

Vetting Stories About Interviews With Alleged Victims and Witnesses

By Charles D. Tobin and Adrianna C. Rodriguez

Interviews with crime victims and witnesses often provide our clients with the richest, most memorable journalism. Their painful and sometimes graphic stories humanize what could otherwise be formulaic recitations of charges and court procedure. When told well, these stories can encourage other victims to come forward, move a community to action and even help solve crimes.

But, these stories—first-hand accounts from those who experienced or witnessed the crime—are also often the ones that portray the accused in the most negative and damaging light. For this reason, they are among the most perilous legal terrain to maneuver for prepublication review.

Fair report privilege is, of course, the journalists' chief legal ally when reporting victims' and witnesses' stories based on official court proceedings, indictments, and the like. Under the privilege, in nearly all circumstances, the law does not hold the journalist accountable for false accusations in the documents or testimony as long as the journalists' account "is accurate and complete or a fair abridgement" of the official proceeding. See Section 611, *Restatement (Second) of Torts*.

But as three recent decisions by two federal courts and one state court demonstrate, statements by victims and witnesses that go beyond the information provided in the official records of a case may or may not be covered by the privilege. That increases the risk to the journalist—and the challenges for counsel in helping their clients get stories into print, on the air, or online. Compounding the concerns for counsel and client are the different approaches these courts have taken, and the different outcomes that have resulted.

Fine v. ESPN, Inc.,

42 Med. Law Rep. 1564 (N.D.N.Y. March 31, 2014)

Laurie Fine, the wife of former Syracuse basketball assistant head coach Bernie Fine, sued ESPN for defamation

arising out of two articles published on ESPN.com and an accompanying video. The journalism reported on allegations that she and her husband sexually abused underage boys in their care. Bernie Fine was investigated for the child abuse claims, but was never charged, because prosecutors determined the claims were outside of the statute of limitations.

The publications reported on and broadcast an audiotape purportedly between Laurie Fine and one of the victims, Bobby Davis, in which Fine purportedly acknowledged that she knew her husband had been molesting Davis. The ESPN stories included interviews with Davis and Davis' babysitter.

ESPN brought a motion under Fed.R.Civ.P. 12(c) for judgment on the pleadings arguing that the publications were protected by New York's fair report privilege, Civil Rights Law § 74, under which "fair and true" reports of any "official proceeding" are absolutely privileged. To assert the privilege, ESPN relied on (1) a copy of the tape that was in police files, (2) the Syracuse Police Department reports from the investigation, (3) a transcript of the district attorney's press conference, and (4) the search warrant application for Fine's home.

The court had no trouble finding that the police reports and the search warrant application were "official proceedings." However, closer questions troubled the court regarding how much of the articles actually reported on those "official proceedings," and whether the articles were "fair and true" ultimately led to the denial of ESPN's motion: "If context indicates that a challenged portion of a publication focuses exclusively on underlying events, rather than an official proceeding relating to those events, that portion is insufficiently connected to the proceeding" to warrant protection as a report of an official proceeding. The court further noted that the privilege did not apply to commentary on the proceeding or additional facts not established in the proceeding.

(Continued on page 25)

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(Continued from page 24)

Based on this, the court held that the portions of the articles that quoted or described the tape recording, which had been given to the police, were privileged. Similarly privileged were portions that provided background for the tape such as Davis' statement to ESPN that the incidents referred to in the taped conversation with Laurie Fine began when he was 18 and in high school.

However, the court held that other portions of ESPN's publications were clearly not part of the investigation or background on it, and fell outside the privilege. These included ESPN reporting that a voice-recognition expert it hired had identified the voice on the tape as Laurie Fine and statements made by Davis and his babysitter describing their opinion on the case. The court rejected ESPN's argument that these statements were not substantially different from the statements the victims had given police, holding that "an ordinary viewer" would not understand the statements being presented as those given to police, in large part because the articles made no reference to the police reports or search warrant application.

The court further held it could not consider on this motion whether the reports on the tape were "fair and true" because, although ESPN had attached it and the law enforcement records to its motion as documents integral to the complaint, the plaintiff had disputed the authenticity and accuracy of the tape. Moreover, the court declined to fully evaluate the contents of the law enforcement records holding that it could take judicial notice of the documents to establish their existence and legal effect, but not for the truth of the matters asserted.

The outcome on this motion: the court dismissed some of the statements ESPN reported, holding that they came squarely within the protections of privilege because they derived from the official record or merely provided background. Other victim and witness statements ESPN reported remained in the case because they fell outside of the privilege, according to the court.

Although the scope of the fair report privileged varies in each jurisdiction, the Fine, Tharp, and Piscatelli cases provide insight into courts' applications of the privilege in journalism that directly reports on statements by victims and witnesses.

Tharp v. Media General,

42 Media L. Rep. 1111 (D.S.C. Dec. 16, 2013)

Louis Clay Tharp was arrested and charged with first degree sexual abuse and first-degree kidnapping on a minor in 2010 after allegedly forcing a minor to perform oral sex on him in a locker room. The police department issued a press release on the arrest. The charges against him were eventually dropped.

Two months after the charges were dropped, on the date of a scheduled court appearance, WBTW-TV and the *Morning News* in Florence, S.C. broadcast and published in the newspaper and online an interview of the victim and his mother, and a mug shot of Tharp. The stories stated at the end that Tharp's options were "to plead guilty or request a trial." Tharp was not interviewed, or contacted, for the story.

A year later, Tharp's records were ordered expunged. Two weeks after that, Tharp sued the station and newspaper for defamation.

In denying WBTW's and the *Morning News*'s summary judgment motion, the court rejected arguments that the reports were privileged. Specifically, the court held that privilege "is inapplicable to the instant case in which the disputed publications publish [ed] information originally based upon their own investigation and interviews, rather than a government report or action." Further, the court found the information in the publications went "beyond what specifically could have been gleaned from the press release or other public records concerning the alleged incident."

In addition, several other facts about the report on Tharp clearly troubled the court.

First, the court noted that the station made no effort to contact Tharp at the time of the story, and only included the victim's and his mother's accounts.

Second, the publications also omitted information from the official records that cast doubt on the victim's story. In the published interviews, the victim told the reporter he had been held at gunpoint by one man, who was never identified

(Continued on page 26)

(Continued from page 25)

or arrested, and forced to perform sexual acts on Tharp. The police department's press release, however, never mentioned a second gunman, and the arrest warrant said that the victim reported that Tharp told him that if he tried to run, an accomplice waiting outside with a gun would stop him; the warrant did not, however, reference the actual presence of a second man. Not only was this distinction omitted from the published story, but a draft of the story produced in discovery showed the reporter had included a statement from police that they had video surveillance of the scene and that it "did not indicate a gunman was involved." As a result of the station's omission, and in light of the absence of a reference to a gunman in the press release and the inconsistency between the search warrant and the victim's statement on camera, the court found the station had "reasons to doubt the veracity" of the victim's story.

Piscatelli v. Van Smith,

35 A.3d 1140 (Md. Jan. 23, 2012)

While the New York and South Carolina court decisions would not bring victims' and witnesses' statement within the ambit of privilege, Maryland's high court reached the opposite conclusion where it found the witness statement perfectly mirrored what police had recounted in a court record.

The *City Paper* of Baltimore published lengthy investigative reports about murders of two nightclub promoters in which a man had already been convicted and sentenced. The articles suggested that instead, nightclub owner Nicholas Piscatelli, who was never charged, may have been involved in the murders.

Specifically, one article included a description of a discovery memorandum that the reporter found in the court file, but that was not introduced at trial. It reported that one of the victim's mothers told detectives an unknown man had approached her shortly after her son's murder and told her Nick Piscatelli had hired someone to commit the killings.

The article also contained quotes from the reporter's direct interview with the mother. She told him a man approached her at a benefit being held for her son's child, and said he

knew who was behind the murder. She told the reporter she didn't know who Piscatelli was but her reaction was "I was like, Whoa!" And she repeated in very similar language from the memorandum: "He said Nick Piscatelli was behind my son's murder" and that Piscatelli "hired someone to do it" and "covered his tracks."

In affirming the award of summary judgment for the newspaper, the Maryland Court of Appeals held that the reporting of the victim's mother's statements accusing Piscatelli of the murders was privileged. The court noted the quotes from the memo were exact, and the details of the mother's recollection were reported in a manner "consistent with the contents of the memorandum and [did] not add additional details or allegations." As a result, they did not defeat the newspaper's privilege.

Lessons Learned

Although the scope of the fair report privilege varies in each jurisdiction, the *Fine*, *Tharp*, and *Piscatelli* cases provide insight into courts' applications of the privilege in journalism that directly reports on statements by victims and witnesses. The following issues, gleaned from the decisions discussed above, may provide a useful framework for counsel in reviewing stories that rely on these types of statements.

Of course, counsel should know the precise parameters of privilege in your jurisdiction:

In New York, as the *Fine* case demonstrates, even material beyond the record may be protected, so long as it is background information that is reported in close proximity to, and tied in with, the portions of a story that cite to the record. The reader's and viewer's understanding that the information comes from official records will be crucial.

In South Carolina, as the *Tharp* case demonstrates, the privilege may be entirely unavailable, no matter how closely what the victim or witness says parallels the official record.

In Maryland, as evident from *Piscatelli*, the privilege will embrace interview statements parallel to, and reported in

(Continued on page 27)

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(Continued from page 26)

tandem with, the official record, so long as they do not add new allegations.

Counsel should consider, if time and client constraints permit, whether to review the official record himself or herself rather than rely on a summary from the reporter. Some stories, particularly longer form pieces or those where the piece heavily relies on the victim more than the record, may warrant a first-hand review.

Watch out for "News 11 has investigated" and "But here's what they haven't told police." Clients want to advance the story themselves rather than repeating what police said or records show. They want to be the "news leader" and not the "news rehasher". Counsel needs to recognize, however, and help the client recognize, that the more they tell their audience that they are not relying on the official record, the more out on their own they may find themselves in litigation.

Refer to the official source for the information as much as possible in the story. For example, phrasing like "Mrs. Jones tearfully recounts the horrific story she told police" while showing the indictment in the background during the interview will remind viewers—and the court—that the story is about an official proceeding. Have the journalist refer to and ask about the official record in a tear-jerking interview.

Include interviews with the other side, be it the victim or the accused, or make reference in the story to the unsuccessful attempts to reach the other side for comment.

Counsel should not lose their own sense of smell in the process of trying to help clients get stories to air. We all want to get to the green light for our journalists. But if the victim or witness is saying something that doesn't sound right, or is different—even if only in nuance—from the records, question it. The questions are better coming from you than from opposing counsel after suit is filed.



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