

True Crime & Punishment: Legal Risks in True Crime Series

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There has been a proliferation of true crime films, documentaries and podcasts in the last few years, and, while our fascination with grizzly crimes is nothing new, the modern era of true crime series has the potential to reach far greater audiences than ever before.

This article focuses on the legal risks and challenges posed by serialised true crime documentaries and podcasts, where one crime (or series of connected crimes) is investigated in depth over the course of a season (e.g. *Serial*, *Trace*, *Making a Murderer*), as opposed to the one-crime/criminal-per-episode format (e.g. *Casefile True Crime*, *My Favorite Murder*). It also focuses on risks specific to true crime series, as opposed to more general legal risks for series (e.g. copyright infringement).

True crime series tend to fall into one of the following categories:

- investigating an unsolved crime, where there has been no criminal prosecution;
- investigating an incident that was not considered to be a crime at the time;
- investigating a crime where a suspect was identified but the suspect was not found guilty, or was found guilty of a lesser crime in criminal proceedings; or
- investigating a crime where a suspect was found guilty, but it is believed the finding was incorrect.

Given the nature of true crime series to seek to "expose the truth" and find someone on whom to put the blame, whether it be someone suspected of a crime or a police officer suspected of incompetence or a malicious cover up, this is an area ripe for defamation litigation.

US Cases

There have been two recent high profile defamation proceedings commenced in the US.

The first relates to the CBS two-part documentary series *The Case of: JonBenet Ramsey*, which aired in 2016. The series investigated the unsolved murder of the child pageant queen, JonBenet Ramsey. The series concluded by suggesting that JonBenet Ramsey's brother, Burke Ramsey, had killed her, and that her parents had covered up his crime. Ramsey sued CBS, the series' production company, and the experts featured in the show for US\$750 million. Ramsey alleged that what had been presented as an investigative documentary was, in fact, a "fictional crime show based primarily on a preconceived storyline".¹ It was alleged that the series contained lies and omitted relevant facts. The case settled at the start of 2019 for an undisclosed sum.

The second relates to the Netflix true crime series *Making a Murderer*, the first season of which debuted on the streaming platform in 2015. It examined whether Steven Avery and Brendan Dassey had been framed for a 2005 murder. Steven Avery had earlier filed a wrongful imprisonment case, and it was alleged that Avery was framed for the murder in retaliation for the wrongful imprisonment case. Police officer Andrew Colborn was featured in the series, alleged to have been part of the cover up. Colborn commenced proceedings against Netflix and the makers of the series in December 2018, claiming that his reputation and livelihood were destroyed by the series, and that, since the series aired, members of the public have confronted him, threatened him and his family, and have stolen his identity.

Colborn alleges his testimony was heavily edited (for example by changing reaction shots, and editing footage so it looks like his answer to one question is the answer to a different question) and gave misleading

impressions.² He also claimed that they excluded relevant facts and evidence, and included only one-sided biased interviews. Colborn claims that what was offered in the series was more than opinions, but declarations of fact. He says the makers of the series should have mitigated the damage by admitting that they distorted facts for the series.

The case has since moved up to the US Federal Court. Netflix's motion to dismiss the case against it, which claimed Colborn had not shown Netflix is at fault in its distribution of the series,³ was dismissed in December 2019 after Colborn proposed to amend his complaint so that it contained specific allegations against Netflix. A separate motion filed by the makers and their production company, which claims that the complaint is statute barred, has been deferred pending an evidentiary hearing on the issue of service of the complaint. At the time of writing, this motion had not yet been heard.

Further cases are emerging: the creator of an interrogation technique has sued Netflix, a director and a production company for defamation over comments made about the validity of his technique in *When They See Us*, a Netflix series about the 1989 "Central Park Jogger" case, where five boys were wrongly convicted.⁴ A prosecutor has also brought an action for defamation against Netflix and the director over her portrayal in the same series, alleging that it is based on complete fabrications, and that she has been falsely portrayed as a "racist, unethical villain".⁵

With the increasing amount of Australian true crime series (e.g. *Teacher's Pet* (The Australian), *Phoebe's Fall* (Sydney Morning Herald), *Trace* (ABC), *Bowraville* (The Australian), *The Claremont Serial Killings* (The West Australian), *Unravel* (ABC) and *Wrong Skin* (The Age)), it seems only a matter of time before similar proceedings are commenced in Australia.

Relevant Features of True Crime Series

There are a number of features of modern true crime documentary series and podcast series that should be considered.

As opposed to more typical reporting of crimes, modern true crime series seek to go beyond police investigations and criminal proceedings to try and uncover new information. It would be extremely difficult to do this and avoid any defamatory imputations (probably impossible) – the old adage "a man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also fire"⁶ is very apt here.

While a risk minimisation strategy is to include the bane and the antidote together, the narrative and/or

investigative structure of the series may not accommodate including an alternative theory every time a new allegation is made. It may not even accommodate including the alternatives in the same episode. This raises issues if a plaintiff chooses to sue on only one episode or only some episodes in the series.



Further, makers will want to end each episode on a cliffhanger or other sensational note, to keep their audience coming back for more. The desire to do so will push against the legal need to try and include any evidence which displaces a conclusion alongside that conclusion.

Those watching or listening to a series may also never get past the first one or two episodes, and therefore never hear a particular allegation being disproved or an alternative theory being promoted. This may be a particular risk for those streaming or subscription services which offer a free episode as a hook.

Similarly to listening to radio broadcasts, podcast listeners in particular are often not giving their full attention to the podcast: podcasts are often listened to while exercising, cleaning or working. The concentration of the listener will not always be on the podcast, and they may miss details or miss a qualification or contradiction being made to a statement.⁷

However, in contrast to radio broadcasts, podcasts can be rewound and listened to again. Given the ability to go back and review, it may be considered similar to a written publication which can be re-read. For written publications, a reader of a book is likely to take more care than a reader of newspaper, who is likely to take more care than the viewer of a television program.⁸ A reader may take the opportunity to go back and check something.⁹ There have not been any cases of defamation litigation in respect of podcasts in Australia as at the date of this article, so it is unclear how courts will seek to deal with the idiosyncrasies of the podcast format, but it seems unlikely podcast listeners will be assumed to have undertaken a detailed review of each episode.

Another feature of true crime series is that it is typical for producers to insert themselves into their stories: describing their own emotions as the story develops, developing relationships with victims or the friends and family of victims, and becoming personally invested in the outcome of their investigation. In some cases, family members of victims invite the producers to look into the relevant crime (e.g. *The Lighthouse*). While the emotive aspect this brings to true crime series is part of their appeal, it can prevent producers from being as objective as they might otherwise be. In losing some objectivity, they may be less likely to give sufficient attention to alternative theories, or be dismissive of facts or details that go against the theory about which they have become captivated.

True crime series also raise questions and invite their audience to speculate on the answer. Following the decision in *Voller v Nationwide News Pty Ltd*,¹⁰ producers of true crime series who promote them through public social media pages face the additional risk of being found responsible for publication of defamatory comments on these posts. In *Voller*, it was determined that operators of Facebook pages can be liable for defamation for comments left on their posts by third parties. Even if the series itself has been carefully produced to minimise defamation risks, commenters coming up with their own theories or making accusations leave producers open to defamation proceedings being brought. The nature of true crime series is to attract people who are interested in solving mysteries: they will develop their own theories and make their own accusations, and want to share these in the comments section. In posting episodes to social media, producers must be aware that comments with defamatory content are highly likely, and, because of the decision in *Voller*, they could be held liable for the publication of these comments.¹¹

True crime podcasts in particular invite audience participation: the nature of the format is that the series

may be being produced in real time as more information is collected and the story develops. Listeners are encouraged to provide any information they have to the producers, and this information may be included in subsequent episodes. The audience becomes part of the story. This can then have impacts on the admissibility of evidence (discussed further below).

The podcast medium is also open to anyone with a recording device and a story they want to tell. Those researching and producing true crime podcasts are not necessarily journalists, and do not necessarily have any legal resources to assist them in assessing the risks of their podcast. They may not be aware that simply using the word "allegedly" will not be sufficient to protect them from defamation actions.¹² They also may not have the protections afforded to them that are available to professional journalists (e.g. journalist's privilege).

The features described above make true crime series more vulnerable to actions for defamation.

Difficulties with Defamation Defences

The nature of true crime series is that they are naturally highly likely to contain defamatory material.

Even if the producers of a true crime series do not intend to convey the guilt of an individual, and merely intend to convey their suspicion, the ordinary reasonable listener/viewer may understand guilt to be conveyed. Producers should keep in mind that different levels of meaning can be conveyed, and that things can be conveyed that they do not intend to convey.

The features of true crime series outlined above mean that it will be extremely difficult for producers to rely on any of the existing defences if defamation is alleged. A brief outline of why each of these defences will be difficult in the context of true crime series is set out in the following table:

DEFENCE	ISSUES FOR TRUE CRIME SERIES
Justification	<p>Relying on the defence of justification requires proving that all of the imputations conveyed by the publication are substantially true.¹³</p> <p>Relying on the defence will often mean having to prove a crime was committed by the individual, and carries all the relevant difficulties of essentially running a criminal prosecution in a civil context.</p> <p>The more serious the allegations made in the series, the higher the level of proof that will be expected. It is best to be prepared to try and meet the criminal standard of proof. Although meeting such a standard isn't a requirement, having evidence in place to do so will help justify the publication, especially where the allegations are so serious as those which arise in true crime series (e.g. murder).¹⁴</p> <p>An additional layer of complexity will arise as true crime series will almost inevitably contain a mixture of fact and opinion. As the producers of the series develop their own investigation, they will make inferences, reach conclusions and criticise earlier investigations. It will not always be clear to the audience what were statements of fact and what were statements of opinion. In this case, to plead justification, defendants will need to not only prove that their statements of fact are true, but also that their statements of opinion are correct, where these statements of opinion are understood as being statements of fact.¹⁵ While arguments may be made as to whether it is possible for an opinion to be "correct", in this situation, an opinion is correct where it is justified by (i.e. implicit in) the facts which have been stated and which can be proved to be true.¹⁶</p>
Contextual truth	<p>This defence will only be available if the producers can prove that a worse additional imputation was conveyed than those relied on by the plaintiff, and was true, which will be difficult where a serious crime or dereliction of duty is already being alleged as being imputed by a plaintiff.</p> <p>A hypothetical example of this is would be in the case of a true crime podcast investigating the death of Person B, where it is alleged that Person A, who was a serial killer, was involved in the murder of Person B. Person A sues the makers of the podcast for defamation over the imputation that he killed Person B. If the makers of the podcast can prove that Person A is a serial killer (i.e. they have been convicted of a number of other murders), they may be able to rely on the defence of contextual truth. Person A's involvement in the murder of a single additional individual will not further harm their reputation, being that of a serial killer.</p> <p>The proposed defamation reform may make this defence easier to rely on, in that it will no longer be required that the imputation pleaded by the producers in their defence be different to those pleaded by the plaintiff.¹⁷</p>
Common law qualified privilege	<p>It will be very difficult for producers to demonstrate that they had the requisite interest or duty to publish the material, given the high standard which is usually required by the courts for this defence, and that the audience had the reciprocal interest in receiving the material.</p> <p>It would have to be demonstrated that there was an element to the investigation which was of significant interest to the general public, for example if the producers find a source in government or the police force who reveals high level involvement in the perpetration or cover up of the crime.</p> <p>Avoiding allegations of malice where producers have chosen to maintain one line of investigation against an individual where others have been abandoned will also be difficult, particularly where producers seek to inject themselves into the story and develop an emotional connection.</p>
Statutory qualified privilege	<p>The requirement for the audience to have an interest is broader for statutory qualified privilege than for common law qualified privilege. True crime investigations are more likely to meet the interest threshold for this defence. For example, the relevant interest was found in the general public for matters relating to the disappearance of an anti-drug campaigner and the continued lack of prosecution of six men identified in a Royal Commission as likely responsible for his</p>

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	<p>murder.¹⁸</p> <p>While producers may be able to demonstrate that their audience had the requisite interest or apparent interest in the subject, it will be difficult for the producers to meet the requirement of reasonableness, given all the factors at play, including the extent of publication and the seriousness of the allegations.</p> <p>The proposed amendments to the statutory qualified privilege defence, and the introduction of the new public interest defence seem unlikely to make any practical difference to the utility of this defence: it will still be very difficult for producers to meet the reasonableness requirement for qualified privilege or the responsibility requirement for the public interest defence.</p>
Public documents	<p>In order for this defence to apply, there must be no alteration or addition by the defendant to the fair summary or extract,¹⁹ which is unlikely in the case of a true crime series, where the document is likely to be added to with other information or opinions, or embellished by conclusions drawn from the document. However, it may be able to be relied upon in relation to imputations that arise directly from the material extracted from the public document.</p>
Fair report	<p>In order for a report of proceedings (whether they be court proceedings or the proceedings of an inquiry, or other proceedings of public concern) to be fair, it must be a fair and honest summary giving the impression the proceedings themselves would have given, and presenting the full range of the evidence.²⁰ In order to be considered a report, it must not contain commentary or opinion,²¹ and must be clearly a report, not the reporter's own statement.²² As above, in the context of a true crime series, it is likely the producers will want to add commentary or opinion, and therefore will not have this defence available to them. However, if they have directly reported proceedings, and an imputation arises from that direct report, they will be able to rely on this defence at least in respect of that imputation.</p>
Political communication	<p>For this extension of the qualified privilege defence to be applicable to a matter raised in a true crime series, the matter must be related to government or politics (at any level). The plaintiff need not be a politician or a public figure.²³ The fact a publication mentions a government or political issue, or references a politician, does not necessarily mean it is a communication concerning a government or political matter – the true nature of the publication will need to be considered.²⁴</p> <p>Difficulties will again arise for true crime producers in meeting the reasonableness standard.</p> <p>This defence is unlikely to be useful for true crime series unless it is being claimed that corruption in government was linked to the crime, or there has been a failure of justice due to failings of the judicial system or the laws being applied.</p>
Fair comment	<p>As with the qualified privilege defences, it will be difficult for true crime series to demonstrate the requisite public interest.</p> <p>If the comment being made is voicing an opinion on how a police or judicial officer exercised their function, then this defence may be appropriate. The defence usually focuses on the conduct of individuals, rather than more general concepts such as organised crime.²⁵</p> <p>The fact that the plaintiff is a public figure will not be sufficient to make the matter one of public interest – it will only become sufficient if the matters relate to how they perform public duties or because that person makes it an issue (e.g. by inviting comment on their involvement in something by claiming to have high standards in relation to it).²⁶</p> <p>To be fair, the comment must be based on facts, and must be objectively fair. If the producers are relying on facts stated in the material as the basis for the publication, they must prove that all the facts relied on are true: failing to prove even one fact true will lead to the defence failing.²⁷ If the facts are not stated, but implied, the truth of the facts that are implied must be shown.²⁸ This means this defence may be almost as difficult to run as a truth defence, in the case of true crime series.</p>

DEFENCE	ISSUES FOR TRUE CRIME SERIES
	<p>(As above)</p> <p>Basically, the defence will apply where those hearing the matter can identify it as an opinion and decide for themselves whether they agree with it.²⁹ The defence will therefore be most likely to succeed where the producers set out for their audience all the facts available to them (that they are able to demonstrate are true or can demonstrate are subject to privilege), and clearly demonstrate how these facts led to them developing the opinion stated.</p>
Honest opinion	<p>The two primary hurdles for generally applying this defence to the true crime series will be demonstrating the requisite public interest, and demonstrating that the opinion was based on the "proper material", which is material that:</p> <ul style="list-style-type: none"> • is substantially true; or • was published on an occasion of absolute or qualified privilege; or • was published on an occasion that attracted the protection of a defence under section 31 (the honest opinion defences), section 28 (the defence for publication of public documents) or section 29 (the defence of fair report). <p>This defence can assist producers where an interviewee has expressed a defamatory opinion. However, producers should be aware that in order to rely on this defence, they may be required identify the person who made the comment, which will raise difficulties if it is a confidential source.³⁰</p> <p>The proposed amendments to this defence would clarify that the "proper material" on which the opinion is based need not be set out in the series: it can be notorious, accessed from a reference point included in the series (e.g. a hyperlink on the series or podcast's webpage) or otherwise apparent from context.</p>
(Proposed new defence) Scientific or academic peer review	<p>Where producers utilise information gained from a scientific or academic article that analyses the crime or some relevant aspect, they may be able to rely on this proposed defence (if it becomes law) in relation to that information, where the article has been peer reviewed before it was published in a journal, and provided that the reporting is a fair summary or a fair extract.</p>
Innocent dissemination	<p>Podcast aggregators, such as Apple Podcasts and Spotify, may be able to claim the defence of innocent dissemination in respect of their publication of true crime podcasts. However, the law in this area is not clear cut, and care should be made to check the content of podcasts before they are uploaded where possible.</p> <p>Media organisations or others who commission the production of true crime series will not be able to rely on this defence.</p>

In addition we note that, given the seriousness of accusing someone of a crime, it is unlikely an action in defamation would be prevented by the proposed serious harm threshold.

Other Legal Risks

Many other legal risks arise from true crime series in addition to the risk of defamation, which are briefly outlined below.

Contempt

Contempts of court (or of similar bodies, such as coronial inquiries) are committed where a person goes against the order of a court or otherwise undermines the ability

of a court to administer justice or be seen to administer justice. Given that true crime series often delve into historical proceedings, or contribute to new proceedings, there are many opportunities at which producers risk being in contempt of court.

Producers of true crime series are at risk for multiple types of contempt:

- sub judice contempt, which is committed where material is published that might prejudice a particular proceeding while that proceeding is on foot, because such publications put at risk the administration of justice in that proceeding. Proceedings are sub judice where they have been commenced, but are not yet complete.³¹ For criminal proceedings, proceedings

commence when a person has been arrested under a warrant,³² arrested and charged,³³ or arrested with a view to them being charged.³⁴ Criminal proceedings can also be commenced by a Court Attendance Notice, which raises additional issues as producers (and even the recipient of the Notice, where it has been despatched by post) may be unaware that the Notice has been issued;

- disobedience contempt, if the producers of the series refuse to reveal their sources when ordered to (especially if the producers are not considered to be journalists and do not have journalists' privilege available to them);
- scandalising contempt, if the true crime series raises questions about the competence or impartiality of the courts;
- contempt for the breach of non-publication orders; and
- contempt for identifying individuals the subject of pseudonym orders.

Non-Publication Orders

Producers should confirm that there are no court orders in place that would prohibit the publication of any details in their series. Publishing details in spite of non-publication orders would constitute a contempt of court. In some instances, even discussing certain information may breach a non-publication order.³⁵

Courts may make non-publication orders in respect of proceedings, prohibiting the publication of certain information in evidence or more generally in relation to the reporting of proceedings.

They may also make non-publication orders more generally in relation to extraneous information about a person before the court (e.g. previous convictions) which could interfere substantially with the administration of justice in a proceeding.³⁶ For example, a judge agreed to a non-publication order in respect of the *Underbelly* series (though this series was a fictionalised account), which contained information relevant to an upcoming murder trial (including an explanation for the motive for the murder), which would affect the ability of the accused person to obtain a fair trial.³⁷

Such orders can also relate to existing material that has already been published, and can require public access to that material be prevented until the trial has concluded.³⁸ It may be quite difficult for producers of true crime series to achieve that where their series has been published to multiple platforms.

It may be difficult for producers to find out about non-publication orders. Only some jurisdictions (e.g. South

Australia)³⁹ maintain a register of such orders, and some non-publication orders have non-publication orders over them, so that the existence of the non-publication orders cannot be reported on.

Where producers are aware that proceedings are on foot, or are concerned that proceedings may be on foot, they should endeavour to find out about any non-publication orders, for example by contacting the relevant registry or the court's media officer.

Producers can elect to challenge a non-publication order, and are particularly entitled to do so where the order directly binds the media.⁴⁰

Publication Restrictions

In addition to taking care to not publish any information the subject of a non-publication order, producers should confirm that there are no legislative provisions that would prohibit the publication of any details in the series. Particular care should be taken if the series discusses children, family law proceedings, proceedings relating to sexual assault, or cases about domestic violence.



In the case of a true crime series investigating what the producers consider to be a wrongful conviction, producers may speculate or want to discuss the deliberations and decision of a jury. If the producers of a true crime series are approached by or identify and interview a juror from a criminal proceeding, they should be extremely cautious about publishing anything a juror says about jury room deliberations, as disclosing such information may amount to an offence.⁴¹ In some jurisdictions, even seeking such information is an offence.⁴² All jurisdictions have statutes which prohibit or restrict disclosing the identity of jurors.⁴³

Secret Recordings

Producers of true crime series may be tempted to secretly record conversations, or may be provided with secret recordings by third parties. Legislation about the recording of conversations is jurisdiction- and scenario-specific. If they are intending to record (or listen in on) a conversation, or are provided with a recording, producers of true crime series should take care to consult the relevant legislation for their state/territory

(and a lawyer) to determine whether making the recording (or listening to the conversation) is lawful, and whether they can communicate the information obtained to their audience.

Reporting Requirements

There are obligations to report crimes, or provide information that may be material to securing the apprehension or conviction of the offender, to relevant authorities. In some jurisdictions, failure to do so may result in the person who held the information being guilty of an offence.⁴⁴ Similar offences exist for concealing child abuse offences.⁴⁵

Producers of true crime series who uncover new information in their investigations should make sure to share any such information with police or other relevant authorities, to avoid the possibility of being prosecuted for failing to report the information.

Plagiarism and Copyright Infringement

If producers of true crime series rely on the reporting or work of others without seeking consent and giving proper credit and/or payment (as required) for the use of their work, the producers may be liable for copyright infringement.

Whistleblowers

Where a source raises an allegation of corruption, negligence or other wrongdoing in an organisation (e.g. the police force), and that disclosure is in the public interest, they may be considered a whistleblower. Relevant legislation varies by jurisdiction. In New South Wales and Queensland, and at the Commonwealth level, disclosure to a journalist may be protected where the individual has already tried to disclose the issue to the relevant authority.⁴⁶ In other jurisdictions, external reporting is not protected.⁴⁷

There can be penalties involved in revealing a whistleblower's identity, and producers should take care to make sure they are maintaining the whistleblower's anonymity. Producers should seek advice if they believe they have been approached by a whistleblower.

Other Risks

Another issue for true crime series makers is to consider what effect their work will have should police investigations be reopened or criminal proceedings be commenced. True crime series have been known to uncover new information which results in investigations being reopened (e.g. the investigation into the murder of Maria James, which was the subject of ABC's *Trace* podcast).⁴⁸

While true crime series can have a positive effect, they may also have a negative effect on the ability of the justice system to ensure justice prevails. Producers will have to balance the desire to investigate and get to the truth of the story with the knowledge that doing so may impact on the success of criminal proceedings.

Applications for non-publication orders, to prevent the use of evidence which the defence believes may be tainted, or to deal with other ramifications of the series can delay criminal proceedings significantly.

Even if it doesn't affect the initial proceedings, it may be a ground of appeal that adverse media coverage prevented a fair trial.

Juries

A developing example is in relation to *The Teacher's Pet* podcast. The suspect identified in the podcast, Chris Dawson, was recently arrested and charged with the murder of his wife, Lynette Dawson. While it is widely believed that the podcast helped to renew public interest in the case and brought new leads to the police, assisting in the arrest, the podcast also has the potential to disrupt criminal proceedings. Questions have already been raised if the podcast has made it impossible for Mr Dawson to have a fair jury trial, given the level of publicity the case has received and the clear assertions of guilt made in the podcast.

Police Investigations

True crime series may also unwittingly interfere with ongoing police investigations, if it uncovers something police were trying to keep hidden for the purposes of their investigation, or it alerts a suspect to the fact they are under suspicion.

Contamination of Witnesses and Evidence

An issue which has been raised by Mr Dawson's lawyers in relation to *The Teacher's Pet* podcast is the potential for contamination of evidence.

Care is usually taken in criminal investigations and prosecutions to prevent cross-contamination of witnesses. Evidence is taken from witnesses separately, and witnesses are only provided with information given by other witnesses if necessary to elicit further information or test the validity of information given by the witness.

The nature of podcasts such as *The Teacher's Pet* is that the investigation by the producers continues as episodes are released to the public, which includes evidence from potential witnesses. Other potential witnesses hear this information and may be influenced

by it, which may then affect the admissibility of their evidence.

Witnesses who had spoken to *The Teacher's Pet* did not give evidence at Mr Dawson's committal hearing, due to concerns their evidence had been contaminated by their involvement in the podcast. There is expected to be a separate hearing about the evidence of these witnesses.

In some instances, potential physical evidence has been presented to producers of true crime series. In the ABC podcast *Trace*, Rachael Brown was given blood-spattered magazines which may have been linked to the murder of Maria James, as well as hair samples from a relative of a suspect. Preserving evidence is vitally important for its future use, as is maintaining the chain of custody so the validity of the evidence is conserved for trial.

While Ms Brown has taken care to preserve this evidence (and did attempt to hand it over to police), a defence lawyer may be able to argue it has been contaminated by her handling of it, and that therefore it should not be admitted as evidence.

Producers of true crime series should take care if they are presented with any physical evidence. The best practice would be to avoid taking custody of the item, but ensure that it is provided directly to the police. If this is not possible (if, for example, the source is not willing to deal with the police), producers should immediately

contain the evidence, and provide it to the police as soon as possible.

Risk Mitigation

Producers of true crime series will need to carefully balance the legal risks of publishing the material with the value of telling the relevant story.

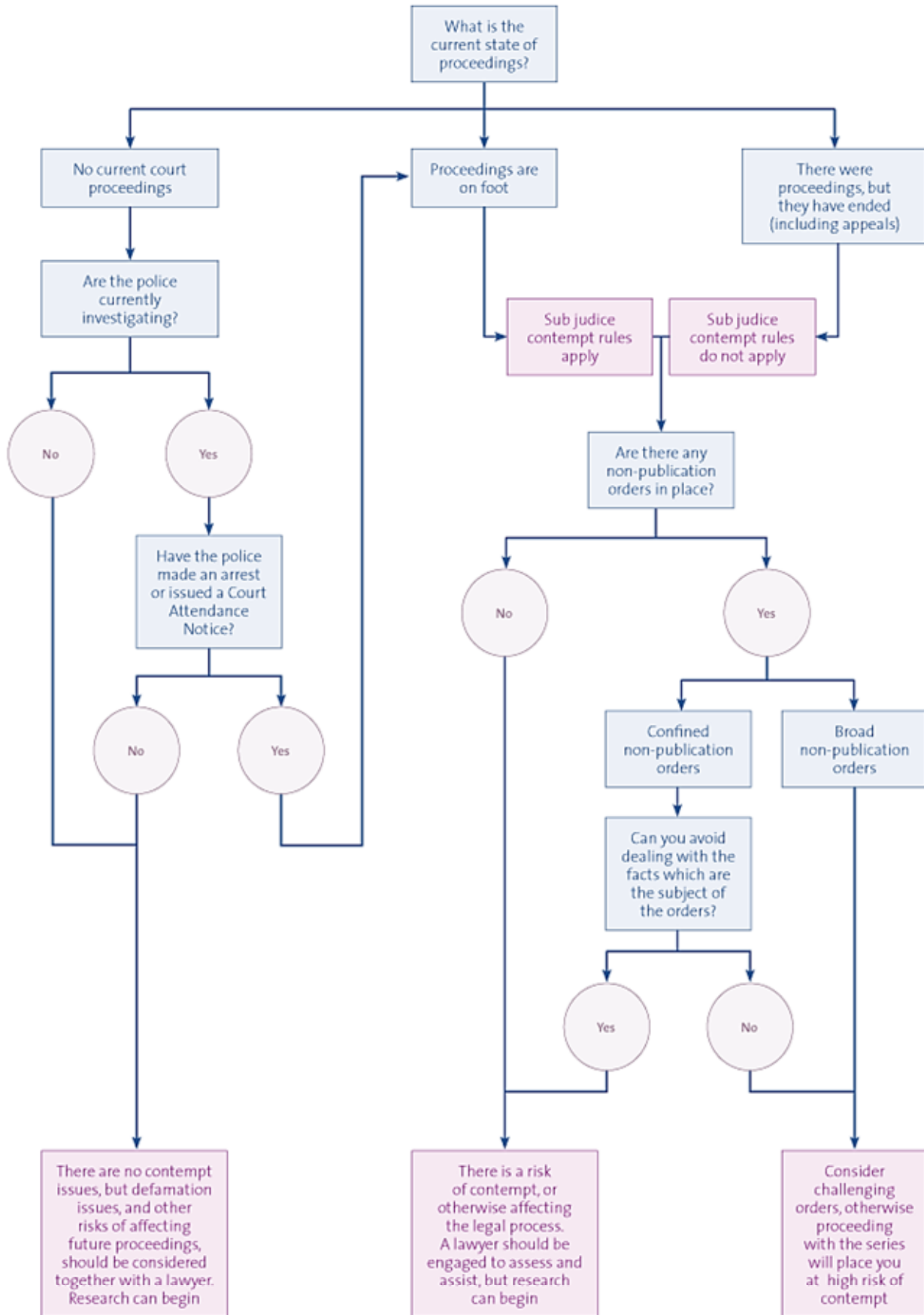
Set out in the following flowchart and checklists are some issues to be considered in the preparation of true crime series.

However, the first and most important item on the to do list of anyone considering producing a true crime series should be to consult a lawyer, to obtain their advice about how best to proceed with investigating and presenting their story with the knowledge of the particular facts of the crime(s).



Flow Chart & Checklist Guide

Before you begin



RESEARCH

- Are there any other statutory restrictions in place that may prevent you conducting your investigations or publishing any information (e.g. the name of a child victim)?
- Have you made attempts to contact the people discussed in your series?
- Have you kept detailed records of the research and interviews you have undertaken?
- If you are considering using any secret recordings, have you checked the legislation in the relevant state or territory about the use of those recordings?
- Have you ensured you are not disclosing the names of any jurors or the nature of their deliberations?
- If you have obtained any new information about a crime, have you considered providing this information to the police?
- Have you taken steps to verify the accuracy of information?
- Have you checked that the conclusions you are drawing are based on evidence?

INTERVIEWS

- Have you obtained releases from your interview subjects?
- Have you explained to any sources that have requested anonymity that, while you will make every effort not to disclose their identity, you may be compelled to by a court?
- Have you confirmed your interview subjects are happy to be recorded? If they are, make sure to preserve the recording. If not, take and preserve detailed notes.
- Have you encouraged interview subjects to describe why they have come to the conclusions they have come to, and ensured they understand how to express their opinion to make it clear they are giving an opinion?

PRESENTATION

- Have you stated where matters are your own opinion, and on what material that opinion is based?
- Have you clearly set out when you are quoting from public documents, and stated the source of the quote?
- Where possible, have you set out alternative theories or explanations?

- Where you have contacted individuals discussed in your series, have you included their responses to you (e.g. any denials)?
- Have you avoided using words that imply guilt where guilt is disputed (e.g. murderer, killer), or imply a higher level of guilt or involvement (e.g. murder v manslaughter, dealing v possession, suspect v person of interest)? Be as precise as possible in the language used. Where possible, look at the relevant criminal legislation to determine appropriate terms. Using the wrong language can mean your audience misinterprets what you are trying to say, and you may be liable for saying something you didn't intend to convey.

EDITING

- Have you included callbacks to previous episodes where they include information that led to the conclusion presented in this episode?
- Have you included pointers to other episodes, where the other episode contains the "antidote" or alternative theory to the theory being presented in this episode?
- Have you included a content warning for any graphic descriptions or depictions of violence, or the use of recordings of deceased indigenous individuals?
- Have you included a disclaimer, stating that the matters in the series are your opinion, and that the outcome of criminal proceedings was different (if applicable)?

POST-PUBLICATION

- If a criminal prosecution is commenced, do you have a mechanism to withdraw the series from publication until the prosecution is concluded?
- Are you carefully monitoring social media comments on your posts to ensure third parties are not making defamatory comments for which you may be liable? On platforms where this is possible (e.g. Instagram), consider blocking comments. Where platforms do not allow comments to be blocked (e.g. Facebook), consider implementing the available controls to restrict comments.⁴⁹
- Have you maintained an organised file of all information, recordings and interviews, in the event the police or the court requires the information..

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Endnotes

- ¹ See Ramsey's Complaint for Defamation filed in the State of Michigan 3rd Circuit Court for the County of Wayne.
- ² See Colborn's Complaint filed in the State of Wisconsin Manitowoc County Circuit Court.
- ³ See Memorandum in Support of Motion to Dismiss by Netflix, Inc., filed in the United States District Court for the Eastern District of Wisconsin Green Bay Division.
- ⁴ See Complaint filed by John E. Reid And Associates, Inc. against Netflix, Inc., Ava Duvernay and Array Alliance, Inc., filed in the United States District Court for the Northern District of Illinois Eastern Division. Netflix has filed a motion to dismiss which claims that the complaint is intended to shut down public debate over the interrogation method contrary to the First Amendment. See Memorandum of Law in Support of Defendant Netflix Inc.'s Motion to Dismiss filed in the same proceedings.
- ⁵ See Complaint and Demand for Jury Trial filed by Linda Fairstein against Netflix, Inc., Ava Duvernay and Attica Locke, filed in the United States District Court for the Middle District of Florida Fort Myers Division.
- ⁶ *Lewis v Daily Telegraph* [1964] AC 234 at 285 (Lord Devlin).
- ⁷ E.g. *Gordon v Amalgamated Television Services Pty Ltd* [1980] 2 NSWLR 410 at 413.
- ⁸ *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165-166.
- ⁹ *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158 at 166.
- ¹⁰ [2019] NSWSC 766.
- ¹¹ We note the decision is currently the subject of an appeal, and the position may therefore change.
- ¹² *Brown v John Fairfax & Sons* (unreported, NSW Supreme Court, Hunt J, 13 July 1988); *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 170.
- ¹³ *Sutherland v Stopes* [1925] AC 47 at 62; *O'Brien v ABC* [2017] NSWCA 338.
- ¹⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449.
- ¹⁵ *Peter Walker & Sons v Hodgson* [1909] 1 KB 239 at 253; *Sutherland v Stopes* [1925] AC 47 at 55, 62-63, 73, 75 and 95.
- ¹⁶ *Goldsbrough v Fairfax* (1934) 34 SR (NSW) 524 at 530.
- ¹⁷ Council of Attorneys-General, *Model Defamation Amendment Provisions 2020* (12 November 2019).
- ¹⁸ *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30.
- ¹⁹ *John Fairfax & Sons Ltd v Hook* (1983) 47 ALR 477 at 490 (citing *Campbell v Associated Newspaper Ltd* (1948) 48 SR (NSW) 301).
- ²⁰ *Cook v Alexander* [1974] 1 QB 279 at 288; *Chakravarti v Advertiser Newspapers Ltd* (1988) 193 CLR 519.
- ²¹ *Burchett v Kane* [1980] 2 NSWLR 266(n) at 273.
- ²² *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43 at 50.
- ²³ This is a distinction from the US, where the fact that the plaintiff is a public figure can form the basis of a defence.
- ²⁴ *Peek v Channel Seven Adelaide Pty Ltd* (2006) 94 SASR 196 at [19].
- ²⁵ *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 193 at 215-218.
- ²⁶ *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 167.

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- ²⁷ *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510 at 553-554, 585.
- ²⁸ *Kemsley v Foot* [1952] AC 345.
- ²⁹ *French v Triple M Melbourne Pty Ltd (No 5)* [2008] VSC 553 at [10].
- ³⁰ *Weeks v Nationwide News Pty Ltd* [2018] WASC 113.
- ³¹ *James v Robinson* (1963) 109 CLR 593.
- ³² *Stirling v Associated Newspapers Ltd* [1960] Sc LT 5.
- ³³ *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NWLR 368.
- ³⁴ *James v Robinson* (1963) 109 CLR 593.
- ³⁵ See e.g. *Court Suppression and Non-Publication Orders Act 2010* (NSW), s 3.
- ³⁶ *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 27-28.
- ³⁷ *R v A* [2008] VSC 73.
- ³⁸ *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) NSWLR 52 at 69.
- ³⁹ *Evidence Act 1929* (SA) s 69(10).
- ⁴⁰ *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153 at 168-171.
- ⁴¹ *Criminal Law Consolidation Act 1935* (SA) s 246(3),(4); *Juries Act 1957* (WA) ss 56C, 56D; *Jury Act 1967* (ACT) s 42C(3),(4); *Juries Act* (NT) s 49A(3),(4); *Jury Act 1995* (Qld) s 70(2); *Juries Act 2003* (Tas) s 58(1)(a); *Juries Act 2000* (Vic) s 78(1).
- ⁴² *Jury Act 1977* (NSW) s 68A(1); *Juries Act 2000* (Vic) s 78(1); *Jury Act 1995* (Qld) s 70(3); *Juries Act 2003* (Tas) s 58(1)(b).
- ⁴³ E.g. *Jury Act 1977* (NSW) s 68.
- ⁴⁴ E.g. *Crimes Act 1900* (NSW) s 316(1).
- ⁴⁵ See e.g. *Crimes Act 1900* (NSW) s 316A; *Crimes Act 1958* (Vic) s 327 (in both Acts, except where the information has been provided by an alleged victim who is now an adult and does not wish the information to be reported to the police).
- ⁴⁶ *Public Interest Disclosures Act 1994* (NSW), s 19; *Public Interest Disclosure Act 2010* (Qld), s 20; *Public Interest Disclosure Act 2013* (Cth), s 26.
- ⁴⁷ E.g. *Public Interest Disclosures Act 2002* (Tas), s 7.
- ⁴⁸ See <https://www.abc.net.au/news/2018-11-30/trace-podcast-subject-maria-james-murder-case-to-re-opened/10569792>.
- ⁴⁹ See <https://www.ashurst.com/en/news-and-insights/legal-updates/no-comment---the-decision-in-voller-and-liability-for-comments-on-public-facebook-pages/>.