Law 3535: Media Law – Take Home Exam
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Advising all relevant parties on media law issues.

This answer assumes there are no specific or general orders against publication of proceedings or extraneous material. Also assumed is that the court proceedings are not held in camera, and the court concerned is the Supreme Court of South Australia.

Publication of books:

Cram publishing two books about Blane's case during the appeal process may be sub judice contempt. The physical elements of sub judice contempt are: publication, when the proceedings are pending and the substance of which would tend to interfere with the administration of justice in these proceedings. [1] What is required is a real tendency, as a matter of practical reality, to interfere with the administration of justice, when due to the nature and circumstances of the publication there is a clear possibility of a jury decision being prejudiced.[2]

Cram has sufficed the first two physical elements by publishing two books when the proceedings are in the appeal stage, which makes them sub judice. Further the material in the book concerns the appeal. There is a real tendency to interfere with the administration of justice here. The tendency of this publication to prejudice the trial immediately during the appeal is quite low as it is before a judge, and judge's decisions are unlikely to be influenced by this type of publication.[3] However if the appeal is successful and the case goes to retrial before a jury the administration of

[1] *James v Robinson* (1963) 109 CLR 593.
[2] *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.
[3] *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25.

justice could be interfered with. This is because there is a real possibility the books are available to future jurors and could influence their decision making on the retrial, particularly if the content of the books elicits sympathy for Blane.[4] This could clearly tend to influence the juror towards the accused, prejudicing the administration of justice.

The mental element required is intention to publish.[5] This is present here.

It is unlikely that Cram could successful argue that publication is in the public interest as protecting the right to a fair trial is more important than the competing public interest in freedom of expression.[6]

Cram has likely committed sub judice contempt by publishing these books and is liable to fine or imprisonment.

Television broadcasting of the trial:

The principle of open justice provides that anyone may attend court and the media may generally report on court proceedings.[7]

[4] *WA v Armstrong* [2007] WASCA 204.
[5] *McLeoud v St Aubyn* [1899] AC 549; *Director of Public Prosecutions v Francis* (2006) 95 SASR 302.
[6] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.
[7] *Scott v Scott* [1913] AC 417; *Robinson v Goodman* [2013] FCA 894.

It is an inherent power of the court for judges to have discretion over whether video recording of the court proceedings can occur. Consequently Blane's trial cannot be filmed without permission of the court, or the broadcasters risk contempt of court.

Media Representative Live Tweeting from Court:

Whether Tweeting can take place in court is also at the discretion of the court, and without permission would make the media representative liable for contempt.

The media representative is probably liable for sub judice contempt for live tweeting from court. Intention to publish can be assumed for the media, and the Tweets have been sub judice as they have been published during the course of an uncompleted trial. The publications could tend to interfere with the administration of justice, as there is a real possibility that members of the jury may read the Tweets or media content based on the Tweets, which could affect their decision-making. However the live tweeting could be lawful assuming only bare facts are published.[8] If not a take down order would likely be sought.

The media representative may also be liable for defamation as they are publishing potentially defamatory content. However the defence of qualified privilege may apply. The elements of qualified privilege are: a fair report (substantially accurate, not slanted), published honestly for the information of the public, on the matter of a

[8] *Packer*.

public concern (including court proceedings).[9] As the topic of the Tweets is the court proceedings it regards a matter of public concern, and as it is for a news company it is likely to be published honestly for the information of the public. Assuming the Tweets are also limited to an account of the events then, they are a report under the *DA*. However live Tweeting is quite inaccurate by nature, and is doubtfully substantially accurate. Subsequently it is likely that the defence would fail and appropriate remedy would be an injunction and/ or damages.

Reporting on Inadmissible evidence:

Reporting on the inadmissible evidence could amount to defamation by imputing that Blane is guilty. However qualified privilege may apply and provide a defence, as described above, assuming the piece was fair and substantially accurate – making clear that the evidence was inadmissible and does not lead to the conclusion that Blane is guilty.[10] If that failed then injunctive relief is likely the appropriate remedy.

Reporting on both pieces of inadmissible evidence during the course of the trial could make the media liable for sub judice contempt, as the media intend to publish a report during the course of the continuing retrial. Inadmissible evidence is an example of contemptuous publication.[11] If published it clearly has the tendency to prejudice the jurors against the accused by providing extrinsic and disallowed information to what the jury has been told can form part of their decision, that portrays Blane negatively.

[9] *Defamation Act 2005* (SA), s 27.
[10] Ibid.
[11] *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368; *Attorney-General v Times Newspapers Ltd* [1974] AC 273.

Jury:

Images/ Video of the Jury:

The publication of information (including images and film) identifying jurors is prohibited.[12] Consequently the publication of images or film taken by the media or the public of the jurors outside the court following the verdict is unlawful, and makes them liable to a fine imposed by the act.

Interview with Juror:

If the interview with the juror identifies them then the media is liable for having identified a juror, as above.

It is an offence to obtain information from a former juror concerning the deliberations of a jury if publishing it is intended.[13] Here however the deliberations of the jury are not discussed in the interview. As jurors are prohibited from disclosing information about jury's deliberations if they are aware as a consequence the information is likely to be published, [14] the juror has met their obligations here.

Stories concerning Jurors Attending Party held by Blane and Story about Jurors wanting to send Blane a Birthday Card during the Trial:

[12] *Criminal Law Consolidation Act 1935* (SA), s 256(3).
[13] *CLCA, s* 256(3).
[14] *CLCA,* s 256(2).

As these stories do not relate to the jury's deliberations the media can publish them as long as they do not identify the jurors (as discussed above). As above the jurors will not be liable either because they did not disclose information concerning the jury's deliberations.

This matter is unlikely to amount to scandalizing the court as the material is not calculated to impair confidence in court judgment by lowering the authority of the court or that of the judge,[15] and is unlike Attorney- General v Fraill,[16] as the jury followed the instructions from the judge and did not act in contempt of court.

Leak of Report:

The publication by the media and bloggers of the leaked report may be a breach of confidence.

The elements of breach of confidence include: the information must have the necessary quality of confidence about it, the information must have been imparted in circumstances importing an obligation of confidence, there must be an unauthorized use of that information to the detriment of the party communicating the information,[17] and a government plaintiff must show that it is in the public interest to enforce secrecy.

[15] *R v Dunbabin: Ex parte Willaims* (1935) 53 CLR 434.
[16] [2011] EWCA Crim 1570, [2011] 2 Cr App Rep 21.
[17] *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41.

Here the information contained in the compensation report is a government secret, as it is a report to a Minister regarding compensation in this particular case,[18] and is therefore confidential. It could be argued that the information about the question of compensation is not a secret as the report was going to be released to the public anyway, however it had not yet become public knowledge and so the obligation to respect the confidence had not yet disappeared.[19] It would be expected here that an obligation of confidence exists between the parties,[20] due to the government being involved, There was an unauthorized use of the information, as it was leaked to the media, and subsequently the Minister of Justice has assumedly incurred a detriment.[21] These first three elements are satisfied.

Disclosure may be restrained in the public interest in circumstances where the ordinary business of government will be prejudiced.[22] Here this report is to do with an aspect of the ordinary business of government, compensation of the wrongly convicted. If this function is prejudiced then the ordinary business of government cannot be effectively carried out, which harms the public interest. Therefore it is in the public interest to enforce secrecy so the government can operate effectively.

Justification for disclosure as a defence by the iniquity rule and for the public interest would likely fail.

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[18] *Attorney- General v Jonathan Cape Ltd* [1976] 1 Qb 752; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1981) 55 ALJR 45.
[19] *Attorney-General v Guardian Newspapers Ltd (No.2)* [1988] 3 All ER 545;*Commonwealth of Australia v John Fairfax & Sons Ltd* (1981) 55 ALJR 45.
[20] *Coco*.
[21] *Coulthard v South Australia* (1995) 63 SASR 531.
[22] *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

Breach of confidence has occurred by virtue of the leak by the original leaker.

It would be unconscionable to not restrain the media from publishing information if they knew or ought to know the information is confidential.[23] As the media and bloggers would likely know that the leaked report is confidential they are liable for breach of confidence, as they published anyway. It is unlikely that the information was already in the public domain following the leak, so the media could not claim that it was and that the information had lost its confidentiality excusing them publishing it.

Due to the extent of the publication an injunction would not be particularly useful, damages for the costs involved in getting another report completed and/ or compensation would likely be sought.

Oliver's Facebook Page:

The original page name and statements (both his comment and the comment by another user) proclaim Blane's guilt, a contemptuous category.[24] Further it is clear sub judice as Oliver made the page during the retrial, and the statements on the public page could clearly prejudice a jurors beliefs and their decision-making.

The name of the page and statements on it are also likely to be defamatory.

Statement made by Oliver:

[23] *Spycatcher* and *John Fairfax & Sons Ltd* (1981).
[24] *Attorney-General (NSW) v Radio 2UE Sydney Pty Ltd* [1997] NSWSC 487.

By referring to Blane by name (in the original title of the page) Oliver imputes that Blane committed the murders. This is by true innuendo (as he omits what Blane did, but as the crime is infamous in Adelaide people would understand the imputation). This is a straightforward imputation of criminal conduct.[25] It is published on Facebook and would have the affect of disparaging Blane in the eyes of the ordinary person, who would think poorly of a murderer.[26]

Here the statement against Blane is presented like a fact and therefore cannot be defended as a fair comment. [27] It can also not be justified as it is in fact proven false. It is not privileged. Triviality would be an unsuccessful defence as while the publication is limited to a range of people, [28] a significant amount of people use Facebook and therefore damage to reputation is still likely.

Oliver is probably liable for the defamation of Blane and an injunction or damages against him.

Statements against Cram, who is identified by name, are also published on the Facebook page. The imputations include: that Cram is a liar (by inference as if Cram knows that Blane is guilty and gives the impression does not think so), that Cram is only aiding a murderer for the money (by inference), and that Cram is greedy (by inference). Each of these imputations, being a liar, being greedy and aiding a

[25] *Ahmadi v Fairfax Media Publications Pty Ltd* [2010] NSWSC 702.
[26] *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500; *Radio 2UE Pty Ltd v Chesterton* (2009) 238 CLR 460.
[27] *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.
[28] *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749.

murderer, would lower the standing of Cram (a well-known retired league player) in the eyes of the ordinary person.

The imputations cannot be justified and none of the other above defences applies.

Statements made by commenter:

Note: Liability extends to Oliver as he invited comments and probably has knowledge of the types of things that people will comment,[29] and likely the actual comment (via notification).

The statements relate to Cram.

The natural and ordinary meaning imputation is that Cram is a liar, and that by inference Blane is guilty. The imputations are true innuendos and rely on extrinsic knowledge of Nazi Germany, and include: that Cram is an exceptional liar comparable to Goebbels and is deceptive.

Blane is also implied to be guilty.

No defences apply as no privilege applies, the statements are treated like facts, the comments cannot be justified and the statements are not trivial.

[29] *Godfrey v Demon Internet Ltd* [2001] QB 201; *Robertson v Dogz Online Pty Ltd* [2010] QCA 295

As the commenter is not identified it is likely that the remedy sought would be an injunction from Facebook or Oliver.

Liability of Facebook:

There is no liability for passive hosting.[30] Further Facebook could argue innocent dissemination, which requires the defenedant to show that they were not the primary author, that they did not know and ought not to know that the matter was defamatory and that this lack of knowledge was not due to negligence.[31] Facebook would meet all the elements of the defence as they can show Oliver and the commenter originated the statements, Facebook did not know and ought not reasonably to know the matter was defamatory (due to the nature and size of Facebook and its reporting system), and this lack of knowledge is not due to negligence on their part but to the nature and volume of Facebook posts.

Newspaper article Oliver's Webpage:

The media may be liable for defamation by repetition of the name of the Facebook page per the repetition rule.[32] If the article involves comment based on the information provided in the article then it is likely defensible under the fair comment defence.[33] The information provided is also true in context, as a Facebook page with that name does exist, and is subsequently not defamatory on that basis either.

[30] *Bunt v Tilley* [2006] 1 WLR 1243.
[31] *DA* s 30.
[32] *Channel Seven Adelaide Pty Ltd v S, DJ* (2006) 94 SASR 296.
[33] *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

It is unclear when the article was published. If it was during the course of the trial it could amount to sub judice contempt. However as it only concerns the bare facts of the webpage and its existence,[34] it is unlikely to be sub judice.

Newspaper Article about Blane's wedding:

It is unclear whether Blane is the possessor of the private vineyard that his wedding took place on.

Assuming Blane is in possession of the land then actions in trespass and nuisance (as well as the other actions discussed below) may be available to him.

It is open to Blane to sue in trespass for the helicopters flying over the vineyard, if it interfered with the ordinary use of the land.[35] However this is unlikely to be successful because it did not interrupt the ceremony, evinced by the guests not even looking up at the helicopters.

Nuisance is not actionable because this was an isolated incident.[36]

While the facts of this case are similar to *Douglas v Hello! Ltd* [2007] 2 WLR 920, as in both cases a private wedding was photographed by the media, the instant case can be distinguished as there is no relationship of confidence created by a contract to one

[34] *Packer*.
[35] *Bernstein v Skyviews Ltd* [1978] QB 479.
[36] *Ibid*.

news organisation, which raised an issue of confidence there. Subsequently an action for breach of confidence would probably fail here.

Privacy is another option open to Blane. While Australia does not currently have a tort of privacy,[37] the High Court left open that a tort of privacy could develop.[38] There are instances of decisions at similar levels in other state courts where a tort of personal privacy is recognised.[39] Arguably a tort of intrusion of privacy should be adopted here, due to the High Courts obiter that appellate courts in Australia should not depart from a decision of an intermediate appellate court in another jurisdiction unless it is plainly wrong.[40] If the tort were to develop here a successful action in privacy against the newspaper would require Blane to show that the intrusion was highly offensive to a reasonable person, and caused him emotional harm.[41] As it is offensive and distressing to have an invitation only wedding gate crashed by paparazzi, Blane would likely succeed.

[37] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.
[38] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.
[39] *Grosse v Purvis* [2003] QDC 151; Jane Doe v ABC [2007] VCC 281.
[40] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.
[41] *Grosse.*