

Public awareness of police fallibility a defence game changer?



By [Jacob Stilman](#)

Social media and smartphone technology have resulted in the rapid public dissemination of incidents of police misconduct and other law enforcement-related abuses.

In the early 1990s, before smartphone technology had equipped every citizen with a ready-made video camera, incidents of police abuse were rarely witnessed by the public. One notable exception, the Rodney King police beating, sparked outrage but would have been seen by many as an outlier, not representative of common police behaviour, due to the paucity of such incidents hitting the news cycle.

Flash forward to the present and it seems that incidents of police abuses are being captured on video — either on personal phones or police body and car cameras — on an almost weekly basis. These occurrences frequently depict beatings, outrageous abuses of authority, and fatal shootings. Social media quickly assures that within hours of such incidents, the online public is witness to yet another display of police malfeasance, brazen dishonesty, or brutality.

From the perspective of the criminal defence bar, an increased public awareness that police are capable not merely of stretching the truth, but of outright criminality, brings an important new tool in how we approach our task of defending an accused person. Traditionally, lawyers are loathe to run a defence based on the premise that the police are outright liars or have conspired to frame a defendant. Lawyers will usually attempt to adopt a strategy whereby the defence accepts police-sourced evidence as reliable, but constructs a legal argument or explanation around it.

However, with incidents of police abuse mounting in the public psyche, this strategy may soon start to shift. And the startling new Netflix documentary “Making a Murderer,” will undoubtedly embolden lawyers in this approach.

“Making a Murderer” follows the story of Steven Avery, a socially marginalized man in Wisconsin who was wrongfully convicted of a serious sexual assault for which he served 18 years before being exonerated by DNA evidence. What was shocking about the wrongful conviction was the negligence, if not deliberate manipulation, of the investigation by the county sheriff’s department. After his exoneration in 2003, Avery launched a substantial lawsuit against the county sheriff and the prosecutor. However, in 2005, just as the lawsuit was picking up steam, Avery was charged with the murder of a young woman, Teresa Halbach, who had attended at his property right around the time of her disappearance.

The evidence of Avery’s complicity in her murder at first appears to be overwhelming — Halbach’s vehicle, her physical remains, and trace DNA evidence, all strongly connect him to the crime. But, as the 10-part documentary unfolds, significant seeds of doubt are sown. Much of the prosecution evidence turns out to be suspect and a strong case is made that the most incriminating elements were deliberately planted by officers of the local police force, the same force that was subject to the \$36-million claim in his lawsuit. A further aspect of the series deals with the charges brought against Avery’s nephew, 17-year-old Brendan Dassey, a low-functioning and vulnerable youth who provided a highly questionable confession that implicated himself and Avery in the murder.

“Making a Murderer” is not the only journalistic piece to take on the issue of prosecutorial abuse and wrongful convictions. “Serial,” a 12-part podcast that also went viral, is similar in many respects to the Netflix series. In the “Serial” podcast, journalist Sarah Koenig explores the story of Adnan Syed, a teenager who was convicted of the murder of his ex-girlfriend in Baltimore in 1999. Syed, like Avery, maintains his innocence, and the series explores in great depth the evidence, the trial process, and the question of Syed’s guilt or innocence.

Both “Making a Murderer” and “Serial” have their proponents and detractors. A recent article in the *New Yorker* by Kathryn Schulz takes the authors of “Making a Murderer” to task and argues they approached the project with complete bias, cherry-picking the evidence that was presented in the program, and leaving out some fairly compelling elements that pointed towards Avery’s guilt.

“Serial,” on the other hand, explores the question of guilt or innocence without an agenda and simply asks hard questions that go not so much to demonstrate “factual innocence” by way of producing exonerative evidence with respect to Syed, but rather to highlight what the “reasonable doubt” standard really ought to imply and demand.

So, what does any of this have to do with social media viral images of police beatings, shootings and lies? Why is it important for defence lawyers to sniff the winds of a shifting mood amongst the public? In my view, the increasing public awareness of the potential for police fallibility, abuse, and deceit, could be a defence game-changer.

Virtually anyone watching “Making a Murderer,” listening to “Serial,” or viewing the completely unlawful arrest of Sandra Bland in Texas, the shooting (and planting of evidence) of Walter Scott in South Carolina, or the pointless execution and coverup of Laquan McDonald in Chicago, will be capable of getting their head around the fact the police sometimes lie, abuse their authority, and commit brazen acts of violence. Lest one think that this phenomenon is restricted to the U.S., one only has to point to the Sammy Yatim shooting or the Adam Nobody beating in Toronto to realize we are not immune to this in Canada.

As the public becomes more aware of the notion that police are capable of deceit, lawyers will become less reticent to point the finger at them, and may increasingly mount defences that target police officers' credibility directly or with a wholesale rejection of police-based evidence. Will this be a positive development? This cannot be answered in the abstract as there is no suggestion here that police misconduct and evidence-tampering is routine. However, the possibility of police malfeasance, where it is appropriate to be raised, may become a powerful tool at trial to hammer out reasonable doubt.