OPEN JUSTICE, 'BACK-TO-BACK' TRIALS AND JUROR PREJUDICE: EXAMINING THE SUPPRESSION ORDER IN THE TRIAL OF GEORGE PELL

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In 2018, a jury in the County Court of Victoria found Cardinal George Pell guilty of sexually abusing two choirboys in St Patrick's Cathedral in the mid-1990s. Controversially, a wide-ranging suppression order made by the trial judge, Kidd CJ, prevented publication of Pell's trial due to concerns that publicity of the trial would prejudice a subsequent trial that Pell was set to face soon after on similar charges. The granting of the suppression order was subject to significant criticism, not least from Arthur Moses SC, then President of the Law Council of Australia. He was reported to have claimed that any potential prejudice arising from reporting of the trial could have been avoided by appropriate directions to the jury in the subsequent trial and that, on this basis, he would not have granted the order. In light of Moses' comments, this article considers the lawfulness of the suppression order in Director of Public Prosecutions (Vic) v Pell (Suppression Order) *[2018] VCC 905. It does so by examining the power that courts have to grant suppression orders to avoid juror prejudice and examines, in particular, the presumed level of confidence that must be placed in jurors' capacity to ignore prejudicial reporting of prior proceedings before a suppression order can be justified. It argues that the order made by Kidd CJ was within the bounds of what was reasonable based on decisions made by other judges in similar circumstances.*

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I Introduction

On 11 December 2018, Cardinal George Pell was found guilty by a jury in the County Court of Victoria of committing a series of historical child sex offences against two choirboys in St Patrick's Cathedral in 1996 and 1997.[1] The reaction to the verdict was deeply divided. While the case was a turning point in the long-running battle to obtain justice for victims of institutional child sex abuse,[2] some argued that the trial was profoundly unfair and that the evidentiary basis of the prosecution's case was so improbable as to make the jury's verdict unsafe.[3] As it transpired, the latter claim had legal merit. On 7 April 2020, the High Court of Australia overturned the guilty verdict on the basis that no jury, acting reasonably, could have found Pell guilty based on the evidence presented at trial.[4] However, it was not only the guilty verdict that proved to be contentious: so too was the fact that a wide-ranging suppression order had prevented the Australian media from reporting on Pell's trial until several months after the verdict had been handed down.

[1] One count of sexual penetration of a child under 16 and four counts of committing an indecent act with or in the presence of a child under 16: *DPP (Vic) v Pell (Sentence)* [2019] VCC 260, [1] (Kidd CJ).

[2] Stephanie Kirchgaessner, 'Cardinal George Pell Trial a "Turning Point", Says Survivors' Rights Group', *The Guardian* (online, 2 May 2018), archived at <https://perma.cc/9V63-THF6>.

[3] Frank Brennan, 'Truth and Justice after the Pell Verdict', *Eureka Street* (online, 26 February 2019), archived at <https://perma.cc/MP9D-TPUD>; Greg Craven, 'A Case in Which Justice Never Had a Fair Chance', *The Australian* (online, 27 February 2019), archived at <https://perma.cc/6UKN-XKBQ>; Charis Chang, 'Some People Can't Accept Cardinal George Pell Is Guilty of Child Sex Offences', *News.com.au* (online, 26 February 2019), archived at <https://perma.cc/BLC7-6S8N>.

[4] *Pell v The Queen* (2020) 268 CLR 123, 164–5 [119] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

The suppression order was put in place by Kidd CJ upon the application of the Director of Public Prosecutions.[5] It was granted due to the risk that media publicity of the allegations, evidence and outcome in the trial, which became known as the 'cathedral trial',[6] would cause prejudice to a separate trial on similar charges that Pell was set to face shortly after the conclusion of the trial.[7] The charges in the second trial, known as the 'swimmers trial',[8] related to allegations that Pell had indecently assaulted two boys at a swimming pool in Ballarat in the 1970s and the concern was that, unless a suppression order was granted, jurors in the second trial would be improperly influenced by any knowledge they might obtain about the first trial, particularly knowledge of a guilty verdict.[9] The suppression order that was granted was effectively in the form of a blanket ban: it prevented publication anywhere in Australia of 'any report of the whole or any part of' the proceedings,[10] and of 'any information derived from' the proceedings,[11] including the evidence, the verdict, the number of complainants, the precise nature of the charges, the fact of multiple trials, and even the fact that a suppression order was in place.[12] However, publication was permitted of the bare fact that Pell was 'facing prosecution for historical child sexual offences in the County Court of Victoria'.[13] As it turned out, the swimmers trial was discontinued by the prosecution on 26 February 2019 after Kidd CJ ruled that crucial evidence in the case was inadmissible.[14] The discontinuance of the swimmers trial meant that the risk of prejudice arising from the media's reporting of the cathedral trial no longer existed and the suppression order was immediately lifted.[15]

[5] *DPP (Vic) v Pell (Suppression Order)* [2018] VCC 905, [14], [48] (Kidd CJ) ('*Pell*').

[6] Ibid [5]–[6].

[7] Ibid [47]. See also at [8]–[10].

[8] Ibid [4].

[9] Ibid [4], [47]; Charis Chang, 'Allegations about George Pell's Behaviour Have Followed Him for Years', *News.com.au* (online, 3 March 2019), archived at <https://perma.cc/8QSK-3JQD>. See also *DPP (Vic) v Pell (Review of Suppression Order)* [2018] VCC 2125, [10]–[11] (Kidd CJ) ('*Pell (Review of Suppression Order)*').

[10] *Pell* (n 5) Annexure A (Kidd CJ).

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] *DPP (Vic) v Pell (Evidential Ruling No 1)* [2019] VCC 149, [50]–[51], [60]–[64], [88], [95], [106], [119]–[121], [150]–[152] (Kidd CJ); Adam Cooper, 'Pell Won't Face Trial on Allegations from the 70s of Pool Impropriety', *The Sydney Morning Herald* (online, 26 February 2019), archived at <https://perma.cc/LKJ9-W3QX>.

[15] Karin Derkley, 'Suppression Orders in the Open Courts Era', *Law Institute of Victoria* (Blog Post, 1 April 2019), archived at <https://perma.cc/C5E2-R9CS>; Rod McGuirk, 'Pell's Trial

The flurry of media and legal commentary that followed the revelation of the suppression order in *Director of Public Prosecutions (Vic) v Pell (Suppression Order)* ('*Pell*')[16] was largely confined to two broad themes. The first theme focused on the supposed futility of the order. From the outset, it was evident that there would be significant international media interest in the case due to Pell's high profile and the global controversy surrounding the Catholic Church's response to allegations of child sexual abuse within its ranks.[17] It was predicted that even if local media entities complied with the order, foreign media organisations without a presence in Australia would be likely to defy its terms and publish reports of the case online and, in doing so, would make information about the cathedral trial readily accessible in Australia.[18] As anticipated, shortly after the jury reached its decision in the first trial but long before the suppression order was revoked, news of Pell's guilt began to appear in media reports online.[19] While some foreign mainstream outlets, such as *The New York Times*, complied with the order in their online editions,[20] others did not, including *The Washington Post*,[21] *The Daily Beast*,[22] the *New York Post*[23] and *Fox News*.[24] Of course, once the news of the guilty verdict had been disclosed on such internationally popular sites, it was only a matter of time before it began to trend heavily on social media sites accessible within

Draws Attention to Court Suppression Orders', *AP News* (online, 26 February 2019) <https://apnews.com/article/8ab4d6fed3eb42b2bae566db737e3ea8>.

16 *Pell* (n 5).

17 See, eg, ibid [46] (Kidd CJ); Lachlan Cartwright, 'Vatican No 3 George Pell Convicted of Sexually Abusing Choir Boys', *The Daily Beast* (online, 11 December 2018) <https://www.thedailybeast.com/vatican-no-3-cardinal-george-pell-on-trial-for-historical-child-sex-charges>.

18 See, eg, Paul Chadwick, 'The Australian Court Ban on Reporting George Pell's Trial Was Bound to Fail', *The Guardian* (online, 22 April 2019), archived at <https://perma.cc/4C4B-3LN8>.

19 See, eg, Paul Farhi, 'An Australian Court's Gag Order Is No Match for the Internet, as Word Gets Out about Prominent Cardinal's Conviction', *The Washington Post* (online, 13 December 2018), archived at <https://perma.cc/ER9J-TPRZ>.

20 Ibid; Damien Cave and Livia Albeck-Ripka, 'How We Reported on the Cardinal Pell Sex Abuse Case That for Months Was Kept Secret from the Public', *The New York Times* (online, 13 March 2019), archived at <https://perma.cc/SW4K-3AVV>.

21 Chico Harlan, 'Australian Court Convicts Once-Powerful Vatican Official on Sex-Abuse-Related Charges', *The Washington Post* (online, 12 December 2018), archived at <https://perma.cc/4CHY-LMAE>; Farhi (n 19).

22 Cartwright (n 17).

23 Tamar Lapin, 'Australian Media Barred from Covering Cardinal's Conviction for Sex Abuse', *New York Post* (online, 12 December 2018), archived at <https://perma.cc/53RJ-R3X4>.

24 Lucia I Suarez Sang, 'Once-Powerful Cardinal Convicted on Sex-Abuse-Related Charges in Australia', *Fox News* (online, 12 December 2018), archived at <https://perma.cc/UWW6-DJUV>.

Australia.[25] Publication of the verdict by mainstream media outlets outside of the Court's jurisdiction and on social media subsequently prompted questions about the limited effectiveness of suppression orders in the digital media environment.[26] Some even went as far as to suggest that the borderless nature of the internet had rendered suppression orders completely pointless as a means of controlling prejudicial publicity and called for them to be jettisoned outright.[27]

The second theme focused on the impact of the suppression order on the widespread and resounding public interest in the trial. Commentators variously claimed that the embargo infringed the public's legitimate interest in

[25] Lucie Morris-Marr, 'Why We Couldn't Publish the World's Biggest Story', *The New Daily* (online, 26 February 2019) <https://thenewdaily.com.au/news/national/2019/02/26/george-pell-media-blackout>; Michael Pelly, 'The George Pell Case Should Trigger a Rethink on Suppression Orders, Says Law Council', *The Australian Financial Review* (online, 27 February 2019) <https://www.afr.com/companies/professional-services/the-george-pell-case-should-trigger-rethink-on-suppression-orders-says-law-council-20190227-h1brwq>.

[26] See, eg, Justice François Kunc, 'Victorian Suppression Orders and the International Media' (2019) 93(2) *Australian Law Journal* 79, 80; Chris Kenny, 'Pell Case Exposes Need to Rethink Suppression Orders', *The Australian* (Sydney, 4 March 2019) 26; Farhi (n 19); MEAA, 'Suppression Orders', *Unsafe at Work* (Blog Post, 2 May 2019) <https://pressfreedom.org.au/suppression-orders-c237df7dfee5>; Rick Noack, 'A Top Official in the Catholic Church Was Convicted of Sex Abuse Last Year. Why Did Australia Ban Reporting on It until Now?', *The Washington Post* (online, 26 February 2019), archived at <https://perma.cc/85R3-GYR2>; McGuirk (n 15); Richard Ackland, 'Pell's Trial Shows Courts Can't Keep Secrets in the Internet Age', *The Guardian* (online, 27 February 2019), archived at <https://perma.cc/Z9Y2-4Z8R>. A significant number of local media outlets in Australia responded by printing articles and front-page headlines that made oblique references to the case, lamenting the fact that while local media were unable to report on a case of immense public interest, the identity of the offender and the nature of the crimes were receiving widespread coverage on overseas sites accessible to readers located in Australia: see, eg, Chadwick (n 18). Subsequently, on 22 March 2019, the Director of Public Prosecutions applied for a declaration that 36 Australian media organisations, editors and journalists be adjudged guilty of contempt, including for being in breach of the suppression order issued by Kidd CJ: *R v The Herald & Weekly Times Ltd* [2021] VSC 253, [1], sch (John Dixon J). On 1 February 2021, the corporate media respondents pleaded guilty to contempt for breaching the suppression order and the remaining charges were dropped: Nino Bucci, 'Media Companies Plead Guilty to Contempt regarding George Pell Case as Other Charges Dropped', *The Guardian* (online, 1 February 2021), archived at <https://perma.cc/E9VR-8769>.

[27] See, eg, Jerome Doraisamy, 'Does the Pell Trial Demonstrate that Suppression Orders Are Futile?', *Lawyers Weekly* (online, 27 February 2019), archived at <https://perma.cc/QA94-L3H5>; Farhi (n 19); Ackland (n 26); Editorial, 'Rampant Use of Suppression Orders Has Become Absurd', *The Age* (online, 13 December 2018) ('Rampant Use of Suppression Orders'). 'Rampant Use of Suppression Orders' (n 27) was removed on 18 December 2018: *R v The Herald & Weekly Times Pty Ltd [No 2]* [2020] VSC 800, [48], [192] (John Dixon J). A copy is on file with the author.

knowing about the case,[28] was an affront to freedom of the press,[29] and had the potential to undermine public confidence in the administration of justice.[30] Importantly, these concerns were sometimes expressed in terms of the legal principle of open justice[31] — the longstanding principle that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[32] Some intimated that the significance of the case meant that Pell's right to a fair trial should not have taken precedence over the public's interest in open justice and their 'right to know'.[33] Others suggested that a suppression order was not the only mechanism available to protect Pell's right to a fair trial.[34] The latter view was expressed most forcefully by Arthur Moses SC, then President of the Law Council of Australia, who said that any potential prejudice to Pell could have been negated by appropriate instructions to the jury in the second trial to disregard their knowledge of the first trial.[35] He was quoted as saying that, on this basis, he would not have made the order if he had been the presiding judge and that, while he believed that Kidd CJ acted in good faith, 'other judges would [have] come to a different view'.[36] It is obvious from these comments that Moses considered that the suppression order made by Kidd CJ was not necessary to ensure the fairness of Pell's second trial.

Moses' claim raises the question of whether the order in *Pell* was properly made according to law. This is because, as explained in this article, the power relied upon by Kidd CJ to grant the suppression order can only be exercised in circumstances of strict necessity. Thus, leaving aside the vexed issue of the futility of suppression orders in the digital age, the purpose of the present article is to consider the lawfulness of the suppression order in *Pell* in light of Moses' claim that directions to the jury would have been sufficient to protect Pell's right to a fair trial. It proceeds as follows. Part II begins by briefly describing the principle of open justice and the power that courts have to grant suppression

[28] See, eg, Harlan (n 21); Editorial, 'It's the Nation's Biggest Story', *The Daily Telegraph* (Sydney, 13 December 2018) 1; 'Rampant Use of Suppression Orders' (n 27).

[29] See, eg, MEAA (n 26); 'It's the Nation's Biggest Story' (n 28); Farhi (n 19).

[30] Kenny (n 26).

[31] Chadwick (n 18); Ackland (n 26); 'It's the Nation's Biggest Story' (n 28).

[32] *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).

[33] Chadwick (n 18); Ackland (n 26).

[34] Mirko Bagaric, 'End Victorian Era of Court Secrecy', *The Australian* (Sydney, 8 March 2019) 23; Pelly (n 25).

[35] Pelly (n 25); Nicola Berkovic, 'Pell Trial "Should Not Have Been Secret", Says Law Council as It Calls for Review of Suppression Order Laws', *The Australian* (online, 27 February 2019), archived at <https://perma.cc/S97Z-PBHH>.

[36] Pelly (n 25).

orders where an accused's right to a fair trial might otherwise be placed at risk. It also describes the reasons provided by Kidd CJ for granting the order in *Pell*. In response to Moses' claim regarding the efficacy of jury directions, Part III examines the level of confidence that is required by the law to be placed in the capacity of jurors to follow judicial directions to ignore adverse pre-trial reporting in deciding an accused's guilt or innocence. In the context of a decision to grant a suppression order, it is argued that judges must proceed on the strong assumption, well established in the law, that jurors are robust and can ordinarily disregard any prejudicial knowledge that they may possess. The case law indicates that this includes the assumption that jurors can *ordinarily* disregard knowledge of a guilty verdict arising from recent proceedings involving an accused, and that such an assumption will only be displaced, and a suppression order granted, in exceptional circumstances. Finally, in light of the principles and authorities discussed in Part III, Part IV considers whether Kidd CJ placed sufficient confidence in the capacity of jurors to disregard knowledge of Pell's first trial. It also considers, irrespective of the precise reasoning adopted by Kidd CJ, whether the ultimate decision to grant the order was reasonably open on the facts of *Pell* by examining decisions made by other judges to grant suppression orders in analogous circumstances — that is, where an accused is facing multiple, 'back-to-back' trials. While the available case law is extremely limited, it suggests that Kidd CJ's decision to grant the order in *Pell* was undoubtedly within the scope of what was reasonable in the circumstances.

II Departing from Open Justice and the Reasons for the Order in *Pell*

A *The Open Justice Principle and Suppression to Avoid Juror Prejudice*

In order to understand the legal significance of the suppression order in *Pell* and the precise issues raised by Moses, it is necessary to commence with a brief discussion of the principle of open justice and the power available to courts to depart from it where publicity of proceedings would risk jeopardising an accused's right to a fair trial. From its very origins, the common law has required that the workings of the courts be open to public scrutiny.[37] Whether this early commitment to openness was by design or by accident,[38] the principle

[37] See, eg, Lord Neuberger, 'Open Justice Unbound?' (2011) 10(3) *Judicial Review* 259, 259–60. For a history of open justice principles, see generally Garth Nettheim, 'The Principle of Open Justice' (1984) 8(1) *University of Tasmania Law Review* 25.

[38] See, eg, Max Radin, 'The Right to a Public Trial' (1932) 6(3) *Temple Law Quarterly* 381, 388–9.

of open justice has endured as one of the most distinctive and important features of the administration of justice under the common law.[39] In its modern legal incarnation, formalised by the House of Lords in 1913 in the seminal case of *Scott v Scott*,[40] the principle has been held to give rise to a series of substantive open justice 'rules' that must be followed in all but exceptional circumstances:[41] first, judicial proceedings must be conducted in fora open to the public;[42] secondly, evidence must not be concealed from members of the public present in court;[43] and thirdly, nothing should be done to prevent fair, accurate and contemporaneous reports to the public of what has taken place in open court, including reports by the media.[44]

The institutional significance of the open justice principle cannot be overstated.[45] This is due to the vital role that observance of the principle (and the rules that flow from it) is considered to play in enhancing and safeguarding the fair and proper administration of justice in the courts. Crucially, public scrutiny through the openness of proceedings is said to guard against the exercise of arbitrary and partial decision-making,[46] provide an 'impetus for high judicial performance',[47] and ensure that all participants in judicial proceedings are held to account, including judges, parties, witnesses and legal counsel.[48] Furthermore, it is thought that the public reporting of proceedings *as they occur* will assist the fair and proper administration of justice by

[39] Neuberger (n 37) 260.

[40] [1913] AC 417 ('*Scott*').

[41] Chief Justice JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29(2) *University of New South Wales Law Journal* 147, 153 ('The Principle of Open Justice'); Chief Justice JJ Spigelman, 'Seen to Be Done: The Principle of Open Justice' (Pt 1) (2000) 74(5) *Australian Law Journal* 290, 292 ('Seen to Be Done').

[42] *Scott* (n 40) 434–5 (Viscount Haldane LC); *Dickason v Dickason* (1913) 17 CLR 50, 51 (Barton ACJ, Isaacs J agreeing at 51, Gavan Duffy J agreeing at 51, Powers J agreeing at 51, Rich J agreeing at 51); *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476 (McHugh JA, Glass JA agreeing at 467) ('*John Fairfax & Sons Ltd*').

[43] *A-G v Leveller Magazine Ltd* [1979] AC 440, 450 (Lord Diplock) ('*Leveller*').

[44] Ibid; *Hogan v Hinch* (2011) 243 CLR 506, 532 [22] (French CJ) ('*Hogan*'); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 335 [15] (Gleeson CJ and Gummow J); *John Fairfax & Sons Ltd* (n 42) 476–7 (McHugh JA, Glass JA agreeing at 467).

[45] See, eg, Spigelman, 'The Principle of Open Justice' (n 41) 153; Spigelman, 'Seen to Be Done' (n 41) 292.

[46] *Leveller* (n 43) 450 (Lord Diplock); *Scott* (n 40) 463 (Lord Atkinson); *Hogan* (n 44) 530 [20] (French CJ).

[47] Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 235 [5.20].

[48] Ibid 235–6 [5.20]. See also *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, 310–11, 320 (Kennedy LJ for the Court).

enabling members of the public who may possess fresh evidence to come forward — evidence which otherwise would not be forthcoming if reports were withheld until after a trial was completed.[49] These effects, in turn, are said to foster public confidence in the administration of justice[50] and, hence, are considered central to the operation of the rule of law.[51] Of course, members of the public do not generally attend court and observe criminal proceedings firsthand;[52] instead, for the most part, the public relies upon the mainstream media to keep them informed of what has transpired in the courts.[53] Thus, given the media's important role as the conduit between the courts and the public, it is widely acknowledged that the media's capacity to publish fair, accurate
and comprehensive reports of proceedings is central to fulfilling the aims of open justice.[54]

However, while openness is generally seen as conducive to ensuring justice in the courts, it is recognised that the former will sometimes be inimical to the latter.[55] Consequently, courts can depart from the requirements of the open

[49] *Re British Broadcasting Corporation* [2018] 1 WLR 6023, 6033 [29] (Lord Burnett CJ for the Court) ('*Re BBC (2018)*'); *Gannett Co*, *Inc v DePasquale*, 443 US 368, 383 (Stewart J, Burger CJ agreeing at 394, Powell J agreeing at 397, Rehnquist J agreeing at 403) (1979).

[50] *R v Legal Aid Board; Ex parte Kaim Todner* [1999] QB 966, 977 (Lord Woolf MR for the Court). See also *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

[51] See, eg, *Bank Mellat v Her Majesty's Treasury [No 2]* [2014] AC 700, 730 [2]–[4] (Lord Neuberger PSC, Baroness Hale, Lords Clarke, Sumption and Carnwath JJSC agreeing), 746 [81] (Lord Hope DPSC); *Re BBC (2018)* (n 49) 6033 [29] (Lord Burnett CJ for the Court). See also Neuberger (n 37) 260; Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40(1) *Monash University Law Review* 45, 47. The constitutional significance of the open justice principle was first recognised in the seminal case of *Scott* (n 40): at 473 (Lord Shaw). In Australia, open justice has been held by the High Court to be an 'essential characteristic' of a court for the purposes of ch III of the *Australian Constitution*: see, eg, *Hogan* (n 44) 530 [20] (French CJ). See also *McPherson v McPherson* [1936] AC 177, 200 (Lord Blanesburgh for Lords Blanesburgh, Macmillan and Wright), where the Privy Council described the principle of open justice as the 'authentic hall-mark of judicial as distinct from administrative procedure'.

[52] See, eg, *Edmonton Journal v Alberta (A-G)* [1989] 2 SCR 1326, 1339–40 (Cory J for Dickson CJ, Lamer and Cory JJ).

[53] Ibid.

[54] See, eg, *Khuja v Times Newspapers Ltd* [2019] AC 161, 176–7 [16] (Lord Sumption JSC, Lord Neuberger PSC, Baroness Hale DPSC, Lords Clarke and Reed JJSC agreeing); *A v British Broadcasting Corporation* [2015] AC 588, 600 [26] (Lord Reed JSC, Baroness Hale DPSC, Lords Wilson, Hughes and Hodge JJSC agreeing) ('*A v BBC*'). For a detailed analysis of the media's capacity to achieve the aims of open justice, see generally Sharon Rodrick, 'Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2014) 19(1) *Deakin Law Review* 123.

[55] *Scott* (n 40) 437 (Viscount Haldane LC).

justice principle in circumstances where it is *necessary* to secure the 'more fundamental' object of achieving justice.[56] Depending on the court in question, the power to do so arises from one or more of the following sources: a superior court's inherent powers,[57] an inferior court's implied powers,[58] or from dedicated statutory powers that now exist in most jurisdictions.[59] Importantly, such powers include, inter alia,[60] the power to grant a suppression order to prevent the media from publishing reports of particular proceedings where such reports would risk undermining an accused's right to a fair trial.[61]

[56] Ibid.

[57] *Hogan* (n 44) 531 [21] (French CJ).

[58] Ibid.

[59] See, eg, *Court Suppression and Non-Publication Orders Act 2010* (NSW) ss 7–8; *Open Courts Act 2013* (Vic) ss 17–18; *Contempt of Court Act 1981* (UK) s 4(2). Note that in some jurisdictions suppression orders can be made in more flexible circumstances where strict necessity does not need to be established: see, eg, *Crimes Act 1914* (Cth) s 15MK(1); *Evidence Act 1939* (NT) ss 57–8; *Evidence Act 1929* (SA) s 69A; *Evidence Act 2001* (Tas) s 194J(1); *Criminal Procedure Act 2004* (WA) s 171(4).

[60] Under the common law, a superior court's inherent powers and an inferior court's implied powers to grant a suppression order can only be exercised in 'few and strictly defined' categories of cases: *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 353 [19] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]) ('*John Fairfax Publications*'), cited in *A-G (NSW) v Nationwide News Pty Ltd* (2007) 73 NSWLR 635, 640 [28] (Hodgson JA, Hislop J agreeing at 643 [46], Latham J agreeing at 643 [47]); *Hogan* (n 44) 531 [21] (French CJ). Categories routinely listed include cases involving confidential information or trade secrets (*Australian Broadcasting Commission v Parish* (1980) 43 FLR 129, 132 (Bowen CJ)), blackmail (*R v Socialist Worker Printers & Publishers Ltd; Ex parte A-G (UK)* [1975] 1 QB 637, 649, 652 (Lord Widgery CJ, Milmo J agreeing at 653, Ackner J agreeing at 653); *John Fairfax Group Pty Ltd (rec and mgr apptd) v Local Court (NSW)* (1991) 26 NSWLR 131, 141 (Kirby P) ('*John Fairfax v Local Court*')), police informers (*Cain v Glass [No 2]* (1985) 3 NSWLR 230, 233–4, 246–7 (Kirby P)), national security information (*A v Hayden* (1984) 156 CLR 532, 599 (Deane J); *John Fairfax v Local Court* (n 60) 141 (Kirby P)), wards of the state and the mentally ill (*Scott* (n 40) 437 (Viscount Haldane LC)). These categories will only be expanded upon when circumstances are 'very closely analogous': *R v Kwok* (2005) 64 NSWLR 335, 341 [16] (Hodgson JA, Howie J agreeing at 343 [28], Rothman J agreeing at 345 [37]); *Hogan* (n 44) 531 [21] (French CJ).

[61] See, eg, *R v Clement* (1821) 4 B & Ald 218; 106 ER 918, 922 (Bayley J), cited in *Scott* (n 40) 438 (Viscount Haldane LC), 453 (Lord Atkinson); *R v Horsham Justices; Ex parte Farquharson* [1982] 1 QB 762, 767 (Forbes J, Glidewell J agreeing at 775) ('*Horsham Justices*'); *Skope Enterprises Ltd v Consumer Council* [1973] 2 NZLR 399, 400 (Cooke J); *Re a Former Officer of the Australian Security Intelligence Organisation* [1987] VR 875, 877 (Brooking J); *J v L & A Services Pty Ltd [No 2]* [1995] 2 Qd R 10, 45 (Fitzgerald P and Lee J) ('*L & A Services*'); *R v Strawhorn [No 2]* [2006] VSC 433, [32] (Habersberger J) ('*Strawhorn*'); *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68, 75 [21] (Warren CJ, Vincent and Kellam JJA) ('*General Television*'); *AW v Rayney [No 4]* [2012] WASCA 117, [32]–[33] (Buss JA, McLure P agreeing at [1], Newnes JA agreeing at [71]) ('*Rayney [No 4]*'). Cf *John Fairfax Publications* (n 60) 359–60 [57]–[60], where Spigelman CJ held that an inferior

Central to the right to a fair trial, itself a 'fundamental prescript' of the common law,[62] is the requirement that guilt be judged only upon admissible evidence presented in court during the course of a trial and not upon facts or alleged facts gathered from extraneous sources.[63] A suppression order may therefore be warranted where there is a concern, as was the case in *Pell*, that media coverage of the evidence and verdict in one trial will improperly influence a jury yet to be empanelled in a subsequent trial.[64] It is important to note that the law ordinarily controls prejudicial media publicity through the threat of criminal liability under the law of sub judice contempt. Thus, it will usually constitute an offence to publish material that is found to have, as 'a matter of practical reality', the tendency to interfere with the impartiality of a jury in pending proceedings.[65] Common examples include the publication of statements of guilt or innocence,[66] allegations of past criminal or disreputable conduct,[67] or portrayals of the accused in a negative[68] or sympathetic light.[69] However, due to the importance of the open justice principle and the attendant right to report on court proceedings, sub judice contempt does *not* apply to prejudicial publications which are found to be fair, accurate and

court under the common law would not have the power to suppress the publication of proceedings in order to prevent prejudice to a forthcoming jury trial. Note that some courts have expressed the view that it may not be possible under the common law to suppress the publication of information revealed in open court at all: see, eg, *Leveller* (n 43) 451–2 (Lord Diplock); *John Fairfax & Sons Ltd* (n 42) 479 (McHugh JA). However, in *Hogan* (n 44), French CJ said that the 'better view' is that such a power does exist: at 534 [26]. Examples of orders made under statutory provisions include: *DPP (Vic) v Lawson [No 2]* [2012] VSC 469, [6]–[7], [23]–[24] (Lasry J) ('*Lawson*'); *R v Benbrika [No 5]* [2007] VSC 332, [9] (Bongiorno J) ('*Benbrika [No 5]*'); *R v Qaumi [No 15] (Non-Publication Order)* [2016] NSWSC 318, [94]–[99] (Hamill J) ('*Qaumi [No 15]*'); *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384, 388 [12], 399–400 [75] (Bathurst CJ, Beazley P and Hoeben CJ at CL) ('*Qaumi (Appeal)*').

62 *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J). See also *McKinney v The Queen* (1991) 171 CLR 468, 478 (Mason CJ, Deane, Gaudron and McHugh JJ); *Jago v District Court (NSW)* (1989) 168 CLR 23, 56 (Deane J) ('*Jago*').

63 *Murphy v The Queen* (1989) 167 CLR 94, 98–9 (Mason CJ and Toohey J) ('*Murphy*'); *A-G v Times Newspapers Ltd* [1974] AC 273, 309 (Lord Diplock).

64 *Pell* (n 5) [47] (Kidd CJ).

65 See, eg, *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, 697 (Samuels JA). See also *Hinch v A-G (Vic)* (1987) 164 CLR 15, 34 (Wilson J), 46 (Deane J) ('*Hinch (1987)*').

66 See, eg, *A-G (NSW) v Radio 2UE Sydney Pty Ltd* [1997] NSWCA 30; *DPP (NSW) v Wran* (1987) 7 NSWLR 616, 627, 636 (Street CJ, Hope, Glass, Samuels and Priestley JJA).

67 *R v Johnson* [2016] VSC 699, [28]–[29] (John Dixon J); *R v Saxon* [1984] WAR 283, 292 (Kennedy J) ('*Saxon*').

68 *Saxon* (n 67) 292 (Kennedy J); *R v Australian Broadcasting Corporation* [1983] Tas R 161, 176–7, 179, 182 (Neasey J).

69 *R v Truth Newspapers* (Supreme Court of Victoria, JD Phillips J, 16 December 1993) 15–16; *Davis v Baillie* [1946] VLR 486, 498 (Fullagar J) ('*Davis*').

contemporaneous reports of judicial proceedings, irrespective of how prejudicial such reports might be.[70] This means that the *only* avenue available to a court to prevent the publication of reports of proceedings that risk causing prejudice to other forthcoming proceedings is to grant a suppression order.[71]

The suppression order granted in *Pell* was made under s 17 of the *Open Courts Act 2013* (Vic) ('*OC Act*'), which confers upon all Victorian courts the power to grant a suppression order restraining the publication of the *whole or any part of a proceeding* on one or more of the grounds enumerated in s 18. The ground relied upon in *Pell* is contained in s 18(1)(a), which provides that a suppression order may be made where it is *necessary* to prevent a real and substantial risk of prejudice to the administration of justice. In recognition of the importance of the open justice principle, the test of necessity under this ground in the *OC Act*, as well as under the common law, is strict: it is well established that suppression orders are regarded as 'exceptional'[72] and will only be considered necessary where it is demonstrated to a 'high standard of satisfaction'[73] that the risk of prejudice will ensue and that *nothing short* of suppression will be sufficient to avoid such risk arising.[74] This means that a

[70] See, eg, *Hinch (1987)* (n 65) 25 (Mason CJ); *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 257–8 (Jordan CJ, Halse Rogers and Bavin JJ agreeing at 260). See also *Wrongs Act 1958* (Vic) s 4.

[71] Note, however, that even in the absence of a suppression order it will be a contempt to publish any information revealed in court during voir dire (a 'trial within a trial' where the jury are instructed to leave the court to enable a ruling on the admissibility of evidence): see, eg, *Leveller* (n 43) 450 (Lord Diplock). However, such a publication does not constitute sub judice contempt but is contempt based on the frustration of an implied order or direction made by the court 'affecting the conduct of the proceedings before it': *Independent Publishing Co Ltd v A-G (Trinidad and Tobago)* [2005] 1 AC 190, 206 [25] (Lord Brown for the Judicial Committee); *Horsham Justices* (n 61) 791–2 (Lord Denning MR); *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, 19 (Hunt J).

[72] See, eg, *Rinehart v Welker* (2011) 93 NSWLR 311, 320 [27] (Bathurst CJ and McColl JA) ('*Rinehart*'); *R v Pomeroy* [2002] VSC 178, [11] (Teague J), quoted in *Herald & Weekly Times Pty Ltd v DPP (Vic)* (2007) 170 A Crim R 313, 319 [23] (Kaye J), *Herald & Weekly Times Pty Ltd v County Court (Vic)* [2004] VSC 512, [20] (Whelan J), *Herald & Weekly Times Ltd v Magistrates Court (Vic)* (2004) 21 VAR 117, 120 [15] (Whelan J).

[73] *Chaarani v DPP (Cth)* [2018] VSCA 299, [41] (Maxwell P, Beach and Hargrave JJA) ('*Chaarani*'); *Herald & Weekly Times Pty Ltd v DPP (Vic)* (n 72) 319 [24] (Kaye J); *Herald & Weekly Times Pty Ltd v County Court (Vic)* (n 72) [20] (Whelan J); *DPP (Cth) v Brady* (2015) 252 A Crim R 50, 60 [59] (Hollingworth J).

[74] See, eg, *Scott* (n 40) 438 (Viscount Haldane LC), quoted in *John Fairfax Publications* (n 60) 356 [37] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]); *L & A Services* (n 61) 18 (Fitzgerald P and Lee J), quoting *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] 1 QB 227, 235 (Sir John Donaldson MR).

suppression order must only be adopted as a measure of *last resort*[75] and not because a jury trial might be more expediently conducted with a suppression order in place,[76] or where such an order is considered by a court to be 'convenient, reasonable, or sensible'.[77]

In line with the stringent nature of the test, the decision to grant a suppression order based on necessity has been held by the High Court to be one of principle and not one of true judicial discretion.[78] Moreover, it does not involve a case-by-case 'balancing' of competing interests between the public's interest in open justice, on the one hand, and competing interests in suppression, on the other.[79] Rather, either an order will be found to be strictly necessary to ensure a fair trial and therefore *must* be made, or it will be found not to be so necessary and therefore must not be made.[80] In this respect, the earlier mentioned suggestion that Pell's right to a fair trial should not have been given precedence over open justice or the public's right to know fundamentally misconstrues the law. The issue is not whether Kidd CJ, on the particular facts of the case, gave sufficient 'weight' to open justice and the public's interest in receiving information about Pell's trial and conviction;[81] instead, the issue is whether Kidd CJ was properly satisfied that the high standard of necessity

[75] See, eg, *Re BBC (2018)* (n 49) 6033 [29] (Lord Burnett CJ for the Court); *Re Press Association* [2013] 1 WLR 1979, 1984 [13] (Lord Judge CJ for the Court); *John Fairfax Publications* (n 60) 358 [51] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]). See also PD Cummins, 'Open Courts: Who Guards the Guardians?' (Seminar Paper, Rule of Law Institute of Australia, 4 June 2014) 3 <https://www.ruleoflaw.org.au/open-courts-suppression-orders>, archived at <https://perma.cc/4VCG-L4SN>.

[76] See *John Fairfax & Sons Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 523 [44]–[45] (Spigelman CJ, Mason P agreeing at 533 [100], Beazley JA agreeing at 533 [101]).

[77] *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [31] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) ('*Australian Crime Commission*'). See also *AB v CD* (2019) 279 A Crim R 357, 368–9 [68] (Ferguson CJ, Beach and McLeish JJA); *Chaarani* (n 73) [41] (Maxwell P, Beach and Hargrave JJA).

[78] *Australian Crime Commission* (n 77) 664 [33] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ). See also *Scott* (n 40) 435 (Viscount Haldane LC); *R v Tait* (1979) 24 ALR 473, 487 (Brennan, Deane and Gallop JJ). Cf *Chaarani* (n 73) [36] (Maxwell P, Beach and Hargrave JJA).

[79] *Australian Crime Commission* (n 77) 664 [31]–[33] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *Rinehart* (n 72) 321 [31] (Bathurst CJ and McColl JA); *Qaumi [No 15]* (n 61) [35] (Hamill J); *Herald & Weekly Times Ltd v Magistrates' Court (Vic)* (n 72) 120 [17] (Whelan J).

[80] *Australian Crime Commission* (n 77) 664 [31]–[33] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ). Cf *A v BBC* (n 54) 605 [41] (Lord Reed JSC, Baroness Hale DPSC, Lords Wilson, Hughes and Hodge JJSC).

[81] See also Chief Justice TF Bathurst, '"Something More, Something Less": The Contemporary Meaning of Open Justice' (Speech, Communications and Media Law Association, 16 October 2019) 6–7 [14].

required by the law to make the suppression order had been established on the facts.

The question of necessity, of course, goes to the very heart of Moses' criticism of the order in *Pell*: there is no doubt that a suppression order will only be considered to be a measure of last resort — and therefore meet the criterion of necessity — where it is first established that directions to the jury will not be sufficient to avoid the risk.[82] Indeed, this requirement is expressly referred to in s 18(1)(a) of the *OC Act*, which states that a suppression order can only be made to prevent a real and substantial risk of prejudice where it cannot be avoided by 'other reasonably available means' and specifies that such means may include 'directions to the jury'. This means that a suppression order should never be granted simply on the precautionary basis that prejudicial material may, or even definitely will, come to the attention of prospective jurors.[83] Instead, for an order to be justified as necessary, the judge must come to the conclusion that there is a real and substantial risk, taking into account all the circumstances of the case, that jurors will not be able to follow judicial directions to disregard any prejudicial publicity in the event that they do, in fact, encounter it.[84]

B *Chief Judge Kidd's Reasons for the Order in* Pell

Turning to Kidd CJ's reasons for granting the order in *Pell*, it is evident that his Honour followed the exact approach just described. Thus, after acknowledging that he was required to 'generally proceed on the assumption that jurors will follow … directions' to disregard prior prejudicial publicity,[85] Kidd CJ concluded that a suppression order was nevertheless necessary because judicial

[82] See, eg, *Chaarani* (n 73) [42] (Maxwell P, Beach and Hargrave JJA).

[83] See, eg, *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] 2 SCR 97, 166–7 [128] (Cory J for Cory, Iacobucci and Major JJ) ('*Phillips v Nova Scotia*').

[84] It should be noted that another means of avoiding juror prejudice is to delay proceedings to allow potential jurors' recollection of pre-trial publicity to fade: see, eg, *R v MSK* [2004] NSWSC 1009, discussed in *R v A* [2005] NSWSC 478, [15] (Hidden J); *Re K* [2002] NSWCCA 374, [15], [19] (Beazley JA, Sully and Simpson JJ); *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 272 [92] (Warren CJ and Byrne AJA) ('*News Digital Media*'); *John Fairfax Publications* (n 60) 359 [55], 360–1 [64] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]). However, nowadays it appears that courts are particularly reluctant to adjourn proceedings due to the fact that anything more than a very short delay will usually be considered contrary to the fair and proper administration of justice, taking into account an accused's right to be brought to trial in a timely fashion and the impact that adjourning a trial might have on witnesses and victims, including their ability to recall events: see, eg, *R v Mokbel [No 2]* [2009] VSC 652, [56] (Kaye J) ('*Mokbel [No 2]*'); *Qaumi [No 15]* (n 61) [73]–[77] (Hamill J); *R v Perre* [2019] SASCFC 100, [79] (Parker J, Nicholson J agreeing at [1], Doyle J agreeing at [105]).

[85] *Pell* (n 5) [45] (Kidd CJ).

directions would not be sufficient to alleviate the impact that prejudicial publicity of the cathedral trial was expected to have on jurors empanelled in the subsequent swimmers trial.[86] As to the precise nature of the prejudice, the concern was that jurors in the swimmers trial would be more likely to find Pell guilty if they had knowledge of the allegations, evidence and outcome in the earlier trial.[87] In particular, Kidd CJ held that there was a risk that jurors would engage in a 'process of impermissible tendency, coincidence or context reasoning'[88] by treating such knowledge as '*apparently* probative' in determining the charges at issue in the swimmers trial.[89]

The cumulative effect of a number of factors led Kidd CJ to conclude that such risk of prejudice could not be negated by strong directions to the jury. These included the expected 'febrile'[90] media attention that the cathedral trial was likely to receive given Pell's high profile as a cardinal of the Catholic Church, along with the fact that the allegations involved sexual offending against children in an institutional setting and therefore were 'likely to provoke or arouse an emotional reaction in the jury'.[91] Chief Judge Kidd also took into account the growing community disquiet regarding the perceived failings by institutions, including the Catholic Church, to properly respond to instances of child sexual abuse, and that the offences were alleged to have been committed by someone of authority within one of those institutions.[92] The close temporal proximity of the trials was also an important consideration[93] — although it was said that the impact of publicity of the first trial was likely to be so great that even a delay in the hearing of the second trial would not operate to reduce the risk of prejudice.[94] Finally, while Kidd CJ accepted that the allegations in the respective trials were temporally distinct and involved conduct of a 'different quality' (touching and fondling as opposed to penetrative offending),[95] he was nevertheless of the view that the allegations in the two trials were not 'so separate and discrete in nature or circumstances as to be unlikely to improperly influence a jury'.[96]

[86] Ibid [47].
[87] Ibid [41].
[88] Ibid.
[89] Ibid [42] (emphasis in original).
[90] Ibid [46].
[91] Ibid [43], [46].
[92] Ibid [46].
[93] Ibid [44], [47].
[94] Ibid [44].
[95] Ibid [42].
[96] Ibid.

Shortly after the guilty verdict in the cathedral trial was handed down, Kidd CJ was required to reconsider the efficacy of jury directions when six media organisations applied to have the suppression order set aside. Despite the media's 'implied acceptance' of the necessity of the order when it was first made,[97] they argued, inter alia,[98] that there was 'great public interest in jury verdicts being published contemporaneously'[99] and that any potential prejudice could be dealt with through strong directions to the jury.[100] In rejecting the application and upholding the order, Kidd CJ focused in particular on the prejudicial effect that publication of Pell's recent conviction in the cathedral trial was likely to have on the jury in the swimmers trial. The conviction and guilty verdict, according to his Honour, provided 'all the more reason that a suppression order in the same terms [was] necessary'.[101] He said:

> If I were to lift the order the swimmers trial would be conducted against the background and within the context of not only the allegations of the cathedral trial, but of convictions of serious child sexual abuse offences in the cathedral trial.
>
> As I indicated in my original reasons, such information is extremely, if not overwhelmingly, prejudicial to Cardinal Pell. It would be forensically devastating to Cardinal Pell's ability to run any defence, but particularly one which involves mistaken identity, accident or misunderstanding.[102]

Chief Judge Kidd noted that the publication of prior convictions can cause an 'extreme level of prejudice' when published in close proximity to an accused's trial[103] and said that '[g]iving directions or instructions to the jury to put matters such as a prior conviction for a serious sexual offence to one side, cannot be the answer to the risk of prejudice in question'.[104]

Given that the order in *Pell* was both originally granted and later affirmed based upon the express conclusion that jurors empanelled in the second trial would be incapable of excluding from their decision-making knowledge of the

97 *Pell (Review of Suppression Order)* (n 9) [7] (Kidd CJ).

98 They also unsuccessfully argued that the suppression order had become futile due to online publicity: ibid [42]–[49].

99 Ibid [15].

100 Ibid [28].

101 Ibid [10].

102 Ibid [10]–[11].

103 Ibid [22].

104 Ibid [12].

evidence and verdict in the first trial,[105] it follows that any criticism of the necessity of the order can only stand, at least from a strictly legal perspective, if it can be established that Kidd CJ erred by not attributing to jurors in the second trial the *degree* of robustness required by the law. Therefore, the crucial issue in assessing the lawfulness of the order is to consider what assumptions regarding the capacity of jurors to follow judicial directions to disregard prejudicial material are required to be made under the law when granting a suppression order, particularly regarding their capacity to disregard knowledge of prior convictions arising from recent proceedings involving an accused. This issue is the focus of the following Part. It is important to note that no attempt is made to examine normative or empirical questions as to whether the law *should* place more or less faith in jurors to disregard prejudicial material; instead, for the purpose of reflecting on the legality of the suppression order in *Pell*, the following Part is confined to the more modest (and admittedly somewhat artificial) task of examining the law as it currently stands.[106]

III The Right to a Fair Trial and the Faith Placed in Jurors

A *The General Position*

As a general rule, common law legal systems around the world have come to place tremendous confidence in the capacity of jurors to disregard prejudicial material.[107] Australia is no exception: the High Court has repeatedly endorsed

[105] Ibid; *Pell* (n 5) [47] (Kidd CJ).

[106] For a recent survey of the psycho-legal and empirical literature, see Rebecca McEwen and John Eldridge, 'Judges, Juries and Prejudicial Publicity: Lessons from Empirical Legal Scholarship' (2016) 41(2) *Alternative Law Journal* 110; Rebecca McEwen, John Eldridge and David Caruso, 'Differential or Deferential to Media? The Effect of Prejudicial Publicity on Judge or Jury' (2018) 22(2) *International Journal of Evidence and Proof* 124.

[107] *John Fairfax Publications* (n 60) 366 [103] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]). See, eg, *Hinch (1987)* (n 65) 74 (Toohey J). In the United Kingdom, see, eg, *Montgomery v HM Advocate (Scotland)* [2003] 1 AC 641, 673–4 (Lord Hope) ('*Montgomery*'); *R v Kray* (1969) 53 Cr App R 412, 414–15 (Lawton J) ('*Kray*'); *R v Coughlan* (1976) 63 Cr App R 33, 37 (Lawton LJ); *R v Cannan* (1991) 92 Cr App R 16, 22, 24 (Lord Lane CJ). In Canada, see, eg, *R v Corbett* [1988] 1 SCR 670, 692–3 (Dickson CJ for Dickson CJ and Lamer J) ('*Corbett*'); *Phillips v Nova Scotia* (n 83) 168–9 [133] (Cory J for Cory J, Iacobucci and Major JJ). In New Zealand, see, eg, *R v Burns [No 2]* [2002] 1 NZLR 410, 413 [11] (Richardson P for the Court) ('*Burns [No 2]*'), citing Law Commission (NZ), *Juries in Criminal Trials: Part Two* (Preliminary Paper No 37, November 1999) vol 1, 69 [287]; *M (CA43/2012) v New Zealand Police* [2012] NZCA 135, [15] (Randerson J for the Court); *R v Harawira* [1989] 2 NZLR 714, 729 (Richardson J for the Court); *Quinn v New Zealand Police* [2019] NZHC 875, [12] (Whata J);

the modern legal assumption that *in all but exceptional cases* jurors are able to ignore extraneous information that they may have acquired about an accused and can base their decisions entirely upon the evidence presented to them in court.[108] The mere fact that a person has been exposed to information about a case, and even formed a tentative opinion about it, does not preclude them from acting as a juror[109] and 'undertaking their duties as such in an impartial and objective manner'.[110] Thus, as explained by Mason CJ and Toohey J in *R v Glennon* ('*Glennon*'), while the law assumes the possibility that a juror might acquire prejudicial material, it 'proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence'.[111] To conclude otherwise, according to their Honours, would 'underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge'.[112]

Importantly, the abiding faith in juries has been held to extend to circumstances where an extreme level of publicity surrounds a particular case.[113] Indeed, as explained by the High Court in *Dupas v The Queen* ('*Dupas*'), '[t]here is nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases',[114] and time and again the courts have concluded that an accused is able to receive a fair trial despite intense and prolonged

R (CA340/2015) v The Queen [2015] NZCA 287, [22]–[30] (Winkelmann J for the Court) ('*CA340/2015*').

108 *Dupas v The Queen* (2010) 241 CLR 237, 247–50 [25]–[32], 251 [38] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Dupas*'); *R v Glennon* (1992) 173 CLR 592, 603 (Mason CJ and Toohey J), 614–15 (Brennan J, Dawson J agreeing at 625) ('*Glennon*'). See also *Alqudsi v The Queen* (2016) 258 CLR 203, 252 [120] (Kiefel, Bell and Keane JJ); *Gilbert v The Queen* (2000) 201 CLR 414, 425–6 [31] (McHugh J); *Murphy* (n 63) 99 (Mason CJ and Toohey J); *Hinch (1987)* (n 65) 74 (Toohey J).

109 *Glennon* (n 108) 603 (Mason CJ and Toohey J), citing *R v Hubbert* (1975) 11 OR (2d) 464, 477 (Gale CJO, Jessup, Arnup, Dubin and Martin JJA) ('*Hubbert*'). See also *Murphy* (n 63) 99 (Mason CJ and Toohey J); *R v S-R (J)* (2008) 236 CCC (3d) 519, 534 [38] (Nordheimer J) ('*S-R (J)*'); *R v Makow* (1974) 20 CCC (2d) 513, 518–19 (Seaton JA, Taggart JA agreeing at 513, Carrothers JA agreeing at 523) ('*Makow*').

110 *S-R (J)* (n 109) 534 [38] (IVB Nordheimer J).

111 *Glennon* (n 108) 603 (Mason CJ and Toohey J). See also *Murphy* (n 63) 99 (Mason CJ and Toohey J); *Dupas* (n 108) 248–9 [29] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

112 *Glennon* (n 108) 603 (Mason CJ and Toohey J).

113 *Dupas* (n 108) 250–1 [36] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *R v Abu Hamza* [2007] QB 659, 685–6 [96]–[99] (Lord Phillips CJ for the Court) ('*Abu Hamza*'); *DPP (Vic) v Williams* (2004) 10 VR 348, 352 [20] (Cummins J) ('*Williams*').

114 *Dupas* (n 108) 250 [36] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

media attention, including in the 'most sensational of cases'.[115] The trust placed in the capacity of jurors to exclude such material is said to be assisted by the 'inward looking' nature of a criminal trial[116] and the 'focusing effect of listening to evidence'.[117] Thus, while acknowledging that the law must 'not ask psychological impossibilities of juries',[118] Cummins J in *Director of Public Prosecutions (Vic) v Williams* explained:

> Juries … see the effort which all counsel put into cases, they see the attention to evidence, they see the testing of evidence and often the destruction of apparently persuasive evidence by cross-examination, they hear the directions of the trial judge and they are in law bound by them. Juries by direction, observation and osmosis assume a proper and responsible role as the judges of the facts, judging the case solely on the evidence led in court.[119]

The 'powerful safeguard'[120] generated by the nature of the trial and the solemnity of the courtroom, in turn, is subsequently buttressed by the collective deliberation process undertaken within the jury room.[121]

However, despite the general assumption that jurors, even in the face of extensive and provocative media coverage, can dutifully follow judicial directions to focus exclusively on the evidence presented at trial, it is nevertheless evident that the capacity of jurors to disregard prejudicial media publicity is treated differently in different legal contexts.[122] For example, the

[115] *John Fairfax Publications* (n 60) 360 [59] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]). See also *R v Dupas [No 3]* (2009) 28 VR 380, 440–1 [239]–[240] (Weinberg JA); *Williams* (n 113) 352 [20] (Cummins J).

[116] Indeed, that trials, by their nature, cause all involved to be 'progressively more inward looking', to the exclusion of extraneous material, has been accepted as a 'well-known phenomenon': *A-G v News Group Newspapers Ltd* [1987] 1 QB 1, 16 (Sir John Donaldson MR, Parker LJ agreeing at 16, Sir George Waller agreeing at 18). See also *Ex parte The Telegraph plc* [1993] 1 WLR 980, 987 (Lord Taylor CJ for the Court) ('*Ex parte Telegraph (1993)*'); *A-G v British Broadcasting Corporation* [1997] EMLR 76, 82 (Auld LJ, Sachs J agreeing at 83).

[117] *HM Advocate (Scotland) v Sheridan* [2012] SCL 298, 303 [10] (Lord Bracadale) ('*Sheridan*'); *Re Guardian News & Media Ltd* [2016] EWCA Crim 58, [55]–[57] (Gross LJ) ('*Re Guardian*').

[118] *Williams* (n 113) 352 [20] (Cummins J).

[119] Ibid.

[120] *Sheridan* (n 117) 304 [10] (Lord Bracadale); *Re Guardian* (n 117) [55] (Gross LJ).

[121] See, eg, *Glennon* (n 108) 614–15 (Brennan J), quoting *R v Munday* (1984) 14 A Crim R 456, 457 (Street CJ).

[122] See, eg, Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 100–1 [7.120]–[7.126]. See also *R v Johnson* (n 67) [33] (John Dixon J). Thus, as noted by Richardson J for the New Zealand Court of Appeal in *Gisborne Herald Co Ltd v Solicitor-General (NZ)* [1995] 3 NZLR 563, 575: 'It may well be … that Courts tend to endow juries with different degrees of responsiveness to jury directions, depending on whether they are looking at the trial in prospect or in retrospect.'

law's faith in jurors is adhered to most strictly in the context where an accused has sought an order for the permanent stay of proceedings based on the argument that they will not be able to receive a fair trial *at all* due to past prejudicial media publicity. The High Court has repeatedly insisted that it will only be in *extremely rare and exceptional* circumstances that the unfair consequences of prejudicial publicity will not be able to be alleviated by appropriate directions to the jury such that the permanent discontinuance of proceedings against an accused would be justified.[123] In contrast, it has been suggested that the courts adopt a much more protective approach to jurors in determining liability for the publication of prejudicial material under the law of sub judice contempt.[124] Thus, contrary to the general assumption in the law that jurors are robust, sub judice contempt cases appear to proceed on the opposite assumption that there is an enduring risk that jurors will *not* be able to obey judicial directions to disregard prejudicial material that they may have encountered via the media.[125] As observed by Roxanne Burd and Jacqueline Horan, the law of sub judice contempt 'assumes that jurors who are exposed to prejudicial material will be rendered partial and unreliable'.[126]

Putting aside the issue of whether the differential treatment of jurors in different legal contexts can be convincingly justified,[127] the pertinent question

[123] *Dupas* (n 108) 250–1 [35]–[36] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Glennon* (n 108) 605 (Mason CJ and Toohey J); *Jago* (n 62) 34 (Mason CJ).

[124] Victorian Law Reform Commission (n 122) 100–1 [7.121]–[7.126].

[125] See, eg, Butler and Rodrick (n 47) 392 [6.280]; Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century: Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36(2) *Criminal Law Journal* 103, 108; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 22 [2.27]. Indeed, it has even been held that judicial directions are of little weight, or perhaps even irrelevant, in determining whether a publication gives rise to liability for sub judice contempt: *DPP (Vic) v Johnson* (n 122) [33]–[36] (John Dixon J).

[126] Burd and Horan (n 125) 108. See also *A-G v Times Newspapers Ltd* (n 63) 309 (Lord Diplock). According to the Victorian Law Reform Commission, the divergent approaches to jurors in these different contexts are exemplified by the fact that there have been instances where media publicity has been found, on the one hand, to pose a sufficient risk of prejudice to justify imposing liability for sub judice contempt but, on the other hand, the same publicity has been found *not* to pose a sufficient risk of prejudice to warrant an order for the permanent stay of the proceedings: Victorian Law Reform Commission (n 122) 100 [7.122], citing *Hinch (1987)* (n 65); *Glennon* (n 108). The difficulty with such seemingly inconsistent reasoning has been noted: see, eg, Allan Ardill, 'The Right to a Fair Trial: Prejudicial Pre-Trial Media Publicity' (2000) 25(1) *Alternative Law Journal* 3, 4–5, 7.

[127] For example, the treatment of jurors as especially robust in the permanent stay context may be driven by important policy considerations that the public expects that a person charged with a criminal offence ought to be brought to trial and that the carriage of justice should not be adventitious: see, eg, *Glennon* (n 108) 613 (Brennan J, Dawson J agreeing at 625); *Dupas*

in assessing the order in *Pell* is: which approach, strict or protective, should be adopted in the decision to grant a suppression order? While this question has never been directly addressed by the High Court, the answer is relatively straightforward. On the one hand, it might be said that sub judice contempt and suppression orders share a common purpose in protecting an accused's right to a fair trial by deterring the publication of prejudicial material.[128] It may therefore seem logical to argue that a more protective or prophylactic approach to jurors should apply when a court is considering the necessity of a suppression order. However, such an argument, while perhaps superficially appealing, ignores a crucial point of distinction between suppression orders and sub judice contempt: suppression orders prohibiting the publication of court proceedings limit open justice,[129] whereas sub judice contempt — which, as explained above, has no application to the publication of fair, accurate and contemporaneous reports of proceedings — does not.[130] As discussed above, due to the heavy reliance placed on open justice as a central feature of the fair and proper administration of justice, the common law requires that suppression orders only be granted in circumstances of *strict necessity*. It therefore follows, as confirmed in the case law discussed in the remainder of this Part, that in assessing the necessity of a suppression order for the purpose of avoiding juror prejudice, courts are required to place the highest possible faith in jurors and attribute to them the same degree of confidence that has been repeatedly endorsed by the High Court in the permanent stay context.[131]

(n 108) 251 [37] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Murphy* (n 63) 99 (Mason CJ and Toohey J).

128 See, eg, *Abu Hamza* (n 113) 684 [92], where Lord Phillips CJ, delivering the judgment of the Court, said:

> Prejudicial publicity renders more difficult the task of the court, that is of the judge and jury together, in trying the case fairly. Our laws of contempt are designed to prevent the media from interfering with the due process of justice by making it more difficult to conduct a fair trial.

129 Note, however, that some suppression orders relate to the publication of information *other than* reports of proceedings and therefore do not have an impact on open justice: see below n 132. This article is confined to the discussion of suppression orders that limit open justice.

130 See above n 70 and accompanying text.

131 It is important to note that, according to some, the bar to a permanent stay has been set so high under the strict approach that, as a matter of practical reality, such an order will almost never be granted in practice: see, eg, Bagaric (n 34) 23; Chris Merritt, 'Judges Get Message on Suppression Orders', *The Australian* (Sydney, 22 November 2010) 27, quoting Justice Weinberg saying, extrajudicially, that permanent stay orders are now 'dead, buried and cremated' following the decision in *Dupas* (n 108). This does not mean, however, that a suppression order under the strict approach will also never be granted in practice. This is because permanent stay applications are always brought in circumstances where there has been, or it is possible for there to be, significant delay between the prejudicial publicity and the later trial. As a result,

Importantly, this argument applies with equal force to both common law powers and statutory powers of suppression expressed in terms of necessity, including the power to grant suppression orders under the *OC Act*.[132] This is because, by virtue of the principle of legality, statutory powers of suppression must be construed, 'where constructional choices are open',[133] in a manner that has the least impact on the common law principle of open justice.[134]

the impact of publicity on potential jurors will have substantially dissipated by the time the trial commences and can therefore be much more effectively addressed through the provision of appropriate directions: see, eg, *Montgomery* (n 107) 673–4 (Lord Hope). Suppression orders, on the other hand, are more likely to be sought in circumstances where the anticipated delay between publicity and trial, as in *Pell* (n 5), is comparatively shorter, and therefore the impact of the publicity potentially much more difficult to address through jury directions alone.

132 Note, however, that not all suppression orders limit open justice. Some orders, known as 'general suppression orders' prevent the publication of information extraneous to court proceedings rather than contemporaneous reports of judicial proceedings: see, eg, *News Digital Media* (n 84) 259 [36]–[39] (Warren CJ and Byrne AJA). Examples include orders restraining the publication of photographs of an accused (see, eg, *A-G (NSW) v Time Inc Magazine Co Pty Ltd* [1994] NSWCA 134); historical prior convictions (see, eg, *News Digital Media* (n 84) 253 [7] (Warren CJ and Byrne AJA)); and the re-enactment of an alleged crime for which an accused is yet to stand trial (see, eg, *General Television* (n 61) 78–9 [31]–[35] (Warren CJ, Vincent and Kellam JJA)). Because general suppression orders do not limit the 'high principle' of open justice, only freedom of expression, it has been held that a less strict approach is applied to the question of necessity: *News Digital Media* (n 84) 258–9 [33]–[39] (Warren CJ and Byrne AJA); *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 66–7 [51] (Basten JA, Bathurst CJ agreeing at 55 [1], Whealy JA agreeing at 79 [106]). For example, it has been held that a general suppression order may be granted where it is merely 'reasonably appropriate and adapted' to protecting the right to a fair trial rather than strictly necessary: at 66–7 [51]. It is for this reason that cases dealing with the necessity of general suppression orders should be treated with caution in the context of decisions dealing with suppression orders that limit open justice. For an exposition of the law regarding general suppression orders, see generally Jason Bosland, 'Restraining "Extraneous" Prejudicial Publicity: Victoria and New South Wales Compared' (2018) 41(4) *University of New South Wales Law Journal* 1263.

133 *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ).

134 Ibid 177 [444] (Heydon J); *Hogan* (n 44) 535 [27] (French CJ). Statutory provisions for suppression 'ought ordinarily to be strictly construed': *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275, 288 [30] (Winneke P, Ormiston and Vincent JJA). See also *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55, where Kirby P said '[s]tatutory derogation from openness is the exception. In defence of the rule, such statutes will usually be strictly and narrowly construed. Unless the derogation is specifically provided for, courts are loathe to expand the field of secret justice'; *The Herald & Weekly Times Ltd v Magistrates' Court (Vic)* [1999] 2 VR 672, 677 [42]–[46] (Beach J).

B *Suppression Orders and the Capacity of Jurors to Disregard Prejudicial Material*

While some courts in Australia have embraced the protective standard adopted in the law of sub judice contempt and proceeded on the assumption that jurors are vulnerable to prejudice when deciding to grant suppression orders,[135] the strict approach has been applied in leading appellate decisions in New South Wales[136] and Victoria.[137] In the seminal case of *John Fairfax Publications Pty Ltd v District Court (NSW)* ('*John Fairfax Publications*'), for example, the New South Wales Court of Appeal held that the decision to grant a suppression order to avoid juror prejudice should be based on the strong presumption that jurors are capable of disregarding prejudicial material in all but the most exceptional circumstances.[138] To underscore the true rarity of such circumstances, Spigelman CJ said that while '[i]t is conceivable that media publicity may create a situation in which an accused will not be able to have a fair trial within a reasonable period', the need for a suppression order was nevertheless so unlikely that it could not, at least in his view, give rise to an implied power of suppression in an inferior court.[139] The appropriate course, if

[135] In these cases, mention of the capacity of jurors to dismiss prejudicial material is either omitted (see, eg, *Miller v Samuels* (1979) 22 SASR 271; *R v Cox [No 7]* [2005] VSC 526; *AW v Rayney [No 2]* [2010] WASCA 221; *AW v Rayney [No 3]* [2010] WASCA 244), given very little weight (see, eg, *Rayney [No 4]* (n 61) [63] (Buss JA, Newnes JA agreeing at [71]); *Advertiser Newspapers Ltd v Bunting* (2001) 212 LSJS 12, 18–19 [23], 21 [31] (Martin J); *Nine Network Australia Pty Ltd v McGregor* (2004) 14 NTLR 24, 41–2 [51] (Angel, Mildren and Riley JJ)), or expressly doubted (see, eg, *L v Australian Broadcasting Corporation* [2005] NTSC 5, [18] (Mildren J) ('*L v ABC*'); *R v Von Einem* (1991) 55 SASR 199, 215–16 (Duggan J), where it was said to be 'undesirable' to rely upon jury directions where the preventative measure of a suppression order was available; *D v DPP (Cth)* (2018) 131 SASR 1, 19–20 [86]–[89] (Kourakis CJ, Blue and Doyle JJ); *An Accused v Adelaide Magistrates Court* (2014) 123 SASR 448, 461 [46] (Nicholson J)). See also *DPP (Vic) v Note Printing Australia Ltd [No 2]* [2012] VSC 304. Justice Hollingworth said that the law's faith in jurors does not mean that the court should not take steps to reduce prejudicial pre-trial publicity in order to protect the right to a fair trial: at [48].

[136] See, eg, *John Fairfax Publications* (n 60) 367 [111] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]).

[137] *Chaarani* (n 73) [4], [6] (Maxwell P, Beach and Hargrave JJA). See also *DPP (Vic) v Hazelwood Pacific Pty Ltd [No 1]* [2019] VSC 870, [22], [49] (Keogh J) ('*Hazelwood Pacific*'); *Mokbel [No 2]* (n 84) [33]–[35] (Kaye J); *R v Goldman [No 3]* [2004] VSC 167, [36]–[38] (Redlich J) ('*Goldman*'); *R v Williams; Re an Application by 'The Age'* [2004] VSC 413, [31]–[32] (Kellam J) ('*Application by 'The Age'*"); *Strawhorn* (n 61) [32]–[39] (Habersberger J); *Lawson* (n 61) [21]–[24] (Lasry J); *Friedrich v Herald & Weekly Times Ltd* [1990] VR 995, 1006 (Kaye, Fullagar and Ormiston JJ) ('*Friedrich*').

[138] *John Fairfax Publications* (n 60) 366 [101]–[103] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]).

[139] Ibid 360 [59].

such a case were '*ever*' to arise, would be for an application for a suppression order to be made to the Supreme Court in the exercise of its inherent jurisdiction (assuming the absence of an express statutory power of suppression available to an inferior court).[140] He further said that the 'extraordinary course' of making such an order will only be justified if the court comes to 'a conclusion at a high level of certainty that prejudice of the trial will ensue'.[141] A similarly strict line of reasoning was recently endorsed by the Victorian Court of Appeal in the case of *Chaarani v Director of Public Prosecutions (Cth)* ('*Chaarani*'),[142] which is discussed further below.

Notably, the strict approach to juror robustness in the suppression order context has also been followed in a number of other common law jurisdictions — namely, Canada[143] and the United Kingdom.[144] For example, in the classic English case of *R v Horsham Justices; Ex parte Farquharson*, Lord Denning MR said the following:

> In considering whether to make a [suppression order], the sole consideration is the risk of prejudice to the administration of justice. Whoever has to consider it should remember that at a trial judges are not influenced by what they may have read in the newspapers. Nor are the ordinary folk who sit on juries. They are good, sensible people. They go by the evidence that is adduced before them and not by what they may have read in the newspapers. The risk of their being influenced is so slight that it can usually be disregarded as insubstantial — and therefore not the subject of [a suppression order].[145]

In New Zealand, on the other hand, although some judges have endorsed the strict approach,[146] in most cases where the making of a suppression order has been considered by a court, very little weight or attention, if any, appears to

[140] Ibid 360 [60] (emphasis added).

[141] Ibid 366 [101].

[142] *Chaarani* (n 73).

[143] See, eg, *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835, 884–5 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ) ('*Dagenais*'), citing *Corbett* (n 107) 692–3 (Dickson CJ for Dickson CJ and Lamer J). See also *S-R (J)* (n 109) 534–6 [38]–[42] (Nordheimer J) [38]–[42]; *R v Kossyrine* [2011] OJ No 4495, [20] (IVB Nordheimer J) ('*Kossyrine*').

[144] *Re BBC (2018)* (n 49) 6034 [32] (Lord Burnett CJ for the Court); *Re B* [2007] EMLR 5, 156–7 [31] (Judge P); *Ex parte Telegraph (1993)* (n 116) 987 (Lord Taylor CJ for the Court); *Horsham Justices* (n 61) 794 (Lord Denning MR); *Ex parte The Telegraph Group plc* [2001] 1 WLR 1983, 1992 [24] (Longmore LJ for the Court) ('*Ex parte Telegraph (2001)*').

[145] *Horsham Justices* (n 61) 794.

[146] See, eg, *Burns [No 2]* (n 107) 413 [11] (Richardson P for the Court); *CA340/2015* (n 107) [22]–[30] (Winkelmann J for the Court).

have been given to the capacity of jurors to follow judicial directions to exclude extraneous material from their deliberations.[147] Consequently, New Zealand case law is of limited utility in the present context.

Where the strict approach is applied, the case law indicates that suppression will most often be justified where the risk of juror prejudice arises from the potential publication of factual findings or allegations revealed in court which *overlap or correspond with* questions of fact expected to be the subject of a future jury determination. A common example is where one co-accused pleads guilty and the plea and sentencing hearings, which might be based on an agreed statement of facts, are suppressed until the completion of the trial of the other co-accused where those same facts will need to be determined by a jury.[148]

[147] This is at least in relation to suppression orders that limit open justice. For example, there was no mention of jury directions in the following cases: *R v Shipton* [2007] 2 NZLR 218, 239 [144]–[150] (Hammond J for the Court) ('*Shipton*'); *M v Police* [2012] NZHC 1242, [25]–[34] (Whata J) ('*M*'); *JR v New Zealand Police* [2012] NZHC 3091, [11]–[13] (Collins J) ('*JR*'); *MS (CA405/2016) v The Queen* [2016] NZCA 544, [17]–[18] (Winkelmann J for the Court) ('*CA405/2016*'); *P (CA314/2010) v The Queen* [2010] NZCA 478, [23]–[24] (Randerson J for the Court) ('*CA314/2010*'); *New Zealand Police v ASRS* (District Court of New Zealand, SM Harrop J, 7 November 2012) ('*ASRS*'); *R v Hines* [2016] NZHC 1588 ('*Hines*'); *S v New Zealand Police* (High Court of New Zealand, Rodney Hansen J, 11 January 2011) [5] ('*S*'). There was cursory mention of jury directions in the following cases: *AJD v Police* [2012] NZHC 577, [13] (French J) ('*AJD*'); *R v B (CA 459/06)* [2009] 1 NZLR 293, 305 [48] (Baragwanath J), [77]–[79] (William Young P for William Young P and Robertson J) ('*CA 459/06*'). Cf *R v Taylor* [2007] NZCA 70, [15] (Ellen France J for the Court) ('*Taylor (NZ)*'). Note that William Young P and Robertson J went so far as to express the view that there is a risk that jurors will *not* follow judicial directions and that the reliance upon jury directions was 'not premised on the assumption that all risks of prejudice can be eliminated' but was instead 'based on a pragmatic assessment that the possibility of prejudice to a defendant associated with … publicity does not outweigh the public interest in criminal cases being tried': *CA 459/06* (n 147) 310–11 [77]–[79].

[148] In *General Television* (n 61) 75 [21] (Warren CJ, Vincent and Kellam JJA), this was described as a 'usual example' of where a suppression order would be granted. See, eg, *R v Wournell* [2000] NSSC 270, [11], [13] (Robertson J); *R v Benbrika [No 4]* [2007] VSC 290, [6], [14]–[15] (Bongiorno J); *Benbrika [No 5]* (n 61) [5]–[6] (Bongiorno J); *R v Ebanks* [2010] ONSC 2086, [8], [20] (Fuerst J); *R v McClintic* [2010] ONSC 2944, [2], [35], [41] (McDermid J); *R v NK [No 2]* [2015] NSWSC 1282, [11]–[13] (Hamill J); *R v Mason* [2005] OJ No 5294, [49]–[50] (CF Graham J); *R v Peebles* [1995] OJ No 429, [9]–[11] (Zuraw PJ); *R v Tutin* [2004] NWTSC 46, [18], [26] (Schuler J) ('*Tutin*'); *R v AC [No 5]* [2016] NSWSC 355, [2]–[4] (Hamill J). Cf *Re B* (n 144) 154–5 [24]–[25], 156 [29] (Judge P), where an order was refused on the basis that the concern was about prejudicial commentary rather than prejudice caused by fair and accurate reports; *R v Nande* [2020] NWTSC 52, [1], [3], [8]–[10], [21] (KM Shaner J). Another example is where an accused is facing multiple trials or proceedings which involve clearly overlapping factual issues for determination (eg civil and criminal matters dealing with the same issue or arising from the same set of circumstances): see, eg, *Hazelwood Pacific* (n 137) [40] (Keogh J); *HSBC Bank plc v 5th Avenue Partners Ltd* [2007] EWHC 2342 (QB), [2], [30]–[37], [46] (Walker J); *R (Da Silva) v DPP* [2006] EWHC 3204 (Admin), [2]–[3], [63] (Richards LJ for Richards LJ, Forbes and Mackay JJ). Suppression orders

Another is where two or more co-accused are tried separately on the same or similar charges arising from the same set of events.[149] Knowledge of overlapping or corresponding facts is thought to be particularly difficult for jurors to disregard,[150] especially when such facts appear in media reports of recent proceedings and may therefore be understood by prospective jurors, either correctly or incorrectly, as having received earlier acceptance or approval of the court.[151]

have also been made to prevent the publication of bail or committal hearings where facts that will be at issue at trial are revealed (see, eg, *JM v The Queen* [2015] NSWSC 978, [5]–[6] (Garling J)), or where an accused is facing a retrial after the dismissal of the jury or following an appeal: see, eg, *London Borough of Sutton v Gray* [2017] 2 FLR 146, 152–3 [31]–[36] (Pauffley J); *Qaumi [No 15]* (n 61) [47] (Hamill J); *R v E (C)* [2016] EWCA Crim 2089, [4] (Hallett LJ); *Attorney General's Reference Nos 77 and 78 of 2009* [2010] EWCA Crim 199, [27] (Lord Judge CJ); *R v Guardian Newspapers Ltd* [2001] EWCA Crim 1351, [3]–[6], [16]–[17] (Rose LJ); *R v Lees; Re BBC's Application* [2001] NI 233, 235, 242–3 (Carswell CJ for the Court).

149 See, eg, *R v Lake* [1997] OJ No 5446, [2]–[3], [28]–[29] (McCombs J); *R v NY* [2008] OJ No 1217, [36]–[42], [75]–[76] (JR Sproat J); *R v Giles* (2008) 257 CCC (3d) 105, 117 [43], 118 [47]–[48] (MacKenzie J); *R v Johnson* [2015] NSSC 379, [3], [25], [29] (Arnold J); *R v Cansanay* [2010] MJ No 127, [12]–[13] (SD Greenberg J); *R v Brown* (1998) 126 CCC (3d) 187, 211 (Trafford J); *R v Wood* (1993) 124 NSR (2d) 128, 134 [27], 135 [31] (Tidman J), where while Tidman J stated that there is 'something inherently wrong in conducting a trial under a cloak of secrecy', he nevertheless ordered a publication ban regarding evidence relating to co-accused who were yet to face trial; *Ex parte Telegraph (2001)* (n 144) 1987–9 [5]–[11], 1995 [34] (Longmore LJ for the Court); *Ex parte Telegraph (1993)* (n 116) 986–9 (Lord Taylor CJ for the Court), in which the Court made a very limited order preventing identification of accused. Cf *British Broadcasting Corporation, Petitioners [No 3]* 2002 SLT 2, 7 [19] (Lord Rodger LJG, Lords Kirkwood and Abernethy), where an order prohibiting publication of the proceedings to protect a co-accused (yet to be charged) from prejudice was rejected on the basis that directions to the jury would be sufficient. Although not mentioned as a factor by the Court, it is also notable that the proceedings against the co-accused had not yet been commenced. The case of *R v Sheikh* (2004) 144 A Crim R 124, 130–1 [37]–[41] (Mason P and Wood CJ at CL) is an example where an accused successfully appealed against conviction on the basis that sensational reporting of an earlier trial of co-accused on charges arising out of substantially overlapping events rendered his trial unfair.

150 *Dagenais* (n 143) 886 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ).

151 See, eg, *Tutin* (n 148) [18] (Schuler J); *Mokbel [No 2]* (n 84) [47]–[48] (Kaye J). However, suppression orders in overlapping-fact cases will usually be refused where the delay between the proceedings is expected to be significant and therefore jurors' recollection of the prior proceeding will have substantially faded: see, eg, *Goldman* (n 137) [37] (Redlich J); *Queensland v Nuttall* [2007] QSC 79; *Strawhorn* (n 61) [35] (Habersberger J); *R v Medich [No 11]* [2017] NSWSC 43, [21]–[22] (Bellew J); *R v Benbrika [No 13]* [2007] VSC 543, [8], [13] (Bongiorno J); *Re Courtenay House Capital Trading Group Pty Ltd (in liq)* [2018] NSWSC 604, [19], [28] (Leeming JA); *Friedrich* (n 137) 1006 (Kaye, Fullagar and Ormiston JJ); *R v Landry* (Supreme Court of Nova Scotia, Kennedy CJ, 4 November 2014); *R v Murrin* [1997] BCJ No 3182, [20] (Oppal J); *R v Haevischer* [2013] BCSC 2014, [34]–[39], [42] (Wedge J); *National Bank Financial Ltd v Potter* [2012] NSSC 90, [43] (GM Warner J); *R v Glowatski* [1999] BCJ No 3210, [20] (Macaulay J); *R v JPG* [1996] OJ No 5427, [45]–[46] (Blishen PJ); *Lawson* (n 61) [16], [22] (Lasry J); *Fraser v The Queen* [2010] NZCA 313, [92]–[93]

Of course, apart from the identity of the accused and the sexual nature of the charges, the two trials in *Pell* did not involve overlapping or corresponding facts. Instead, as explained earlier, the concern was that media reporting of the evidence and, in particular, the *guilty verdict* in the first trial might cause the jury in the second trial to employ impermissible tendency or coincidence reasoning on the basis that the sets of allegations in the two trials were similar in nature despite being factually unconnected in either time or circumstance. No doubt, this concern was entirely justified. It is well established in the law that the publication of a guilty verdict, and hence an accused's prior conviction, will be especially capable of putting the right to a fair trial at risk, particularly where it relates to an offence similar to the one for which an accused is to stand trial.[152] As explained by Barwick CJ in *Donnini v The Queen*, the concern is that jurors with knowledge of such information may 'be prone to reason towards guilt by the use of the fact of prior conviction as indicative of a disposition to crime on the part of the accused'.[153] It is for this reason that prior convictions are inadmissible as evidence in court, subject only to narrow exceptions.[154] It is also for this reason that a trial will be aborted if prior convictions are published by the media after a jury has been empanelled[155] or if it emerges that one or more of the jurors has, or may have, acquired during the course of a trial knowledge of an accused's prior convictions, either inadvertently in evidence

(Venning J for the Court). However, even in circumstances where factually overlapping proceedings are held in quick succession, some courts in Canada have nevertheless held steadfast to the belief that jurors can disregard recent media reports of proceedings and disabuse themselves of any associated prejudice: see, eg, *S-R (J)* (n 109) 523–4 [4]–[6], 534–5 [39]–[40] (Nordheimer J), where multiple accused were tried separately in close succession with much of the evidence overlapping; *Kossyrine* (n 143) [9], [20] (IVB Nordheimer J), where jury directions and the challenge for cause process were sufficient, and the co-accused had pleaded guilty, but the guilty plea would not establish that either of the co-accused yet to face trial had a role in the plan to murder; *R v Larue* [2012] YKSC 15, [1], [50] (Gower J), where the co-accused was tried separately.

[152] *Glennon* (n 108) 604 (Mason CJ and Toohey J), citing *Maxwell v DPP* [1935] AC 309, 317 (Viscount Sankey LC). See also *Hinch (1987)* (n 65) 28 (Mason CJ); *R v Border Television; Ex parte A-G* (1978) 68 Cr App R 375, 377 (Lord Widgery CJ, Melford Stevenson J agreeing at 380, Lloyd J agreeing at 380) ('*Border Television*').

[153] (1972) 128 CLR 114, 123 ('*Donnini*'). See also *Hinch (1987)* (n 65) 28 (Mason CJ).

[154] Uniform evidence legislation enacted in most Australian jurisdictions excludes the admission of tendency (or propensity) and coincidence (or similar fact) evidence: see, eg, *Evidence Act 2008* (Vic) ss 97–8. Such evidence can generally only be admitted where, inter alia, it has 'significant probative value': at ss 97(1)(b), 98(1)(b); and, where the evidence is about an accused, such probative value 'substantially outweighs any prejudicial effect it may have on the accused': at s 101(2).

[155] See, eg, *Murphy* (n 63) 97 (Mason CJ and Toohey J); *Taylor (NZ)* (n 147) [1] (Ellen France J for the Court); *Border Television* (n 152) 377 (Lord Widgery CJ).

tendered in court[156] or from an outside source.[157] Furthermore, the exposure of jurors to an accused's prior convictions is considered to be so prejudicial that their publication will almost inevitably constitute a sub judice contempt.[158]

Given the seriousness with which the law treats the publication of prior convictions, some have argued that the suppression of a trial and guilty verdict will be justified almost as a matter of course where an accused is facing, as in *Pell*, multiple criminal trials in close succession.[159] This is based on the view that the publication of a guilty verdict will inevitably have such a lasting and profound impact upon jurors that it must be assumed that they will be incapable of complying with judicial directions to disregard it.[160] Such a categorical assumption, however, is inconsistent with the strict approach to juror robustness.[161] As explained in the following section, despite the

[156] See, eg, *DPP (Vic) v Kerr* [2013] VSC 749, [5], [15], [21], [23] (Hollingworth J); *R v Halliday* (2009) 23 VR 419, 426 [36]–[37], 438–9 [80]–[82] (Buchanan, Ashley and Weinberg JJA) ('*Halliday*'); *R v Knape* [1965] VR 469, 473 (Winneke CJ for the Court) ('*Knape*'); *R v Peckham* [1935] All ER Rep 173, 174 (Lord Hewart CJ for the Court); *R v Firth* [1938] 3 All ER 783, 786 (Lord Hewart CJ for the Court). However, where prior convictions are revealed in evidence in court for a legitimate purpose, directions to the jury to disregard them will sometimes be considered sufficient to avoid any potential prejudicial effect: see, eg, *Donnini* (n 153) 123 (Barwick CJ).

[157] See, eg, *Hinch (1987)* (n 65) 28 (Mason CJ); *Glennon* (n 108) 596–7, 604 (Mason CJ and Toohey J).

[158] See, eg, *R v Nationwide News Pty Ltd* [2018] VSC 572, [31] (Taylor J); *R v The Age Co Ltd* [2006] VSC 479, [14] (Cummins J), quoting *Davis* (n 69) 496 (Fullagar J); *R v The Herald & Weekly Times Ltd* (2007) 19 VR 248, 265–6 [57]–[60], 270 [77] (Smith J); *A-G (NSW) v Willesee* [1980] 2 NSWLR 143, 147–8 [7] (Moffitt P, Hope JA agreeing at 154 [30]); *Border Television* (n 152) 377 (Lord Widgery CJ). Cf *R v Hinch* [2013] VSC 520, [114] (Kaye J) ('*Hinch (2013)*'), where publication of the fact that the accused was on bail at the time of the offences was not a sub judice contempt due to the fact that potential jurors were unlikely to be exposed to the publication and that there would be significant delay between the time of the publication and the proposed trial.

[159] For example, Warren CJ and Byrne AJA in *News Digital Media* (n 84) 254 [11] quoted the trial judge's description of such orders as 'usual'. Note that historical prior convictions will sometimes be suppressed where they do not arise from recent reports of proceedings involving an accused. Such orders are 'general suppression orders' and do not involve a derogation from open justice where the strict approach to the question of necessity is required: see above n 132. See, eg, *News Digital Media* (n 84) 252 [5], 253 [7], 258 [33]–[34] (Warren CJ and Byrne AJA); *Hinch (2013)* (n 158) [6], [10] (Kaye J).

[160] According to the New South Wales Law Reform Commission, for example, judicial directions are 'unlikely to displace' the prejudicial impact of a juror's knowledge of an accused's prior convictions: New South Wales Law Reform Commission (n 125) 29 [2.50].

[161] Note that in *R v Beck; Ex parte Daily Telegraph plc* [1993] 2 All ER 177, 181 (Farquharson LJ for the Court) ('*Beck*'), although the Court did not refer to jury directions as a relevant factor, it was acknowledged that a suppression order is not justified simply because further trials involving an accused are expected. It said that the granting of a suppression order will depend

inherently prejudicial nature of prior convictions, the authorities indicate that the law's faith in jurors under the strict approach must be taken to extend, *at least in the ordinary course of events*, to their capacity to disregard knowledge of prior convictions, even where such knowledge arises from recent reports of earlier proceedings involving an accused. This means, contrary to what is sometimes assumed, a suppression order will not *ordinarily* be justified as necessary where an accused is facing consecutive or back-to-back trials.

C *Juror Robustness and the Suppression of Prior Convictions*

Based on the legal assumption that jurors, other than in exceptional circumstances, have the capacity to follow directions to disregard all but the evidence at trial, it has been held by the courts in a range of different contexts that a juror's knowledge of prior convictions will not ordinarily be sufficient, *in and of itself*, to render a trial unfair. It is well established, for example, that a post-trial (as opposed to intra-trial) revelation that a juror had knowledge of an accused's prior convictions will not justify, without more, the setting aside of a conviction upon appeal.[162] Likewise, it has been held numerous times by the High Court in permanent stay cases that an accused will still be able to receive a fair trial notwithstanding the fact that one or more of the jurors may have acquired knowledge of an accused's criminal history through the media.[163] In *Glennon*, for example, the High Court held that considerable media coverage

on 'all the circumstances, including the nature of the charges, the timing of the second trial and the place where that second trial is to be heard'.

[162] See, eg, *R v King* (2013) 228 A Crim R 406, 417 [60] (Bellew J); *R v K* (2003) 59 NSWLR 431, 446 [67] (Wood CJ at CL, Grove J agreeing at 450 [95], Dunford J agreeing at 450 [96]); *R v Booth* [1983] 1 VR 39, 44 (Lush J, Young CJ agreeing at 40); *R v Hood* [1968] 1 WLR 773, 776 (Cusack J for the Court); *R v Box* [1964] 1 QB 430, 434–5 (Lord Parker CJ); *R v Thompson* [1962] 1 All ER 65, 66 (Lord Parker CJ for the Court); *R v Armstrong* [1951] 2 All ER 219, 219–20 (Lynskey J for the Court). The position will be different where the fact of the accused's prior convictions is inadvertently revealed in evidence during the course of the trial: see, eg, *Knape* (n 156) 473–4 (Winneke CJ for the Court); *Walker v The Queen* [2014] VSCA 177, [13]–[15], [32] (Osborn JA); *Halliday* (n 156) 438–9 [80]–[82] (Buchanan, Ashley and Weinberg JJA); or where knowledge of them is acquired through a juror's independent inquiries in defiance of clear judicial instructions not to search for material relevant to the accused: see, eg, *R v K* (n 162) 445–6 [63]–[65] (Wood CJ at CL, Grove J agreeing at 450 [95], Dunford J agreeing at 450 [96]), discussing *Cant v The Queen* (2002) 12 NTLR 133.

[163] See, eg, *Glennon* (n 108) 604–6 (Mason CJ and Toohey J), 615 (Brennan J, Dawson J agreeing at 625); *Dupas* (n 108) 248 [29], 250–1 [36], 251 [38]–[39] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Goldman* (n 137) [21] (Redlich J). It has long been recognised under the common law that the fact that potential jurors may have been made aware of events at issue in a trial, or may have even formed preliminary opinions about it, does not mean that they cannot act as jurors: see, eg, *R v Edmonds* (1821) 4 B & Ald 471; 106 ER 1009, 1016–17 (Abbott CJ).

of a former priest's prior convictions for child sex offences did not deny him the ability to receive a fair trial on further similar charges.[164] It was in this context that Mason CJ and Toohey J made some important observations regarding the capacity of jurors to disregard prior convictions. While acknowledging that the '[r]eception of inadmissible evidence of a prior conviction has been said to offend against one of the most deeply rooted and jealously guarded principles of our criminal law',[165] they nevertheless endorsed the proposition that there is 'not an absolute insistence by the law that a jury have no knowledge of a prior conviction of an accused on trial'.[166] A distinction, according to their Honours, must be drawn between the situation where the jury is made aware of the prior conviction during the course of a trial — for example, where it is mistakenly revealed in evidence — and where such awareness arises in other ways.[167] Where there is a *possibility* that jurors will acquire knowledge of prior convictions from an outside source, the law proceeds on the usual assumption that the jury will comply with the instructions given to them to decide the case solely upon the evidence.[168] Effectively the same conclusion was reached almost two decades later by the High Court in *Dupas*, where a well-known serial killer who was facing a charge of murder was held to be able to receive a fair trial notwithstanding extensive pre-trial publicity of his prior convictions for two other murders conducted in similar circumstances.[169] In a unanimous judgment, the Court said that any potential defect in the trial caused by past publicity of Dupas's criminal history 'was capable of being relieved against by the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury'.[170]

A significant feature of both *Glennon* and *Dupas* was that in each case there was a significant delay between publicity of the accused's prior convictions and the time of the trial.[171] This worked to strengthen the effectiveness of jury directions to negate the risk of prejudice due to the assumption that prospective jurors' memories will fade with the passage of time.[172] However, the assumed

164 *Glennon* (n 108) 603 (Mason CJ and Toohey J), 616 (Brennan J, Dawson J agreeing at 625).

165 Ibid 604 (Mason CJ and Toohey J).

166 Ibid, quoting *Glennon v The Queen* (Supreme Court of Victoria, Court of Criminal Appeal, McGarvie, Southwell and Nathan JJ, 13 December 1991) 28 (McGarvie J).

167 *Glennon* (n 108) 604 (Mason CJ and Toohey J).

168 Ibid.

169 *Dupas* (n 108) 241–2 [6]–[7], 250–1 [36]–[39] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

170 Ibid 251 [38].

171 Ibid 240–1 [3]–[8]; *Glennon* (n 108) 596–7 (Mason CJ and Toohey J).

172 See, eg, *Montgomery* (n 107) 673 (Lord Hope).

confidence in the capacity of jurors to disregard prior convictions under the strict approach is not contingent upon there being such delay. Rather, the assumption that jurors will ordinarily be able to disregard prior convictions published in the media has been held to apply even where, as in Pell's case, two or more trials involving an accused are held in close succession. The leading English authority on this point is the oft-cited 1969 English case of *R v Kray* ('*Kray*').[173] In that case, the infamous Kray twins, responsible for organised crime in East London in the 1950s and 1960s, were about to stand trial for murder and other serious offences.[174] Prior to the trial commencing, Ronald Kray's counsel asked the judge to give a preliminary ruling on his right to challenge prospective jurors for cause based on the fact that the accused had been found guilty and convicted of murder in a well-publicised trial only one month earlier.[175] The concern was that a juror exposed to such publicity would not be able to try the case free from prejudice.[176] In his decision, Lawton J firmly rejected the proposition that the reporting of a recent trial involving an accused facing a further trial on similar charges would *ordinarily* give rise to a presumption of bias. He said:

> The reporting of trials which take place in open court is an important part of the functions of a newspaper, and it would not to be in the public interest, in my judgment, if newspapers desisted from reporting trials, and from reporting verdicts and sentences in those trials, merely because there was some indictment still to be dealt with. What is more, *the mere fact that a newspaper has reported a trial and a verdict which was adverse to a person subsequently accused ought not in the ordinary way to produce a case of probable bias against jurors empanelled in a later case*. I have enough confidence in my fellow countrymen to think that they have got newspapers sized up just as they have got other public institutions sized up, and *they are capable in normal circumstances of looking at a matter fairly and without prejudice even though they have to disregard what they may have read in a newspaper*.[177]

[173] *Kray* (n 107).

[174] Ibid 413 (Lawton J); John Ezard, 'Krays Will Be Sentenced for Murder Today', *The Guardian* (London, 5 March 1969) 1.

[175] *Kray* (n 107) 413 (Lawton J).

[176] Ibid 414.

[177] Ibid (emphasis added), approved by the Court of Appeal in *Ex parte Telegraph (2001)* (n 144) 1992 [24] (Longmore LJ for the Court); *Ex parte Telegraph (1993)* (n 116) 987 (Lord Taylor CJ for the Court); *A-G v News Group Newspapers Ltd* (n 116) 16 (Sir John Donaldson MR, Sir George Waller agreeing at 18).

In support of the view that such reporting would not give rise to a prima facie case of prejudice, Lawton J noted that the 'public's recollection is short'[178] and that the 'drama … of a trial *almost always* has the effect of excluding from recollection that which went before'.[179]

Importantly, the assumption that jurors can ordinarily disregard prior convictions arising from recent proceedings involving an accused has been relied upon to justify the refusal of suppression orders in a number of cases where an accused has faced multiple, back-to-back trials. A comprehensive search of the case law in Australia, the UK and Canada has revealed four such cases. The first is *R v Taylor* ('*Taylor (BC)*').[180] In that case, an application for suppression was made in the British Columbia Supreme Court to prevent the publication of the first of four trials involving the so-called Squamish Five, an 'urban guerrilla' group who were charged on four separate indictments each arising from separate events, including the infamous bombing of industrial sites and video stores in Vancouver and Toronto.[181] Despite finding that the case was 'unique'[182] due to the nature and degree of the media publicity that the accused had already received,[183] Toy J refused to grant the suppression order.[184] The accused's case, as pointed out by counsel for the media, was based on the premise that jurors selected for the latter trials 'would not be faithful to their oath and [would] not give a true verdict according to the evidence'.[185] Justice Toy said that such an assumption did not reflect his experience, nor established dicta in Canada regarding the robustness of jurors.[186] Moreover, Toy J said that his view that jurors would be able to decide a case impartially despite knowing of prior proceedings involving an accused was 'fortified'[187] by Lawton J's

[178] *Kray* (n 107) 415 (Lawton J).

[179] Ibid (emphasis added). Importantly, it should be noted that it was found on the facts in *Kray* (n 107) that extensive media coverage of the previous trial went beyond providing fair and accurate reports of the proceeding by incorporating extraneous matter that severely discredited the accused, and that this led to the 'wholly exceptional' situation where the accused was entitled to challenge prospective jurors to guard against possible bias: at 415–16.

[180] (Supreme Court of British Columbia, Toy J, 21 October 1983) ('*Taylor (BC)*').

[181] Ibid 3, 8.

[182] Ibid 5.

[183] Ibid.

[184] Ibid 21.

[185] Ibid 12.

[186] Ibid, citing *Makow* (n 109) 518–19 (Seaton JA).

[187] *Taylor (BC)* (n 180) 19 (Toy J).

decision in *Kray*,[188] which he said was consistent with appellate authorities in Canada, including *R v Makow*[189] and *R v Hubbert*.[190]

The second is the 1995 Victorian case of *Talia v Director of Public Prosecutions (Vic)* ('*Talia*').[191] The accused, well-known businessman Joseph Anthony Talia, had pleaded guilty in the County Court of Victoria to one count of conspiracy to defraud arising from what was described by the Crown as the 'largest non-institutional fraud in Victoria's history'.[192] He was set to face a subsequent trial only two months later on a further count of conspiracy to defraud arising out of completely unrelated circumstances.[193] The sentencing judge's refusal to grant a suppression order over the accused's guilty plea and sentencing hearing was upheld by the Victorian Supreme Court.[194] Justice Beach held that not only was there great interest in the public learning about a crime of such 'historic dimensions',[195] but also that any potential prejudice flowing from publicity could be remedied by appropriate directions to the jury.[196] In arriving at this conclusion he said that it was 'wrong to under estimate the intelligence of a jury in a trial'[197] and endorsed the observations of Lord Taylor CJ in *Ex parte The Telegraph plc* that

> [i]n determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them.[198]

Reasoning consistent with *Taylor (BC)* and *Talia* has more recently been endorsed in two leading Australian appellate decisions on suppression orders, both of which were referred to earlier: *John Fairfax Publications* and *Chaarani*. In *John Fairfax Publications*, a judge of the District Court of New South Wales, Norrish DCJ, had granted an order suppressing the publication of a guilty

[188] Ibid 19, citing *Kray* (n 107) 414 (Lawton J).

[189] *Makow* (n 109).

[190] *Hubbert* (n 109).

[191] (Supreme Court of Victoria, Beach J, 21 February 1995) ('*Talia*').

[192] Ibid 6.

[193] Ibid 1.

[194] Ibid 7–8.

[195] Ibid 7.

[196] Ibid, quoting *Ex parte Telegraph (1993)* (n 116) 987 (Lord Taylor CJ for the Court).

[197] *Talia* (n 191) 7.

[198] Ibid, quoting *Ex parte Telegraph (1993)* (n 116) 987 (Lord Taylor CJ for the Court).

verdict in the first of three consecutive trials involving financial crimes.[199] The trial itself had attracted widespread publicity given the minor celebrity status of both the accused and the victim.[200] In setting aside the order, Spigelman CJ held that it was 'quite inconceivable' that sufficient prejudice to justify suppression 'could emerge from the publication of a verdict after anything like normal publicity of the course of a trial'.[201] More to the point, relying upon the High Court's decision in *Glennon* (as *Dupas* had not been decided at the time), he found that the trial judge was in error in granting the order by failing to proceed on the requisite assumption that the jurors would comply with their oath to exclude from their decision-making any knowledge they may have of the guilty verdict reached in the earlier trial.[202]

The Victorian Court of Appeal's decision in *Chaarani* involved a similar scenario to *John Fairfax Publications*. Following a nine-day jury trial, the applicants were convicted of conspiracy to carry out acts in preparation for, or planning, a terrorist act.[203] On the final day of the trial and after extensive media reporting of the trial itself, the applicants applied for a suppression order to prevent publication of the verdict on the basis that they were due to face a further trial two months later on related terrorism charges (attempting to engage in a terrorism act and engaging in a terrorism act).[204] Along with the capacity to 'weed out'[205] jury members with detailed knowledge of the applicants and of the first trial, the trial judge found that the necessity test was not met for the following reason:

> [M]indful of … what the High Court have said about the capacity of juries to follow directions and not to allow the notoriety of some of the accused who come before juries to predetermine the outcome, I am of the view that any danger of unfair prejudice to the accused men can be dealt with in that fashion …[206]

199 *John Fairfax Publications* (n 60) 347 [4], 352 [16] (Spigelman CJ, Handley JA agreeing at 368 [113], MW Campbell AJA agreeing at 368 [114]).

200 Ibid 349 [11]–[13].

201 Ibid 360 [60].

202 Ibid 366–7 [101]–[111].

203 *Chaarani* (n 73) [8] (Maxwell P, Beach and Hargrave JJA).

204 Ibid [2], [10], [12].

205 Ibid [30], quoting *DPP (Cth) v Mohamed* (Supreme Court of Victoria, Beale J, 2 November 2018) 2893 ('*Mohamed*').

206 *Mohamed* (n 205) 2894 (Beale J), cited in *Chaarani* (n 73) [4] (Maxwell P, Beach and Hargrave JJA).

The Victorian Court of Appeal refused to grant leave to appeal.[207] It held that not only would granting a suppression order to prevent the publication of a verdict following a publicised trial undermine public confidence in the administration of justice,[208] but also it was open to the trial judge, on the basis of the High Court's unanimous decision in *Dupas*, to conclude that directions to the jury would 'sufficiently ameliorate'[209] the risk of prejudice arising from the publication of the guilty verdict and therefore that it was open to him to find that the circumstances did not meet the strict standard of necessity required to grant a suppression order.[210] Given the close temporal proximity of the trials, the similarity and seriousness of the offences, and the level of media publicity that they would receive, this conclusion can only be described as a ringing endorsement of the law's faith in the general capacity of jurors to disregard an accused's prior convictions.

IV The Order in *Pell* and Compliance with the Strict Approach

The principles and authorities discussed in Part III demonstrate that, when considering the necessity of a suppression order in the context of back-to-back trials, the strict approach requires that courts proceed on the assumption that jurors can, apart from in extraordinary circumstances, follow judicial instructions to disregard knowledge of past proceedings involving an accused, including knowledge of a recent guilty verdict arising from a well-publicised trial. This Part examines whether the making of the order in *Pell* was compatible with this approach. It does so by considering, first, whether Kidd CJ based his *reasoning* upon the strict approach both in his original decision to grant the order and when he refused the media's application to revoke it and, secondly, whether Kidd CJ's *ultimate decision* to grant the order can be said to be a reasonable one in light of decisions made by other judges to grant suppression orders in comparable circumstances.

A *Did Kidd CJ Follow the Strict Approach in Granting the Order in* Pell*?*

It is impossible to glean from Kidd CJ's original reasons for the order whether he had the strict approach in mind when he came to the conclusion that jurors

[207] *Chaarani* (n 73) [51] (Maxwell P, Beach and Hargrave JJA).

[208] Ibid [46].

[209] Ibid [42].

[210] Ibid [42]–[43].

in Pell's second trial would not be able to disregard media publicity of the cathedral trial. On the one hand, his Honour acknowledged the high standard of satisfaction required to meet the necessity test[211] and cited the High Court's decision in *Dupas* when referring to the general assumption that jurors are capable of following judicial instructions.[212] Moreover, it appears that Kidd CJ did not simply assume from the fact of back-to-back trials that a suppression order was necessary: as explained above, he undertook a contextual analysis of all of the circumstances of the case, including the identity of the accused, the serious nature of the charges, the broader controversy regarding sexual offending within religious institutions, and the nature and extent of the media coverage that the trial was expected to receive. On the other hand, however, he did not refer to the fact that it will only be in extraordinary circumstances, even in the context of back-to-back trials, that the presumed confidence in jurors will be displaced, and a suppression order justified.

However, in contrast to his original reasons, Kidd CJ's reasons for refusing the media's application to have the order lifted after the guilty verdict was delivered by the jury provide much greater insight into his approach. In that decision, contrary to the requirements of the strict approach outlined above, Kidd CJ appeared to treat the publication of Pell's guilty verdict in the cathedral trial as essentially determinative.[213] In categorically rejecting the contention that prior convictions could be disregarded by jurors,[214] Kidd CJ's reasoning can be criticised in two broad respects. First, Kidd CJ erroneously held that the High Court's decision in *Dupas* could not be used to support the media's argument that prejudice arising from a juror's knowledge of prior convictions in the cathedral trial could suitably be alleviated by judicial directions.[215] He said that such reliance

> overstates the effect of *Dupas* and naïvely ignores the risks associated with adverse publicity concerning prior convictions and the court's undoubted powers and duty to mitigate such risks.[216]

He also said that *Dupas* 'must be viewed in its context and on its facts'.[217] However, such dismissal of *Dupas* is clearly inconsistent with *Chaarani*, where

[211] *Pell* (n 5) [32] (Kidd CJ).

[212] Ibid [45].

[213] *Pell (Review of Suppression Order)* (n 9) [21]–[29] (Kidd CJ).

[214] Ibid [24], [28]–[30].

[215] Ibid [28]–[30].

[216] Ibid [29].

[217] Ibid [29] n 14.

the Victorian Court of Appeal agreed not only with the trial judge's reliance upon *Dupas* in the suppression order context but also with his conclusion that it justified the finding that jury directions could be relied upon to alleviate the prejudicial effect of publishing a guilty verdict in the first of two consecutive trials.[218]

The second ground upon which Kidd CJ's reasoning can be critiqued relates to his finding that *Chaarani* was not relevant to his decision to lift or maintain the suppression order in *Pell*. He said that *Chaarani* could be distinguished from *Pell* on the basis that the former involved an application to suppress a guilty verdict *after* an already heavily publicised trial,[219] whereas the order in *Pell* involved an application at the commencement of the proceedings to suppress *both* the trial and the subsequent guilty verdict.[220] Chief Judge Kidd put forward two related arguments as to why this distinction rendered *Chaarani* irrelevant. His first argument focused on an observation of the Court of Appeal in *Chaarani* that to prevent the publication of a verdict *after* a trial itself had been widely publicised would undermine public confidence in the administration of justice because those who were aware of the trial through media reports would be 'rightly concerned' at being denied information regarding the verdict.[221] As the order in *Pell* suppressed *both* the trial and the verdict, Kidd CJ said that the 'significant consideration' of maintaining public confidence in the administration of justice by allowing publication of the verdict did not exist in *Pell*.[222] This reasoning, however, misconstrues the role that considerations of public confidence played in the decision in *Chaarani*. Crucially, the Court of Appeal's comment regarding the preservation of public confidence in the administration of justice was not made in the context of its discussion of whether a suppression order was necessary on the facts;[223] rather, in the Court of Appeal's own words, it was an entirely 'separate consideration'[224] made only after it had already affirmed the correctness of the primary judge's decision that an order suppressing the guilty verdict was not necessary because jury directions were sufficient to negate the risk of prejudice.[225] Understood this way, the decision in *Chaarani* that jurors can disregard an accused's prior

[218] *Chaarani* (n 73) [42]–[43] (Maxwell P, Beach and Hargrave JJA).

[219] *Pell (Review of Suppression Order)* (n 9) [19] (Kidd CJ).

[220] Ibid [20].

[221] Ibid [19], quoting *Chaarani* (n 73) [46] (Maxwell P, Beach and Hargrave JJA).

[222] *Pell (Review of Suppression Order)* (n 9) [20] (Kidd CJ).

[223] *Chaarani* (n 73) [46] (Maxwell P, Beach and Hargrave JJA).

[224] Ibid.

[225] Ibid [43]–[46].

conviction arising from an earlier trial was, contrary to the view of Kidd CJ, *entirely* relevant to the question of the necessity of the order in *Pell*.

The second argument advanced by Kidd CJ to distinguish *Chaarani* focused on an observation made by the Court of Appeal that, compared to the suppression of a verdict alone, 'entirely different considerations' will apply if, as was the case in *Pell*, 'in anticipation of a subsequent or "back-to-back" trial, a suppression order was made at the commencement of the first trial, to operate until the conclusion of the second trial'.[226] Unfortunately, apart from the fact that knowledge of the trial will already be in the public domain when a verdict alone is sought to be suppressed and cannot be 'put back in the bottle',[227] the Court of Appeal did not indicate what those considerations might be or how they might be relevant. However, the Court of Appeal's reference to 'back-to-back' trials involving different considerations does not justify the outright dismissal of *Chaarani* as irrelevant; nor should it be taken to suggest that an order preventing the media's reporting of a trial itself as well as a verdict, as in *Pell*, should be granted more readily than an order suppressing publication of a guilty verdict alone after a publicised trial. Not only would such an approach be inconsistent with *Taylor (BC)* and *Talia*, but it is also manifestly illogical to suggest that the capacity of jurors to disregard an earlier trial and guilty verdict will differ depending on whether the question is asked at the commencement of the earlier trial or after a guilty verdict has been handed down. Indeed, in both contexts the issue is the same: jurors empanelled in a latter case are either ordinarily capable of disregarding knowledge of an earlier trial and verdict, or they are not.

In addition to the criticisms just discussed, it is also worth reflecting on a comment made by Kidd CJ in his reasons for refusing to revoke the order that publication of the guilty verdict in the first trial would 'render nugatory' the decision to hear the sets of charges separately.[228] The decision to hear the cathedral and swimmers charges in separate trials was made for the same reason that the suppression order was granted: to avoid the risk that a jury hearing both sets of charges in a single trial would engage in impermissible tendency reasoning.[229] Naturally, Kidd CJ's view that the decision to hear the charges separately would be undermined by publication of Pell's guilty verdict is entirely consistent with the protective assumption clearly adopted by his Honour that jurors in the second trial would not be able to put knowledge of

[226] Ibid [45].

[227] Ibid.

[228] *Pell (Review of Suppression Order)* (n 9) [21] (Kidd CJ).

[229] Ibid [11], [21]; *Pell* (n 5) [4], [41] (Kidd CJ).

the guilty verdict aside.[230] However, it is important to note that, under the strict approach, the decision to hear charges in separate trials (including following a formal order from the court to hear the charges separately — known as an order for severance)[231] should never be treated as ipso facto justification for suppression. Adopting such a course, which is effectively the approach in New Zealand,[232] assumes that publicity of the first trial will inevitably undermine the decision to hear charges separately because of the risk that jurors in the subsequent trial may hear through the media the evidence that justified separate trials in the first place.[233] This reasoning, however, ignores the crucial distinction between jurors being exposed to evidence that is not admissible on all charges in the formal environment of the court (where the impact on jurors is likely to be great and severance therefore warranted) and jurors being

[230] See *Pell (Review of Suppression Order)* (n 9) [12] (Kidd CJ).

[231] In Victoria, a judge has the discretion to order separate trials where an accused is charged with more than one offence in a single indictment and hearing the charges together would prejudice the accused: *Criminal Procedure Act 2009* (Vic) s 193(3)(a). Note that severance is relatively common in cases expected to 'arouse strong emotions or excite revulsion', including allegations of child sexual abuse, where it is thought that a single jury will find it difficult to follow directions to disregard evidence admissible in relation to some but not all of the charges before them: *R v TJB* [1998] 4 VR 621, 629–31 (Callaway JA, Phillips CJ agreeing at 623, Buchanan JA agreeing at 634). See also *De Jesus v The Queen* (1986) 68 ALR 1, 4–5 (Gibbs CJ).

[232] It is the '[u]sual, but not universal, practice' in New Zealand for an accused's name to be suppressed to avoid the possibility of propensity reasoning where an accused faces multiple trials for factually unrelated offences, or where multiple charges presented on a single indictment have been or may be severed: *CA 459/06* (n 147) 309 [69] (William Young P for William Young P and Robertson J). See, eg, *AJD* (n 147) [5], [9]–[10] (French J); *JR* (n 147) [12] (Collins J); *RTK v Police* (High Court of New Zealand, Heath J, 27 July 2006) [27]–[28]; *Shipton* (n 147) 239 [144]–[147] (Hammond J for the Court); *S* (n 147) [6] (Rodney Hansen J); *CA 459/06* (n 147) 308–9 [66]–[68] (Baragwanath J), 311 [80] (William Young P for William Young P and Robertson J); *M* (n 147) [32]–[34] (Whata J); *CA405/2016* (n 147) [17]–[18] (Winkelmann J for the Court); *CA314/2010* (n 147) [23]–[24] (Randerson J for the Court); *ASRS* (n 147) [9]–[10] (SM Harrop J); *Hines* (n 147) [21]–[22] (Lang J). Cf *R v Izett* [2020] NZHC 403, [51]–[54] (Venning J), where the severed charges were dissimilar; *Wood v New Zealand Police* (High Court of New Zealand, France J, 8 October 2003) [21]–[22], where the possibility of severance was too distant to order suppression. Unlike in other jurisdictions, suppression will usually be the case even when the respective trials are expected to be held some time apart: see, eg, *M* (n 147) [32] (Whata J), where identifying complainants and the laying of further charges would take up to 12 months. Cf *Young v The Queen* [2015] NZHC 426, [52], [56]–[57] (Asher J) ('*Young*'), where over 12 months would pass between the trials, but there was also a strong chance that the trials would be joined; *Taylor (NZ)* (n 147) [16] (Ellen France J for the Court), where the trial was not expected to commence for six months, and where the link between the respective charges was 'subtle and nebulous' and therefore could be appropriately dealt with by directions to the jury: at [15].

[233] See, eg, *CA 459/06* (n 147) 296 [2], 305 [48], 307 [58], 308 [66] (Baragwanath J), 309 [69], 310 [74]–[76] (William Young P for William Young P and Robertson J).

exposed to the same evidence *in media reports* at a time *before they know they will be jurors*.[234] As explained by Nordheimer J in *R v S-R (J)*:

> [T]here is a very different effect, it seems to me, in twelve persons, having been selected as jurors and knowing that they are tasked with deciding the issue of guilt of the accused, learning of problematic material in the midst of the trial contrasted with the effect on persons learning of such material when they have no idea that they will be a juror in a case to which the material relates. In the former situation there is not only the immediacy of the impact of such material on the jurors given their role, there are compelling reasons for the jurors to remember the information in the trial context *that do not exist in the pre-trial context*.[235]

It follows from this important distinction that, although the *reasons* for separate trials might be used in support of an application for suppression, the *fact* that a decision has been made to have separate trials to avoid juror prejudice should not alone alter the assumption established in the cases just discussed that jurors *ordinarily* should be able to perform their task free from prejudice in the face of media reports of prior proceedings involving an accused. This is the case even where the trials relate to similar offences and are conducted in reasonably close succession.

However, whatever criticisms might be made of the precise reasoning employed by Kidd CJ, it is also important to consider whether the *ultimate decision* to grant the order in *Pell* was compatible with the strict approach. In considering this, it is important to note that while the decision to grant a suppression order is a matter of principle and does not involve the exercise of a true judicial discretion,[236] it is nevertheless accepted that reasonable minds might differ as to whether an order is necessary on the facts of a particular case.[237] Indeed, this is understandable given the inherently imprecise and largely impressionistic nature of the inquiry and the fact that it unavoidably involves speculating about the likely impact of future events.[238] Therefore, the decision to grant a suppression order may not necessarily permit of only one

[234] See, eg, *Lawson* (n 61) [16] (Lasry J); *S-R (J)* (n 109) 535 [40] (Nordheimer J).

[235] *S-R (J)* (n 109) 535 [40] (emphasis added). This distinction was also alluded to by Cacchione J in *R v Shrubsall* [2000] NSJ No 315, [50]–[51].

[236] See above n 78 and accompanying text.

[237] See, eg, the comments of Maxwell P in *Nationwide News Pty Ltd v Farquharson* (2010) 28 VR 473, 476 [9] ('*Farquharson*'), albeit in a slightly different context.

[238] See, eg, *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643, 657 [85], where Basten JA said: 'The present exercise involves the application of ill-defined and imprecise conflicting principles, on the basis of speculation as to future consequences.'

correct answer but instead requires that judges be afforded a degree of latitude in their decision-making.[239] Hence, the pertinent question in assessing the legality of the suppression order in *Pell* is whether, based on the principles discussed in Part III, the decision to grant it was *reasonably open* to Kidd CJ in all of the circumstances of the case.[240] What can be said with some degree of confidence is that, having regard to the demanding nature of the test and the law's assumption that jurors are exceptionally resilient, it is likely that it would have been reasonably open to Kidd CJ to conclude, as suggested by Moses,[241] that a suppression order in *Pell* was not necessary based on the law's faith in the robustness of jurors. However, this does not inevitably lead to the conclusion that Kidd CJ should not have granted the order. While Kidd CJ's decision in *Pell* turns entirely upon the facts of the case, perhaps the best gauge as to the reasonableness of Kidd CJ's decision to make the order is to consider past decisions made by other judges to grant suppression orders in circumstances analogous to *Pell*.[242] The next section, therefore, examines available cases where suppression orders have been granted under the strict approach in circumstances where an accused has faced multiple, factually unrelated, back-to-back trials.

B *The 'Reasonableness' of the Order in* Pell *Based on Analogous Cases*

As with the handful of cases where suppression orders have been refused in the context of back-to-back trials (as discussed in Part III), there are very few publicly available decisions where orders have been granted in such

[239] See ibid 658 [89].

[240] *Farquharson* (n 237) 475 [8], 476 [10] (Maxwell P, Nettle JA agreeing at [19]); *Chaarani* (n 73) [37], [39] (Maxwell P, Beach and Hargrave JJA).

[241] Pelly (n 25).

[242] However, note that analogous cases have been said to be of 'limited assistance' in practice: *Lawson* (n 61) [14] (Lasry J).

circumstances — only five in Australia,[243] and none in either Canada[244] or the United Kingdom. However, the low number of decisions identified does not necessarily mean that orders in the context of back-to-back trials are not more frequently applied for or granted by courts *in practice*. In fact, there is no doubt that orders in such a context have been made by courts in Victoria much more

[243] *'Mr C'* (1993) 67 A Crim R 562, 563, 566 (Hunt CJ at CL, Smart J agreeing at 566, James J agreeing at 566); *R v A* (n 84) [1], [13]–[14], [19] (Hidden J); *L v ABC* (n 135) [5], [23] (Mildren J); *Mokbel [No 2]* (n 84) [8], [15], [17], [43], [61]–[64] (Kaye J); *Qaumi [No 15]* (n 61) [13]–[15], [90]–[91], [94]–[99] (Hamill J). In addition to reported decisions where reasons are provided, a number of cases refer to orders previously made to protect back-to-back trials on unrelated charges but where reasons for the orders themselves are not available: see, eg, *R v Wilson* [2007] VSC 498, [4]–[6] (Harper J); *A-G v Guardian Newspapers Ltd [No 3]* [1992] 1 WLR 874, 877 (Mann LJ). Note that there are also a number of decisions where the same accused was facing separate trials on unrelated offences where significant delay was expected between trials. In these cases, suppression orders were refused: see, eg, *Application by 'The Age'* (n 137) [32] (Kellam J); *R v Barrett* [2016] NSSC 11, [4], [24]–[26] (Gogan J), where an order suppressing publication of the first murder trial was refused because a second murder trial would not commence for nine months and appropriate directions to the jury would be sufficient; *Young* (n 232) [52], [56]–[57] (Asher J), where over 12 months would pass between trials, but there was also a strong chance that the trials would be joined; *R v Pearson* [2011] ONSC 1910, [19], [21] (B Glass J), where there would be a five-month delay between trials; *R v Riley* [2009] OJ No 3377, [3] (MR Dambrot J), where an order suppressing the outcome of a murder trial pending further murder charges was refused on the basis that the media agreed to refrain from further publicity, and there was uncertainty about when the accused would be tried on the additional charges.

[244] Note, however, that a blanket ban suppression order was recently issued by the Supreme Court of Nova Scotia in circumstances where an accused was charged with two counts of murder. The alleged murders occurred close in time to each other but nevertheless on separate occasions. The charges on the single indictment were severed at the consent of the prosecution and the accused, and each charge was set down to be heard in separate trials one month apart. This case is not identified or discussed in this article for two reasons. First, at the time of publication, an active suppression order prevented publication of all aspects of the trials. Providing further details would potentially have the effect of frustrating the suppression order and, while the order may not directly apply to prevent publication in Australia, the publication of this article would have the effect of making information that falls within the scope of the order available in Canada. Secondly, the reasoning of the judge, at least in this author's view, is contrary to the strict approach. It effectively relies entirely upon a presumption of unconscious bias, which is inconsistent with the usual assumption adopted by the Canadian courts that jurors are capable in even the most extreme circumstances of performing their role free from prejudice. The judge appears to treat the presumption of unconscious bias as 'triggered' whenever an accused faces highly publicised back-to-back trials. This, in turn, appears to effectively reverse the onus of proof, with those opposing the restriction on publication (usually the media) having to establish why the suppression order should not be made. This is inconsistent with the well-established principle that the applicant for suppression has the burden of establishing, by reference to cogent evidence, why the presumption of openness and freedom of expression — and, indeed, the presumption of juror robustness — should be displaced in any given case: see, eg, *Dagenais* (n 143) 890 [98] (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ).

frequently than the scant case law would suggest.[245] This is due to the fact that courts, especially inferior courts, often grant or refuse suppression orders without providing publicly available reasons.[246] In this respect, the provision of public reasons by Kidd CJ for the making of the suppression order in *Pell* is unusual. Of the five decisions identified, two are excluded from further discussion: one because the order was made under legislation where the test of necessity was not applicable,[247] and another because no consideration was given to the efficacy of jury directions to avoid prejudice as required under the strict approach.[248] This leaves just three relevant cases: *R v A*,[249] *R v Mokbel [No 2]* ('*Mokbel [No 2]*')[250] and *R v Qaumi [No 15] (Non-Publication Order)* ('*Qaumi [No 15]*').[251] Given the very fact-specific nature of the decision to make a suppression order, it is both difficult and of limited utility to undertake a direct and detailed comparison of these cases with *Pell*. Nevertheless, it is fair to say — given Pell's notoriety, the highly emotive reaction to sexual offences against children, the public's indignation regarding the incidence of and responses to institutional sexual abuse, and the level of local and international media coverage that the trial was expected to attract — that *Pell* involved circumstances that were at least as exceptional in terms of the impact on prospective jurors as the circumstance that justified suppression in each of the

[245] For example, such orders have been described as 'relatively common': Patrick O'Neil and Michael Bachelard, 'Why Media Can't Report on a High-Profile Case', *The Age* (Melbourne, 13 December 2018) 1.

[246] The practice of not providing *public* reasons for suppression, even if only after proceedings have been concluded, is entirely unacceptable: such lack of scrutiny risks decisions regarding suppression being made without sufficient justification or compliance with the law and has the capacity to undermine public confidence in the courts. For a discussion of the disciplining effect that the provision of reasons has on ensuring that judges comply with the open justice principle, see Jason Bosland and Judith Townend, 'Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom' (2018) 23(4) *Communications Law* 183, 194–5. On the common law obligation to give reasons as an incident of the open justice principle, including reasons for suppression orders, see Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38(2) *Melbourne University Law Review* 482, 498–502.

[247] *L v ABC* (n 135) [9] (Mildren J). A suppression order was made under s 57(1)(b) of the *Evidence Act 1939* (NT), where an order can be made where it is 'desirable' rather than 'necessary'.

[248] *'Mr C'* (n 243). A pseudonym order was granted rather than a suppression order because there was no statutory power to grant suppression orders at the time, and the court was of the view that such power was not available under the common law: at 563–4, 566 (Hunt CJ at CL). In any case, no consideration was given to the efficacy of jury directions in granting the pseudonym order.

[249] *R v A* (n 84).

[250] *Mokbel [No 2]* (n 84).

[251] *Qaumi [No 15]* (n 61).

cases identified. This, of course, suggests that Kidd CJ's decision to grant the order was within the scope of what was reasonable. The three cases are discussed in turn.

The first case is *R v A*, where Hidden J of the New South Wales Supreme Court granted a suppression order preventing the publication of the trial of three accused, who were brothers, on sexual assault offences alleged to have been committed against a number of young women.[252] The order was made to protect two further trials on similar charges involving two of the three accused.[253] The Australian Broadcasting Corporation ('ABC') applied to have the order revoked.[254] Counsel for the ABC referred Hidden J to the principles expounded by Spigelman CJ in *John Fairfax Publications*[255] and argued that the order was not necessary because judicial directions would be sufficient to ensure the accused's right to a fair trial.[256] Given the similarity of the offences at issue in the two trials — they were alleged to have taken place in the same location and in similar circumstances[257] — and the fact that the trials were to be conducted in close succession, Hidden J concluded that there was a 'very real danger, indeed a virtual inevitability, that at least one of the jurors in each of the subsequent trials' would identify similarities and would make a connection between the cases.[258] Moreover, '[n]otwithstanding the confidence that trial judges ought to have in the respect of juries for their directions',[259] Hidden J held, after 'anxious consideration',[260] that it was his view that the confluence of these factors would 'strain'[261] the confidence placed in the capacity of jurors to disregard publicity of the first trial. Thus, he held that the high standard of necessity recognised in *John Fairfax Publications* was satisfied and that a suppression order was therefore warranted.[262]

The second case is *Mokbel [No 2]*. The accused, a well-known Melbourne criminal identity, was facing a trial in the Victorian Supreme Court on a charge of murder arising out of Melbourne's so-called 'gangland wars', as well as five

252 *R v A* (n 84) [1], [10].
253 Ibid [1].
254 Ibid.
255 *John Fairfax Publications* (n 60) 366 [103] (Spigelman CJ).
256 *R v A* (n 84) [8] (Hidden J).
257 Ibid [10].
258 Ibid [12].
259 Ibid [14].
260 Ibid [12].
261 Ibid [14].
262 Ibid [13].

further trials for drug-related offences.[263] Justice Kaye made an order which had the effect of preventing publication of the murder trial until the conclusion of all proceedings against the accused.[264] The order was made to prevent prejudice to Mokbel's right to a fair trial in both the murder trial itself[265] and in the five forthcoming drug trials, the first of which was set to commence shortly after the murder trial.[266] A number of print and broadcast media organisations applied to have the order varied to permit publication of the murder trial.[267] In relation to the risk of prejudice to the drug trials, counsel for the media argued that the order should be lifted based on the 'extraordinary capacity of jurors to disregard antecedent publicity and prejudice to an accused and to focus judicially and fairly on the evidence in a trial'.[268] Accepting the usual assumption that jurors are exceptionally robust and that they assiduously adhere to directions to decide a case only upon the evidence,[269] Kaye J nevertheless refused to vary the order.[270] His Honour held that the seriousness of the allegations in the murder trial was enough to conclude that publicity would have the effect of causing 'substantial prejudice to the accused' in the drug trials.[271] In addition, his Honour held that aspects of the evidence in the murder trial, in particular evidence of the motive or setting for the murder, would further prejudice the drug trials because it would lead to the 'public perception that the accused was criminally involved in a very violent and corrupt drug scene'.[272] Justice Kaye was also of the view that reporting of the murder trial would risk 'reviving eroded and fading memories' of prior adverse publicity involving the accused in the minds of such jurors.[273] While Kaye J acknowledged that there was 'substantial force' in the argument advanced on behalf of the media applicants that jurors have the capacity to

263 *Mokbel [No 2]* (n 84) [1], [7]–[11], [15] (Kaye J).

264 Ibid [2], [62].

265 The concern in relation to the reporting of the murder trial was the risk that jurors in the murder trial would be exposed to prejudicial public commentary that would inevitably occur in *response* to such reports: ibid [30], [33]. A similar argument was accepted in the English case of *Re British Broadcasting Corporation* [2016] 2 Cr App R 13, 161 [11] (Sir Brian Leveson P).

266 *Mokbel [No 2]* (n 84) [1], [7], [43], [52] (Kaye J).

267 Ibid [4].

268 Ibid [23].

269 Ibid [33].

270 Ibid [70].

271 Ibid [44].

272 Ibid [46].

273 Ibid [50].

receive and follow directions to disregard prejudicial material,[274] the aforementioned factors meant that the circumstances in *Mokbel [No 2]* were 'exceptional' and that an order therefore was justified.[275]

The third and final case is *R v Qaumi [No 15]*. In that case, five accused were about to stand trial charged with 24 counts, including murder (the 'Hamzy' murder), arising out of a 'turf war' between two rival criminal gangs.[276] The trial judge, Hamill J, had previously ordered that two of the accused, Farhad and Mumtaz Qaumi, be tried separately on additional murder charges (the 'Antoun' murder charges) that were also contained on the original indictment.[277] This was because the Antoun murder (a contract killing) was unrelated to the Hamzy murder (part of a gangland turf war) and it would have been impossible 'to fashion directions to a jury that would overcome the prejudice inherent' in trying both sets of murder charges together.[278] The two accused applied for a suppression order to prevent publication of the first trial (the Hamzy murder trial) until the conclusion of the second murder trial (the Antoun murder trial), which was due to commence immediately after the first.[279] They argued that extensive coverage of the Hamzy murder trial would make it 'impossible to summon a jury pool that [was] not affected or influenced by the knowledge' arising from that trial, and that anticipated media coverage would 'render otiose the orders for severance and separation of the trials'.[280]

At the outset, Hamill J acknowledged that the question of whether to grant an order on the facts was 'not one that [was] easy to resolve and [that he had] deliberated and contemplated anxiously for some days before arriving at a decision'.[281] Nevertheless, accepting evidence that media coverage of the Hamzy murder trial was likely to be 'prominent, dramatic and sustained',[282] his Honour said:

> I am comfortably satisfied that, in the absence of some form of restriction on the publication, a large sector of the public will become aware of the fact that Farhad

[274] Ibid [59].

[275] Ibid [60]. Note, the Victorian Court of Appeal refused an application for leave to appeal the making of the order: *News Digital Media Pty Ltd v Mokbel* (n 84) 263–4 [56]–[59] (Warren CJ and Byrne AJA).

[276] *Qaumi [No 15]* (n 61) [14] (Hamill J).

[277] *R v Qaumi [No 3] (Severance and Separate Trials)* [2016] NSWSC 15, [70]–[74], [143]–[146] (Hamill J).

[278] *Qaumi [No 15]* (n 61) [19] (Hamill J).

[279] Ibid [7].

[280] Ibid [20].

[281] Ibid [6].

[282] Ibid [24].

> and Mumtaz Qaumi are alleged to have been the leaders of the group known as the Brothers for Life at Blacktown and directed the activities of that organisation and that those activities included criminality of the highest order. The public would be made aware that the criminality included a number of shooting incidents in which one man was killed and a number of others seriously wounded or injured. Included would be the allegation that an innocent child was injured when a shot gun was discharged in her home.
>
> There is little doubt that if a jury trying the Antoun murder case was aware of some or all of this material, it would be inimical to the accused's right to a fair trial. It would make the orders severing the counts otiose and it would not be possible (as I made clear in my judgment on severance) to direct the jury in such a way as to overcome the prejudice.[283]

Proceeding on the assumption that jurors are robust[284] and recognising that orders suppressing publication must only be granted in 'extreme or extraordinary' circumstances,[285] Hamill J said the question was whether

> members of the panel called for the Antoun trial [had] been influenced to a degree that the accused's trial would have to be postponed or where there [was] a real risk of a miscarriage if the case proceed[ed] shortly after the [Hamzy] trial.[286]

Based on the evidence, he concluded that 'unless there is some restriction or suppression on the publication of evidence in the [Hamzy murder] trial, it will not be possible to proceed with the Antoun trial for some significant time'.[287] However, as it was not possible or effective to postpone the trial,[288] order a change of venue,[289] or rely upon orders that the accused be referred to by pseudonym,[290] a suppression order delaying publication of the entirety of the evidence until the conclusion of the Antoun trial was found to be the only option available to protect the accused's right to a fair trial.[291] Appeals against

[283] Ibid [25]–[26].
[284] Ibid [63]–[65], [67]–[68].
[285] Ibid [53].
[286] Ibid [68].
[287] Ibid [72].
[288] Ibid [74]–[77].
[289] Ibid [78].
[290] Ibid [82]–[89].
[291] Ibid [90]–[91].

the order brought by Nationwide News Pty Ltd and the ABC were subsequently dismissed by the New South Wales Court of Criminal Appeal.[292]

While each of the cases just described indicates that Kidd CJ's order in *Pell* was far from outside the bounds of what was reasonable, it is also worth discussing the English case of *R v Beck; Ex parte Daily Telegraph plc* ('*Beck*').[293] In that case, three social workers were each charged with a large number of offences involving the extremely serious sexual and physical abuse of children within institutional care over a lengthy period of time.[294] Due to the large number of counts contained in the original indictment, a decision was taken for case management purposes to split it into three.[295] At the initiative of the trial judge, an order was made that there be no reporting of the first trial in order to prevent prejudice being caused to the second and third trials, each of which was scheduled to be held in close succession.[296] The order was appealed by various news media organisations.[297] The England and Wales Court of Appeal acknowledged that the fact of back-to-back trials will not itself be sufficient to justify the making of a suppression order.[298] Nevertheless, having regard to 'the nature of the allegations, the identity of the defendants concerned and the circumstances' of the offending, it was held that media reporting of the first trial would pose a substantial risk to the administration of justice in the subsequent trials.[299] While the Court of Appeal did not expressly mention the capacity of jurors to follow directions, this consideration is implicit in their finding that the shocking details of the case would be unforgettable and that, as a result, 'the difficulties of empanelling a second jury would be great, if not insurmountable'.[300] However, notwithstanding that the Court of Appeal was clearly of the view that the risks to the administration of justice could not be overcome by reliance upon jury robustness and that an order was therefore necessary,[301] the order was nevertheless overturned on discretionary grounds that do not exist under Australian law.[302] It was held that the horrific nature of

[292] *Qaumi (Appeal)* (n 61) 387 [6], 403 [93] (Bathurst CJ, Beazley P and Hoeben CJ at CL).

[293] *Beck* (n 161).

[294] Ibid 179 (Farquharson LJ for the Court).

[295] Ibid.

[296] Ibid 179–80.

[297] Ibid 178.

[298] Ibid 181.

[299] Ibid 182.

[300] Ibid.

[301] Ibid.

[302] Under s 4(2) of the *Contempt of Court Act 1981* (UK), a court can make an order restraining publication of proceedings where three conditions are met. First, there must be a real and

the allegations, the fact that they concerned officers of social services and that they were alleged to have occurred over a very long period of time, meant that the public interest in reporting the trial outweighed any risk that reporting might have posed to the administration of justice.[303] While the order was quashed by the Court of Appeal, the case nevertheless provides support for Kidd CJ's decision in *Pell*. This is because the circumstances in *Beck* bear significant parallels with those at issue in *Pell*, and there is no doubt that if *Beck* had been decided under Australian law — where, as explained earlier, there is neither a discretion to refuse an order once it is found to be necessary, nor a case-by-case balancing of interests between the benefits of publicity and an accused's right to a fair trial — the order, having been found to be necessary on the facts, would have been upheld.

V Conclusion

In response to Moses' claim that the suppression order made by Kidd CJ was not necessary to protect Pell's right to a fair trial,[304] this article has considered the power that courts have to make suppression orders for the purpose of avoiding juror prejudice and reflected upon the lawfulness of Kidd CJ's decision. Based on the principles and authorities discussed, it has been argued that a suppression order must only be granted as a matter of last resort, and this requires that a judge specifically conclude that strong judicial directions to the jury will not be sufficient to avoid the anticipated risk of prejudice. In assessing the likely effectiveness of judicial directions, the law requires that the utmost faith be placed in the robustness of jurors: it must be assumed that jurors, in all but exceptional circumstances, can disregard prejudicial knowledge of past proceedings, including in the context of back-to-back trials, and can decide a case entirely upon the evidence presented in court. This includes the capacity to disregard knowledge of a prior guilty verdict arising from recent proceedings

substantial risk of prejudice that would be caused by the publication; secondly, the order must be necessary to eliminate the threatened prejudice; and thirdly, the judge must exercise a 'discretion' to evaluate the priority between the right to a fair trial and competing public interests, including open justice and freedom of expression: see, eg, *Ex parte Telegraph (1993)* (n 116) 986 (Lord Taylor CJ for the Court); *Ex parte Telegraph (2001)* (n 144) 1991–2 [22] (Longmore LJ for the Court). However, it might be questioned whether such balancing of interests is compatible with the fact that the right to a fair trial in art 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) is unqualified and cannot be outweighed by competing interests in freedom of speech: see, eg, *A v BBC* (n 54) 607–8 [49]–[51] (Lord Reed JSC, Baroness Hale DPSC, Lords Wilson, Hughes and Hodge JJSC agreeing).

[303] *Beck* (n 161) 182 (Farquharson LJ for the Court).

[304] Pelly (n 25).

involving an accused. It concludes that while, at least in certain respects, the reasoning of Kidd CJ may not have been in strict compliance with the law, his Honour's ultimate decision to grant the order is consistent with decisions to grant suppression orders made by other judges in corresponding circumstances, including in cases where the circumstances were far less exceptional than in *Pell*.