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PRE-TRIAL PUBLICITY AND FAIR TRIAL — A TALE OF THREE DOCTORS

By ALAN GRANT*

A. INTRODUCTION

Samuel Holmes Sheppard, John Bodkin Adams and Henry Morgentaler all share certain antecedents. Each was a doctor, each stood trial for a serious criminal offence, and each had problems with aspects of pre-trial publicity. Sheppard faced trial in Cleveland, Ohio, in 1954 and again in 1966 for the alleged murder of his wife; Adams was accused of the murder of one of his patients in England in 1957; and Morgentaler was indicted in Montreal both in 1973 and 1975 for abortion. They share another similarity: each was acquitted by a jury, although Sheppard had to wait until 1966 for his ultimate acquittal on a re-trial¹ and in Morgentaler's case the 1973 jury acquittal was overturned on appeal.²

The experiences of these three doctors living in three different jurisdictions provide an opportunity to examine the concept of pre-trial publicity and to observe how it has been dealt with in societies which, despite sharing a common law tradition, clearly differ in cultural terms.

B. PRE-ARREST PUBLICITY

This aspect of the problem is best illustrated by the case of Dr. Sheppard. His wife was bludgeoned to death in an upstairs bedroom of the Sheppard home on July 4, 1954 in Bay Village, Ohio. The police were called and, although Dr. Sheppard was suspected, no arrest was made. Twenty-five days later, on July 29, still with no arrest made, the local police chief is said to have told reporters:

Our feeling is that Sam Sheppard killed his wife even though we can't prove it. If we had a single shred of solid evidence against him, I'd send the janitor out to make the arrest.³

This statement, its frankness surpassed only by its lack of diplomacy, is all the more surprising because it was made on the eve of Dr. Sheppard's arrest for the murder of his wife. The events which had occurred between the date of the murder and the arrest of the accused might fairly be described as a classic case of pre-trial publicity adverse to the accused. To recount just a few

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¹ The conviction registered against him at his first trial in 1954 was set aside by the U.S. Supreme Court in 1966. See, *Sheppard v. Maxwell, Warden*, 384 U.S. 333.

² *R. v. Morgentaler* (No. 5) (1974), 47 D.L.R. (3d) 211 (Que.C.A.), aff'd by (1975), 53 D.L.R. (3d) 161 (S.C.C.).

³ J. H. Pollack, *Dr. Sam* (New York: Avon Books, 1975) at 16.

of the headlines which appeared in the *Cleveland Press* on the appropriate dates, is to make the case:

- July 16: "The Finger of Suspicion"
 July 20: "Getting Away with Murder"
 July 21: "Isn't this Murder Worth an Inquest"
 July 21 — later edition:
 "Why No Inquest? Do it Now Dr. Gerber"
 (An inquest was in fact ordered to commence at 9 a.m. the following day. The inquest, which lasted three days, was televised live from a high school gymnasium seating hundreds of people; Sheppard was examined for five hours having been refused counsel and the proceedings ended in a public brawl.)
 July 28: "Why Don't Police Quiz Top Suspect?"
 July 30: "Why Isn't Sam Sheppard in Jail?"
 July 30 — afternoon edition:
 "Quit Stalling — Bring Him In"
 (At 10 p.m. that same evening, Dr. Samuel Holmes Sheppard was arrested for the murder of his wife.)

It is, of course, not possible to prove a cause and effect relationship between the allegations published in the newspaper and the manner in which the authorities reacted, but that is not the point here. Could it be fairly said that a Cleveland jury, exposed to such reporting at the pre-arrest stage, could come to their task in an unbiased frame of mind and remain steadfast in remembering that the defendant enjoys the presumption of innocence unless and until the prosecution proves his guilt beyond a reasonable doubt? The answer, from an Anglo-Canadian perspective, would appear to be clearly in the negative. Justice would hardly be seen to be done in such a case by simply selecting a jury from those who claim not to have read the papers. In fact, all but one of the jury members in the Sheppard trial had read papers or heard broadcasts about the case, but the judge allowed himself to be satisfied with statements from the jurors that they would not be influenced by what they had read or heard.⁴

This whole area presents a perplexing problem in the United States. On the one hand, the 14th amendment guarantees an accused person a fair trial under due process of law, but the 1st Amendment guarantees freedom of the press. Insofar as pre-arrest publicity is concerned, this latter freedom seems to have prevailed over the former. Even the U.S. Supreme Court of the 1960's, the Warren Court, famous for its careful consideration of the rights of the accused in criminal cases, based its decision for a re-trial in the Sheppard case exclusively on the judge's failure to insulate the *trial proceedings* from prejudicial publicity and disruptive influences. Thus, ". . . bedlam reigned at the court house during the trial, and newsmen practically took over the whole courtroom, hounding most of the participants in the trial, especially Sheppard."⁵ However, on the issue of the pre-arrest publicity to which the accused was subjected, the court held that "we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pre-trial publicity alone."⁶ In the inevitable contest between the 1st and 14th

⁴ *Supra*, note 1 at 354.

⁵ *Id.* at 355, *per* Justice Clark.

⁶ *Id.* at 354.

Amendments in the U.S.A., effective restrictions on pre-arrest publicity seem to be something of a lost cause; when prejudice from this cause appears likely, all a judge can do is to order an adjournment until the adverse effects have abated, or transfer the case to a venue unaffected by the publicity. These alternatives are, of course, of little use in cases of massive and continuous nation-wide publicity of a prejudicial nature.

Although the Court in the *Sheppard* case made no express mention of judicial orders preventing pre-trial publicity ("gag orders") judges started making use of them after the U.S. Supreme Court handed down its judgment in that case. Indeed, a group called The Reporters Committee for Freedom of the Press has counted no less than 192 such court orders in the last decade.⁷ Such orders can, of course, have no effect on pre-arrest publicity; in that respect the 1st Amendment continues to reign supreme. But such orders are having some effect on post-arrest publicity; the issue of their constitutionality is currently before the U.S. Supreme Court, arising out of a sensational multiple murder case in Nebraska.⁸ The "gag" orders have been taking several forms, including banning the reporting of the "gag" itself, preventing reporters from printing information that they have discovered themselves, and reporting matters that are otherwise publicly available. In *Simants v. State of Nebraska*, now before the U.S. Supreme Court, a local judge, at the request of both prosecution and defence counsel, ordered the press not to print most of the information revealed at the preliminary hearing, despite the fact that the hearing was held in public. The position taken by the Supreme Court in this case will clearly have a great effect upon the extent to which the 1st Amendment right of freedom of the press is superseded, if at all, by the 14th Amendment right to due process and fair trial. The Court is likely to be split upon just where the proper balance of advantage should lie in such cases.⁹ Even if the court rules in favour of some limitation on the freedom of the press, however, it is unlikely to extend such limits to the area of pre-arrest publicity, possibly because no court is expressly seized of the issue at that stage.¹⁰ At the pre-arrest stage, therefore, judicial decree is no substitute for self-discipline within the communications industry.

Such self-discipline is usually practised by the communications media in England and Canada at the pre-arrest stage. The media have developed a convention of identifying a prospective defendant as merely "a man" or "a woman"; a whole range of euphemisms have been developed, including the notorious "a man is believed to be assisting the police with their inquiries." Indeed in England there is a view that this practice may not be evidence of self-discipline at all, since, even at the pre-arrest stage, a court can use its contempt of court power to punish a reporter or broadcaster who, knowing

⁷ Time Magazine, May 3, 1976 at 46.

⁸ *Simants v. State of Nebraska*. This case was argued during May, 1976 and judgment is still reserved at the time of going to press.

⁹ Time Magazine, May 3, 1976 at 46-47. ". . . the questioning [of counsel representing the State of Nebraska and no less than thirty-five news organizations] indicated the high court may be closely split on this issue."

¹⁰ As will be seen later, however, this has not been regarded as a problem by the English courts in seeking to control the communications industry.

or having good reason to believe that criminal proceedings are imminent, chooses to publish matters calculated to prejudice a fair trial. This was certainly the position taken by Lord Justice Salmon speaking for the English Court of Appeal in 1968 in the case of *R. v. Savundranayagan*.¹¹

That case arose out of the collapse of the Fire, Auto and Marine Insurance Co. Ltd. in England; as a result the defendant was convicted of fraud and sentenced to eight years imprisonment and fined £50,000. The accused appealed (*inter alia*) on the ground that he did not have a fair trial because the jury must have been affected by attacks made on him in the press, on television and in books which concluded upon his guilt before he was even arrested. Prior to his arrest, Mr. Savundranayagan was interviewed on television by Mr. David Frost. Speaking of this in the Court of Appeal, Lord Justice Salmon said:

In my view the television interview with Mr. Savundranayagan was deplorable. With no experience of television he was faced with a skilled interviewer whose clear object was to establish his guilt before an audience of millions of people. None of the ordinary safeguards for fairness that exist in a court of law were observed, no doubt because they were not understood. . . . This court hopes that no interview of this kind will ever again be televised. The court has no doubt that the television authorities and all those producing and appearing in televised programmes are conscious of their public responsibility and now also of the peril in which they all stand if any such interview were ever to be televised in the future. *Trial by television is not to be tolerated in a civilised society.* (emphasis added)¹²

In spite of its recognition of the dangers inherent in such events, the court declined to interfere with the conviction or sentence. Rather than exploring the essential criteria of "due process", the judgment seems to have served the very clear purpose of warning the communications industry of the contempt of court powers which exist to control even pre-arrest publicity. It appears to have been a warning much taken to heart as no reported English case since then records any further difficulties on this point. In the absence of Canadian case law on this point, the equivalent position in Canada is unclear, although it would appear that Canadian judges would be likely to follow the example of the English Court of Appeal. The American practice, which so enshrines the freedom of the press as guaranteed by the 1st Amendment, is such that the position taken in the *Savundranayagan* case would probably be regarded as unconstitutional.

C. PUBLICITY AFTER ARREST BUT BEFORE TRIAL

The case which best illustrates this problem area is that of Dr. John Bodkin Adams. The duty of a jury is to try a case and render a true verdict according to the evidence presented at trial. If this duty is to be effectively discharged, the jury should ideally hear or see nothing about the case except in court. In the run-of-the-mill case this is not difficult to achieve; but in the sensational case it is virtually impossible. Thus it proved with Dr. Adams. When a respected doctor is accused of murdering one of his elderly, wealthy patients, that is news. It is even more newsworthy if there is the suspicion, as

¹¹ [1968] 1 W.L.R. 1761.

¹² *Id.* at 1764-65.

was suggested by the prosecution, that the doctor hoped to gain financially from the death of his patient who had earlier altered her will to leave certain property to that doctor. Six years had elapsed between the death and the trial. In the interim a rumour-mill had been at work. In these circumstances, the distinction between the motive as outlined by the prosecution at trial and that which was generally understood by the public (and, one must assume, the jury), was well put in a book about the trial:

The motive, as presented by the prosecution, is bewilderingly inadequate. Can they be suggesting that a — sane? — man in the Doctor's circumstances would commit murder for the chance of inheriting some silver and an ancient motor-car ironically enough no longer mentioned in the will? Unless some sense or strength can be infused into the motive it must become the sagging point of this unequal web. Yet in a way the motive has already drawn sustenance from an irregular but not secret source; it has waxed big by headlines, by printed inuendo, by items half remembered from the preliminary hearing. *There have been published rumours of rich patients, mass poisonings, of legacy on legacy in solid sterling. . . . Everybody knows a bit too much and no one knows quite enough; there is a most disturbing element in this case, extra-mural half knowledge that cannot be admitted and cannot be kept out.* (emphasis added)¹³

Dr. Adams was acquitted and therefore could not claim to have been prejudiced by the pre-trial publicity, but the potential danger to an accused person was so widely recognized in England following this trial that a departmental committee was set up, under Lord Tucker, to consider the matter. The committee recommended that "unless the accused has been discharged or until the trial has ended, any report of committal proceedings should be restricted to particulars of the name of the accused, the charge, the decision of the court and the like."¹⁴

It was not until the following decade that both England and Canada introduced legislation to give partial effect to this recommendation.¹⁵ Although the Tucker Committee had advised against any exceptions to its "limited-details only" recommendation,¹⁶ this was not followed in either jurisdiction, and each jurisdiction chose a different method of operation for triggering the decision whether or not to allow pre-trial publicity. In England it is generally unlawful to publish evidence taken at the preliminary inquiry before the trial proper, but the defendant may insist on publication,¹⁷ whereas in Canada, publication is generally lawful but the defendant can require the justice holding the inquiry to direct that the evidence should not be published or broadcast.¹⁸ Furthermore, when there are multiple defendants in England, one accused can insist on publication as a result of which the whole proceedings (including

¹³ S. Bedford, *The Trial of Dr. Adams* (New York: Simon & Shuster, 1959) at 14, 15.

¹⁴ Report of the Departmental Committee on Proceedings before Examining Justices, (H.M.S.O.) Cmnd. 479 of 1958 (Reprinted 1965) at 24.

¹⁵ England: *Criminal Justice Act*, 1967, s. 3. Canada: *Criminal Code*, S.C. 1968-69, c. 38, s. 33. (Now R.S.C. 1970, c. C-34, s. 467.)

¹⁶ *Supra*, note 14 at paragraphs 63-64.

¹⁷ *Criminal Justice Act*, 1967, s. 3(2).

¹⁸ *Criminal Code*, R.S.C. 1970, c. C-34 (hereafter Code), s. 467(1).

the evidence against the other accused), may be published;¹⁹ whereas in Canada a demand by one accused for no publication will effectively prevent reporting of all the evidence, whatever the views of the co-accused.²⁰ In addition to the general provisions regulating the reporting of evidence, a special provision exists in Canada²¹ to protect from publication any alleged admission or confession tendered in evidence at a preliminary inquiry. This provision pre-dates the 1968-69 amendments²² and appears to remain in force notwithstanding s. 467 of the *Criminal Code*. Therefore, even in a case where publication is not prohibited in Canada, reporting the details of an admission or confession, or even the fact that one had been made at the preliminary inquiry, remains proscribed until after the trial. A feature of both the English and Canadian law in this general area is the express enactment of offences, punishable on summary conviction, to deal with persons who fail to comply with any restrictions placed upon publication of the evidence by the court hearing the preliminary inquiry.²³

The minimal nature of the statutory penalty in England, however, is such that the common law contempt power is probably much more feared by editors and publishers alike. That the courts in England will not resile from stinging rebukes to prestigious newspapers, was shown by the case of *R. v. Thomson Newspapers Ltd. ex parte Attorney-General*²⁴ in 1967. In that case one Malik was awaiting trial for an offence under the *Race Relations Act*, 1965 when the *Sunday Times* published an article on race relations which included a photograph of Malik and a caption which included the words "Came to U.K. 1950, took to politics after unedifying career as brothel-keeper, procurer and property racketeer." Notwithstanding the fact that this newspaper had devised an elaborate system to avoid contempts of court and had done so successfully for 150 years, Lord Parker, C.J. fined the newspaper £5,000. "It is not one of the very worst cases," he said, "on the other hand, it is a serious case and in all the circumstances the court feels that the publishers . . . must pay a considerable fine."²⁵ Once again, as in the *Savundranayagan* case, one is left with the impression that the court was addressing itself to the communications media in general. When no respite was available to the mighty, the rest of the media could expect little mercy in similar circumstances.

Another related issue is the question of public attendance at preliminary inquiries. Mr. Justice Devlin, in his summing-up to the jury in the case of *Dr. Adams*, commented that, in his view (apparently shared by the then Lord Chief Justice Goddard), the committal proceedings in that case should have

¹⁹ *R. v. Russell, Ex parte Beaverbrook Newspapers Ltd.*, [1968] 1 Q.B. 342; 3 All E.R. 695.

²⁰ This appears to follow from the wording of s. 467(1). Obviously, this would only arise where the evidence against the co-defendants was so inter-connected as to result in one single committal proceeding against all of them.

²¹ Code, s. 470.

²² Code, S.C. 1953-54, c. 51, s. 455 [Now s. 470].

²³ England: *Criminal Justice Act*, 1967, s. 3(5) — £500 fine. Canada: Code, ss. 467(3) and 722 — 6 months imprisonment or \$500 fine, or both.

²⁴ [1968] 1 W.L.R. 1 (Q.B.D.).

²⁵ *Id.* at 5 and 6.

been held *in camera*.²⁶ This opinion no doubt reflected the fact that, at that time, there were no restrictions on the reporting of preliminary inquiries. The Tucker Committee thought that there were formidable objections to normal or frequent *in camera* preliminary inquiries.²⁷ The then existing English law merely stated that “[e]xamining justices shall not be obliged to sit in open court.”²⁸ This was reversed by the post-Tucker legislation which required that “examining justices shall sit in open court except where any enactment contains an express provision to the contrary and except where it appears to them as respects the whole or any part of the committal proceedings that the ends of justice would not be served by their sitting in open court.”²⁹ Canadian law seems to have favoured the holding of the preliminary inquiry in public and the exception to this also relates to cases where “the ends of justice will be best served” by excluding the public.³⁰ The policy in both England and Canada, therefore, appears to encourage publicity in the form of the attendance in court of members of the public, but, depending upon the wishes of a defendant, to discourage it in respect of the wider audience available through the press and television.

Thus far this discussion has centered on the plight of an accused who is likely to be prejudiced by pre-trial publicity. It has seen that the courts have a battery of devices available, some aimed at alleviating the problem of a biased jury (such as adjournment and change of venue), and others aimed at punishing the publisher and deterring others from interfering with the availability of a fair trial for accused persons (such as statutory penalties and the contempt of court power). But what about the case of a defendant, who seeks the widest publicity for his case and who finds that restrictions are being placed upon his ability to bring his fate to the attention of the general public? It is this area of pre-trial publicity and fair trial, to which the case of Dr. Henry Morgentaler is relevant.

Unlike Dr. Adams, and to some extent, Dr. Sheppard,³¹ Dr. Morgentaler does not appear to have shrunk from publicity. Are the considerations to be applied different when the accused invites publicity on general issues arising from his prosecution, as opposed to when he seeks to limit the extent to which details of his case are disseminated prior to trial?

Dr. Morgentaler was accused of conducting illegal abortions contrary

²⁶ *Supra*, note 13 at 209.

²⁷ Cmnd. 467 (1958), para. 30.

²⁸ *Magistrates' Courts Act 1952*, s. 4(2).

²⁹ *Criminal Justice Act, 1967*, s. 6(1).

³⁰ Code, s. 465(1)(j). Similar provision also existed in earlier Codes, e.g., R.S.C. 1927, c. 36, s. 679(d). If the public is excluded, the record should contain both the order and the reasons therefore: *Re Armstrong and State of Wisconsin* (1972), 7 C.C.C. (2d) 331; [1972] 3 O.R. 229.

³¹ The press not only inferred that Sheppard was guilty because he “stalled” the investigation, hid behind his family and hired a prominent criminal lawyer, but denounced as “mass jury tampering” his efforts to gather evidence of community prejudice caused by such publications. Sheppard replied with counter-attacks of his own in the press and, to that extent, he added fuel to the flames, though not enough to preclude him from asserting his right to a fair trial. (See, *supra*, note 1 at 359).

to what is now s. 251(1) of the *Criminal Code*. It appears to have been common ground that those abortions were conducted under hygienic conditions and appropriate medical supervision. The main contention of the prosecution was that such abortions could only be performed legally in accredited or approved hospitals with the approval of a properly constituted therapeutic abortion committee.³² Further common ground between the prosecution and defence appears to have been that Dr. Morgentaler's premises were neither accredited nor approved and no approval of a therapeutic abortion committee had been forthcoming in respect of any of Dr. Morgentaler's numerous operations. The defence contended, however, that the operations performed by the accused were protected from criminal liability by the common law defence of necessity³³ and by the special provision in the *Criminal Code* granting immunity to persons performing "reasonable" surgical operations with "reasonable care and skill," having regard to all the circumstances of the case.³⁴ The effect of the Morgentaler litigation to date has been to validate the "necessity" defence (at least in cases where some evidence of necessity has been adduced so that the issue may be left to the jury), but to deny the defence of "reasonable surgical operation" on the ground that s. 251 provides a comprehensive code on the subject of abortion.³⁵ The focus of discussion here does not lie in this area of substantive criminal law, however, but only in aspects of the case which relate to pre-trial publicity.

It is not the purpose of this comment to suggest that pre-trial publicity is a major aspect of the multi-faceted *Morgentaler* case. At the same time, however, the long history of the litigation contains some significant points of interest on this topic, not the least of which is the novelty of seeing the accused being restrained from publication as opposed to the more commonplace situation, where the accused wishes that others be so restrained.

The events of interest here, therefore, are as follows:³⁶

- 1) The grant of a prosecution request for an *in camera* hearing at the preliminary inquiry on June 12, 1970, and the judicial discussion on October 30, 1970 of defence claims that Code s. 465(1)(j) (which purports to allow such hearings *in camera*) contravened the *British North America Act 1867* and infringed upon the right to a fair and public hearing under the *Bill of Rights*.³⁷

³² Code, s. 251(4).

³³ Made applicable in general Canadian criminal law by Code, s. 7(3).

³⁴ Code, s. 45.

³⁵ *Morgentaler v. The Queen* (1975), 20 C.C.C. (2d) 449; 53 D.L.R. (3d) 161 (S.C.C.).

³⁶ Of related interest is the complaint by the prosecution, in its appeal of the 1975 acquittal, that the trial judge should have ordered a mistrial when the defence lawyer appeared on television and alleged "persecution of his courageous client." As this occurred during the trial, however, it is beyond the scope of a comment on pre-trial publicity. In the sense that a re-trial and other charges are pending against Morgentaler, however, it can, of course, be regarded as publicity prior to those later proceedings.

³⁷ *R. v. Fauteux, ex parte Morgentaler* (1971), 3 C.C.C. (2d) 187 at 196-204. This was an application for *certiorari* to quash an order of a magistrate that there was sufficient evidence on a preliminary hearing to warrant asking the accused if he had any statement to make. It was dismissed on the grounds that there was not, at the above stage, a judicial conclusion or determination made by the magistrate so as to make the proceedings amendable to *certiorari* (*Id.* at 189). The comments on the *in camera* hearing are thus clearly *obiter*.

- 2) The grant of bail to the accused on August 19, 1973, on conditions (*inter alia*) that he must not comment publicly on the charges against him, not meet with media reporters and not hold press conferences, and the application by the prosecution on November 28, 1973, for the imprisonment of Dr. Morgentaler for breach of some of these conditions.

Where the issue of an *in camera* hearing and the question of publicity arose at the preliminary inquiry the transcript reveals the position of defence counsel:

I do not ask that publicity be forbidden; on the contrary. My client would like to be judged in public, but naturally, since there might be persons whose names might be mentioned and who would not care for publicity, I would submit to the Court that the Court suggest to the press that names should not be mentioned.³⁸

Defence counsel requested that the record show that his client did not require or request *in camera* proceedings and that the case be *public* subject to the newspapers being instructed not to disclose any names.³⁹

Why did the prosecution seek an *in camera* hearing at all? It is clear that the subsequent trials in 1973 and 1975 were held in open court, although s. 442 of the *Criminal Code* would have allowed the respective judges to have held them *in camera* if they were of the opinion that it was "in the interest of public morals, the maintenance of order or the proper administration of justice" to do so. But the prosecution does not appear to have sought such an order at trial. Clearly, different principles apply at the preliminary inquiry as opposed to at trial; but if the prosecution's concern was the embarrassment of the potential witnesses who had undergone abortions, this particular difficulty could have largely been overcome by reporting directions to the press as the defence requested.

It seems more likely that, from the point of view of strategy, the prosecution sought the committal of Dr. Morgentaler with a minimum of publicity, and since s. 476 makes the question of publicity a decision for the defence and not the prosecution, s. 465(1)(j) was resorted to as a possible, but apparently ineffective, means of maintaining a low-visibility prosecution. This is suggested because s. 465(1)(j) seems, by concentrating on who can remain in court, to exclude the press. Section 465(1)(j) states:

A justice acting under this Part may order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing.

Section 442, however, is couched in different terms:

S. 442. The trial of an accused that is a corporation or who is or appears to be sixteen years of age or more shall be held in open court, but where the court, judge, justice, or magistrate, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room, he may so order.

This latter section obviously allows some persons, *e.g.*, the press, to be

³⁸ *Id.* at 196.

³⁹ *Id.* at 197.

present at the court's discretion. By holding that s. 442 applies to preliminary inquiries,⁴⁰ the press can be allowed to remain in court when the rest of the public have been excluded. This latter procedure seems to have been followed at the *Morgentaler* preliminary inquiry although the precise issue of the relevance of s. 442 to those proceedings does not seem to have arisen until the *certiorari* decision was handed down. There Shorteno, J., appears to have approved the position taken by Maybanks, J., in *Re Spence*⁴¹ who said that, (for the purposes of what is now s. 442) of the Code:

[t]he preliminary hearing is, indeed, a trial, not a trial in which an accused may be found guilty or innocent, but certainly a trial of an issue — the issue whether or not an accused person should be called upon to stand trial in a superior court.

From a pragmatic point of view this approach has much to commend it, since it takes the preliminary hearing out of the straitjacket of s. 465(1)(j) which would otherwise be excessively restrictive if a decision to exclude were made.⁴²

On the issue of the constitutionality of *in camera* proceedings, Shorteno, J., clearly took the view that nothing in the Canadian constitution would proscribe such hearings and that they are not contrary to the *Bill of Rights*.⁴³ Surely he was right in supporting *in camera* proceedings in cases where the subject matter of the suit would be destroyed, for example, by the disclosure of a secret process, or of a secret document, or where the court is of the opinion that witnesses would be hindered in, or prevented from, giving evidence by the presence of the public.⁴⁴ It is difficult, therefore, to find sympathy for the claim, made on behalf of Dr. Morgentaler, that proceedings held *in camera* must be illegal in the circumstances of that case. Perhaps this is the sort of claim which Hugesson, A.C.J., had in mind, at sentencing, when he referred to "lack of good faith in evading the legal contest" and "recourse to procedural devices to evade the contest."⁴⁵ Of the many exceptional issues to which this litigation has given rise, the status of the *in camera* hearing can hardly be one.

A much more contentious issue appears to be the bail restrictions on public comment placed on Dr. Morgentaler and the prosecution's attempt to seek committal to prison for their breach. Such restrictions appear to be both superfluous and, in the context of the present case, irrelevant. If a court in

⁴⁰ See, e.g., Maybanks, J., in *Re Spence* (1961), 132 C.C.C. 368; 37 C.R. 244; 37 W.W.R. 481.

⁴¹ *Supra*, note 37 at 201.

⁴² Since a court holding a preliminary inquiry under Part XV of the Code has (unlike superior courts of criminal jurisdiction — Code s. 2) no inherent jurisdiction, it must find express legislative authority for what it does. Thus, although the word "may" appears in s. 465(1)(j) this does not imply that the official presiding at the preliminary inquiry has any additional powers in the area of *in camera* proceedings (unless they can be found in legislation). This is the importance of the finding that s. 442, which is more flexible, applies to preliminary inquiries. A short but useful description of the legislative history of inherent jurisdiction can be found in, Poultney, *The Criminal Courts of the Province of Ontario and their Process*, Vol. IX Law Society of Upper Canada Gazette (1975), 192 at 201.

⁴³ *Supra*, note 34 at 196-204.

⁴⁴ See, 13 Hals. 2nd Ed. at 751-52.

⁴⁵ *The Globe and Mail*, August 3, 1974.

Canada has extensive and effective powers to deal with contempt of court not committed in its face, as appears to be the case, surely it is superfluous to add to those powers by bail conditions. Furthermore, since the 1973 jury acquittal was under appeal to the Quebec Court of Appeal at the time the bail restrictions were imposed, comment on abortion in the media by Morgentaler was hardly likely to sway the minds of senior judicial officers who would ultimately have before them legal questions on criminal liability for abortion in Canada. At the same time, however, one can hardly ask that the prosecution be prevented from trying its cases in the newspaper or television while allowing the defendant free rein to do so. Therefore, some restrictions on Dr. Morgentaler could be defended, *e.g.*, discussion of the specific facts of the charges against him. The restrictions placed upon him, however, went far in advance of that, including a general ban on meeting reporters or holding press conferences. This is clearly a dangerous development in a country which prides itself on safeguarding freedom of speech and association. It is hoped that the *Morgentaler* case will not provide a precedent for the imposition of such restrictive bail conditions in other cases. The courts should be careful not to protect the purity of the trial process at the expense of other fundamental liberties; a start might be made by imposing or enforcing no restrictions beyond those absolutely essential to ensure a fair trial. General bans on addressing the media are clearly objectionable on this basis. The danger is underlined by the fact that when the prosecution sought the committal to custody of Dr. Morgentaler in November of 1973 for breach of his bail conditions, it was on the basis of his alleged failure to comply with the wider restrictions against addressing a public meeting and the news media.⁴⁶

D. CONCLUSION

Pre-trial publicity and the right to a fair trial raise difficult problems of balancing competing interests in society. The cases of Dr. Sheppard and Dr. Adams show that the advantages which a free press brings to a democratic society can have a counter-productive effect on the quality of justice available to a particular individual. Steps must be taken to try to ensure a fair trial, and, if not unconstitutional in the particular jurisdiction, to penalize those whose reporting causes prejudice to accused persons. At the same time, however, the case of Dr. Morgentaler shows that cases can arise where the defendant seeks publicity for his case and ways must be devised to ensure that the courts decide cases upon the facts in issue at the trial and not upon pressures created or disseminated by the communications media. Striking a fair balance is no mean task but it is one from which neither legislatures nor the judiciary can resile if the advantages of both a free and a fair trial are to be enjoyed in a given jurisdiction.

⁴⁶ *The Globe and Mail*, November 29, 1973.

