THE COURT OF PUBLIC OPINION
PUBLIC RELATIONS INSTITUTE OF AUSTRALIA SEMINAR
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1. Does the public have the right to know the full details of matters before the courts?

This question can be answered "Usually, yes."

An independent judicial system, free from the control of the legislature or the executive, is the least known, but nevertheless essential , third arm of government in Queensland. The judiciary plays a vital role in the good government of this State, ensuring fair criminal trials, just sentences, the proper adjudication disputes between parties and, where necessary, the protection of the rights of the individual from the power of police, large corporations and the government of the day.

It is a fundamental principle of our judicial system that the courts are open and accessible to the public, that justice is administered in public and that court proceedings can be freely reported. Jeremy Bentham described the principle requiring openness in court proceedings and the free reporting of those proceedings this way:
"Where there is no publicity there is no justice. Publicity is the very sole of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial." [1] I will forgive Bentham his use of the masculine pronoun as in his day there were no women judges.

Full exposure to public and professional scrutiny and criticism of the courts means that improper or quirky behaviour or decisions by judges will be exposed; it maintains public confidence in the integrity, independence and public administration of the courts. Publicity has been described as the distinguishing hallmark separating judicial from administrative procedure.

Nevertheless, the courts, in rare cases, recognise that the proper administration of justice may require modification to the general rule that courts are open to the public and court proceedings can be freely reported. Where publicity could damage the public or an individual's interest to such an extent to require relief in the interests of justice, the courts have a discretion to place limits on publicity. This requires a judicial balancing exercise, heavily weighted in favour of publicity, but also involving considerations of fairness.[2] The following factors are relevant.

- The need for courts of criminal jurisdiction to control their own process in furtherance of the rule of law.
- The need to protect the innocent.
- The need to protect the privacy of parties, witnesses and victims.
- Whether evidence tendered during the trial was ruled inadmissible, particularly where the evidence was inculpatory and an acquittal resulted.

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1 B. McFarlane QC and H Keating, "Horrific Video Tapes as Evidence" Criminal Law Quarterly Vol 41(4), February 1999, 413, 416.

2 *J v L&A Services Pty Ltd (No 2)* [1995] 2 QdR 10, 49.

- Whether the court concludes that it is necessary to limit or prohibit publicity surrounding the trial, especially where it is necessary to protect the identity and background of a witness or victim.
- The need to ensure that an accused will be able to have a fair trial.[3]

Legislative exceptions
There are a number of legislative exceptions to the general rule of openness in court proceedings.

(a) Juveniles.
The *Juvenile Justice Act* 1992 is a code dealing with the sentencing of young people and, unlike the sentencing of adults, requires the court to focus primarily on the rehabilitation of the young person. To protect the privacy of children and encourage prospects of rehabilitation, the Children's Court, unlike other courts, is not open to the public.

The *Juvenile Justice Act* 1992 makes it an offence to publish the name, address, school, place of employment or any other particular likely to lead to the identification of the child charged in a criminal proceeding or any photograph, picture, videotape or other visual representation of the child or of another person that is likely to lead to the identification of the child charged in the criminal proceeding.[4]

The publication of any identifying information about a child who is a victim or witness in a court proceeding about a sexual offence is also prohibited.[5]

In proceedings for offences of a sexual nature where a child is a witness or victim, a report of the court proceeding must not disclose the matters just outlined unless the court expressly authorises publication. As to evidence in cases other than sexual offences, the court has a discretion to prohibit publication of identifying information about a child witness. Nor can the name of an authorised officer or police officer involved in the proceeding be reported without the court's authorisation.[6]

When Court of Appeal judgments are given in respect of matters involving juveniles, the judgment refers only to the child's initials and no identifying matters are contained within the judgment.

(b) Special witnesses
The *Evidence Act* 1977 creates a unique regime for special witnesses, namely children under 12 or people with mental, intellectual or physical impairment, such as to make them likely to be disadvantaged as witnesses or those likely to suffer severe emotional trauma or those likely to be so intimidated as to be disadvantaged as witnesses. These witnesses are permitted to give their evidence in criminal proceedings with the accused

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3 McFarlane and Keating, op cit.

4 Section 62(2); punishable by up to 100 penalty units or 6 months imprisonment, or 200 penalty units for a body corporate; one penalty point is equivalent to $75.

5 *Juvenile Justice Act* 1992, s 192.

6 *Child Protection Act* 1999, s 193. The maximum penalty is up to two years imprisonment or up to 100 penalty units or, for a corporation, 1,000 penalty units.

person obscured from their view, effectively in closed court, or even from another room by way of video.[7]

(c) Law enforcement agencies can issue certificates of anonymity allowing witnesses, such as protected witnesses or undercover police officers, to give evidence under assumed names.[8] This is because of the danger to the witnesses and to ongoing investigations if their true identity were revealed.

(d) Complainants and Defendants in Sexual Cases
A complainant in the sexual offences of rape, attempted rape, assault with intent to commit rape or sexual assault gives evidence in a closed court room. The complainant may have a support person present.[9]

Ordinarily, any report or publication concerning such offences must not reveal the name, address, school or place of employment of the complainant or any particular likely to lead to the identification of the complainant, unless the court for good and sufficient reason orders to the contrary.[10]

Any report of the committal proceedings shall not ordinarily reveal the name, address, school or place of employment of a defendant in such cases or any other particular likely to lead to identification of a defendant, unless the justices taking the examination for good and sufficient reason order to the contrary.[11]

Where a body corporate has committed such an offence, a director or member of the governing body of the body corporate or the manager or an officer concerned in the management of the business in Queensland of the body corporate at the time the offence is committed, including the editor of a newspaper, is deemed to have committed and be liable for the offence, unless the person proves the offence occurred without consent or connivance and that the person exercised all due diligence to prevent its commission.[12]

(e) Police informers.
Another statutory exception to the principle of openness in courts is the sentencing of informers. It is in the interests of the criminal justice system to encourage criminals to cooperate with the authorities and to inform on other criminals. Informing is a dangerous business and informers often put their lives, or the lives of others close to them, at risk. For that reason, oral submissions as to an informer's cooperation occur in closed court; the sentence is imposed in an open court, but afterwards the reasons for the reduced sentence and the sentence that would have been otherwise imposed are stated in closed court; material relevant to the information

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7 Section 21A.
8 *Evidence Act* 1997 Division 5, ss 21B-21K.
9 *Criminal Law Sexual Offences Act* 1978, s 5.
10 Section 6.
11 Section 7. As to penalty, s 10 provides that the penalty for committing an offence against those provisions is a fine up to $500 or up to six months imprisonment or, in the case of a body corporate, a penalty not exceeding $2,000.
12 Section 12.

provided is placed in a sealed envelope. The sentencing judge or magistrate may make an order prohibiting publication of all or part of the proceeding or the name or address of any witness.[13]

(f) Committal proceedings.
The *Justices Act* 1886 now provides that a room in which justices take examinations and statements for the purposes of the committal for trial is not deemed to be an open court and the magistrate has a discretion to order people to leave the room where justice requires it.[14]

(g) *Coroners Act* 1958
The *Coroners Act* 1958 gives the coroner power in certain circumstances to exclude people from the hearing room and prohibit publication of evidence at an inquest.[15]

Non-statutory exceptions
In some cases, for example, a civil case where the premature publication of material could have disastrous consequences for a company or a financial institution or where material constitutes an apparently unjustifiable and serious attack on the character of an individual, the court may grant an injunction or non-publication direction. Such orders or directions are much less common in criminal cases.

It may be helpful to look briefly at some cases in which the courts have discussed when it is appropriate to depart from the general rule of openness.

- Before the amendment to the *Justices Act* 1986 which I have noted, in a criminal case[16] involving official corruption an important prosecution witness, a former prostitute, was concerned that her father's health would be adversely affected if her prior prostitution was revealed and published during the trial. The witness refused to testify and was prepared to go to jail for contempt. The trial judge allowed her to give her evidence as Miss X and permitted her to give her address and occupation by writing it down rather than stating it publicly in court. The case came to the Court of Appeal which reiterated the general principle that justice should always be administered in public and that the invariable practice for a witness who testifies at trial is to be asked and to give his or her name and, usually, an address and occupation. In order to ensure the due administration of justice, modifications to that rule might be required either by ordering that some part of the proceedings be heard in closed court or by making a direction concealing the names of witnesses and prohibiting the publication. Disobeying such a direction could amount to contempt of court.

- Again, before the amendment to the *Justices Act* 1886, a magistrate at a committal hearing[17] allowed former prostitutes to give evidence under assumed names without disclosing their identities in open court; instead they wrote their real names and addresses on a piece of paper which was handed to the magistrate. The magistrate ordered that any report made or published concerning the proceedings should not reveal the name or other identifying

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13 *Penalties & Sentences Act* 1992, s 13A.
14 Section 71.
15 Section 30A.
16 *R v His Honour Judge Noud ex parte MacNamara* [1991] 2 QdR 86.
17 *Rockett v Smith ex parte Smith* [1992] 1 QdR 660.

particulars of those witnesses. The magistrate's decision was not interfered with on appeal. Two judges warned, however, that it would be a serious threat to the proper administration of justice according to law if prospective Crown witnesses were gratuitously presented with the expectation that their evidence in court would or might be given under cover of anonymity.

- In another case, [18] a plaintiff brought an action against an employer and an associated group of medical practitioners alleging that in the course of their employment they acquired HIV and that each was at risk of contracting AIDS. They argued that if their medical condition became known to the public, they feared ostracism, discrimination and an exacerbation of their medical condition through associated stress. The primary judge ordered that the respondents be permitted to sue using a single initial instead of their names and that publication of the proceedings be prohibited to the extent that publication might tend to identify the plaintiffs. On appeal, that decision was overturned by a 2-1 majority. The majority noted:
  - that although there was a public interest in avoiding or minimising disadvantages to private citizens from public activities, paramount public interest in the due administration of justice, freedom of speech, a free media and an open society required that Supreme Court proceedings be open to the public and able to be reported and discussed freely.
  - that the public might be excluded and publicity prohibited when public access or publicity would frustrate the purpose of such a proceeding by preventing the effective enforcement of some substantive law and depriving the court's decision of practical utility.
  - that while a limited exclusion or restraint was sometimes permissible to ensure fairness or in the interests of a party or a witness, information was not to be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm or other collateral disadvantage.
  - that the interests of a party or a witness relied on as the basis for a proposed restraint must be balanced against other factors, including the interests of others.

These cases demonstrate how jealously the courts protect the principle of openness. Even in cases like blackmail or extortion, where victims would wish to avoid publicity to protect themselves and to discourage copycat crime, this is not generally sufficient reason to justify a departure from the rule in favour of openness, particularly criminal courts. Normally victims of an extortion will be disclosed in the usual way in open court and the proceedings publishable in the media.[19]

English courts are also strongly committed to the principles of open justice. In one case, a freelance journalist appealed against the denial to him of public access to the court. The English Court of Appeal reaffirmed that the public can be excluded only when and to the extent that it is strictly necessary; each application must be considered on its own merits; it is not sufficient that a public hearing will cause embarrassment for some or all of those concerned.[20]

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18 *J v L&A Services Pty Ltd (No 2)* (1995) 2 QdR 10.

19 See, for example, *R v Clear* [1968] 1 QB 670; *Austin v R* (1989) 166 CLR 669.

20 *Re Crook* [1992] 2 AllER 687.

You will not be surprised to know that US courts also give primacy to freedom of the press and the right to free speech, [21] although they, too, recognise that these principles must be tempered by the right to a fair trial. American courts counteract the pre-trial media frenzy in high profile cases by remedial strategies such as the interrogation of potential jurors as to prejudice and the sequestration of empanelled jurors.

2. What can the media legally report before someone is charged?

The reporting of matters before someone is charged is subject to the laws of defamation and the media should act with great care and circumspection to avoid costly law suits. The media also risks causing the permanent staying of criminal trials if unfair media publicity ultimately has the effect that a person cannot get a fair trial.

Once the person is charged, then ordinarily the media can report anything said or done in open court, unless there is a judicial direction to the contrary or unless the statutory provisions I have noted apply. This statement is subject to the rider of common sense. For example, if on a bail application the criminal history of an accused person was read out in open court, it would be very wrong to report the accused's criminal history, or to say that the prosecution or the judge said the case against the accused was strong, as this could prejudice the accused's right to a fair trial. For the same reason, if during the course of a trial there are arguments in the absence of the jury as to admissibility of evidence, it would be wrong for the media to report the legal argument or the judge's rulings before verdict, in case this prejudiced the jury's deliberations.

The media should tread carefully in reporting cases and should strive to be accurate and not inflammatory. Whilst the public has a right to be informed, the media has a responsibility not to prejudice the constitutional right of the accused person to a fair trial. Most members of the media usually act responsibly, even if only to avoid the commission of a contempt of court which would put them at risk of a custodial sentence.

Father Glennon, a Roman Catholic priest, was charged with several sexual offences against young people in Victoria. Derryn Hinch, in a broadcast from a Melbourne radio station, described the then pending charges, stated that the respondent had previously pleaded guilty and been convicted of an indecent assault on a youth and expressed outrage that Glennon had then held senior office in a children's youth organisation after being jailed for that offence. Hinch was convicted of contempt of court and sentenced to imprisonment. The primary judge refused an application for a permanent stay of proceedings in Glennon's case on the combined grounds of delay and ineradicable prejudice from the publicity. A similar application at the start of Glennon's trial was also refused. Glennon was convicted on five counts. On appeal, the Court of Criminal Appeal in Victoria ordered his acquittal, accepting that the trial should have been stayed permanently because of this extremely prejudicial pre-trial publicity. The High Court of Australia overturned the Court of Criminal Appeal's decision which they found disregarded the community's right to expect that a person accused of a serious criminal offence will be brought to trial. Although in many circumstances it

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[21] *Nixon v Warner Communications Inc* 435 US 589 (1978), 589, 609.

is not practically possible to insulate a jury from potentially prejudicial media reports, that in itself should not result in a trial being permanently stayed. The risk of prejudice from a juror's knowledge of the respondent's 1978 conviction was outweighed by the interests of the community in ensuring that a prosecution for the serious offences charged against Glennon was pursued, provided that the trial judge took all appropriate steps available to ensure a fair trial, that is, either instructing the jury to ignore pre-trial publicity and decide the case only on the evidence or adjourning the trial until the influence of prejudicial publicity subsides.[22]

In a recent case the media mis-reported matters in a trial in the Supreme Court but the trial judge gave adequate directions to the jury warning them to disregard the mis-reporting. The appeal was dismissed. I noted that:
"… as ordinary members of the community, jurors are aware that the media can seriously mis-report matters; the court can also expect jurors to follow the clear judicial directions which were given."

But will there come a point where pre-trial publicity does require the permanent staying of a trial to ensure fair process because a jury could not receive evidence with an open and untainted mind no matter how careful the judicial directions?[23] This debate reminds me of the story about the criminal trial in Dublin. The accused admitted committing the offence but the jury acquitted him. The judge, puzzled, asked the foreman how he arrived at the verdict. "Oh, your Honour, everybody except you knows him to be the biggest liar in Ireland."

Some question, for example, whether Christopher Skase could ever receive a fair criminal trial if he returned to Australia, regardless of what directions the judge gave the jury.

A further strategy to avoid pre-trial prejudice is to delay the start of the trial until the effects of the publicity have died down.

Another is to apply for a change of venue so that the trial is heard in an area where the subject matter of the trial is less well-known. Ordinarily, trials proceed in the district in which the offence or claim is alleged to have been committed or arose and the applicant bears a heavy onus in such an application.

Pre-trial publicity may warrant a special procedure when empanelling the jury: challenge for cause.[24] This allows counsel to question potential jurors about issues such as prejudice from pre-trial publicity. The story of the self-represented accused comes to mind; when solemnly asked by the judge if he wanted to challenge any member of the jury, he replied, "I reckon I could fight that little bloke on the end!"

Even after conviction, the media should take care to avoid inflammatory reporting because an appeal could result in a retrial.

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22 (1992) 173 CLR 592, 614.

23 Giddings, "Would Christopher Skase Receive a Fair Trial?" Criminal Law Journal, Vol 24(5), October 2000, 281, 296.

24 *Jury Act* 1995, s 47.

I should also mention public access to court records. Presently in Queensland, anyone can search for and inspect a document in a court file; the Registrar is obliged to comply, subject to any order or direction restricting access to the file or unless the document is required for the court's use.[25] The court probably also has an inherent power exercisable only for the purpose of protecting the administration of justice to order that a file or a document in it not be open to inspection either generally or by particular individuals for a period of time.[26]

As the court moves to electronic filing of documents and wider public access to filed documents, the court may re-formulate and narrow its present policy on access to court filed documents.[27]

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

As a lawyer and judge, this is the most difficult question for me to answer. You are the professionals with the contacts and knowledge of how to communicate in the best interests of your clients and the ability to turn a sow's ear into a silk purse. The media will be concerned about defamation law and contempt and will not deliberately want to flaunt the law, if only because of the sanctions. The area is one that requires the skills of two sets of professionals: the application of legal knowledge to the particular facts that arise in each case and the public relations skills to best use that information ethically in the client's best interests. In the end, it will require this combination of legal knowledge and public relations skill and savvy to best protect your client's reputation. Sometimes, sadly, even that may not always be enough. My advice is to work closely with your client, find out as much as you can from others with information, discuss this information with your client and the client's lawyer, give the lawyer your own professional advice and together adopt a strategy to achieve the best outcome for the client in the particular circumstances, which will vary greatly from case to case.

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25 UCPR, 980 and 981.

26 *Ex parte Queensland Law Society Incorporated* [1984] 1 QdR 166, 168. See also *Nixon v Warner Communications Inc* 435 US 589 (1978) 589, 597-8.

27 Anne Wallace, "Courts Online: Public Access to the Electronic Court Record" Journal of Judicial Administration, Vol 10(2), November 2000, 94