

## CHAPTER 13

### The Court of Public Opinion

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Shortly before 6 a.m. on 16 January 2008 reporters from all media organisations gathered outside the gates of the Midlands Prison to cover the release of Wayne O'Donoghue. Having served three years of a four-year sentence for the manslaughter of Robert Holohan, O'Donoghue's release had been much flagged the previous week and had turned into an impending media spectacle. Traditionally Irish journalists leave those who have served their prison sentences alone to rebuild their lives without media intrusion. This time it was different. It seemed O'Donoghue's release was a natural extension of a story that had created sensational headlines for several years. In media terms, this was a story that could be made to run and run. Any exclusive details a media organisation could get would give it an edge over its competitors. But the timing of the release did not suit newspaper deadlines as that day's papers would already have been printed. In an attempt to describe what it thought might transpire, the *Irish Sun* declared that O'Donoghue had been 'spirited out of prison in the back of a van'.<sup>1</sup>

In reality, O'Donoghue exited the prison and stopped to read a statement expressing remorse for his actions and apologising for the hurt and anguish he had caused. The tabloid press that had erroneously accused him of trying to sneak out of the prison now condemned the apology as a publicity stunt. But despite media attempts to build up interest in the release, public opinion did not demonstrate an appetite for the continuation of the story. There was a sense of public fatigue with media coverage of the case: it had been reported on almost continuously for nearly four years at that point. Over that period it had encompassed every aspect of the justice–media–public nexus and on several occasions had prompted lengthy public debates on the role of the media in the administration of justice, both in the courtroom, where freedom is at stake, and in the wider court of public opinion, where a person's reputation is on trial.

#### *Crime as media content*

The media form a central part of the public sphere wherein individuals discuss and evaluate issues of importance to society. Since crime is a violation of agreed social norms and has implications for wider society, the media devote a significant amount of space to matters pertaining to crime. The various elements of crime – the crime itself, the subsequent investigation and the eventual court case – provide ample raw material for all media products and genres. In terms of news and current affairs reportage, crime – unlike politics, sport and economics – does not have calendar-bound sessions, seasons or cycles. It is an ever-present phenomenon that boasts an excellent infrastructure for generating news stories. The legal diary that lists forthcoming court cases is never far from any editor's desk and nearly all media outlets have full-time crime correspondents with sources cultivated from within An Garda Síochána.

From a news perspective, each element of crime can be given as much or as little coverage as the news agenda of any given day dictates: a quiet day on the political and economic fronts can always be compensated for by reporting on new crimes committed or ongoing investigations and court hearings. Crime, in all its elements, therefore satisfies the demand by media outlets for new events or new developments to report on when other news may be relatively scarce.

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<sup>1</sup> *Irish Sun*, 16 January 2008.

In their seminal work on news values, Johan Galtung and Mari Ruge identified criteria that influence whether media personnel feel an event is newsworthy.<sup>2</sup> Among the criteria are frequency – the time span needed for an event to unfold; amplitude – the dramatic effect of an event; clarity – the unambiguous nature of the event; meaningfulness – the emotional impact of the event; unexpectedness – the unanticipated occurrence of the event; negativity – the harmfulness of an event; continuity – whereby the event becomes a running story; and personification – whereby an event is portrayed as being representative of the moral state of society. Galtung and Ruge argued that the more an event satisfies these criteria the more likely that event will become news.

It is arguable that crime, particularly physical crime, satisfies all these news values in a more consistent and dependable way than politics, sport or economics. The immediate, here and now, element of criminal acts, investigations and court cases fits the news production cycle; crime is dramatic and investigations and court cases can take dramatic twists and turns; crime can be reported in an easily understood and accepted ‘good versus evil’ narrative; it is meaningful because people sympathise with its victims; it is always unexpected (witness on television reports how often people say ‘we never thought something like this would happen around here’); it has negative consequences; running stories often emerge from coverage of the investigation and subsequent court case; and isolated events, horrific or tragic though they may be, are often held up by the media as an indicator of moral decline and of a society in crisis.<sup>3</sup>

The fact that the public demonstrates an almost insatiable appetite for certain crime-related material adds to this never-ending cycle. In recent years there has been an avalanche of true crime paperbacks on everything from specific high-profile killings, unsolved murders, gangland violence and drug gangs to books focusing on specific criminals, prison life and the workings of specialist police units. Such is the demand for these books that true crime is now the second most popular non-fiction genre after sports biographies.<sup>4</sup>

Crime has also come to dominate television schedules. From RTÉ’s true crime series, *Solved and Unsolved*, to its monthly crime reconstruction programme, *Crimecall*, the public is called upon to help solve cases. There has been a marked increase in crime-centred television drama and such shows have also evolved in terms of content. Formulaic shows such as *The Bill*, with its old-style ‘goodie versus baddie’ storylines, have been replaced by shows such as the relatively sophisticated *Crime Scene Investigation (CSI)* series, with its minute and complex explanations of modern forensic investigation techniques.

All this has implications in terms of the administration of justice. The public’s increased consumption of true and fictional crime stories has arguably improved the general literacy in relation to crime and criminal behaviour. The public continually draws upon media representations of crime as a resource to develop views on crime and criminality. One of the more fascinating aspects of recent murder cases is the way in which everyone seems to have a view on the innocence or guilt of the accused and how publicly those views are aired and argued about. Nowadays, the public operates with ‘stocks of knowledge’ derived from media products that enable them to negotiate the once remote criminal justice system.

In particular, the public has become familiar with the application of forensic science and the intricacies of DNA profiling through their dramatic representations on shows such as *CSI*, which place forensic investigative techniques at the heart of their rapid crime-solving

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<sup>2</sup> J. Galtung and M. Ruge, ‘Structuring and selecting news’, in S. Cohen and J. Young (eds), *The Manufacture of News*, London: Constable, 1973, pp. 62–72.

<sup>3</sup> In contrast to physical crime, white collar crime usually entails less immediate coverage, involves financial jargon and technical detail, may be investigated by a regulatory body and may wrongly be perceived as victimless.

<sup>4</sup> U. Mullaly, ‘Crime can pay’, *Sunday Tribune*, 7 October 2007.

narrative. This, in turn, has given rise to what is known in legal circles as ‘The CSI Effect’, whereby legal practitioners feel under pressure to introduce unnecessary forensic evidence to placate jury members who have come to expect every court case to be exactly like the ones they see on television.<sup>5</sup> Such representations have also crept into news reporting: nowadays RTÉ News sometimes refers to the Garda Technical Bureau as the Garda Crime Scenes Investigation Unit.

But the fact that we base our judgments on information selected, and sometimes dramatised, for us by the media – rather than our presence in court to view the evidence and hear the advocacy – seems not to bother us. In every murder case in modern Ireland there are, in actuality, two trials running simultaneously. One trial occurs within the courtroom, where the outcome is decided by a jury solely on the evidence presented by the prosecution and defence. The other trial takes place in the media, where the outcome is decided on not by evidence, but by emotion and how the courtroom trial is reported and commented upon. It is this trial in which we are all jury members.

### *Trial by media*

The case against Wayne O’Donoghue, aged twenty, was no different. His friend and neighbour, eleven-year-old Robert Holohan, went missing in January 2005 and was the subject of a large-scale search before his body was discovered on wasteland. Shortly afterwards, O’Donoghue confessed to killing Robert and dumping his body before later returning to try to burn it. The situation was made worse by O’Donoghue’s participation in the search for the missing boy, thus prolonging the agony of the Holohan family. When the case came to trial the prosecution contended that O’Donoghue was guilty of murder; the defence argued that, despite the attempt to cover up the killing, there had been no intent. O’Donoghue pleaded not guilty to the charge of murder but guilty of manslaughter.

The media, which had already given the search for Robert Holohan extensive coverage, devoted substantial space to the trial. In reporting trials, journalists are granted qualified privilege to allow them to discharge their duty to keep the public informed of events without exposing them to libel lawsuits. Court cases are adversarial in that two sides of a story are put forward and generally one side is accepted by the jury as being the truth. Without qualified privilege, the media would not be able to publish both sides of the story without the risk of being sued for libel by, for example, someone charged with a serious crime but found innocent by the jury. By and large this system works – the media report on what transpires in court without prejudicing the trial itself or damaging the reputation of a defendant who might be found innocent of all charges.<sup>6</sup>

After a short trial, the jury found O’Donoghue not guilty of murder but guilty of manslaughter. At the subsequent sentencing hearing, Robert’s mother, Majella Holohan, was afforded the opportunity to present a victim impact statement to the court. At the end of her statement, in an unscripted conclusion, she asked eight questions relating to information that the prosecution had decided to omit from its case against O’Donoghue. This information had been omitted on the basis that it was not relevant to the case and, if introduced, could have resulted in the trial’s collapse. The questions seemed to imply that there was a sexual element to the killing. After O’Donoghue had been sentenced and was being led from the court more specific allegations were shouted at him.

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<sup>5</sup> C. Coulter, ‘TV shows can lead juries to expect forensic evidence, conference told’, *The Irish Times*, 26 May 2008.

<sup>6</sup> There have, however, been instances when media reportage is curtailed by the judge in the interest of ensuring a fair trial. In the murder trial of Catherine Nevin in 2000, the judge ordered that newspapers cease publishing photographs of Nevin and cease commenting on her attire and demeanour.

As the victim impact statement had been made in a privileged forum, journalists were free to report on the allegations made against O'Donoghue. The manner in which they did so varied across the different media organisations. The *Irish Sun* led its reportage with the stark headline 'Nothing but a Paedophile'.<sup>7</sup> Three other tabloid newspapers led with similar coverage and from then on O'Donoghue's reputation was on trial in the court of public opinion. The onus now seemed to be on O'Donoghue to prove his innocence against charges levelled against him, not as part of his prosecution by the state, but as part of his prosecution by the media. These charges were not based on evidence but on investigation material deemed unsubstantiated and inadmissible by the state.

While many people would be supportive of victims having the right to address a court in terms of how a crime has impacted on them, in this instance the victim impact statement and some media outlets combined to provide an alternative system of justice – one that is governed not by laws of evidence but by emotion and distress. The laws of evidence exist to ensure fairness in a trial and the exclusion of material that might bias the minds of jury members. In this particular case, investigation material, not evidence, was not presented by the prosecution because it was deemed as unsubstantiated. For such material to be introduced via a victim impact statement was unprecedented. For it to be portrayed as truth by some media outlets was tantamount to subjecting O'Donoghue to a public trial for offences with which he had never been charged.

Notions of objectivity, fairness and balance went out the window and the emotional consequences of the crime and the trial, as opposed to the facts presented to the court, determined how some media organisations covered the case. This had the effect of shifting the balance of power away from the rational-legal system, where emotion is discounted in favour of cold objectivity, to the court of public opinion in which emotion is king. In terms of the news values outlined by Galtung and Ruge, emotional distress fits far better than any dispassionate, rational-legal judgment.

Interviews with victims' relatives constitute high-value media content in terms of an interested public. Whether such interviews, especially those that contain unsubstantiated allegations against the offender, are in the public interest is more problematic. Several months after O'Donoghue's sentencing hearing, the trial judge, Justice Paul Carney, declared that crime victims were being given 'iconic status' by the media and that the sentencing objectives of the courts were being 'frustrated by an unwilling coalition between the victim and the tabloid press'.<sup>8</sup>

### *Televising trials*

How such 'coalitions' between crime victims and the media would evolve if trials were to be broadcast on television will be of crucial importance to the administration of justice. This issue arose in 2008 when the Association of Garda Sergeants and Inspectors (AGSI) called for murder and manslaughter trials to be televised. Such coverage would, according to the AGSI, improve public confidence in the judicial system.<sup>9</sup>

At present there is no legislation covering the recording or broadcasting of court proceedings – such activity is at the discretion of the presiding judge. The strict convention has been not to allow recording and broadcasting although that has been relaxed somewhat in recent years. In July 2003 Justice Paul Carney allowed cameras to record the Central Criminal Court's first sitting in Limerick. Broadcasters were allowed to film the empty

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<sup>7</sup> *Irish Sun*, 25 January 2006.

<sup>8</sup> P. Carney, 'Accused has no future in this country when his time is served', *The Irish Times*, 11 October 2007.

<sup>9</sup> P. Newenham, 'Televising of trials would boost access to legal process – DPP', *The Irish Times*, 27 December 2008.

courtroom and have since used it as stock footage when reporting on trials.<sup>10</sup> While this was a significant development, it is quite different to televising trials. The pertinent question is: would justice (the public interest) be served by the broadcasting of trials to an interested public?

It is at least arguable that the public would benefit from televised coverage of such cases: it might lessen the remoteness of court proceedings and raise awareness of the rules and procedures used to conduct trials. On the other hand, televised coverage might create more problems than it solves. Would the presence of cameras be intrusive and disruptive to proceedings? What impact would cameras have on victims, the accused, witnesses and jury members? Would legal professionals and witnesses play to the camera? Would we have celebrity judges and celebrity barristers? Would televised trials be reduced to a new version of reality television? What if the victim made a series of allegations against the accused in a victim impact statement? What if, through either advocacy or evidence that was edited out of televised proceedings, public opinion differed greatly from the findings of the jury? Interestingly, in the United States one study found that the presence of cameras increased witnesses' nervousness but did not impair their ability to recall details of the crime accurately or to communicate.<sup>11</sup>

There are also the issues of time and patience. Television is a very immediate medium and the attention span of today's channel-hopping audience is short. The challenge for television producers would be to devise a format for trial coverage that would keep audience engaged. But trials, with their formalised rules and procedures, do not easily lend themselves to a televisual format. The public has become accustomed to the televisual representation of fictional trials through shows such as *Law & Order*. Such trials are overly dramatised to hook the audience. Quick-fire confrontations between the prosecution and defence, between lawyers and witnesses and between lawyers and judges, generally ignore legal conventions and procedures and create a sense of excitement and tension for the audience. In the real world, criminal trials, for the most part, are not exciting and tend to involve a lot of minute detail. There are rules of evidence to be observed and cases are not neatly wound up in the space of fifty-two minutes. It is doubtful that audiences would have the patience or inclination to sit through hours of detailed evidence and legal argument.

The US cable channel In Session, formerly Court TV, provides live coverage of trials and uses experts and commentators – in a similar way to sports coverage – to break up the monotony of proceedings. A cursory glance at its footage on [www.youtube.com](http://www.youtube.com) would not offer any inspiration for advocates of televised trials. Alternative formats are equally problematic. Reconstructions often lack authenticity and documentaries take time to produce: by the time of broadcast the public's attention may have moved on to the next, more immediate, murder trial.

### *Conclusion*

The relationship between justice and the media is not always a harmonious one. The role of the judicial system is to ensure that justice is done, not on behalf of the victim, but for the good of society. The role of news media is to inform the public about events of concern to society. The two often clash when, as in the O'Donoghue trial, certain media outlets take on the roles of prosecutor, judge and jury and seek retribution for the victim rather than considering the greater good of society. In such instances the justice system can be displaced by the vagaries of public opinion.

<sup>10</sup> K. Wood, 'Court TV serves justice and the public', *Sunday Business Post*, 17 August 2003.

<sup>11</sup> E. Borgida, K. DeBono and L. Buckman, 'Cameras in the courtroom: The effects of media coverage on witness testimony and juror perceptions', *Law & Human Behaviour*, vol. 14, no. 5, 1990, pp. 489–509.

As profit-driven enterprises, some media outlets may have a vested interest in exploiting the grief of victims. Emotionally charged anger and grief sells; unemotive legal logic does not. The introduction of victim impact statements has given all media organisations greater access to victims. Victims are constantly asked for their views on the judicial system, thus reinforcing the notion that criminal justice is an emotive contest between the accused and victims rather than being an objective process of ensuring that the laws of society are observed and enforced. With greater access comes huge responsibility and the ability to do great harm. Televising trials, unless strictly regulated, has the potential to make matters worse. If some media outlets are determined to act as judge and jury, then they must also be prepared to take responsibility if, through a determination to demonise the accused rather than keep a critical eye on the administration of justice, a miscarriage of justice, or worse, were to occur.