate the information which ensures the survival of our democratic system. But the power to guarantee such freedom resides with judges - as much in a busy, isolated district court as in the arena of conflicting rights that is our Supreme Court.

In the Supreme Court’s judgement in *Irish Times Ltd. v. Murphy*,<sup>3</sup> Denham J. points out that we do not live in ancient times or a city state, that it is impractical for all people to attend court and that any curtailment of the press “must be viewed as a curtailment of the access of the people to the

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<sup>1</sup> Murphy, “Journalists and the Law” (2nd. Ed., 2000), Preface.

<sup>2</sup> O’ Flaherty, “Justice, Liberty and the Courts”, p. 87.

<sup>3</sup> [1998] 1 I.R. 359; [1998] 2 I.L.R.M. 161.

administration of justice and should be analysed accordingly.”<sup>4</sup>

As laws evolve in a changing environment and as case law develops, publicity is attached to change. Judges, just as much as politicians, depend on the media to explain that change. Publicity of this sort has the power to help the judiciary to maintain their independence, by encouraging acceptance by the citizen of the changes they rule on.

However, it has been pointed out by many that there is a constant clash between judge and journalist: “[j]udges and journalists do not believe each other’s rhetoric... [t]he words one speaks are not the sounds the other hears”.<sup>5</sup> Throughout this article I will explore a little of the history of reporting on the courts, examine the processes and constraints which fashion court reporting and comment on the current reporting of crime and courts nationally and internationally. I do not propose any solution to the issues which arise between the media and the courts – but hope to give food for thought.

## II. JOURNALISM AND COURTS THROUGH THE CENTURIES

The reporting of crime is not new: historically the reporting of crime has always featured in newspapers. As common law courts and the flexibility of the printing press developed alongside each other in England and Wales the number, type and nature of court reports also developed. The debate today between the usefulness of media in ensuring open public access to and accountability of the courts, versus the use by the media of hyped up court reports to sell papers, is one which goes back to this time. In defending his newspaper’s allegedly voyeuristic reporting of crime the editor of *The Times* once said:

[The reports] were such as the temper of the day required. Unless newspapers contained

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<sup>4</sup> [1998] 1 I.R. 359 at 398; [1998] 2 I.L.R.M. 161 at 184.

<sup>5</sup> Simons and Califano, *The Media and the Law*, p. 5, as cited in Gerald, *News of Crime: Courts and Press in Conflict*, p. 19.

what the temper of the day required they would be read by none but the printer, and the trade would therefore become useless...<sup>6</sup>

This particular statement was made in 1789.

Before 1848 most reporting of cases was very factual and short. Local courts were often spontaneous and not open to the public, so they were not widely reported. However, trials and appeals in London still only attracted factual, almost chronological style recording of yesterday's trial. A typical example of this was the following:

On Wednesday last, four sailors who have for a considerable time travelled the country with the model of a ship were committed to the House of Correction, in this town, as vagrants, by the Rev. A. B. Haden, Clerk.<sup>7</sup>

Things were not to stay so cosy forever and the following excerpt identifies how quickly some of the media slipped into tabloid sleaziness. This is a report of an initial hearing of charges in a magistrate's court in London:

... a brisk gale sprang up, and the surface of the ocean, which had previously been undisturbed by the slightest zephyr, became agitated with considerable fury...

- Captain Stephenson... having imprinted some impassionate kisses, took other liberties with the person of Mrs. Popplewell which delicacy forbids our describing...

- a gentleman rushed to the spot in time to prevent the perpetration of the vile and dishonourable intentions of the Captain...

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<sup>6</sup> Jones, *Justice and Journalism*, p. 11.

<sup>7</sup> *Wolverhampton Chronicle*, 28 April 1790 as cited in Jones, *Justice and Journalism*, p. 9.

- the criminal is likely to meet the legal punishment of his villany...<sup>8</sup>

There were two matters of significance about this report. Firstly, the first ever restrictions on the reporting of evidence given at preliminary examination were ordered following a libel trial pertaining to this report. Secondly, the absolute straying from the path of reporting into assessing the likely outcome of the case caused the case to collapse. What is striking about the report is that it ended by saying that “[t]his was the only examination which occurred at this office worth detailing”.<sup>9</sup>

This is the most important point in examining the reporting of court cases in the media – a decision is taken as to what is worth detailing. When no case stands out, the actions and words of those involved in a case can be the item that is regarded as worth detailing: when it is the actions of someone of note, even more so. If there is no singular item in a court worth detailing the words and actions of the lawyers, defendants and judiciary can take centre stage. This was as prevalent in the 19th century as it is today.

By 1822 *The Sunday Times* commented on how frequent and numerous reports of preliminary examinations had become especially when they concerned sexual offences.<sup>10</sup>

Even though this early interaction between the media and the judiciary saw a clamp down on the excesses or reporting on preliminary hearings it was not long before judges themselves saw the value of court reporting – indeed some saw it as necessary. As early as the beginning of the last century senior Law Lords felt judges did, at times, have an

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<sup>8</sup> *R. v. Fisher* (1811) 11 R.R. 799 as cited in Jones, *Justice and Journalism*, p. 14. The quotation was originally printed in the London newspaper *The Day* in 1810.

<sup>9</sup> Jones, *Justice and Journalism*, p. 16.

<sup>10</sup> Jones, *Justice and Journalism*, p. 18.

obligation to explain themselves to the public, and more so “even in his judicial character, he should always welcome fair, decent, candid and I would add, vigorous criticism of his judicial conduct”.<sup>11</sup>

Despite the passing of two centuries the situation here remains one of tension between the two professions – judge and journalist. However, I would argue the interdependence of both is probably the best remedy to any temptation for excess in reporting or reacting.

### III. FORCES WHICH FORM A PARADIGM FOR JOURNALISM

To begin any examination of the reporting of a particular topic by the media it is important to consider the question ‘what is news?’. It is also of benefit to understand how the media operates in society.

#### *A. What is News?*

To answer this question would require a treatise in itself. In a succinct way it can be said that research conducted into the makeup of news defines news as:

- that which is a political, social, economic event which contains matters of human importance;
- that which will be of interest, excitement or entertainment to an audience;
- that which is immediate and fresh;
- that which is dramatic and open for personalisation; and
- that which can be attributed, and has proximity to readership.<sup>12</sup>

Most importantly news can be said to be something, which someone somewhere does not want reported.

If you throw in some negativity or a bad news element to the above, or if it involves someone of notoriety, it is more

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<sup>11</sup> O’Brien L.C.J. in *R. v M’Hugh* [1901] 2 I.R. 569 at 579.

<sup>12</sup> See Hetherington, *News, Newspapers & Television*.

likely to be viewed as news. Given the above it is easy to see why crime and court reporting are so prominent in the media. Indeed, despite some claims of modern media being obsessed with courts and criminals, this has historically, normally been the case. A heavy level of crime reporting has always been a particular feature of local or regional papers, possibly because of the proximity and familiarity of readers with the subjects being discussed.

Although journalism is an indirect intervention into the actions, progress and at times privacy, of people with political, economic or judicial power, it is rarely accompanied by a laying-bare of political or partisan interests. Journalism like many other professions has a code of conduct, and seeks to respect ethics in the performance of its task: yet as a profession it seeks to limit statutory controls or licensing as these are seen as a form of state control.<sup>13</sup> In the current framework of journalistic work, one-minute reports seem to lend themselves more to accusation than defence. There are definite reasons for this and none more so than the fact that news is not a very definable, isolated phenomenon, it is however something more complex.

#### *B. News is a Social Construct*

News is a social construct – a product or phenomenon defined by the various and competing forces within a society<sup>14</sup> – which depends for guidance and editorial parameters on the ownership of the particular station or paper, the type of medium used to tell the story and the processes of production involved. The relationship between the specific organ and the establishment, the background and education of the journalists, the readership aimed at, and the interpretation given to an event all add to this construction or *mediation* of

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<sup>13</sup> See Belsey and Chadwick (eds.), *Ethical Issues in Journalism and the Media*, particularly the chapter by Harris, “Codes of conduct for journalists”.

<sup>14</sup> See Cuklanz, *Rape on Trial: How the Mass Media Construct Legal Reform and Social Change*.

what happened in the immediate past. News is never a chronological account of what just happened, it is a distilled and subjective account of what the reporter sees as important in what happened. It emphasises that which is unusual and which may have an effect on the future of a person or community. In this way news can never be purely objective, but within this paradigm of understanding and analyses, news can still be objective if it is constant in its approach and ethical in its delivery to the public.<sup>15</sup>

Almost all media are businesses geared towards, and regularly achieving, profit. Increasingly they are being operated by a concentrated group of magnates who, it is argued, have a control culture in place in the production of their titles. This ensures they maintain their common interests with other for-profit organisations, financial institutions and governments.<sup>16</sup> This does not rule out the exposing of government or corporate wrongdoing, but it does not usually cause fatal damage to the establishment when reported.

Likewise, it can be argued that the controllers and owners of media wish to maintain divisions in society through their highlighting of various issues. The highlighting of deviancy and crime by certain newspapers gives them the scope to call for law and order campaigns, thus allowing them become the primary definers of what is social concern. This in turn allows them some leeway in refining society's political objectives and reactions.

Within this thinking the political party which meets a newspaper's defined need for law and order, gets the newspaper coverage and the public support. This can be seen as a confluence of interests between the producers of news and the state. In relying on official sources, newspapers both invoke and reproduce prevailing conceptions of serious crime. Indeed I would argue that 'crime and punishment' is the

<sup>15</sup> See the literature review in Curran, *An analysis of press coverage of industrial relations disputes in Ireland*, DCU M.A. thesis.

<sup>16</sup> See Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media*.



greatest social construct of all, with its defined wrongs and sanctions.

It has been argued that this relationship with the establishment; the need to maintain divisions; and the opportunity posed by law and order scares (for greater influence and circulation) combine, with all the other reasons given earlier, to ensure the prominence of the reporting of crime, court cases and criminals. It also ensures that the judiciary are prominent in the society we live in and as such are open to being commented upon.

Added to this is the belief that the judiciary are the last great pillar of state and society not to have been seemingly brought to heel by the media (as the media may perceive it) and you can see why many believe the judiciary to be the next target for the media. Articles and broadcasts at the end of 2000 - the usual roundup and look forward - concentrated on tribunals and politicians and were slanted towards the view that the judiciary also needed to be examined and made accountable.

#### IV. REPORTING OF CRIME AND COURTS IN IRELAND.

At this point, as a journalist I would like to lay out the very straightforward understanding most working journalists have of the law and the limitations on reporting of court cases. Article 34.1 of the Constitution states that save in circumstances prescribed by law, courts should be held in public. In general there can be a limit to reporting where the evidence is of an indecent or obscene nature, or where there is a preliminary hearing of evidence for an indictable offence, where the accused is to go on trial before a jury. In these cases the press may attend and report that the hearing took place, the charge, and the name and address of the accused. At the request of the accused other information may be published with the judge's permission.<sup>17</sup>

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<sup>17</sup> S. 17(2) of the Criminal Procedure Act, 1967.

Journalists operate under the guidance that they may report on any court case freely, except where there are family law matters, lunacy or minor matters, where there is a victim of sexual assault, or where there is disclosure of secret manufacturing processes.<sup>18</sup> In reality there are an extended list of situations where a judge may order non-reporting. This list is not generally known amongst the media and can lead to tension, if it is brought to their attention or, if they report matters the law does not allow. Items in this category are very well summarised in McHugh's recent guide for journalists.<sup>19</sup>

This however, has not stymied interest in, or the dedication of volumes of pages to the reporting of crime and courts. I would like to quickly examine some research into how the Irish media report crime. Firstly I would like to take a look at the *Evening Herald*, to show the difference in prominence given to various story types.

*Evening Herald* Front-Page Headlines 1996 - frequency of type:

1. Crime
2. Drugs
3. Politics
4. Consumer
5. Northern Ireland
6. Sport
7. Celebrity
8. Human Interest
9. Children
10. Foreign News

In this quantitative analysis 39% of front-page stories were related to crime. The combination of crime and drugs outstripped the total for all other story types in that year. This may have reflected an upsurge in high profile crimes that

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<sup>18</sup> S. 45 of the Courts (Supplemental Provisions) Act, 1961.

<sup>19</sup> McHugh, *Libel Law: A Journalist's Handbook*, Chapter 4.

year, including the murder of the journalist Veronica Guerin.<sup>20</sup>

Media studies of newspaper coverage of crime have been undertaken as far back as 1900. What is undisputed in all of this by the majority of researchers is the lack of relativity between the extent of the coverage of crime and the levels of official statistics of the incidence of crime.<sup>21</sup>

What is not agreed is the effect this type of reporting has on a population, whether there exists a common ideology which informs such reporting, and the exact nature of the discrepancy between the world of crime as reported and the world as factually experienced.

There has been, over the last 30 years, an actual decrease in front-page stories dedicated to crime in the broadsheet national newspapers. In 1972 the *Irish Independent* dedicated 26% of its front-page stories to crime; this reduced to 14% in 1982 and came in at 18% in 1992. Similarly the *Irish Times* had figures for the same years of 23%, 11%, and 14% respectively.<sup>22</sup>

The type of crime reported decreased for public institutional criminal acts - such as terrorism and espionage - by 81%. Crimes in the private institutional sphere - such as customs violations, fraud and traffic violations - saw a decrease of 50% in their being reported. At the same time individual crimes in the public sphere, typified by mugging, rape and manslaughter saw paper coverage dedicated to them increase by 33%. Finally private/individual crimes such as drug abuse, spouse battery and incest saw a 400% increase in front-page reporting. How does this relate to the statistics on recorded crime/prosecutions over the same period? Did the

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<sup>20</sup> Williamson, *Aspects of Newspaper Coverage of Crime within the Republic of Ireland*, DCU M.A. thesis.

<sup>21</sup> O'Braonain, *A Longitudinal Quantitative Content Analysis of the Coverage of Crime in Three Irish Daily Newspapers*, DCU M.A. thesis.

<sup>22</sup> O'Braonain, *A Longitudinal Quantitative Content Analysis of the Coverage of Crime in Three Irish Daily Newspapers*, DCU M.A. thesis.

number of incest cases heard by the courts actually increase by 400%? There is little to suggest relativity between the levels of story type reported and the incidence or prosecution of crimes. However, the author does refer to the fact that the worst horrors of the Northern Ireland conflict and the cold war, happened in the early part of this study, and also that society and media have concentrated on issues relating to offences against the person more in the past decade.

These swings could very well reflect the change in high profile crimes in that time (the research does not make a direct correlation) but probably also reflect a perceptual change in the media regarding society and what is important. It may also reflect the socio-political agenda of the three decades covered. Murder as a public crime has always had a constant place due to its obvious newsworthiness. However not all murders make the front page in every paper and it leads to a belief that other attached elements to the crime attract attention. Examples of this are given as in the murder of an old person or a sexually motivated murder.

There are four basic findings regarding international research into the reporting of the criminal justice system and crime:

- commercial interests drive the media's increasing attention to detailing court cases;
- mainstream media increasingly moving in the tabloid direction of turning criminals into celebrities;
- the proliferation of new media uses court stories to fill air time just as others use parliamentary debates to fuel a channel – giving the stories the impression of being very important; and
- mass exposure of trials causes a familiarity with the system but can be linked to a lack of faith in the system.<sup>23</sup>

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<sup>23</sup> Fox et al, *Tabloid Justice – Criminal Justice in an Age of Media Frenzy*.

All of the above sets the scene and establishes the public milieu in which the courts conduct their work, come under scrutiny and are praised or criticised.

#### V. CONSEQUENCES FOR THE JUDICIARY

Comment on the judiciary has become more trenchant in the past two decades. There is no doubting this. This is a reflection of a more robust media, a more critical and less accepting public, and the natural curiosity and critique brought about by an educated population and a healthy public sphere. This has seen reactions from the bench which have been varied. Holding journalists in contempt of court must seem an obvious route for members of the judiciary who feel affronted by the media. Many a journalist is inhibited by the fear of this alone.

However, journalists must have taken heart when Henchy J. stated:

... contempt of court.... is a remedy primarily [aimed], not at upholding the dignity of the court or judge, but at enabling the administration of justice without obstruction or interference.<sup>24</sup>

It could be argued in light of this that a heavy criticism, editorial or satirical colour piece in any media, about a court, could not be in contempt of court unless it was primarily aimed at obstructing justice rather than just 'having a go' at a member of the judiciary.

Caution needs to be added, to any sense of foolishness this may cause in the media, as the current Chief Justice has been reported as saying that contempt can be caused when a person publishes something calculated to interfere with the courts of justice – and it is not necessary that this resulted in actual interference.<sup>25</sup>

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<sup>24</sup> Mc Hugh, *Libel Law: A Journalist's Handbook*, p. 53.

<sup>25</sup> Mc Hugh, *Libel Law: A Journalist's Handbook*, p. 53.

Whatever attitude the media take to the judiciary or vice-versa, the reality is that courts will always attract attention and the courts need this attention to gain common acceptance. On the way to this acceptance, criticisms will be made, unusual actions and statements will be reported, and inaccurate reporting will be printed. The relationship between the professions of judge and journalist will never be dull, and probably always tense. However, the interdependency of the two should quell any flights of extremism.

Finally, when the tensions of deciding on cases, reporting the courts and dealing with an inaccurate report are mounting, it might be best for all to remember that “[t]here is a quiet, cool current of altruism and public service identifiable in both law and journalism”.<sup>26</sup>

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<sup>26</sup> Gerald, *News of Crime - Courts and Press in Conflict*, p. 11.