

Wooing the "Court of Public Opinion"

Winning a court case won't necessarily win back your client's reputation – unless the media too are on your side. **Kevin Childs** looks at the role of the journalist as judge. This article was first published by *Lawyers Weekly*.

Within the ranks of the media watchers and the legal scrutinisers, there's a powerful argument that, more than ever, the media is the court of public opinion.

As Stephen Parker, professor of law at Monash University, notes, "The prevalence, immediacy and pervasiveness of the media risk supplanting the courts in people's consciousness as a relevant body deciding truth or falsity, guilt or innocence."

When a deputy chief magistrate in Victoria, Jelena Popovic, sued the *Herald Sun* newspaper for libel, the case had not finally ended when Ms Popovic featured in a glowing profile on page three of the rival group's *Sunday Age*. Beyond what happened in the Supreme Court, Ms Popovic was recovering her reputation where it had first been under attack – in the media.

With the incessant outpouring of news and opinions on four media fronts – newspapers and magazines, television, radio and, increasingly, the internet – the actions of people in and out of public life are under scrutiny as never before. In what is often an unseemly and careless rush to judgment, reputations are damaged, mistakes are made and sticky mud is thrown.

Lawyers concede that submitting oneself to the long, exhausting and expensive process of a trial to try to

gain an apology or financial recompense of libel or slander is a lottery. Juries are notoriously unpredictable. In the Popovic matter, the judge had to make a finding that seemed left open by the jury and award her considerable damages.

There seems little doubt that the days when a public reputation could be regained by a court action – if they ever existed – are long since gone.

These days any such action must be undertaken on more than one front. The court of public opinion must be used for people either to regain some lost standing or to establish themselves in the view of their peers and the people.

There have been many just criticisms of the legal system of the United States, but it is open, accountable and offers enormous protections. Certainly Australian lawyers have been rocked when they have heard of American conferences that a prominent lawyer beginning an action includes a call to a media reputation specialist in the early stages of the matter. There can be no doubt of the awareness there of the need for public opinion to be well on-side during litigation.

In Australia, we have seen a leading media expert put a tremendous amount of work into sculpting a glowing sympathetic view of a Mexican banker Carlos Cabal, who escaped to Australia with his family after being wanted on fraud charges in his home country. Through photos and interviews, much sympathy was generated for Cabal, his wife and his children.

In Sydney, the wealth investment adviser, Rene Rivkin, generated support for his action against a newspaper through media reportage.

By contrast, the ignorance in some areas of the media became clear when lawyers were on the receiving end of a public scolding when there was a revelation of the seemingly vast fees for a royal commission into the building industry. Some of this criticism centred on the apparently high level of payments to what are termed "junior barristers". To the uninformed, this may conjure up a picture of lawyers not long out of law school being paid unfair amounts. But the "juniors" are only known thus because they assist Queen's Counsel, Senior Counsel and the like and may have had up to two decades of experience.

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Here, again, the public "court" brings in a verdict because it does not have complete information. The failure to use relevant language that can be clearly understood damages lawyers and inhibits their standing as public communicators.

There is little doubt that few people with resources would undertake serious and expensive legal action without ensuring that they have the best available legal advice. The time is fast approaching, if it has not yet arrived, when it would be similarly unthinkable to consider such an action without a well-considered media strategy. Magistrate Popovic was able to tell reporters, through her solicitor, that all she had ever sought was an apology from the *Herald Sun*. It is not always the case that an issue is seen so clearly by someone who has gone to the nerve-wracking, stressful and potentially financially disastrous lengths of suing. But, with professional advice of a high order, the outcome and best result that is sought at court can be translated into a "message" for the media.

And any fears that traditionalists may still harbour, to the effect that the media is so far-reaching that its power may eclipse that of the courts, can be put to rest.

Significantly, the High Court of Australia recently sought the appointment of a media adviser. (*Editor's note: Prior to publication the High Court announced the appointment of its inaugural Public Information Officer*).

Our highest court has been disappointed in the reception of some of its judgments. It wants to make sure the correct message gets out, in a similar fashion to the many other courts that employ these professionals. There is, however, no guarantee that no matter how skilled and dedicated the media officers at these courts are, that argument of a person taking an action may be heard and understood.

That is where decent media advice enters the picture. Without it, there is a danger that a case may be but half-argued. One acute observer of the influence of the media puts it this way: "If judges and juries are not swayed, then it (the media) is a form of infotainment, background noise."

He explains that the courts have always been centres of drama, the powerful events played out becoming the stuff of folksongs and penny dreadfuls. The abiding public interest is in the conflicts played out in the courts.

He has a note of caution for defence lawyers in criminal actions: "There is real concern in the police using the media. There must, for example, be a suspicion about the number of arrests that are caught on camera. There is no justification for the police using the media for their own purposes to get a conviction."

In another issue, while the attack in Federal Parliament on Mr Justice Kirby of the High Court was outside the courts, it could be that people started to become confused about what actually comprises a court, and on the views of guilt or innocence obtained by the media.

As an aside, the authority quoted above points out that there was an increasing scepticism of the media. "We don't know just what the public

makes of it all. They may treat it with the same seriousness as advertising, as bits of puffery."

The key questions, naturally, are whether the media affects juries and the judicial system. Judges certainly seem unaffected. Increasingly there is a healthy public debate about non-criminal matters before the courts. We say ABC TV's *Lateline* examining a High Court case involving judges' superannuation.

And for the shock jocks of radio and tabloid newspapers constantly demanding harsher sentencing by the courts, Professor Parker has an interesting final word. When a hypothetical court case involving judges and journalists has been staged, invariably the journalists impose more lenient sentences than those in wigs and gowns. But who ever hears of bleeding heart journos? ①

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