PROCESS AND OUTCOME: THE CONSTRUCTION OF THE *PELL* ACQUITTALS

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In 2018, Cardinal George Pell was convicted by a jury of child sex offences committed 20 years earlier at St Patrick's Cathedral. At trial, the complainant's allegations were pitted against the testimony of church members that the defendant lacked opportunity. The tendency rule excluded allegations of Pell's other child sexual abuse. On appeal, a majority found the complainant highly credible, doubted the opportunity evidence, and upheld the convictions. However, on further appeal the High Court overturned the convictions, invoking procedural concerns relating to the prosecution's cross-examination and the defence's forensic disadvantage, and criticising the Court of Appeal majority for trespassing on the province of the jury by assessing credibility. The Pell *acquittals are constructions in which process values had at least as great an impact as the evidence.*

CONTENTS

I Introduction 373
II The Criminal Process Framework 376
  A Factual Uncertainty and the Presumption of Innocence 376
  B The Adversarial–Accusatorial System 379
  C The Jury and the Trial Judge 383
  D The Confined Conviction Appeal 387
  E The Jury's Advantage and Appeal Court Intervention 392
III The *Pell* Verdicts 396
  A Complainant Credibility and Defendant Opportunity 397
  B 'Unchallenged' Opportunity Witnesses 403
  C Delay, Forensic Disadvantage and the Right To Be Heard 408
  D Corroboration from Pell's Other Alleged Victims 413
IV Conclusion 420

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I Introduction

Pell is one of the highest profile criminal cases of modern times.[1] Following a complaint to police in 2015,[2] Cardinal George Pell, one of the most senior office holders of the Catholic Church, was charged with committing child sex offences in 1996–97 against two choir boys in St Patrick's Cathedral,[3] Melbourne, where he served as Archbishop. The case took a few twists and turns. In 2018, the first trial ended in a hung jury,[4] and the second trial in convictions on all charges.[5] In 2019, on the first appeal, the Victorian Court of Appeal ('VSCA') upheld the convictions by a majority.[6] But on further appeal in 2020, the High Court of Australia unanimously overturned the convictions and ordered acquittals.[7] Community opinion was similarly divided. Pell's detractors celebrated the initial convictions and first appeal outcome,[8] but then his supporters claimed vindication from the successful High Court appeal.[9]

[1] The *Pell* cases culminated in the High Court's decision in *Pell v The Queen* (2020) 268 CLR 123 ('*Pell (HCA)*'). See also *Pell v The Queen* [2019] VSCA 186 ('*Pell (VSCA)*').

[2] *Pell (HCA)* (n 1) 136 [2] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[3] Ibid 136 [1]. See also Melissa Davey, '"Disgraceful Rubbish": The Moment George Pell Reacted to Child Abuse Allegations', *The Guardian* (online, 25 February 2019) <https://www.theguardian.com/australia-news/2019/feb/26/disgraceful-rubbish-the-moment-george-pell-reacted-to-child-abuse-allegations>, archived at <https://perma.cc/HYA3-HS3J>.

[4] See *Pell (HCA)* (n 1) 136 [3] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Pell (VSCA)* (n 1) [31] (Ferguson CJ and Maxwell P).

[5] See *Pell (HCA)* (n 1) 136 [1] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Pell (VSCA)* (n 1) [356] (Weinberg JA).

[6] *Pell (VSCA)* (n 1) [352] (Ferguson CJ and Maxwell P, Weinberg JA dissenting at [1179]–[1180]).

[7] *Pell (HCA)* (n 1) 166 [129] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[8] See, eg, Julie Szego, 'Why Did Howard, Abbott and the Rest Come Out To Support George Pell?', *The Sydney Morning Herald* (online, 2 March 2019) <https://www.smh.com.au/national/why-did-howard-abbott-and-the-rest-come-out-to-support-george-pell-20190301-p5114b.html>, archived at <https://perma.cc/XB2J-KSJS>; David Marr, 'At the Verdict George Pell Didn't Flinch; He Just Pursed His Lips a Little. He Was Going Back to Jail', *The Guardian* (online, 21 August 2019) <https://www.theguardian.com/australia-news/2019/aug/21/at-the-verdict-george-pell-pursed-his-lips-he-was-going-back-to-prison>, archived at <https://perma.cc/6VAG-GQ26>; 'Thursday August 22', *The Drum* (Australian Broadcasting Corporation, 2019) 01:27–24:02 <https://www.abc.net.au/news/2019-08-22/the-drum-thursday-august-22/11440124>, archived at <https://perma.cc/NB3A-JQ7L>; Melissa Davey, 'Victim Advocates Cheer as Pell Appeal Rejected: "Hallelujah — Proof There Is a God"', *The Guardian* (online, 20 August 2019) <https://www.theguardian.com/australia-news/2019/aug/21/victim-advocates-cheer-as-pell-appeal-rejected-hallelujah-proof-there-is-a-god>, archived at <https://perma.cc/PT2L-K7R9>.

Of course, while serial criminal proceedings produced these successive outcomes, Pell's actual guilt or innocence remained an objective fact, unchanged ever since the offences did or did not take place in 1996–97.[10] As this article explores, the various court outcomes along the way did not hinge entirely on the actual facts of the matter, the evidence of those facts that happened to be available, or the identities and attitudes of the decision-makers. The outcomes were heavily mediated by the manifold complexities of criminal process. To a degree, criminal process is directed towards arriving at a factually accurate outcome. However, process has also become an end in itself.

Factual accuracy is a major goal of the criminal justice system,[11] but it is elusive. Arguably the larger overarching goal is to provide a process that is legitimate and trusted, so as to deter the parties and their supporters from taking matters into their own hands.[12] The criminal justice system is the 'last line of defense in the indispensable effort to secure the peaceful settlement of social conflicts'.[13] Trials play a 'critical role in the promotion of social order'.[14] In Australia, as in other common law jurisdictions, these goals are pursued through the adversarial model.[15] The parties and the community are both involved in the process. The parties are largely responsible for identifying the issues, and gathering and presenting evidence. The trial is more of a contest

9 See, eg, Chris Mitchell, 'ABC Skirts Public Duty To Fairly Cover Pell, Analyse Victorian Justice System', *The Australian* (Canberra, 13 April 2020) 20; Michael Quinlan, 'Exposing the Truth in the Persecution of Cardinal Pell', *The Catholic Weekly* (online, 8 October 2020) <https://www.catholicweekly.com.au/exposing-the-truth-in-the-persecution-of-cardinal-pell>, archived at <https://perma.cc/AT8K-9GMA>; David Ward, 'The Credibility Deficit in Victoria's Courts' (2021) 65(4) *Quadrant* 50, 51–5.

10 Jeremy Gans, 'Pell in Purgatory: If the High Court Is Right about the Evidence on Timing, What Went Wrong during the Prosecution and Hearings?', *Inside Story* (online, 13 April 2020) <https://insidestory.org.au/pell-in-purgatory>, archived at <https://perma.cc/8F26-KQBC>.

11 See, eg, Marvin E Frankel, 'The Search for Truth: An Umpireal View' (1975) 123(5) *University of Pennsylvania Law Review* 1031, 1033; William Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicolson, 1985) 117.

12 See generally Justice Stephen Gageler, 'Evidence and Truth' (2017) 13(3) *Judicial Review* 249.

13 Henry M Hart Jr and John T McNaughton, 'Some Aspects of Evidence and Inference in the Law' in Daniel Lerner (ed), *Evidence and Inference: The Hayden Colloquium on Scientific Concept and Method* (Free Press, 1959) 48, 52. See also Eduardo J Couture, 'The Nature of Judicial Process' (1950) 25(1) *Tulane Law Review* 1, 7; Charles Frederic Chamberlayne, 'The Modern Law of Evidence and Its Purpose' (1908) 42(5) *American Law Review* 757, 765.

14 James Jacob Spigelman, 'Judicial Appointments and Judicial Independence' (2008) 17(3) *Journal of Judicial Administration* 139, 139.

15 For a theoretical perspective, see Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986) 3–15. For a historical perspective, see generally John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003).

than an inquiry. The jury, made up of community representatives, determines the winner.

While this decentralised approach promises buy-in from litigants and the broader community, it also brings dangers such as the resource imbalance between the prosecution and defence, and the risk of jury error and prejudice. The system manages these issues through a complex set of principles of procedure and evidence law. The primary role of the trial judge is to enforce these rules and procedures, and ensure the contest is fair. The trial is generally considered to provide a final answer to the dispute. Despite this, the defence does have limited avenues of appeal in relation to process irregularities and the safety of the conviction. The outcome that emerges from this process is far from necessary or determined. Instead, it flows from a cascade of system choices, from the foundational adoption of the adversarial jury trial, through to the finer points of procedure, evidence law, and appeal jurisprudence.

This article explores some of these process choices and their interplay with verdict outcomes in the *Pell* cases. Part II takes a broad brush, examining the key features of the criminal proceedings: the presumption of innocence, the criminal trial as an accusatorial variant of the adversarial model, the role of the jury, and the confined criminal appeal. Part III picks up a number of strands from that discussion, providing a close-grained analysis of several specific principles of evidence law and criminal procedure and their operation in the *Pell* case. (This discussion is based upon the *Pell* appeals; I did not have access to trial transcripts.) The case was a battle between the complainant's allegations and the defence claim of lack of opportunity, supported by church witnesses. The weight attributed by the appellate courts to the competing evidence was affected by appellate attitudes regarding the role of the jury, counsel's duty to challenge opposing witnesses, and forensic disadvantage to the defence from delay. The exclusionary tendency rule played a key role prior to trial, keeping out evidence of Pell's other alleged child abuse.

This article highlights the indeterminacy resulting from the tension between process and outcome. The elaborate array of procedures and principles governing the adversarial jury trial renders the verdict indeterminate in two senses. First, in many cases it becomes difficult to predict what the ultimate outcome will be for a given body of evidence. Second, the eventual outcome is distanced from the objective facts of the case, making it difficult to ascribe any simple meaning to the criminal verdict. As well as being a factual statement of the defendant's guilt or innocence, the criminal verdict is also an expression of process values, such as autonomy, legitimacy, fairness, and finality. And the latter meanings may compete with and dilute the former.

II The Criminal Process Framework

A *Factual Uncertainty and the Presumption of Innocence*

The underlying difficulty giving rise to the criminal trial is the inherent uncertainty of past events. This section discusses factual uncertainty and the key principles for its management in the criminal trial: the presumption of innocence and the requirement of proof beyond reasonable doubt. According to leading authorities, these principles operate strongly in favour of the defence.[16] But they are not inflexible. Depending upon how stringently these principles are applied, a given body of evidence could result in either conviction or acquittal.

It is not surprising that criminal cases — more serious ones in particular — may leave a fact finder uncertain. Generally, when people commit crimes, they try to avoid detection. Even where defendants are brazen and take considerable risks, as the prosecution alleged in *Pell v The Queen* [2019] VSCA 186 ('*Pell (VSCA)*'),[17] it can be difficult for a fact finder, years later, to determine what truly occurred.[18] If a fact finder is left uncertain to any degree, the decision will carry an appreciable risk of error. In error management, the system favours the defendant since the prosecution generally has greater resources, and the defendant has more at stake.[19] The defendant is presumed innocent,[20] and the prosecution must prove guilt beyond reasonable doubt.[21] The demanding criminal standard of proof minimises the risk of the 'searing injustice' of a wrongful conviction.[22] However, the standard does not demand absolute

[16] See, eg, *Woolmington v DPP (UK)* [1935] AC 462, 481 (Viscount Sankey LC) ('*Woolmington*'); *R v Dookheea* (2017) 262 CLR 402, 411–12 [13]–[14] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ) ('*Dookheea*').

[17] *Pell (VSCA)* (n 1) [98]–[102] (Ferguson CJ and Maxwell P), [752]–[760], [1093]–[1096] (Weinberg JA).

[18] See Greg Byrne, 'The High Court in *Pell v The Queen*: An "Unreasonable" Review of the Jury's Decision' (2020) 45(4) *Alternative Law Journal* 284, 287.

[19] See, eg, *R v Horncastle* [2010] 2 AC 373, 385–6 [24]–[26] (Thomas LJ for the Court) ('*Horncastle*'); *Re Winship*, 397 US 358, 363–4 (Brennan J for the Court), 372 (Harlan J) (1970).

[20] See, eg, *Woolmington* (n 16) 481 (Viscount Sankey LC).

[21] See, eg, *Dookheea* (n 16) 426 [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

[22] *Van Der Meer v The Queen* (1988) 82 ALR 10, 31 (Deane J) ('*Van Der Meer*').

certainty because that may be unachievable.[23] Such a demand could grant criminals impunity.[24]

The demanding criminal standard increases the risk of mistaken acquittal,[25] particularly in sexual assault cases. Where the victim knows the perpetrator, as is usually the case, the victim may not make a prompt report. Adult victims may feel conflicted or confused, while child victims are susceptible to being groomed, threatened, or otherwise manipulated by the perpetrator.[26] The 20-year reporting delay in *Pell* is not unusual.[27] With delay, and physical and other evidence lost, the prosecution may be left with little more than the complainant's allegation. Even with a highly credible complainant, the demanding standard of proof can be very difficult for the prosecution to satisfy.

Recent decades have brought growing awareness of the prevalence and seriousness of child sexual abuse and the problems of enforcement. Since the latter part of the 20th century, ongoing reforms to evidence law and criminal procedure have addressed particular obstacles to prosecutions.[28] Further reform impetus has been provided by the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'), which ran from 2013 to 2017 — 'Australia's longest-running Royal Commission'.[29] Quite apart

[23] See *Dookheea* (n 16) 422–3 [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ); *Briginshaw v Briginshaw* (1938) 60 CLR 336, 360 (Dixon J), quoting Thomas Starkie, *A Practical Treatise of the Law of Evidence*, ed George Morley Dowdeswell and John George Malcolm (V & R Stevens and GS Norton, 4th ed, 1853) 817–18; *Miller v Minister of Pensions* [1947] 2 All ER 372, 373–4 (Denning J); *Secretary of State for the Home Department (UK) v AF [No 3]* [2010] 2 AC 269, 357 [72], 358 [74] (Lord Hoffman) ('*AF*'); *R v Lifchus* [1997] 3 SCR 320, 336–7 [39] (Cory J) ('*Lifchus*'); *R v Wanhalla* [2007] 2 NZLR 573, 587–8 [48] (William Young P, Chambers and Robertson JJ).

[24] See Jeremy Bentham, 'Principles of Judicial Procedure: With the Outlines of a Procedure Code' in John Bowring (ed), *The Complete Works of Jeremy Bentham* (William Tait, 1843) vol 2, 169, cited in William S Laufer, 'The Rhetoric of Innocence' (1995) 70(2) *Washington Law Review* 329, 333–4 n 17.

[25] See David Hamer, 'Probabilistic Standards of Proof, Their Complements and the Errors That Are Expected To Flow from Them' (2004) 1(1) *University of New England Law Journal* 71, 87.

[26] See Kamala London et al, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us about the Ways That Children Tell?' (2005) 11(1) *Psychology, Public Policy, and Law* 194, 202–3, 205; *R v MM* [2014] NSWCCA 144, [18], [27], [29]–[30] (Emmett JA, Price and Fullerton JJ).

[27] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 2017) vol 4, 30 ('*Royal Commission Final Report*').

[28] See generally Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan, 2020).

[29] 'About the Royal Commission', *Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Web Page) <https://www.childabuseroyalcommissionresponse.gov.au/about-the-royal-commission>, archived at <https://perma.cc/E6ZQ-9HXU>.

from specific reforms, a more general change of attitude in the community towards sexual assault may make it easier for the prosecution to rebut the presumption of innocence.

The 'beyond reasonable doubt' standard has been confirmed by the High Court on many occasions and is enshrined in the *Uniform Evidence Law* ('*UEL*').[30] This 'time-honoured formula'[31] establishes 'the highest standard of proof known to the law, and therefore requires a much higher state of satisfaction than proof on the balance of probabilities'.[32] However, it does not equate to an 'arbitrarily fixed percentage'.[33] '[T]he jury's function includes determining what *is* reasonable doubt — or to put that in more concrete fashion, whether the doubt which is left (if any) is reasonable doubt or not.'[34] Interpretation of the standard in a case like *Pell* could be influenced by a juror's attitude to the problem of child sexual assault. A juror conscious of the need to address the law enforcement problem may find a degree of doubt more tolerable than would a juror focused on the 'searing injustice' of a wrongful conviction.[35] The trial outcome is dependent upon how the system — including the individual juror — balances these concerns. Of course, it is possible that the appeal court will balance values differently, as may have occurred in *Pell*, where the High Court held that the jury 'ought … to have entertained a reasonable doubt'.[36]

[30] *Uniform Evidence Law* s 141(1) ('*UEL*'). The *UEL* (n 30) is the collection of the *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 2004* (Norfolk Island); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

[31] *Green v The Queen* (1971) 126 CLR 28, 31 (Barwick CJ, McTiernan and Owen JJ) ('*Green*'), quoting *Dawson v The Queen* (1961) 106 CLR 1, 18 (Dixon CJ). Traditionally it was assumed that juries understand the expression and that it is 'unwise for a trial judge to attempt explanatory glosses': *La Fontaine v The Queen* (1976) 136 CLR 62, 71 (Barwick CJ). In *Dookheea* (n 16), the High Court noted that, while not pursued in that case, this traditional view may be open to challenge: at 418 [28], 426 [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

[32] *Dookheea* (n 16) 425 [39].

[33] *R v Cavkic* (2005) 12 VR 136, 143 [228] (Vincent JA). See also ibid.

[34] *R v Chatzidimitriou* (2000) 1 VR 493, 498 [11] (Phillips JA) (emphasis in original), quoted with approval in *Dookheea* (n 16) 423 [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[35] Some empirical evidence suggests that jurors adopt a weaker interpretation of the criminal standard in sexual assault cases: Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 *Crime and Justice Bulletin* 1, 4. Cf Ward (n 9) 51.

[36] *Pell (HCA)* (n 1) 145 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also Andrew Hemming, 'Do Juries Understand the Criminal Standard of Proof of beyond Reasonable Doubt?' (2021) 30(3) *Journal of Judicial Administration* 103, 103–4.

Which verdict is factually correct is impossible to determine.[37] The difficulty of discerning the objective facts is the underlying problem that the standard of proof addresses.

B *The Adversarial–Accusatorial System*

The previous section discussed the inherent proof-related difficulties that may arise in a criminal trial, and how the consequent risk of error is managed by the criminal burden and standard of proof. Many other principles of procedure and evidence law may have a decisive influence on the verdict. These principles are largely implicated in two key pillars of the criminal process: its adversarial nature, and its use of a jury as the primary tribunal of fact. This section outlines the adversarial model, and the following section discusses the jury. Part II looks in more detail at particular principles of the adversarial jury trial arising in *Pell*.

The adversarial criminal process is not conducted by the court as an active free-ranging inquiry. Instead, the parties develop their competing case theories, identify the facts in issue, and gather and adduce evidence to advance their respective positions.[38] The court remains 'above the fray'[39] and does not '[descend] into the arena'.[40] It adjudicates the contest, but in a relatively passive manner.

Actually, the adversarial model is a poor fit for criminal justice. It is premised on the notion of an 'equality of arms',[41] 'the existence of contestants who are more or less evenly matched',[42] whereas in criminal matters 'the adversaries wage their contest upon a tilted playing field'.[43] The prosecution, with the

[37] There is no 'gold standard': Michael L DeKay, 'The Difference between Blackstone-Like Error Ratios and Probabilistic Standards of Proof' (1996) 21(1) *Law and Social Inquiry* 95, 125. See also *Connelly v DPP (UK)* [1964] AC 1254, 1353 (Lord Devlin). DNA exonerations provide something close to a 'gold standard' for a very narrow range of cases: see Samuel Gross, 'How Many False Convictions Are There? How Many Exonerations Are There?' in C Ronald Huff and Martin Killias (eds), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge, 2013) 45, 46, 51.

[38] See Sir Richard Eggleston, 'What Is Wrong with the Adversarial System?' (1975) 49(7) *Australian Law Journal* 428, 429; Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts* (LexisNexis Butterworths, 6th ed, 2017) 641 [6.1].

[39] *R v Esposito* (1998) 45 NSWLR 442, 468 (Wood CJ at CL).

[40] *Yuill v Yuill* [1945] P 15, 20 (Lord Greene MR).

[41] *Horncastle* (n 19) 435 [26] (Lord Phillips PSC).

[42] See *Dietrich v The Queen* (1992) 177 CLR 292, 354 (Toohey J).

[43] Daniel Givelber, 'Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?' (1997) 49(4) *Rutgers Law Review* 1317, 1360. See also Elisabetta Grande, 'Dances

assistance of the police, generally has far greater resources to gather and present evidence than the defence.

> [T]he adversarial system does not require that the adversaries be of equal ability. The system does its best to provide a level playing field, but it cannot alter the fact that some players are faster, or stronger, or more experienced than others.[44]

Nevertheless, criminal process has moved away from pure adversarialism and may be better described as 'accusatorial'.[45] Whereas the civil standard of proof, 'balance of probabilities',[46] treats the parties equally,[47] the criminal standard demands far more of the prosecution, as discussed in the previous section. The prosecution also carries a heavier burden in relation to gathering evidence. As 'a "minister of justice" … [t]he prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness'.[48] Although, on some occasions at least, prosecutors seem more interested in winning a conviction than in complying with their ethical obligations.[49]

The rationale of the adversarial–accusatorial process is complex and controversial.[50] Some argue that giving parties autonomy is effective in pursuing factual accuracy. '[E]ach side [will] strive as hard as it can, in a keenly partisan

of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth' in John Jackson, Máximo Langer and Peter Tillers, *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Hart Publishing, 2008) 145, 145.

44 *Nudd v The Queen* (2006) 225 ALR 161, 166 [11] (Gleeson CJ) ('*Nudd*').

45 See, eg, *Lee v Crime Commission (NSW)* (2013) 251 CLR 196, 202 [1] (French CJ), 266 [176]–[178] (Kiefel J); *Hofer v The Queen* (2021) 274 CLR 351, 361–2 [29] (Kiefel CJ, Keane and Gleeson JJ) ('*Hofer*').

46 See *UEL* (n 30) s 140(1).

47 David Hamer, 'The Civil Standard of Proof Uncertainty: Probability, Belief and Justice' (1994) 16(4) *Sydney Law Review* 506, 509, 535.

48 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* (Guidelines, 1 June 2007) 5 <https://www.childabuseroyalcommission.gov.au/sites/default/files/WEB.0119.001.0073.pdf>, archived at <https://perma.cc/2RA2-R36F>.

49 See, eg, *Anderson v The Queen* (1991) 53 A Crim R 421, 449 (Gleeson CJ); *Tran v The Queen* (2000) 105 FCR 182, 206–9 [149]–[168] (Black CJ, Weinberg and Kenny JJ); *R v Livermore* (2006) 67 NSWLR 659, 662–3 [18], 669 [47], 671 [53]–[54] (McClellan CJ at CL, Johnson and Latham JJ); *Gilham v The Queen* [2012] NSWCCA 131, [404] (McClellan CJ at CL, Fullerton and Garling JJ); *Wood v The Queen* [2012] NSWCCA 21, [604]–[634] (McClellan CJ at CL); *Wood v New South Wales* [2018] NSWSC 1247, [552], [1332]–[1345] (Fullerton J).

50 This discussion builds on David Hamer and Gary Edmond, 'Forensic Science Evidence, Wrongful Convictions and Adversarial Process' (2019) 38(2) *University of Queensland Law Journal* 185, 189–95.

spirit, to bring to the court's attention the evidence favourable to that side.'[51] '[P]artisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'[52] This argument has obvious weaknesses. The adversarial system suffers a 'combat effect'.[53] A lawyer will not 'concede the existence of any facts if they are inimical to his client and he thinks they cannot be proved by his adversary'.[54] The evidence that is placed before the court is likely to be the 'partisan and coerced residue … culled by the parties with a view not so much to establishing the whole truth as to winning the case'.[55]

While some defend the adversarial model as furthering factual accuracy, others say it expresses scepticism about the feasibility of this goal, 'scepticism towards an objective reconstruction of reality'.[56]

> 'Since no belief or idea regarding human affairs' was considered 'exclusively or demonstrably true', a third party factual enquiry was regarded as an imposition upon the parties of an arbitrary single-sided reconstruction of reality.[57]

In an environment of mistrust of bureaucracy and government,[58] such an imposed verdict may be insufficiently acceptable to head off vigilantism. Giving the parties control and autonomy[59] is the best way to ensure that the parties 'believe that justice has been done regardless of the verdict'.[60] It may reduce the 'feelings of resentment that will be aroused if a party to legal proceedings

[51] Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1950) 80.

[52] *Herring v New York*, 422 US 853, 862 (Stewart J for the Court) (1975).

[53] Langbein (n 15) 103–5.

[54] Frank (n 51) 84. See also Frankel (n 11) 1038–9; Eric S Fish, 'Against Adversary Prosecution' (2018) 103(4) *Iowa Law Review* 1419, 1446–7.

[55] Hart Jr and McNaughton (n 13) 53.

[56] Grande (n 43) 147.

[57] Ibid 152 (citations omitted), quoting Mirjan Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84(3) *Yale Law Journal* 480, 532 ('Structures of Authority').

[58] See Damaška, 'Structures of Authority' (n 57) 510–11, 521, 532–3; Michael Asimow, 'Popular Culture and the Adversary System' (2007) 40(2) *Loyola of Los Angeles Law Review* 653, 658, 662–6.

[59] See PD Connolly, 'The Adversary System: Is It Any Longer Appropriate?' (1975) 49(7) *Australian Law Journal* 439, 441; John D Jackson, 'Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach' (1988) 10(3) *Cardozo Law Review* 475, 484; John Thibaut and Laurens Walker, 'A Theory of Procedure' (1978) 66(3) *California Law Review* 541, 546.

[60] Thibaut and Walker (n 59) 551. See generally Justin Sevier, 'The Truth–Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems' (2014) 20(2) *Psychology, Public Policy, and Law* 212; Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006) 115–24.

is placed in a position where it is impossible for him to influence the result'.[61] The disappointed litigant may feel '[t]he judge … let me make my case, he listened. … I left court disappointed but not bitter'.[62] 'The point goes further', beyond litigants, to their 'family and friends … [and] the wider public'.[63]

This discussion reveals a tension between process and outcome in the criminal justice system. On one view, the adversarial process furthers the goal of accurate outcomes. A competing view is that the adversarial system has given up on 'substantive truth', substituting '"formal" or "procedural" truth' in its stead.[64] One instance of the latter is the criminal justice system's efforts to level the playing field which, rather than strengthening the defence, often appear to '[handicap]' the prosecution.[65] This point is accentuated in *Pell* because, exceptionally, *Pell* was not a particularly uneven contest. Pell, a cardinal and a senior member of the Vatican, obtained the support of leading counsel and, as explored in Part III, numerous members and officers of the Church. He was a beneficiary of the 'wealth effect':[66] the fact that the system 'is intrinsically skewed to the advantage of wealthy defendants'.[67] As one *Pell* observer noted, '[w]hen you have the money you can afford a full-on defence … not only the lawyers but their team behind them … whereas the ordinary punter accused of anything can't afford that'.[68]

[61] *AF* (n 23) 355 [63] (Lord Phillips).

[62] Frederick Wilmot-Smith, 'Justice eBay Style' (2019) 41(18) *London Review of Books* 27, 31.

[63] *AF* (n 23) 355 [63] (Lord Phillips). See also Charles Nesson, 'The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts' (1985) 98(7) *Harvard Law Review* 1357, 1368 ('The Evidence or the Event?').

[64] Chrisje Brants and Stewart Field, 'Truth-Finding, Procedural Traditions and Cultural Trust in the Netherlands and England and Wales: When Strengths Become Weaknesses' (2016) 20(4) *International Journal of Evidence and Proof* 266, 269.

[65] Jenny McEwan, 'Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial' in Antony Duff et al (eds), *The Trial on Trial: Truth and Due Process* (Hart Publishing, 2004) vol 1, 51, 68.

[66] Langbein (n 15) 102.

[67] Ibid 103.

[68] Peter Kelso, lawyer and supporter of child sexual abuse victims, quoted in John Ferguson, 'George Pell's $3m Legal Bill To Clear His Name', *The Weekend Australian* (Canberra, 3 July 2021) 3. See also Melissa Davey, 'Sydney Archdiocese Runs Ads Seeking Donations for Cardinal George Pell's Legal Fees', *The Guardian* (online, 8 May 2018) <https://www.theguardian.com/australia-news/2018/may/09/sydney-archdiocese-runs-ads-seeking-donations-for-cardinal-george-pells-legal-fees>, archived at <https://perma.cc/WL4Q-4Q9N>; Simone Fox Koob, '"Thoughtful, Considerate": The People Who Wrote Character References for George Pell Revealed', *The Age* (online, 27 February 2019) <https://www.theage.com.au/national/victoria/thoughtful-considerate-the-people-who-wrote-character-references-for-george-pell-revealed-20190227-p510pp.html>, archived at <https://perma.cc/M54J-7Q4J>; Szego (n 8).

C *The Jury and the Trial Judge*

While the trial judge is responsible for ensuring that legal process is properly followed, fact finding is the province of the jury. Just as the adversarial model gives parties control in an effort to make verdicts more acceptable to them, particularly the loser, a key rationale of the jury is to make the verdict more acceptable to the community. The High Court has described the jury as 'the constitutional arbiter of guilt',[69] and emphasised its 'central place … in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community'.[70] A jury verdict, issued by 'a kind of microcosm of the community',[71] has 'a special authority and legitimacy'[72] and is more likely to accord with community views.

This route to verdict legitimacy and acceptability is not unproblematic. The jury verdict, unlike that of judges and tribunals, is inscrutable. Jury deliberations are secret and, as lay people, jurors are not expected to provide written reasons. This is difficult to square with the view that 'a fair trial entail[s] that the accused, and indeed the public, must be able to understand the verdict. This [is] "a vital safeguard against arbitrariness"'.[73] Further, it reflects judicial doubts that extend beyond jury writing skills. Disconcertingly, the High Court opines that jurors

> are both unaccustomed and not required to submit their processes of mind to objective analysis … A reasonable doubt which a jury may entertain is *not to be confined to a 'rational doubt', or a 'doubt founded on reason'*.[74]

[69] *Jones v The Queen* (1997) 191 CLR 439, 442 (Brennan CJ) ('*Jones*'). See also *M v The Queen* (1994) 181 CLR 487, 502 (Brennan J) ('*M*'); *Pell (HCA)* (n 1) 145 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[70] *R v Baden-Clay* (2016) 258 CLR 308, 329 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ) ('*Baden-Clay*'). See also *Cheatle v The Queen* (1993) 177 CLR 541, 549, 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Cheatle*'); *Alqudsi v The Queen* (2016) 258 CLR 203, 255 [131] (Gageler J), discussing Sir Patrick Devlin, *Trial by Jury* (Stevens & Sons, 1966) 164.

[71] *MFA v The Queen* (2002) 213 CLR 606, 621 [48] (McHugh, Gummow and Kirby JJ) ('*MFA*'), quoted in *Pell (VSCA)* (n 1) [41] (Ferguson CJ and Maxwell P), [603] (Weinberg JA).

[72] *MFA* (n 71) 621 [48], quoted in *R v BJB* [2005] NSWCCA 441, [34] (Rothman J).

[73] John Jackson, 'Unbecoming Jurors and Unreasoned Verdicts: Realising Integrity in the Jury Room' in Jill Hunter et al (eds), *The Integrity of Criminal Process: From Theory into Practice* (Hart Publishing, 2016) 281, 297 ('Unbecoming Jurors'), citing *Taxquet v Belgium* [2010] VI Eur Court HR 145, 176–7 [90].

[74] *Green* (n 31) 33 (Barwick CJ, McTiernan and Owen JJ) (emphasis added). Other jurisdictions identify reasonable doubt with a 'doubt based on reason': Jon O Newman, 'Beyond "Reasonable Doubt"' (1993) 68(5) *New York University Law Review* 979, 983. See also *Lifchus* (n 23) 335 [36] (Cory J).

As with party autonomy, the jury's role is often justified in terms of verdict accuracy as well as verdict acceptability. '[T]he purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters.'[75] Jurors possess 'worldly wisdom' that gives them a greater 'capacity [than judges] for evaluating the cogency of a witness's evidence'.[76] The requirement of jury unanimity (or high majority)[77] is believed to '[promote] deliberation and [provide] some insurance that the opinions of each of the jurors will be heard and discussed'.[78]

Whatever epistemic benefits a jury may bring, juries also carry epistemic risks. Indeed, 'the law of evidence … owes an appreciable part of its provenance to a concern about the cognitive or decision-making capacities of jurors'.[79] Relevant evidence may be excluded because of the risk of jury 'prejudic[e]',[80] a concern that 'the jury are likely to give the evidence more weight than it deserves or … [that] the nature or content of the evidence may inflame the jury or divert the jurors from their task'.[81] Exclusionary rules traditionally operate more strongly against prosecution evidence,[82] but there are exceptions. Most notable is the rule excluding the sexual history of complainants[83] which has the goal of preventing the defence from invoking 'rape myths':[84] 'that a complainant is

[75] *Doney v The Queen* (1990) 171 CLR 207, 214 (Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Doney*'), quoted in *Pell (VSCA)* (n 1) [107] (Ferguson CJ and Maxwell P). See also *M* (n 69) 528–9 (McHugh J); Gans (n 10).

[76] *Jones* (n 69) 442 (Brennan CJ).

[77] See, eg, *Juries Act 2000* (Vic) s 46. In the first *Pell* trial, the jury was unable to reach the requisite majority: *Pell (VSCA)* (n 1) [356] (Weinberg JA). Only the Australian Capital Territory and the Commonwealth have not adopted a majority verdict requirement. Federal trials require unanimous verdicts: *Cheatle* (n 70) 562 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also *Rizeq v Western Australia* (2017) 262 CLR 1, 19 [37]–[38] (Bell, Gageler, Keane, Nettle and Gordon JJ), 74 [204] (Edelman J).

[78] *Cheatle* (n 70) 553 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (citations omitted). It is difficult to generalise as to whether a verdict arising from group deliberation is more accurate than the verdict of an individual. It 'depend[s] on a host of contextual and group-specific factors': Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* (Harvard University Press, 2012) 198.

[79] Frederick Schauer, 'On the Supposed Jury-Dependence of Evidence Law' (2006) 155(1) *University of Pennsylvania Law Review* 165, 166.

[80] See *UEL* (n 30) ss 53(3), 101(2), 135–7, 189(5)(a).

[81] *Festa v The Queen* (2001) 208 CLR 593, 609–10 [51] (McHugh J).

[82] See, eg, *UEL* (n 30) ss 18, 65(8), 101(2), 137.

[83] See, eg, *Criminal Procedure Act 1986* (NSW) ss 294CB(2)–(3); *Criminal Procedure Act 2009* (Vic) ss 340–6.

[84] See, eg, Julia R Schwendinger and Herman Schwendinger, 'Rape Myths: In Legal, Theoretical, and Everyday Practice' (1974) 1 (Spring–Summer) *Crime and Social Justice* 18, 18–21, 24.

more likely to have consented or that she is less worthy of belief' on account of her sexual experience.[85]

The defence in *Pell* was the beneficiary of a more longstanding exclusionary rule. The jury was not exposed to prejudicial evidence regarding Pell's other alleged child sexual abuse. As discussed in Part III(D), current reforms to the rule following the Royal Commission are making such evidence far more readily admissible. Had it been admissible in *Pell*, evidence of these allegations may have protected the jury convictions against the High Court reversal. Exclusion of relevant evidence is clearly a suboptimal solution. It weakens the connection between outcome and the objective facts. Like the admission of prejudicial evidence, exclusion also risks misleading the jury.[86] And when it becomes known that relevant evidence has been held back from the jury, the jury may feel misled,[87] and the process may lose legitimacy with participants and the broader community.[88]

When it comes to weighing evidence at the proof stage, juries are generally left to their own devices. However, '[e]xceptionally, judicial experience is sometimes accorded greater weight than the experience of a jury'.[89] The trial judge may provide a direction to warn the jury of an evidential danger that may not be apparent to them.[90] Traditionally, jury directions have favoured the defence;[91] however, there is growing recognition that evidence may play on jury prejudices against sexual assault complainants as well. Below I discuss directions raised by the *Pell* cases relating to complainant credibility and forensic disadvantage from delay. To direct a jury to avoid prejudicial reasoning may appear a better solution than excluding relevant evidence. However, this

85 *R v Darrach* [2000] 2 SCR 443, 465 [32] (Gonthier J).

86 *R v Handy* [2002] 2 SCR 908, 960 [149] (Binnie J). This is 'a pervasive phenomenon', dealing with which is 'the key function of evidence law': Alex Stein, *Foundations of Evidence Law* (Oxford University Press, 2005) x, 64.

87 See, eg, Richard Ackland, 'Jurors Who Sat in the Zachary Rolfe Murder Trial Might Now Feel Cheated: That's Understandable', *The Guardian* (online, 25 March 2022) <https://www.theguardian.com/law/commentisfree/2022/mar/26/jurors-who-sat-in-the-zachary-rolfe-trial-might-now-feel-cheated-thats-understandable>, archived at <https://perma.cc/95CL-S9L6>.

88 See *Royal Commission into Institutional Responses to Child Sexual Abuse: Parts III–VI* (Criminal Justice Report, 2017) 432–3, 436, 439–40, 445 ('*Royal Commission Criminal Justice Report (Parts III–VI)*').

89 *Jones* (n 69) 442 (Brennan CJ).

90 See, eg, *Longman v The Queen* (1989) 168 CLR 79, 91 (Brennan, Dawson and Toohey JJ) ('*Longman*').

91 See ibid 88–9.

solution too has its shortcomings. Concerns about jury comprehension of lengthy and complex directions are perennial.[92]

In limited situations, the trial judge may engage in a more dramatic intervention than evidence exclusion or jury direction. The trial judge may direct the jury to acquit. It is a matter 'of striking a balance between, on the one hand, usurpation by the judge of the jury's function, and on the other the danger of an unjust conviction'.[93] Trial judges should only intervene in the clearest of cases. The trial judge assumes the reliability of evidence and inferences favouring the prosecution,[94] and ignores evidence and arguments to the contrary.[95] Only if the prosecution case taken 'at its highest' would not support conviction may a trial judge direct an acquittal.[96]

The power to direct verdicts appears to be asymmetrical, favouring the defendant. A conviction 'where the law requires acquittal is insupportable',[97] although the converse does not necessarily hold.[98] Jurors must swear or affirm they will 'give a true verdict according to the evidence',[99] which is taken to mean 'determin[ing] the case on the merits *in accordance with the evidence*'.[100] Arguably the jury has leeway with regard to 'the full rigour of *the law*'[101] and may deliver a '"perverse" verdict of not guilty'.[102] This 'has traditionally been seen as a protection against oppressive laws or prosecutions'.[103]

[92] See, eg, Simon (n 78) 184–8. See generally Supreme Court of Victoria, *Simplification of Jury Directions Project Report: A Report to the Jury Directions Advisory Group* (Report, August 2012). Cf Trimboli (n 35) 10.

[93] *R v R* (1989) 18 NSWLR 74, 77 (Gleeson CJ) ('*R*'), quoted in *R v JMR* (1991) 57 A Crim R 39, 42–3 (Lee CJ at CL) ('*JMR*').

[94] *R* (n 93) 81 (Gleeson CJ), citing *Tau v Public Prosecutor* [1982] AC 136, 151 (Lord Diplock for the Court), both quoted in *JMR* (n 93) 42–3 (Lee CJ at CL) (emphasis added).

[95] *DPP (Cth) v Bradley* (2009) 3 ACTLR 159, 166–7 [30] (Gray P, Penfold and Marshall JJ), quoting *R v Bilick* (1984) 36 SASR 321, 337 (King CJ).

[96] *Doney* (n 75) 215 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[97] *R v LK* (2010) 241 CLR 177, 196 [31] (French CJ) ('*LK*').

[98] *Yager v The Queen* (1977) 139 CLR 28, 36 (Barwick CJ, Stephen J agreeing at 40), 46 (Mason J) ('*Yager*') may be viewed as offering limited support for a directed conviction, but French CJ indicates any such support could be viewed as being 'strictly obiter': ibid. Cf *Yager* (n 98) 38 (Gibbs J), 51–2 (Murphy J); Natalia Antolak-Saper, 'The Role of Directed Verdicts in the Criminal Trial' (2012) 21(3) *Journal of Judicial Administration* 146, 156–9. See also *R v Wang* [2005] 1 WLR 661, 670 [13] (Lord Bingham for the Court).

[99] *Jury Act 1977* (NSW) s 72A(1); *Juries Act 2000* (Vic) sch 3.

[100] Jackson, 'Unbecoming Jurors' (n 73) 291 (emphasis added).

[101] Ibid (emphasis added).

[102] *LK* (n 97) 197 [31] (French CJ).

[103] Ibid.

These various criminal process interventions — exclusionary rules, use rules, and directed acquittals — serve various purposes. As well as addressing the risk of factual error by juries, they are a 'means of shoring up "ex ante the legitimacy of inscrutable jury verdicts"'.[104] In the absence of a statement of the reasoning behind the jury verdict, they may be seen as giving 'the parties … sufficient "input" control into the process to ensure that unreasoned verdicts are not tainted by adversarial deficit'.[105] Trial judge interventions in the jury trial are efforts to ensure that community investment in the verdict is not bought at too great a cost, not only to outcome accuracy, but also to party investment in the process. However, they impose a further cost: an increase in process complexity and outcome indeterminacy.

D *The Confined Conviction Appeal*

Determining the historical facts of a criminal case can be challenging. In the absence of any clear insignia of correctness, the adversarial jury trial aims to provide an outcome that is nevertheless acceptable to the parties and the community. Of course, an unsuccessful defendant may still have difficulties in accepting the verdict. In the event of conviction, the defence may appeal. (In another procedural asymmetry, the traditional protection against 'double jeopardy' severely limits the prosecution's ability to appeal against an acquittal.)[106] As with trials, the appeal framework displays a concern for both '"process" and "outcome"',[107] with considerable tension between the two.

[104] Jackson, 'Unbecoming Jurors' (n 73) 301, quoting Mirjan R Damaška, *Evidence Law Adrift* (Yale University Press, 1997) 46.

[105] Jackson, 'Unbecoming Jurors' (n 73) 301.

[106] See Marilyn McMahon, 'Retrials of Persons Acquitted of Indictable Offences in England and Australia: Exceptions to the Rule against Double Jeopardy' (2014) 38(3) *Criminal Law Journal* 159, 159. It would not be possible for the prosecution to appeal against the *Pell* acquittals, for example, on the basis of fresh and compelling evidence of guilt, because the charges are not sufficiently serious: see *Criminal Procedure Act 2009* (Vic) s 327M. Note that 'fresh' may be given a narrow interpretation that would not extend, for example, to tendency evidence freshly admissible under the Royal Commission reforms discussed below in Part III(D): *A-G (NSW) v XX* (2018) 98 NSWLR 1012, 1051–64 [179]–[255] (Bathurst CJ, Hoeben CJ at CL and McCallum J).

[107] *Kalbasi v Western Australia* (2018) 264 CLR 62, 71 [15] (Kiefel CJ, Bell, Keane and Gordon JJ) ('*Kalbasi*'). The majority goes on to say this distinction 'may or may not be helpful'.

Appeal rights are limited.[108] This reflects 'the overarching societal interest in the finality of litigation in criminal matters'.[109] The system seeks to avoid 'the "danger that trial by jury will come to be regarded as a preliminary skirmish in a battle destined to reach finality before a group of appellate judges"'.[110] As well as efficiency, the finality principle aims to reinforce the status of the adversarial jury trial, and to enable the parties and the community to achieve closure.[111] The defence can generally only mount a single conviction appeal, albeit one which may, with special leave, be taken further to the High Court.[112] Restrictions on conviction appeals have sometimes given rise to the criticism that the system 'love[s] finality too much',[113] leaving wrongful convictions uncorrected.

The defence has several potential grounds of appeal. The Victorian appeal provision provides:

> [T]he Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that —
>
> (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
>
> (c) for any other reason there has been a substantial miscarriage of justice.[114]

[108] See Hamer and Edmond (n 50) 207–34; David Hamer, 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37(1) *University of New South Wales Law Journal* 270, 279–98 ('Wrongful Convictions').

[109] *R v Brown* [1993] 2 SCR 918, 923 (L'Heureux-Dubé J), quoted in *Crampton v The Queen* (2000) 206 CLR 161, 172 [15] (Gleeson CJ) ('*Crampton*'). See also Andrew Dyer and David Hamer, 'He "Came Across as Someone Who Was Telling the Truth": *Pell v The Queen*' (2020) 42(1) *Sydney Law Review* 109, 120.

[110] *Crampton* (n 109) 172 [16] (Gleeson CJ), quoted in *Standage v Tasmania* (2017) 28 Tas R 184, 216 [75] (Wood J), in turn quoted in *R v Bromley* [2018] SASCFC 41, [311] (Peek, Stanley and Nicholson JJ).

[111] See Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee on Its Inquiry into the Criminal Cases Review Commission Bill 2010* (Parliamentary Paper No 211, 18 July 2012) 82.

[112] After that, the options for further appeals are extremely limited: see Hamer and Edmond (n 50) 207–34; Hamer, 'Wrongful Convictions' (n 108) 279–86.

[113] *Burrell v The Queen* (2008) 238 CLR 218, 236 [72] (Kirby J).

[114] *Criminal Procedure Act 2009* (Vic) s 276(1). That provision is a modernisation of the Australian 'common form' provision based on the *Criminal Appeal Act 1907*, 7 Edw 7, c 23, s 3, which was

The first ground focuses on factual error and the second focuses on legal or procedural error, while the third is a more open-ended category, recognising that miscarriages of justice 'are too numerous and too different to permit prescription of a singular test'.[115] In relation to each ground, the court's determination balances considerations of process and outcome. Here I work through these three appeal grounds from broadest to narrowest.

To succeed under para (b), the defence must establish a process error or irregularity, for example that the trial judge wrongly admitted evidence or failed to provide a required jury direction. As a consequence of the adversarial nature of the trial, the defence may be prevented from claiming that an error occurred if they did not object at the time. Without this, arguably, 'the trial judge has made no error of law because he or she has not been asked for a ruling'.[116]

Even where there is a defence objection at trial and an error is established, this may not be enough for the appeal to succeed. If the error appears very minor or technical the appellate court may hold that there was no substantial miscarriage of justice and allow the conviction to stand.[117] But the appellate court will be wary of speculating about how a jury would have decided the case had the error not occurred; this may 'substitute trial by an appeal court for trial by jury'.[118] It is sometimes said that for the conviction to stand, it must have been 'inevitable' in the absence of the error:[119] an acquittal was not a 'reasonable possibility'.[120] But the appellate court must keep in mind that 'some errors will

repealed by the *Criminal Appeal Act 1968* (UK) sch 7. The 'common form' provision is used in various forms in other Australian jurisdictions: see David Hamer, 'Appeals against Conviction on Indictment: Process, Outcome and NSW Reform after Kalbasi v Western Australia' (2019) 43(3) *Criminal Law Journal* 201, 201 ('Reform after Kalbasi').

115 *Baini v The Queen* (2012) 246 CLR 469, 479 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Baini*').

116 *Papakosmas v The Queen* (1999) 196 CLR 297, 319 [72] (McHugh J). Cf at 311 [44] (Gaudron and Kirby JJ). According to Gleeson CJ, it is a 'cardinal principle … that … parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest … [and] what evidence to … seek to have excluded': *Nudd* (n 44) 164 [9]. See also *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262, 287 [149] (Spigelman CJ).

117 In other Australian jurisdictions this question arises under the proviso, and the prosecution bears the burden of proof: see Hamer, 'Reform after Kalbasi' (n 114) 206. Victoria's reformed provision shifts the burden to the defence: *Criminal Procedure Act 2009* (Vic) s 276(1); Hamer, 'Reform after Kalbasi' (n 114) 206. In *Baini* (n 115), it was suggested that '[a]s a practical matter, few, if any, appeals governed by s 276 [of the *Criminal Procedure Act 2009* (Vic)] will turn upon which party bears the onus of proof': *Baini* (n 115) 478 [23] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Cf Hamer 'Reform after Kalbasi' (n 114) 206–7.

118 *Baden-Clay* (n 70) 330 [66] (French CJ, Kiefel, Bell, Keane and Gordon JJ), quoted in *Lane v The Queen* (2018) 265 CLR 196, 210 [50] (Kiefel CJ, Bell, Keane and Edelman JJ) ('*Lane*').

119 *Baini* (n 115) 481–2 [31]–[33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

120 Ibid 493 [66] (Gageler J).

prevent the appellate court from being able to assess whether guilt was proved to the criminal standard'.[121] This may be so in 'cases which turn on issues of contested credibility';[122] credibility issues are believed to fall squarely in the jury's province, as discussed in the next section. In such cases, 'regardless of the apparent strength of the prosecution case, the appellate court cannot be satisfied that guilt has been proved'.[123]

Paragraph (c) recognises that, even without an error or irregularity at trial, a conviction may constitute a substantial miscarriage of justice. One such situation is where the defence adduces exculpatory evidence on appeal that was not before the trial court. If the evidence was reasonably available to the defence at trial and was deliberately or negligently held back, it will be classified as merely 'new' rather than 'fresh', and the appeal will only be allowed where 'the court is either satisfied of innocence or entertains such a doubt that the verdict of guilty cannot stand'.[124] The conviction may be upheld 'even though it may appear that if that evidence had been called and been believed a different verdict at the trial would *most likely* have resulted'.[125] As with the requirement of an objection at trial under para (b), this elevates finality and adversarial process over accuracy of outcome. If the contest was fair the defence is stuck with the outcome even though it is 'most likely' wrong. Counsel's forensic choices as to 'what witnesses to call [and] what evidence to lead'[126] are generally 'treated as final'.[127]

Even where the evidence is genuinely 'fresh' — in that it was not reasonably available at trial — the appellate court will require some persuasion. The conviction will only be overturned if the appellate court is satisfied that there is a '*significant possibility* that the jury … would have acquitted the appellant had the fresh evidence been before it at the trial'.[128] This is more demanding than para (b) under which the appeal will be upheld if a process error deprived the defendant of a '*chance fairly open* to him of being acquitted'.[129]

[121] *Kalbasi* (n 107) 71 [15] (Kiefel CJ, Bell, Keane and Gordon JJ). See also *Weiss v The Queen* (2005) 224 CLR 300, 316 [41], 317 [44]–[45] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

[122] *Kalbasi* (n 107) 71 [15] (Kiefel CJ, Bell, Keane and Gordon JJ).

[123] Ibid. See also Hamer, 'Reform after Kalbasi' (n 114) 207–8.

[124] *Ratten v The Queen* (1974) 131 CLR 510, 517–18 (Barwick CJ) ('*Ratten*'). See also at 516.

[125] Ibid 517 (emphasis added).

[126] *Nudd* (n 44) 164 [9] (Gleeson CJ).

[127] *R v Taufahema* (2007) 228 CLR 232, 290 [168] (Kirby J).

[128] *Mickelberg v The Queen* (1989) 167 CLR 259, 273 (Mason CJ) (emphasis added), quoted in *Van Beelen v The Queen* (2017) 262 CLR 565, 575 [22] (Bell, Gageler, Keane, Nettle and Edelman JJ).

[129] *Pollock v The Queen* (2010) 242 CLR 233, 252 [70] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added).

These restrictions on new and fresh evidence uphold the primacy of the adversarial trial.

Paragraph (a) provides the narrowest ground of appeal. The defence does not rely on any irregularity in the trial process, nor on fresh or new exculpatory evidence. The defence simply claims that the jury got the facts wrong; the conviction 'is unreasonable or cannot be supported'.[130]

As with the other grounds, trial strategy may limit the defence's ability to rely on this ground on appeal. The appellate court may not allow the defence to present a different factual theory from that relied upon at trial. In *R v Baden-Clay* ('*Baden-Clay*'),[131] the defendant, charged with his wife's murder,[132] sought an outright acquittal at trial, claiming 'he had nothing to do'[133] with her death.[134] Following conviction, he argued on appeal that because it was not proven beyond reasonable doubt that the killing was not accidental,[135] a manslaughter — not a murder — conviction was appropriate.[136] But the High Court held that it was not legitimate for the defence to raise on appeal a 'hypothesis [that] was never put to the jury by the respondent's counsel, either directly or indirectly. The hypothesis was contrary to, and excluded by, the case that the respondent put to the jury'.[137] The defence at trial, having taken 'a "considered tactical position"',[138] should not be allowed to depart from this position on appeal.

This was 'another difficulty' for the appellant in *Baden-Clay*.[139] The High Court also considered that the state of the evidence did not permit the appellate court to overturn the jury verdict.[140] The High Court indicated

> the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'.[141]

[130] *Criminal Procedure Act 2009* (Vic) s 276(1)(a).

[131] *Baden-Clay* (n 70).

[132] Ibid 314–15 [1]–[6] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

[133] Ibid 319 [32].

[134] Ibid 319 [31]–[32].

[135] Ibid 320–1 [35]–[38].

[136] Ibid 314–15 [2]–[3].

[137] Ibid 327 [59].

[138] Ibid 328 [61].

[139] Ibid 327 [59].

[140] Ibid 329–33 [64]–[79].

[141] Ibid 330 [66], quoting *M* (n 69) 494–5 (Mason CJ, Deane, Dawson and Toohey JJ).

In *Baden-Clay*, the High Court emphasised that 'the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way'.[142] On other occasions, however, the High Court's approach has been more prescriptive and less deferential to jury verdicts.[143] 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced.'[144] Appellate courts have greater scope for intervention than the trial judge in considering a directed acquittal.[145] The question for the appellate court is not simply whether 'there is evidence to sustain a verdict'.[146] 'The question is one of fact which the court must decide by making its own independent assessment of the evidence.'[147]

E *The Jury's Advantage and Appeal Court Intervention*

In determining whether to overturn an 'unreasonable or … unsupported' jury conviction under para (a), the appellate court must find a balance between process and outcome, between respect for the jury verdict and satisfaction in that verdict's correctness.[148] The same balancing issue arises under para (b) where the appeal court has found a legal error and is deciding whether to order a retrial or to let the conviction stand on the basis that conviction was inevitable even without error. In making its independent assessment of the evidence the appellate court should take into account '[the] jury's advantage in seeing and hearing the evidence'.[149] While occasionally acknowledging 'scientific research'

142 *Baden-Clay* (n 70) 329 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ). See also *Ratten* (n 124) 519–20 (Barwick CJ); *Kalbasi* (n 107) 121 [159] (Edelman J); Hamer, 'Reform after Kalbasi' (n 114) 211; Byrne (n 18) 285–6.

143 Occasionally in the past the High Court has referred to '[t]he deference which is due to a jury's verdict': *Knight v The Queen* (1992) 175 CLR 495, 511 (Brennan and Gaudron JJ), quoted in *Jones* (n 69) 443 (Brennan CJ). See also at 467 (Kirby J). However, in *Pell (VSCA)* (n 1), the majority indicated that there is 'no room for any notion of deference on an appeal such as this': at [106] (Ferguson CJ and Maxwell P).

144 *M* (n 69) 494 (Mason CJ, Deane, Dawson and Toohey JJ).

145 See *SKA v The Queen* (2011) 243 CLR 400, 425 [89] (Crennan J) ('*SKA*'); David Hamer, 'The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v The Queen*' (2017) 41(2) *Melbourne University Law Review* 689, 709–11 ('Unstable Province').

146 *M* (n 69) 493 (Mason CJ, Deane, Dawson and Toohey JJ).

147 Ibid 492 (citations omitted).

148 See Dyer and Hamer (n 109) 112.

149 *Pell (VSCA)* (n 1) [20] (Ferguson CJ and Maxwell P), [592] (Weinberg JA), quoting *M* (n 69) 494 (Mason CJ, Deane, Dawson and Toohey JJ).

to the contrary,[150] courts maintain the 'conventional assumption'[151] that the opportunity to observe witness demeanour gives the jury an advantage. In *Pell*, the High Court reiterated that 'the assessment of the credibility of a witness by the jury on the basis of what it has seen and heard of a witness in the context of the trial is within the province of the jury as representative of the community'.[152] In practice, however, this seems to leave appellate courts plenty of scope to intervene should they wish to do so.

On the face of it, a distinction can be drawn between a case where 'the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force',[153] and 'a case which turns on the jury's preference for the evidence of one witness over another witness'.[154] To overturn a verdict in the latter kind of case might be seen as 'usurping the function of the jury'.[155] '[J]uries play a particularly important role in cases involving sexual offences',[156] which may turn on complainant and defendant credibility. But even in these cases appellate courts overturn jury convictions.

In *Pell (VSCA)*, Weinberg JA, dissenting, would have overturned the jury convictions. He suggested that the notion that 'questions of credibility and reliability … are "quintessentially" for the jury is … somewhat incomplete'.[157] The High Court, overturning the convictions, indicated that it 'proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable'.[158] But the court then 'examines the record' and may find 'by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence … that the jury, acting rationally, ought nonetheless to have

[150] *Jones* (n 69) 467 (Kirby J). See also *Pell (VSCA)* (n 1) [922] (Weinberg JA); *Fennell v The Queen* (2019) 373 ALR 433, 451–2 [81] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ) ('*Fennell*').

[151] *Jones* (n 69) 467 (Kirby J).

[152] *Pell (HCA)* (n 1) 144 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also *Fennell* (n 150) 452 [81] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

[153] *M* (n 69) 494 (Mason CJ, Deane, Dawson and Toohey JJ). In a civil appeal, the High Court drew a similar distinction between 'the appearances of witnesses' and 'contemporary materials, objectively established facts and the apparent logic of events': *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ) ('*Fox*').

[154] *Hofer* (n 45) 370 [61] (Kiefel CJ, Keane and Gleeson JJ), citing *Castle v The Queen* (2016) 259 CLR 449, 472 [64]–[66].

[155] *Hofer* (n 45) 371 [61] (Kiefel CJ, Keane and Gleeson JJ).

[156] *Jones* (n 69) 467 (Kirby J).

[157] *Pell (VSCA)* (n 1) [595] (Weinberg JA).

[158] *Pell (HCA)* (n 1) 145 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

entertained a reasonable doubt'.[159] *Pell* is discussed in detail in the next part. Here I briefly consider two other recent High Court decisions illustrating the appellate court's broad scope for intervention.

In *Hofer v The Queen*,[160] the defendant had been convicted by a jury of the sexual assaults of two women on consecutive nights notwithstanding his testimony that he believed that each complainant consented.[161] On appeal, the High Court found that the prosecution's imputation in cross-examination of the defendant that his claimed belief in consent was a recent invention should not have been allowed.[162] However, a majority still considered that there had been no substantial miscarriage of justice[163] and, rather than ordering a retrial, dismissed the appeal.[164] The defendant's credibility was 'important'[165] but a majority of the High Court, purportedly without 'usurping the function of the jury',[166] still felt able to dismiss his claim on the basis that it was 'glaringly improbable'.[167] The defendant, who weighed 130 kg,[168] was much older than the complainants,[169] did not know them previously, and met them on a pretext of offering them accommodation.[170] The majority held that the defendant had

> pursued a course of conduct that was plainly focused upon having sex with them. The evident purpose of the appellant's plan was to reduce each complainant's agency by isolating her in his house, where, affected by alcohol, she would be at his mercy by reason of his height and weight.[171]

[159] Ibid. During the hearing of the High Court appeal, Bell J distinguished between 'credibility' and 'the reliability of the evidence, having regard to inconsistencies or other imperfections': at 128. See also discussion of the distinction between evidential source and evidential context in Hamer, 'Unstable Province' (n 145) 723–5.

[160] *Hofer* (n 45).

[161] Ibid 3 [1]–[2] (Kiefel CJ, Keane and Gleeson JJ).

[162] Ibid 11–12 [42]–[48].

[163] Ibid 19 [77] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 19 [80]).

[164] Ibid 19 [78] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 31 [124]).

[165] Ibid 3 [2] (Kiefel CJ, Keane and Gleeson JJ).

[166] Ibid 15 [61].

[167] Ibid 16 [63]. Justice Gordon objected that evidence could not be classified as 'glaringly improbable' without the making of a credibility assessment: at 35 [141]. Witness credibility 'had to be an important part of that assessment': at 34 [137].

[168] Ibid 6 [21] (Kiefel CJ, Keane and Gleeson JJ).

[169] Ibid 4 [5], [10], 6 [21].

[170] Ibid 4 [5], [10].

[171] Ibid 16–17 [65]. 'The extraordinary circumstance that the incidents in question occurred on consecutive nights is significant … because of what it reveals of the appellant's modus operandi

In *GAX v The Queen*,[172] the defendant was convicted of indecent dealing with a child and appealed on the basis that the conviction was not supported by the evidence.[173] The child complainant had given direct evidence of the defendant's sexual touching,[174] but the High Court considered that there was a 'real possibility that the complainant's evidence was a reconstruction and not an actual memory'.[175] This conclusion was based upon other parts of the complainant's evidence in which she said that she 'didn't know' what the defendant was doing in bed with her, and that she was 'asleep before and ended up finding out what happened'.[176] There was also a lack of correspondence on matters of detail between the complainant's account and the accounts of her mother and her sister.[177] The majority said

> [t]his is not a case in which the jury's advantage in seeing and hearing the evidence can provide an answer to the challenge to the sufficiency of the evidence to support the verdict.[178]

This discussion of conviction appeals has revealed further interplay between considerations of process and of outcome. Scope for the conviction to be overturned is greatest under para (b), where there has been a failure of process. In the interests of finality, the appellate court may allow the conviction to stand where it appears the failure was too minor to affect the outcome. However, in making such a finding the appellate court will be wary of trespassing on the jury's province. An appellate court has the least scope to intervene under para (a) where, without questioning the trial process, the defence simply argues the jury got the facts wrong. Here again trial by appellate court should not be substituted for trial by jury. However, as we have seen, where the appellate court has real doubts about the jury outcome it may well find a way of making the substitution. All grounds of appeal are subject to an adversarial restriction. On appeal, the defence may be prevented from relying upon a procedural objection, new evidence, or a case theory that was strategically held back at

and the intention which informed his plans': at 16 [65]. Notwithstanding the majority's claims to the contrary, it appears that the conclusion that there was a plan or a modus operandi does rely upon a view as to 'coincidence or tendency'.

172 (2017) 344 ALR 489 ('*GAX*').

173 Ibid 490 [1]–[3] (Bell, Gageler, Nettle and Gordon JJ).

174 Ibid 491 [6]–[7], 494 [22].

175 Ibid 496 [31], citing *R v GAX* [2016] QCA 189, [19] (Margaret McMurdo P).

176 *GAX* (n 172) 496 [29] (Bell, Gageler, Nettle and Gordon JJ).

177 Ibid 496 [30].

178 Ibid 496 [31].

trial. In such cases, respect for adversarial process trumps concerns about outcome accuracy.

III The *Pell* Verdicts

Part II examined the key pillars of criminal justice, relating them to the dual concerns of process and outcome. The risk of error stemming from the inherent uncertainty of past events is managed by the presumption of innocence and the requirement of proof of guilt beyond reasonable doubt. The adversarial jury trial involves parties and community representatives in the process, as a means of securing the legitimacy and acceptance of uncertain verdicts. This process is elaborated by principles addressing potential adversarial imbalance and jury prejudice. The trial judge and appellate court seek to ensure proper process is followed; they also have limited scope to direct or overturn jury outcomes. However, this raises the spectre of trespassing on the jury's province. Throughout, the tension between process and outcome generates verdict instability.

Part II took a fairly broadbrush approach to criminal process. This part provides a closer analysis of principles operating in the *Pell* case. Pell appealed primarily on the factual basis that the evidence was incapable of proving guilt beyond reasonable doubt.[179] The first section outlines the defence's argument, contrasting the way it was received by the VSCA majority and the High Court. The subsequent two sections consider principles dealing with aspects of the adversarial process — the duty to challenge opposing evidence, and forensic disadvantage from delay — which contributed considerably to the High Court upholding the defence appeal. The final section in this part considers the exclusionary tendency rule which kept from the jury other allegations of Pell's child sexual abuse. This rule is worth exploring, because under current reforms, those allegations could well have gained admission and may have prevented the convictions from being overturned by the High Court.

[179] The two grounds on which special leave was sought to appeal to the High Court were both tied to this factual basis: *Pell (HCA)* (n 1) 137 [7] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). Leave to appeal to the VSCA was refused on two other procedural grounds, including the trial judge's exclusion of the so-called 'moving visual representation' adduced in aid of the 'impossibility' argument: *Pell (VSCA)* (n 1) [16], [352] (Ferguson CJ and Maxwell P), [1115]–[1180] (Weinberg JA). See also Patrick Durkin and Michael Pelly, '"Confident': George Pell's Lawyers Target Pac-Man Video in Appeal', *The Australian Financial Review* (online, 1 March 2019) <https://www.afr.com/politics/confident-george-pells-lawyers-target-pacman-video-in-appeal-20190301-h1bvow>, archived at <https://perma.cc/U65J-Z7XA>.

A *Complainant Credibility and Defendant Opportunity*

The prosecution case in *Pell* rested entirely upon the credibility of the complainant, C.[180] C testified that the defendant, then Catholic Archbishop of Melbourne, committed sexual offences against him and another choirboy after a Sunday Mass in St Patrick's Cathedral in late 1996, and against C in a second incident after another Sunday Mass a few weeks later.[181] They were both aged 13 at the time.[182] The defendant did not testify, but in police interview, which was in evidence, he denied the offences and said he would not have had the opportunity to commit the offences.[183] The defence case received the support of a large number of opportunity witnesses from the Cathedral.[184] They testified to certain Church rituals and practices that, according to the defence, would have denied the defendant the opportunity to commit the offences.[185] Some opportunity witnesses offered specific recollections of the defendant's movements after Mass on the first occasion which were inconsistent with the allegations.[186]

The jury, convicting the defendant, must have found C highly credible. Presumably some members of the community, outraged at widespread child sexual abuse by Catholic priests and the Church's efforts to cover them up,[187] might feel motivated to fabricate criminal allegations against Cardinal Pell. Indeed, the trial judge, Kidd CJ, felt it necessary to direct the jury not to make Pell 'a scapegoat for any failings or perceived failings of the Catholic Church'.[188] However, there was no evidence that C (whose identity has not been disclosed)[189]

[180] *Pell (HCA)* (n 1) 136 [2], 148–9 [50]–[53] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[181] C was confused and imprecise about the dates of the offences, both with police and at trial. This presented some difficulties, but eventually the prosecution settled on 15 or 22 December 1996 for the first incident, and 23 February 1997 for the second: *Pell (VSCA)* (n 1) [211]–[216], [233]–[238] (Ferguson CJ and Maxwell P), [386], [403]–[406], [416]–[423], [667]–[681], [1016]–[1029] (Weinberg JA).

[182] *Pell (HCA)* (n 1) 139 [15] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[183] *Pell (VSCA)* (n 1) [181]–[185] (Ferguson CJ and Maxwell P), [927], [1091] (Weinberg JA); ibid 141 [26]. Of course, a defendant's denials may carry little credibility. This is what may be expected from a defendant whether guilty or innocent: see *R v Campbell* [2007] 1 WLR 2798, 2808 [30] (Lord Phillips CJ).

[184] See *Pell (VSCA)* (n 1) [585]–[587] (Weinberg JA).

[185] Ibid. See also at [456]–[536].

[186] See, eg, *Pell (HCA)* (n 1) 151 [61], 155 [79], 157 [88] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[187] See below nn 269–71 and accompanying text.

[188] *DPP (Vic) v Pell* [2019] VCC 260, [10] ('*Pell (Sentence)*').

[189] See *Judicial Proceedings Reports Act 1958* (Vic) s 4.

had this, or any other, motive to lie about the offences.[190] There were inconsistencies in C's evidence which could diminish his credibility, though these could also be explained away by reference to the delay in reporting.[191] It is interesting to note that Kidd CJ, for policy reasons, ruled that

> the complainant could not be cross-examined as to any past confidential communications that there may have been between himself and a medical practitioner or counsellor, arising out of any mental health issues that he may have had.[192]

It is unknown whether this kept out any material that may have damaged C's credibility. Despite the evidence of the opportunity witnesses, the jury clearly accepted C's evidence, concluding that the defendant did have the opportunity to commit the offences and took advantage of it.[193]

The VSCA majority noted that '[i]n recent years … the gap between the position of the jury and that of the appeal court has narrowed in important respects',[194] and questioned whether the jury any longer has an 'incomparable

[190] The absence of evidence damaging C's credibility did not actually bolster the prosecution case. It was more a matter of C's credibility not being damaged on that account: *Pell (VSCA)* (n 1) [70]–[71] (Ferguson CJ and Maxwell P), citing *Palmer v The Queen* (1998) 193 CLR 1, 9 [9] (Brennan CJ, Gaudron and Gummow JJ) ('*Palmer*'). Cf *Pell (VSCA)* (n 1) [1057] (Weinberg JA).

[191] See *Jury Directions Act 2015* (Vic) ss 54D(1)–(2); *Pell (VSCA)* (n 1) [75]–[76] (Ferguson CJ and Maxwell P), [898]–[899] (Weinberg JA). The VSCA was split on this. The majority indicated at [73] that

> where his responses involved any alteration of — or addition to — what he had said previously, the changes seemed to [them] to be typical of what occurs when a person is questioned on successive occasions, by different people, about events from the distant past.

See also at [91] (Ferguson CJ and Maxwell P). At [455], Weinberg JA in dissent indicated that

> there was ample material upon which his account could be legitimately subject to criticism. There were inconsistencies, and discrepancies, and a number of his answers simply made no sense.

See also at [928]. The High Court suggested this 'division … may be thought to underscore the highly subjective nature of demeanour-based judgments': *Pell (HCA)* (n 1) 148 [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). Their Honours concluded that the majority 'did not err' in finding that any inconsistencies did not 'require the jury to have entertained a doubt as to guilt': at 164 [118]. See also Dyer and Hamer (n 109) 113, 116.

[192] *Pell (VSCA)* (n 1) [991] n 248 (Weinberg JA), referring to *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C. Justice Weinberg compares this to the New South Wales exclusion of sexual history evidence in what was then s 293(3) of the *Criminal Procedure Act 1986* (NSW) (now s 294CB(3)). But it is more similar to the sexual assault communications privilege: see s 296. This privilege clearly pursues policy goals unrelated to factual accuracy.

[193] See *Pell (VSCA)* (n 1) [351] (Ferguson CJ and Maxwell P).

[194] Ibid [30].

advantage'.[195] The VSCA watched video of C's testimony and of many of the opportunity witnesses' testimony.[196] As it turned out, the VSCA majority agreed with the jury about C's credibility. The majority acknowledged 'the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses'.[197] And yet, this is what the majority seemed to do. The majority held that 'the content of what he said and *the way in which he said it* — including the language he used — *appeared* to us to be entirely authentic'.[198] He '*came across* as someone who was telling the truth'.[199] The VSCA majority said it did not '"experience a doubt" about the truth of C's account or the Cardinal's guilt'.[200] The VSCA majority was sufficiently impressed by C's evidence to uphold the convictions in the face of not only the defendant's denials but also a considerable body of negative opportunity evidence. Perhaps the VSCA majority relaxed the flexible standard of proof slightly to facilitate this outcome.[201]

In response, the High Court highlighted 'the functional or "constitutional" demarcation between the province of the jury and the province of the appellate court',[202] and indicated 'the appeal court should not seek to duplicate the function of the jury'.[203] Generally appellate courts should not watch video evidence from the trial.[204] Whereas the VSCA majority had formed their own extremely positive view as to C's credibility, the High Court merely proceeded '[u]pon the assumption that the jury assessed C's evidence as thoroughly credible and reliable'.[205] The strength of this assumption is unclear though. Perhaps it was weakened by the fact that the first hung jury was clearly less persuaded by C's

195 Ibid [35], noting several differences, including jury deliberations and the requirement of unanimity (or of a very high majority): at [35]–[38].

196 Ibid [31]–[32] (Ferguson CJ and Maxwell P), [1045] (Weinberg JA).

197 Ibid [57] (Ferguson CJ and Maxwell P), quoting *Fox* (n 153) 128–9 [30] (Gleeson CJ, Gummow and Kirby JJ). See also John Finnis, 'Where the Pell Judgment Went Fatally Wrong' (2019) 63(10) *Quadrant* 20, giving the London Metropolitan Police's 'Operation Midland' as an example of the dangers of relying upon demeanour-based credibility assessments: at 21.

198 *Pell (VSCA)* (n 1) [94] (Ferguson CJ and Maxwell P) (emphasis added) (citations omitted).

199 Ibid [91] (emphasis added).

200 Ibid [39].

201 See above nn 35–6 and accompanying text.

202 *Pell (HCA)* (n 1) 145 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

203 Ibid 145 [37].

204 Ibid 144 [36], citing *SKA* (n 145) 410–12 [30]–[31] (French CJ, Gummow and Kiefel JJ), 432–3 [116] (Crennan J).

205 *Pell (HCA)* (n 1) 164 [119] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also Byrne (n 18) 288.

evidence than was the second jury.[206] Ultimately the High Court did not consider the assumption strong enough to withstand the opportunity evidence. For procedural reasons, discussed in the following two sections, the High Court felt compelled to disregard potential shortcomings with the opportunity evidence and held that, even '[m]aking full allowance for the advantages enjoyed by the jury', 'the compounding improbabilities … nonetheless required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt'.[207]

Two interesting logical points arise in relation to the parties' competing arguments. The first is the defence argument involving 'compounding improbabilities'. The defence relied upon the improbability of a number of church practices, which individually would have denied the defendant opportunity, all being departed from at the same time. The defence initially listed '12 issues',[208] which Weinberg JA 'distilled' to ten.[209] The High Court focused on four:

1. That it was Church practice that the Archbishop is always accompanied by the Master of Ceremonies or Sacristan while robed;
2. That it was Archbishop Pell's practice to pause on the Cathedral steps for 10 minutes or longer to greet congregants after Mass (which meant he would have still been there when the assaults allegedly took place);
3. That the two boys were sopranos and would have been towards the front of the formal procession out of the Cathedral after Mass (and would not have been able to 'nick off' to the sacristy without being noticed and stopped); and
4. That the sacristy (where the assaults allegedly took place) was ordinarily a 'hive of activity' after Mass.[210]

206 I am grateful to one of the anonymous referees for highlighting this point.

207 *Pell (HCA)* (n 1) 164–5 [119] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

208 *Pell (VSCA)* (n 1) [119] (Ferguson CJ and Maxwell P), quoting defence counsel.

209 *Pell (HCA)* (n 1) 150 [56] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also ibid [841] (Weinberg JA).

210 *Pell (HCA)* (n 1) 150 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), here renumbered chronologically. The High Court engaged in a fine analysis of the facts relating to the 'hive of activity': at 162–4 [107]–[117]. The VSCA majority considered that a jury may have concluded the assaults took place in 'the 5–6 minutes of private prayer time' following Mass but preceding the 'hive of activity' in the sacristy: *Pell (VSCA)* (n 1) [300] (Ferguson CJ and Maxwell P). The High Court considered the VSCA majority to have made an error: the private prayer time would have overlapped with the time of the procession leaving too little time for the assaults before the 'hive of activity': *Pell (HCA)* (n 1) 162–4 [110]–[117]

According to defence counsel, 'when … you compound all those things, you come to the conclusion that you cannot accept what [C] says is true'.[211] This invokes the product rule of probabilities.[212] As the number of events increases, the probability of them all happening at the same time decreases exponentially.[213] Crucially though, this compounding effect is reduced to the extent that events are not independent.[214] (Events will only be independent in the relevant sense where 'the occurrence of one does not influence the probability of the occurrence of the other'.)[215] And in this case there are reasons to question the events' independence. An unusual incident may have disrupted several of the usual practices, or a disruption to one practice may have had flow-on effects to other practices. Further, if Pell wanted to sexually abuse the boys and saw a slim opportunity, he may have departed from the usual practices so as to take full advantage of it.

The other logical point concerns the competition between C's credibility and the opportunity evidence. If C was found to have perfect credibility, then, provided there was some possibility the defendant had opportunity, C's evidence would be sufficient for conviction. It does not matter if the possibility was slight, because C's testimony would suffice to prove the opportunity must have arisen.[216] The defence appreciated this point and sought to meet it on its own terms, presenting an absolute version of the opportunity defence — it was 'impossible' for the defendant to have committed the offence.[217] '[D]efence counsel in cross-examination pressed for answers to the effect that a particular practice

(Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also Finnis (n 197) 23–4. See generally Keith Windschuttle, 'Pell's High Court Appeal and "This Hiatus, This Gap"' (2019) 63(11) *Quadrant* 26, 26–8. There is not space for detailed engagement with this issue here. However, to a degree the High Court analysis hinges on its crediting of the opportunity witnesses. As discussed in this and the following part, the VSCA majority does not take the opportunity evidence at face value, which provides greater flexibility in the timeline: see below Part III(B). See also Gans (n 10).

[211] *Pell (VSCA)* (n 1) [118] (Ferguson CJ and Maxwell P).

[212] Ibid [842] (Weinberg JA).

[213] The probability of getting n heads in a row tossing a fair coin is $(½)^n$: see Ian Hacking, *An Introduction to Probability and Inductive Logic* (Cambridge University Press, 2001) 43–4.

[214] This was recognised by Weinberg JA: *Pell (VSCA)* (n 1) [1064] n 262; and by the Crown: *Pell (HCA)* (n 1) 134–5 (KE Judd QC) (during argument).

[215] Hacking (n 213) 41.

[216] See Byrne (n 18) 289.

[217] *Pell (VSCA)* (n 1) [114]–[151] (Ferguson CJ and Maxwell P). The paradoxical question arises as to how to deal with perfectly credible evidence that an impossible event occurred. This is a variation on the paradox of an immovable object meeting an unstoppable force. The traditional solution is that the question, as stated, cannot logically arise — either the evidence is not perfectly credible or the event is not truly impossible: see Roy A Sorensen, *Thought Experiments* (Oxford University Press, 1992) 153–4.

was not merely "common" but "invariable"'.[218] '[E]vidence such as this was, effectively, alibi evidence.'[219] Testimony that an impossible event occurred cannot be credible.[220] '[F]inding that a complainant is "compelling" is an inadequate mechanism for eliminating a doubt raised by an otherwise cogent alibi.'[221]

Contrary to the High Court's view, it was not just a 'rhetorical flourish'[222] for the defence to invoke impossibility. As the VSCA majority appreciated, it was 'a considered forensic decision'[223] based on 'perfectly sound forensic reasons'[224] and formed 'a central part of the defence case'.[225] Contrary to defence arguments in the High Court,[226] the VSCA majority did not reverse the burden of proof. It recognised that 'at all stages of the trial the burden of proof rested with the prosecution'.[227] It correctly identified the ultimate issue as being whether, '[t]aking the evidence as a whole',[228] 'the jury must have had a doubt about whether there was a realistic opportunity for the offending to occur, [or] a doubt that the particular sexual conduct occurred'.[229] 'If any of the evidence showed impossibility, in one respect or another, then the jury must have had a doubt.'[230] But anything less than impossibility could be trumped by a sufficiently strong assessment of C's credibility. Ultimately, the VSCA majority held that even 'uncertainty multiplied upon uncertainty'[231] was insufficient to

[218] *Pell (VSCA)* (n 1) [127] (Ferguson CJ and Maxwell P).

[219] *Pell (HCA)* (n 1) 127 (BW Walker SC) (during argument). See also George Pell, 'Applicant's Submissions', Submission in *Pell v The Queen*, M112/2019, 3 January 2020, 12 [35]. This strategy may have been used more strongly in the appeals than at trial: see ibid [140].

[220] See *R v Kanaan* (2005) 64 NSWLR 527, 559 [135] (Hunt AJA, Buddin and Hoeben JJ), quoted in *Pell (VSCA)* (n 1) [142] (Ferguson CJ and Maxwell P); *Palmer* (n 190) 12 [14] (Brennan CJ, Gaudron and Gummow JJ), quoted in *Pell (VSCA)* (n 1) [625] (Weinberg JA).

[221] *Pell (HCA)* (n 1) 127 (BW Walker SC) (during argument).

[222] Ibid 146 [42] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also *Pell (VSCA)* (n 1) [955] (Weinberg JA).

[223] *Pell (VSCA)* (n 1) [126] (Ferguson CJ and Maxwell P).

[224] Ibid [127].

[225] Ibid [114].

[226] *Pell (HCA)* (n 1) 129 (BW Walker SC) (during argument). See also Windschuttle (n 210) 26; Finnis (n 197) 22–3.

[227] *Pell (VSCA)* (n 1) [129] (Ferguson CJ and Maxwell P).

[228] Ibid [351].

[229] Ibid. See also Dyer and Hamer (n 109) 117–18.

[230] *Pell (VSCA)* (n 1) [130] (Ferguson CJ and Maxwell P).

[231] Ibid [170].

'demonstrate impossibility',[232] and C's 'entirely authentic'[233] account was still able to prove the defendant's guilt beyond reasonable doubt.

The High Court appeared not to appreciate the defence's strategic use of the 'impossibility' notion, accepting defence criticism that the VSCA majority 'failed to engage with whether, against [the opportunity] evidence, it was reasonably possible that C's account was not correct'.[234] Further, the High Court gave far greater weight to the impossibility argument than did the VSCA majority or the jury. As with C's credibility, the High Court did not make an independent assessment of the credibility of the opportunity witnesses. Instead, as discussed in the sections following, the weight the High Court attributed to the opportunity evidence was predominantly based on considerations of process rather than outcome accuracy.

B *'Unchallenged' Opportunity Witnesses*

This section contrasts the approaches taken by the VSCA majority and the High Court to the evidence of the opportunity witnesses. The VSCA majority accepted the existence of routines and practices to which the opportunity witnesses testified, but concluded that the defendant's opportunity was not altogether ruled out. The majority described the 'overall effect' of the opportunity evidence as being one of 'uncertainty and imprecision'.[235] The High Court held that the VSCA majority's treatment of the opportunity evidence was 'wrong',[236] largely for reasons of process. One of the High Court's criticisms was that key items of opportunity evidence, about which the VSCA majority expressed doubts, were 'unchallenged' by the prosecution.[237] However, the VSCA majority's approach is more defensible by reference to considerations of both process and outcome.

In *Fennell v The Queen* ('*Fennell*'),[238] the High Court indicated that

> the [appellate] court may take into account the realities of human experience, including the fallibility and plasticity of memory especially as time passes, the

232 Ibid.

233 Ibid [94].

234 *Pell (HCA)* (n 1) 147 [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also Finnis (n 197) 23–4.

235 *Pell (VSCA)* (n 1) [166] (Ferguson CJ and Maxwell P).

236 *Pell (HCA)* (n 1) 158 [91] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

237 Ibid.

238 *Fennell* (n 150).

> possibility of contamination of recollection, and the influence of internal biases on memory.[239]

This provides a good description of the VSCA majority's approach to the opportunity evidence in *Pell*. Given human fickleness, fallibility and distractibility, it is difficult to accept that the Church *practices* were 'invariable'[240] and 'never'[241] departed from. As the VSCA majority observed, 'statements about human behaviour can rarely be made with certainty'.[242] Moreover, having regard to the psychology of human memory, opportunity witnesses' *specific recollections* of two particular Masses, more than twenty years later, also strain credulity.[243] As the VSCA majority noted,

> the events being described are … of a kind which was repeated week after week, year after year, and involved the same participants, in the same setting, performing the same rituals and following the same routines.[244]

239 Ibid 452 [81] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

240 *Pell (HCA)* (n 1) 153 [67], 166 [127] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

241 Ibid 155–6 [79]–[80], 157 [86]. See also at 159 [93], 164 [117]; *Pell (VSCA)* (n 1) [167], [279], [343]–[346] (Ferguson CJ and Maxwell P), [526], [532], [559], [959]–[960] (Weinberg JA).

242 *Pell (VSCA)* (n 1) [169] (Ferguson CJ and Maxwell P).

243 Some specific evidence genuinely related to particular events. For example, McGlone gave evidence of him and his mother meeting Pell on the Cathedral steps: ibid [526] (Weinberg JA); *Pell (HCA)* (n 1) 152–3 [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). 'Portelli gave quite specific evidence regarding 23 February 1997. … It was a memorable occasion because it was the first time that the applicant had presided over Sunday solemn Mass said by another priest': ibid [875] (Weinberg JA). See also *Pell (HCA)* (n 1) 151 [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). Much of what might have appeared to be specific evidence was actually evidence of the witnesses' observations of ordinary practice, with the witnesses or defence counsel inferring that the practice was followed on the specific occasion: see, eg, ibid [526] (Weinberg JA). This is arguably a version of tendency reasoning and the evidence should have been subject to the tendency exclusionary rule: *UEL* (n 30) s 97(1). This was not mentioned at all, though there was some discussion of 'habit' evidence: *Pell (HCA)* (n 1) 159 [93] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); ibid [944]–[947] (Weinberg JA). The better view is that 'habit' evidence is subject to the tendency rule, even if in most cases it would satisfy the admissibility test(s): see Stephen Odgers, *Uniform Evidence Law* (Thomas Reuters, 16th ed, 2021) 731–5 [97.60], 736–50 [97.120], 756–9 [97.450]. Some of the evidence may, however, have proved the existence of the system without tendency reasoning, for example, by reference to 'learned works which themselves date back some centuries. The teaching in these texts requires that an archbishop not be unaccompanied from the moment the archbishop enters a church': *Pell (HCA)* (n 1) 155 [76] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); Odgers (n 243) 752–4 [97.240].

244 *Pell (VSCA)* (n 1) [160] (Ferguson CJ and Maxwell P).

Psychologists note that '[m]emory for repeated events … is less distinct and far more vulnerable to memory errors than memory for single events'.[245] C's memory of the two instances of abuse is plausible due to the 'presence of unique or distinctive details that make the event stand out from other life experiences'.[246] The opportunity witnesses, however, may have 'fill[ed] in gaps with their general expectations'.[247]

Trial procedure provided the VSCA majority with further reason to discount the weight of the opportunity evidence. While the opportunity witnesses — 'witnesses who held official positions at the Cathedral, or were members of the choir, during the relevant period'[248] — could be viewed as lying in the defence camp,[249] they were called by the prosecution.[250] In a departure from pure adversarialism, the prosecution has an ethical obligation as 'a minister of justice … to call all material witnesses', notwithstanding that they would be unhelpful to the prosecution.[251] In *Pell*, this gave defence counsel the opportunity to cross-examine and lead the sympathetic opportunity witnesses.[252] However, this weakens the value of their evidence.

> The cross-examiner who persistently asks leading questions of a witness in total sympathy with the interests of the cross-examiner's client is employing a radically flawed technique.[253]

Unlike the evidence ordinarily obtained from sympathetic witnesses through open questions in examination-in-chief, the opportunity evidence in *Pell* is not 'the witness's own testimony, resting on the witness's own perceptions … It is … something created by the narrow, specific and carefully crafted leading questions of an advocate'.[254] The VSCA majority noted, in relation to a key

[245] Jane Goodman-Delahunty, Natalie Martschuk and Mark Nolan, 'Memory Science in the Pell Appeals: Impossibility, Timing, Inconsistencies' (2020) 44(4) *Criminal Law Journal* 232, 236.

[246] Ibid 235. However, victims of repeated prolonged abuse may not have clear memories of specific instances: see Deborah A Connolly et al, 'Perceptions and Predictors of Children's Credibility of a Unique Event and an Instance of a Repeated Event' (2008) 32(1) *Law and Human Behavior* 92, 93–4.

[247] Goodman-Delahunty, Martschuk and Nolan (n 245) 239.

[248] *Pell (VSCA)* (n 1) [8] (Ferguson CJ and Maxwell P).

[249] Cf *Dyers v The Queen* (2002) 210 CLR 285, 291 [8] (Gaudron and Hayne JJ) ('*Dyers*').

[250] *Pell (HCA)* (n 1) 136–7 [5] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[251] *Dyers* (n 249) 327 [119] (Callinan J). See also at 292–3 [11] (Gaudron and Hayne JJ), 298–9 [27] (McHugh J).

[252] Arguably, defence counsel's use of leading questions in cross-examination should have been limited: see *UEL* (n 30) s 42.

[253] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 586 [117] (Heydon J).

[254] Ibid 587 [117].

opportunity witness, Charles Portelli, the Archbishop's Master of Ceremonies, that his 'testimony' consisted of the 'ready adoption of statements put to him by defence counsel about what he recalled'.[255] '[T]he jury were entitled to have reservations about the reliability of Portelli's affirmative answers.'[256] Defence counsel also 'put a series of leading questions … in cross-examination'[257] to another key opportunity witness, Maxwell Potter, the Cathedral's Sacristan, which 'inevitably reduced the weight to be given to his answers'.[258]

Inconsistently with its observations in *Fennell* quoted above, the High Court in *Pell* failed to address the psychological and procedural weaknesses with the opportunity evidence. Instead, the High Court focused on a defence claim that key parts of the opportunity evidence were 'unchallenged' by the prosecution.[259] Here the High Court was invoking a procedural requirement known as the rule in *Browne v Dunn*.[260] As Gleeson CJ and Heydon J observed in *MWJ v The Queen*,

> [this] principle of fair conduct on the part of an advocate … is an important aspect of the adversarial system of justice. … Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination.[261]

Their Honours suggested that 'it is a principle that may need to be applied with some care when considering the conduct of the defence at criminal trial'.[262] In *Pell*, however, the High Court applied the principle forcefully to the conduct of the prosecution; it amplified the weight of the negative opportunity evidence significantly.

The High Court's application of the rule against the prosecution in *Pell* appears unduly stringent and forceful. It is questionable whether the opportunity witnesses' 'direct evidence and evidence of practice' could accurately be

[255] *Pell (VSCA)* (n 1) [254] (Ferguson CJ and Maxwell P).

[256] Ibid [253].

[257] Ibid [261].

[258] Ibid.

[259] The term 'unchallenged' appears four times in the defence argument in the report: *Pell (HCA)* (n 1) 126, 129 (BW Walker SC) (during argument); and 14 times in the High Court's judgment: at 137 [6], 147 [46], 150 [56], 151 [61], 155 [76], 157 [88], 158 [91], 161 [101]–[102], 164 [119], 166 [126]–[127] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[260] (1893) 6 R 67, cited in ibid 161 [101].

[261] (2005) 222 ALR 436, 440 [18] ('*MWJ*'). See also *Hofer* (n 45) 361 [28] (Kiefel CJ, Keane and Gleeson JJ). Note this is subject to exceptions, including in relation to Potter 'in light of [his] apparent infirmity': *Pell (HCA)* (n 1) 160 [101] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also *Pell (VSCA)* (n 1) [993] (Weinberg JA).

[262] *MWJ* (n 261) 440 [18].

described as 'unchallenged'.[263] It is highly unlikely that the witnesses or the defence would have formed the false impression that the prosecutor accepted testimony that denied the defendant the opportunity to commit the offences. Admittedly, prosecution challenges were relatively muted. Since these were prosecution witnesses, the prosecution required leave under the unfavourable witness provision[264] to challenge their evidence and their credibility 'as though … cross-examining' them.[265] 'Leave was granted, but in a restricted form, going only to memory, and not to truthfulness.'[266] The VSCA majority considered that within these limits, the prosecution conducted its examination appropriately. For example,

> [w]hile eschewing … any submission that Portelli had given knowingly false evidence, [the prosecution] … submitted that Portelli's apparent recollection, as elicited in cross-examination, was incorrect.[267]

This submission was appropriately grounded in the prosecution's examination of Portelli.

More direct prosecution challenges to the opportunity witnesses were conceivable. They were all connected with the Catholic Church and, as the Royal Commission found,

> the avoidance of public scandal, the maintenance of the reputation of the Catholic Church and loyalty to priests … largely determined the responses of Catholic Church authorities when allegations of child sexual abuse arose.[268]

In some cases the Catholic Church 'acknowledged … those in positions of authority concealed or covered up what they knew'.[269] But, with widespread

[263] *Pell (HCA)* (n 1) 150 [56] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[264] *UEL* (n 30) s 38(1).

[265] Ibid. See also s 38(3).

[266] *Pell (VSCA)* (n 1) [994] (Weinberg JA). See also at [988]–[989], discussing *DPP (Vic) v Pell (Evidential Ruling No 3)* [2018] VCC 1231, [112]–[119] (Kidd CJ) ('*Pell (Evidential Ruling No 3)*').

[267] *Pell (VSCA)* (n 1) [251] (Ferguson CJ and Maxwell P).

[268] *Royal Commission Final Report* (n 27) 278.

[269] Ibid 278–9. Indeed, Cardinal Pell was implicated in some of these failures. The Royal Commission redacted some of its reports while the cases against Pell were ongoing. The unredacted versions were only tabled on 7 May 2020, following the conclusion of the final appeal to the High Court: see 'Previously Redacted Reports', *Royal Commission into Institutional Responses to Child Sexual Abuse* (Web Page) <https://www.childabuseroyalcommission.gov.au/previously-redacted-reports>, archived at <https://perma.cc/5NK3-HKDL>; Naomi Neilson, 'Untold Cover-Ups: Unredacted Commission Documents Reveal Pell's Role', *Lawyers Weekly* (online, 7 May 2020) <https://www.lawyersweekly.com.au/biglaw/28241-untold-cover-ups-

community abhorrence of such cover-ups and in the absence of any specific evidence, the trial judge expressly ruled out any such imputation as unfair to the witnesses and prejudicial to the defendant.[270] In compliance with this ruling, the prosecution did not put to the opportunity witnesses 'that they were lying … [or] that they were biased, either consciously, or subconsciously, in favour of the [defendant]'.[271]

Justice Weinberg suggested there was 'obvious force' to the defence submission that the prosecution's failure to put to the opportunity witnesses that they were 'subconsciously biased … had to be borne in mind' when 'considering the weight to be given to [their] exculpatory evidence'.[272] This seems unduly favourable to the defence. The trial judge appeared to rule out such challenges not because they were baseless but because they would be pointless. 'If it is "unconscious", then it is not a question the witnesses could possibly answer.'[273] But there was potential for unconscious bias to distort the opportunity witnesses' memories 'absent any ill will'.[274] 'Decades of research show that the memory system *constructs* memorial accounts from fragments of memories of the observed event.'[275] Memory construction may be affected by '[w]itnesses' motivations'[276] — memories may be 'motivated toward a particular outcome'.[277] This consideration lends further support to the VSCA majority's doubts about the plausibility of the opportunity evidence, given the witnesses' sympathy with the defendant, and given that their answers were being fed by defence counsel.

C *Delay, Forensic Disadvantage and the Right To Be Heard*

The High Court said that it 'was wrong' for the VSCA majority to discount the opportunity evidence 'for two reasons'.[278] The first reason, critically assessed in the previous section, is that, in the High Court's view, the opportunity evidence

unredacted-commission-documents-reveals-pell-s-role>, archived at <https://perma.cc/6XFU-DPJN>; Kate Gleeson, 'Reckoning with Denial and Complicity: Child Sexual Abuse and the Case of Cardinal George Pell' (2020) 9(4) *International Journal for Crime, Justice and Social Democracy* 31, 35.

270 *Pell (VSCA)* (n 1) [988]–[989] (Weinberg JA), quoting *Pell (Evidential Ruling No 3)* (n 266) [112], [114]–[116], [119], [129] (Kidd CJ).

271 *Pell (VSCA)* (n 1) [995] (Weinberg JA) (citations omitted).

272 Ibid [997].

273 Ibid [988], quoting *Pell (Evidential Ruling No 3)* (n 266) [119] (Kidd CJ).

274 Simon (n 78) 102.

275 Ibid 96 (emphasis in original).

276 Ibid 110.

277 Ibid 146.

278 *Pell (HCA)* (n 1) 158 [91] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

was 'unchallenged'.[279] The second reason is that the VSCA majority, according to the High Court, did not sufficiently 'take into account the forensic disadvantage experienced by the applicant arising from the delay of some 20 years in being confronted by these allegations'.[280] The jurisprudence of forensic disadvantage is obscure. Before trying to make sense of it, it will be helpful to distinguish forensic disadvantage from a related issue: the potential impact of delay on complainant credibility.

Historically, delay in reporting had the capacity to do considerable damage to the complainant's credibility.[281] As recently as 1973, in *Kilby v The Queen*, the High Court supported a 'general rule' that the jury be directed that, 'in determining whether to believe [the complainant], they could take into account that she had made no complaint at the earliest possible opportunity'.[282] In the latter decades of the 20th century, substantial reforms were prompted by the recognition that this approach was out of step with the reality of sexual assault victims' behaviour.[283] In accordance with the current Victorian legislation — the *Jury Directions Act 2015* (Vic) ss 51–4 ('*Jury Directions Act*') — the trial judge in *Pell* directed the jury that victims of sexual assault commonly delay before reporting the offence.[284] Under s 4A of the *Jury Directions Act*, appellate courts are required to take these provisions into account in their reasoning. Neither at trial nor on appeal was the defence allowed to challenge C's credibility on the basis of his delay in reporting.[285]

However, C's delay did benefit the defence case in another respect. In certain circumstances, s 39 of the *Jury Directions Act* requires the trial judge to direct the jury in relation to forensic disadvantage suffered by the defence as a result of delay. The VSCA majority said that, pursuant to s 4A, it had 'kept those matters firmly in mind in [its] review of the evidence'.[286] The High Court, however, pointed out that the majority had discounted the opportunity witnesses' evidence because 'they considered the likelihood that the memories of honest

[279] Ibid.

[280] Ibid.

[281] See John Willis and Marilyn McMahon, 'Educating Juries or Telling Them What To Think? Credibility, Delay in Complaint, Judicial Directions and the Role of Juries' (2017) 41(1) *Criminal Law Journal* 27, 38–9; Ligertwood and Edmond (n 38) 838–9 [7.100].

[282] (1973) 129 CLR 460, 465 (Barwick CJ, McTiernan J agreeing at 473, Stephen J agreeing at 476, Mason J agreeing at 476).

[283] See Ligertwood and Edmond (n 38) 357–9 [4.45]; Willis and McMahon (n 281) 39–40.

[284] *Pell (VSCA)* (n 1) [89] (Ferguson CJ and Maxwell P).

[285] See ibid [847]–[851] (Weinberg JA), rejecting defence counsel submissions that, in the circumstances of this case, C's failure to talk about the alleged abuse with the other boy did damage his credibility.

[286] Ibid [163] (Ferguson CJ and Maxwell P). See also at [164].

witnesses might have been affected by delay'.[287] The High Court apparently considered that the deleterious impact of delay on witnesses' memories should be ignored, at least in relation to evidence supporting the defence.

The High Court's position is consistent with established principle, but the underlying rationale is difficult to understand. In this section, drawing on earlier work,[288] I argue that, while the forensic disadvantage direction appears to express a concern about outcome accuracy, it may be better understood as reflecting process concerns.

Undoubtedly, evidence will deteriorate and be lost over a 20-year delay, making the fact finder's task more difficult. But it is illogical to assume that the *defendant* suffers forensic disadvantage. If evidence has been lost, then clearly the content of the evidence is unknown. Perhaps the missing evidence would have assisted the prosecution, in which case its loss is a forensic advantage to the defence.[289] Had there been no delay in *Pell*, opportunity witnesses may have recalled that there had been a departure from the usual Church practices on those occasions. The second choirboy would have still been alive and may have provided a highly credible account entirely consistent with that of C. Not knowing the content of the lost evidence, the potential for disadvantage is balanced between the defence and the prosecution.[290] However, given the heavy presumption of innocence, delay may be a greater problem for the prosecution.[291] Logically, rather than a direction on forensic disadvantage, 'the importance of delay as leading to uncertainty should be dealt with by the trial judge as part of the direction as to burden and standard of proof'.[292]

Recent reforms have moderated the forensic disadvantage direction both as to its preconditions and its content. The common law seemed to require courts to presume that delay resulted in forensic disadvantage even where a reasonable

[287] *Pell (HCA)* (n 1) 158 [91] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[288] See, eg, David Hamer, 'Delayed Complaint, Lost Evidence and Fair Trial: Epistemic and Non-Epistemic Concerns' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, 2012) 215 ('Delayed Complaint'); David Hamer, 'Trying Delays: Forensic Disadvantage in Child Sexual Assault Trials' [2010] (9) *Criminal Law Review* 671 ('Trying Delays').

[289] Hamer, 'Trying Delays' (n 288) 682–3. See also Hamer, 'Delayed Complaint' (n 288) 220–2; CR Williams, 'Warnings Occasioned by Delay in Paedophile Prosecutions' (2003) 27(2) *Criminal Law Journal* 70, 75.

[290] Hamer, 'Trying Delays' (n 288) 683–7; Hamer, 'Delayed Complaint' (n 288) 221.

[291] *Jago v District Court (NSW)* (1989) 168 CLR 23, 60 (Deane J); Hamer, 'Trying Delays' (n 288) 684–5; Hamer, 'Delayed Complaint' (n 288) 217.

[292] Williams (n 289) 75. See also Hamer, 'Trying Delays' (n 288) 684.

body of evidence remained available.[293] Under the legislation a direction should be given 'only if the trial judge is satisfied that the accused has experienced a significant forensic disadvantage'.[294] The common law required the jury to be directed that it would be 'dangerous to convict' on the complainant's evidence, and that the complainant's evidence should be 'scrutiniz[ed] … with great care'.[295] These expressions, described by the New South Wales Court of Criminal Appeal ('NSWCCA') as a 'not too subtle encouragement by the trial judge to acquit',[296] are now prohibited by the legislation.[297] The jury should simply be told of 'the nature of the disadvantage experienced by the accused',[298] and 'the need to take the disadvantage into account when considering the evidence'.[299]

While the law is less pro-defendant than it once was, it remains illogical in focusing exclusively on the potential disadvantage to the defence. In the first *Pell* appeal, Weinberg JA appeared to appreciate this. He noted the possibility 'that the complainant's evidence was … also diminished by delay' but added that 's 39 does not permit delay to be taken into account in the complainant's favour'.[300] Other courts have noted the imbalance.[301] In *R v BWT*, Wood CJ at CL commented that 'the impact of delay is double edged, since it is just as likely to occasion practical difficulty for the prosecution in pinning down times and places, and in gathering relevant witnesses'.[302] But the orthodox view

293 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (Report No 102, December 2005) 615–16 [18.86], citing *R v BWT* (2002) 54 NSWLR 241, 247 [14] (Wood CJ at CL) ('*BWT*'). See also *Doggett v The Queen* (2001) 208 CLR 343, 380 [137]–[138] (Kirby J) ('*Doggett*'). Cf Williams (n 289) 74–5; *Doggett* (n 293) 348 [10] (Gleeson CJ), 364–5 [80]–[81] (McHugh J).

294 *Jury Directions Act 2015* (Vic) s 39(2). See also s 38. These provisions are in similar terms to those contained in the *UEL* (n 30): see, eg, *Evidence Act 1995* (NSW) s 165B(2).

295 *Longman* (n 90) 91 (Brennan, Dawson and Toohey JJ). See also Law Reform Commissioner, *Rape Prosecutions: Court Procedures and Rules of Evidence* (Report No 5, 1976) 33, quoted in Williams (n 289) 71.

296 *BWT* (n 293) 251 [35] (Wood CJ at CL). See also at 280 [118] (Sully J); *Riggall v Western Australia* (2008) 37 WAR 211, 217–18 [26] (Wheeler JA).

297 *Jury Directions Act 2015* (Vic) s 39(3)(b).

298 Ibid s 39(3)(a)(i).

299 Ibid s 39(3)(a)(ii).

300 *Pell (VSCA)* (n 1) [1009].

301 See *R v M* [2000] 1 Cr App R 49, 58 (Rose LJ) ('*R v M*'); *R v Ferrisey* [2002] EWCA Crim 2405, [17]–[19] (Pitchford J).

302 *BWT* (n 293) 248 [23]. See also *R v Inston* (2009) 103 SASR 265, 294 [112] (Vanstone J); *R v M* (n 301) 58 (Rose LJ); Hamer, 'Trying Delays' (n 288) 683; Hamer, 'Delayed Complaint' (n 288) 221–2.

is that the 'warning must be unequivocally favourable to the accused. This is not an occasion for balance between the parties'.[303]

The law's illogical and unbalanced treatment of forensic disadvantage is puzzling. The explanation may be that, while the forensic disadvantage direction on its face appears directed to outcome accuracy, it actually addresses process concerns.[304] As discussed above, the adversarial design of the trial expresses 'scepticism towards an objective reconstruction of reality'.[305] Rather than the court striving for objective truth, the adversarial trial allows the parties to participate in the construction of a '"procedural" truth'.[306] In the criminal trial, 'an essential component of procedural fairness is an opportunity to be heard'.[307] Of course, this serves the epistemic goal of 'ensur[ing] that the innocent are not convicted'.[308] However, the right to be heard can also be seen as having 'a non-instrumental grounding in the demands of respect for persons, whether or not it would serve the aim of establishing the truth'.[309] This process goal may be threatened where the complaint has been significantly delayed. A trial consisting of a bare allegation and a bare denial is 'scarcely a forensic contest at all'.[310] Indeed, 'the lapse of time may be so great as to deprive the party against whom an allegation is made of his "capacity … to be effectively heard"'.[311] The forensic disadvantage direction may be viewed as compensating for the impairment of the defence right to be heard.

Even if this non-epistemic rationale for the law's treatment of forensic disadvantage were accepted, it seems to have limited application to the *Pell* case. The defence was not reduced to a bare denial. Far from it. The defence exercised the right to be heard with vigour. 'The trial ran for five weeks.'[312] While the

[303] *R v GVV* (2008) 20 VR 395, 411 [65] (Lasry AJA). See also Hamer, 'Trying Delays' (n 288) 674, 682–3; Hamer, 'Delayed Complaint' (n 288) 222.

[304] See Hamer, 'Trying Delays' (n 288) 687–8; Hamer, 'Delayed Complaint' (n 288) 225–6.

[305] Grande (n 43) 147. See also Thibaut and Walker (n 59) 544–5.

[306] Brants and Field (n 64) 269.

[307] *United States v Scheffer*, 523 US 303, 329 n 16 (Stevens J) (1998). See also *Powell v Alabama*, 287 US 45, 68 (Sutherland J for the Court) (1932); *R v Rose* [1998] 3 SCR 262, 316–17 [98] (Cory, Iacobucci and Bastarache JJ).

[308] *R v Stinchcombe* [1991] 3 SCR 326, 336 (Sopinka J for the Court). See also Hamer, 'Delayed Complaint' (n 288) 229–31. The defendant's right to be heard also stands a little uneasily with the right to silence, and the overshadowing role of defence counsel: see at 228, 233.

[309] Antony Duff et al, *The Trial on Trial: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007) vol 3, 100. See also Hamer, 'Delayed Complaint' (n 288) 225.

[310] *J O'C v DPP (Ireland)* [2000] 3 IR 478, 533 (Hardiman J).

[311] Ibid 500, quoting *O'Keeffe v Commissioners of Public Works (Ireland)* (Supreme Court of Ireland, Henchy J, 24 March 1980) 10. See also Hamer, 'Delayed Complaint' (n 288) 225.

[312] *Pell (VSCA)* (n 1) [4] (Ferguson CJ and Maxwell P). The complexity of the defence argument is also apparent in the length of the VSCA decision: 1180 paragraphs across 320 pages.

prosecution case was based solely on C's testimony, the defence relied on more than 20 opportunity witnesses.[313] The defence case was elaborate, invoking 'a large number of independently improbable, if not "impossible", things'.[314] The claim that the defence in *Pell* suffered a forensic disadvantage in either sense — epistemic or non-epistemic — is unsubstantiated.

D *Corroboration from Pell's Other Alleged Victims*

In *Pell*, the complainant's allegations were entirely uncorroborated.[315] C's report to police was very late and there was no evidence of any earlier complaint, for example, to family or friends.[316] Nor had the other boy complained; indeed, when asked by his mother in 2001 whether he had been the victim of sexual interference while in the choir, he denied it, though this could well have been a false denial.[317]

Historically, the law required that the evidence of sexual assault complainants and children be corroborated.[318] Such requirements, based upon dubious notions such as 'the cherished male assumption that female persons tend to lie',[319] added to the difficulty of prosecuting sexual offences. Most jurisdictions

[313] See *Pell (HCA)* (n 1) 141–2 [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[314] *Pell (VSCA)* (n 1) [840] (Weinberg JA). See also ibid.

[315] *Pell (HCA)* (n 1) 148–9 [50]–[53] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Pell (VSCA)* (n 1) [1104] (Weinberg JA). The VSCA majority considered C's account received some support from his display of esoteric knowledge about the priests' sacristy where the first incident was alleged to have occurred: at [95]–[97] (Ferguson CJ and Maxwell P). However, '[s]atisfaction that [C] had been inside the priests' sacristy did not afford any independent basis for finding that, on such an occasion, he had been sexually assaulted by the applicant': *Pell (HCA)* (n 1) 148 [50] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). On the view of the majority, 'the Crown could rely on … [opportunity witnesses] in discharging its burden to establish that there was a realistic opportunity for the offending to have occurred': *Pell (VSCA)* (n 1) [170] (Ferguson CJ and Maxwell P). Opportunity evidence does not strictly amount to corroboration: JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10th ed, 2015) 491 [15165].

[316] *Pell (HCA)* (n 1) 136 [2] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). Note that evidence of prompt complaint, while traditionally admissible, does not strictly constitute corroboration: see Heydon (n 315) 494 [15185].

[317] *Pell (VSCA)* (n 1) [179] (Ferguson CJ and Maxwell P). See also at [886], [888] (Weinberg JA).

[318] See Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 2nd ed, 2010) 668–70. Or at least that the jury be encouraged not to convict without corroboration: at 665. See also at 670–1.

[319] Law Reform Commission, *Evidence* (Interim Report No 26, 1985) vol 1, 271 [490], quoting Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Secker & Warburg, 1975) 369. Note that corroboration was required whether the complainant in a sexual case was male or

have now abandoned general corroboration requirements.[320] 'There is no requirement that a complainant's evidence be corroborated before a jury may return a verdict of guilty upon it.'[321] Nevertheless, it may be difficult for the prosecution to prove guilt beyond reasonable doubt without corroboration.

In *Pell*, corroborating evidence was potentially available: allegations of the defendant's sexual interference with other boys on other occasions. Several such allegations are in the public domain. One alleged victim claimed that, in 1961 or 1962 when aged 12 or 13, he was sexually touched by Pell, then a seminarian, on a camping trip.[322] Two other alleged victims claimed that, in the summer of 1978–79 when they were eight or nine years old, they were sexually touched by Pell, then an Episcopal vicar, at the Ballarat swimming pool.[323] Another alleged victim said he was sexually touched by Pell at the Ballarat pool a couple of years earlier when he was about 12 years old.[324] Another witness said he saw Pell, then serving as rector at Corpus Christi College in Melbourne, expose himself to three young boys at Torquay Life Saving Club in 1986 or 1987.[325] The

female: *R v Nation* [1954] SASR 189, 199 (Abbott J for the Court); *R v Ridgeway* [1983] 2 NSWLR 19, 25 (Lee J, Slattery J agreeing at 30, Cross J agreeing at 30).

320 As well as many having a dubious rationale, corroboration requirements were also viewed as unduly complex: Roberts and Zuckerman (n 318) 665, 671–2. With the exception of perjury charges, they have been replaced with more flexible principles tailoring jury directions to the circumstances of the instant case: see *UEL* (n 30) s 164. See also s 165A(1) in relation to children.

321 *Pell (HCA)* (n 1) 149 [53] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

322 AJ Southwell, *Report of an Inquiry into an Allegation of Sexual Abuse against Archbishop George Pell* (Report, 2002) 2–3.

323 Louise Milligan, *Cardinal: The Rise and Fall of George Pell* (Melbourne University Press, 2019) 197. These allegations were aired on the Australian Broadcasting Corporation's ('ABC') current affairs program *7.30* on 27 July 2016. Following criticism of the report, the ABC appears to have removed the details of the program from their website: Roger Franklin, 'An ABC "Scoop" Goes down the Memory Hole', *Quadrant* (online, 3 October 2019) <https://quadrant.org.au/an-abc-scoop-down-the-memory-hole/>, archived at <https://perma.cc/6PKX-Z5YM>. However, an unofficial transcript can still be found: 'George Pell: The Swimming Pool Allegations', *Sylvia's Site* (Blog Post, 27 July 2016) <https://www.theinquiry.ca/wordpress/rc-scandal/other-countries/australia-and-new-zealand/george-pell-the-swimming-pool-allegations/>, archived at <https://perma.cc/8QRU-RLKN>. See also Milligan (n 323) ch 21.

324 See Milligan (n 323) ch 25. There is another report of a similar allegation in 1975 or 1976 relating to a 10-year-old boy at Lake Boga, near Swan Hill, in Victoria: Adam Cooper, 'Pell Won't Face Trial on Allegations from the 70s of Pool Impropriety', *The Sydney Morning Herald* (online, 26 February 2019) <https://www.smh.com.au/national/pell-won-t-face-trial-on-allegations-from-the-70s-of-pool-impropriety-20190226-p510b7.html>, archived at <https://perma.cc/3FNQ-NA6E>.

325 Melissa Davey, 'George Pell Exposed Himself to Young Boys at Surf Club, Says Victorian Man', *The Guardian* (online, 28 July 2016) <https://www.theguardian.com/australia-

camping allegations gave rise to an official inquiry by the Catholic Church in 2002, headed by a former Supreme Court judge, which failed to make a positive finding.[326] The swimmers' allegations were investigated by police at the same time as the Cathedral allegations. Pell was committed for trial, but the prosecution was discontinued.[327]

Other misconduct evidence can be particularly valuable in sexual assault cases given that there is often little other available evidence. However, this kind of evidence — at common law, termed 'propensity' or 'similar fact' evidence, and in the *UEL*, 'tendency' or 'coincidence' evidence[328] — has traditionally been distrusted by the criminal justice system and subject to exclusion. One concern is that the notion that past misconduct determines future misconduct is contrary to the values of autonomy and individual responsibility that underpin criminal justice and the adversarial trial.[329] A further, more dominant concern is that other misconduct evidence, while possessing limited relevance, could prejudice the jury against the defendant.[330] Despite the exclusionary rule, such evidence has often been admitted on the basis that it is so probative it would be an 'affront to common sense'[331] to exclude it. Under the *UEL*, to have gained admission in the *Pell* trial, the other allegations would have required 'significant

news/2016/jul/28/george-pell-exposed-himself-to-young-boys-at-surf-club-says-victorian-man>, archived at <https://perma.cc/K42E-ZMNH> ('Surf Club'). Other allegations have also surfaced: see, eg, Melissa Davey, 'George Pell Allegedly Exposed Himself to Choir Boy, Court Hears', *The Guardian* (online, 23 March 2018) <https://www.theguardian.com/australia-news/2018/mar/23/george-pell-allegedly-exposed-himself-to-choir-boy-court-hears>, archived at <https://perma.cc/G7U3-XFNY>; Melissa Davey, 'Cardinal George Pell: Vatican Treasurer Faces Historical Sexual Offences Trial', *The Guardian* (online, 1 May 2018) <https://www.theguardian.com/australia-news/2018/may/01/cardinal-george-pell-stand-trial-historical-sexual-offence-charges>, archived at <https://perma.cc/X77Y-3874>.

326 Southwell (n 322) 1, 15.

327 See Cooper (n 324).

328 See generally David Hamer, '"Tendency Evidence" and "Coincidence Evidence" in the Criminal Trial: What's the Difference?' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 158.

329 See HL Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press, 2008) 337; David P Leonard, 'In Defense of the Character Evidence Prohibition: Foundations of the Rule against Trial by Character' (1998) 73(4) *Indiana Law Journal* 1161, 1196.

330 David Hamer, 'Propensity Evidence Reform after the Royal Commission into Child Sexual Abuse' (2018) 42(4) *Criminal Law Journal* 234, 236–7 ('Propensity Evidence Reform'); David Hamer, 'The Legal Structure of Propensity Evidence' (2016) 20(2) *International Journal of Evidence and Proof* 136, 137–8.

331 *R v Feng* [1985] 1 NZLR 222, 225 (Cooke J for the Court); *DPP (UK) v Kilbourne* [1973] AC 729, 759 (Lord Simon).

probative value',[332] sufficient to 'substantially [outweigh] any prejudicial effect [they] may have on the accused'.[333]

In a further procedural asymmetry of the accusatorial trial, the defence may adduce good character evidence as proof of the defendant's innocence without restriction.[334] While Pell relied upon a number of character witnesses in sentencing,[335] the defence did not adduce any good character evidence at trial.[336] No doubt they were concerned about the potential downside of adducing good character evidence: it may open the door to prosecution bad character evidence in rebuttal.[337] With Pell's character in issue, the prosecution may have been allowed to admit evidence that, contrary to the claims of Pell's supporters, it was not out of character for Pell to sexually abuse children.

In the middle of last century, the legal regulation of propensity evidence was described as presenting issues of 'apparently insoluble difficulty'.[338] In subsequent decades the law was described as a 'pitted battlefield'[339] and 'vexed'.[340] Things have not improved under the *UEL*. A few years before *Pell*, the VSCA described the *UEL* provisions as 'exceedingly complex and extraordinarily difficult to apply'.[341] The VSCA has construed the *UEL* admissibility tests in quite strict terms. The features shared by the other misconduct and the charged offence would need to be '"remarkable", "unusual", "improbable" [or] "peculiar"'[342] for tendency evidence to gain admission. In 2017, in *Hughes v The Queen* ('*Hughes*'),[343] a majority of the High Court described the VSCA's

332 *UEL* (n 30) s 97(1)(b).

333 Ibid s 101(2).

334 Ibid s 110(1). In *Melbourne v The Queen* (1999) 198 CLR 1, McHugh J described this inclusionary principle as 'anomalous' and a product 'not [of] logic but [of] the "policy and humanity" of the common law': at 20 [47] (citations omitted).

335 *Pell (Sentence)* (n 188) [114] (Kidd CJ). See also Szego (n 8); Koob (n 68).

336 See *Pell (VSCA)* (n 1) [10] (Ferguson CJ and Maxwell P).

337 See *UEL* (n 30) ss 110(2)–(3).

338 Zelman Cowen and PB Carter, *Essays on the Law of Evidence* (Greenwood Press, 1973) 106.

339 *DPP (UK) v Boardman* [1975] AC 421, 445 (Lord Hailsham).

340 *Pfennig v The Queen* (1995) 182 CLR 461, 510 (McHugh J).

341 *Velkoski v The Queen* (2014) 45 VR 680, 687 [33] (Redlich, Weinberg and Coghlan JJA) ('*Velkoski*').

342 Ibid 711 [133], quoting *Reeves v The Queen* (2013) 41 VR 275, 289 [53] (Maxwell ACJ). Previously, the Court had occasionally taken a more liberal approach, at least in incestuous child sex offence cases: see, eg, *RHB v The Queen* [2011] VSCA 295, [17]–[18] (Nettle JA, Harper JA agreeing at [29]); *DR v The Queen* [2011] VSCA 440, [88] (Neave and Hansen JJA and Beach AJA). Cf ibid 707 [115].

343 (2017) 263 CLR 338 ('*Hughes*').

approach as 'unduly restrictive'[344] and supported a more open admissibility test.[345] But the pendulum swung back towards greater stringency in subsequent High Court decisions: *R v Bauer*[346] and *McPhillamy v The Queen* ('*McPhillamy*').[347] In *McPhillamy*, a case decided just as the second *Pell* Cathedral trial got underway in late 2018, the High Court held that evidence of other misconduct was inadmissible.[348] The other victims were boys of a similar age to the complainant, and the defendant was in a position of authority in relation to each, but the Court said that there was no 'feature of the other sexual misconduct and the alleged offending which serves to link the two together',[349] and that the other misconduct was ten years earlier with 'no evidence that the asserted tendency had manifested itself in the [intervening] decade'.[350]

It may not be surprising then that the other allegations were, in *Pell*, viewed as lacking a sufficient connection with the Cathedral allegations to gain admission. The swimmers' prosecution was reportedly discontinued because the trial judge ruled that the various allegations relating to the Ballarat pool would not be cross-admissible as tendency evidence.[351] The connections between the other allegations and the Cathedral allegations are obviously far weaker. The alleged victims were all boys of a similar age, some of the alleged acts were broadly similar,[352] and the alleged incidents occurred in similar contexts. However, the similarities were not distinctive, and there were also marked dissimilarities between the allegations.[353] Further, the other incidents allegedly

[344] Ibid 347 [12] (Kiefel CJ, Bell, Keane and Edelman JJ).

[345] Ibid 347 [12], 355 [37], 357 [42].

[346] (2018) 266 CLR 56, 86–7 [56]–[58] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[347] (2018) 361 ALR 13, 19 [27], 20 [32] (Kiefel CJ, Bell, Keane and Nettle JJ) ('*McPhillamy*').

[348] Ibid 20 [32] (Kiefel CJ, Bell, Keane and Nettle JJ), 20–1 [33], 22 [39] (Edelman J).

[349] Ibid 20 [31] (Kiefel CJ, Bell, Keane and Nettle JJ).

[350] Ibid 19 [27].

[351] See Cooper (n 324); *DPP (Vic) v Pell (Evidential Ruling No 1)* [2019] VCC 149, [147]–[154] (Kidd CJ) ('*Pell (Evidential Ruling No 1)*').

[352] The first and second Cathedral incidents involved Pell allegedly touching a boy's genitals. This was also the substance of most of the camping and swimming allegations: *Pell (HCA)* (n 1) 140 [18], [20] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); Southwell (n 322) 2–3; Milligan (n 323) 197–8. Some of the camping allegations, like the swimming allegations, involved Pell touching boys while swimming with them: Southwell (n 322) 3. The surf club allegation, like some of the swimmers' allegations, involved Pell exposing himself in a change room: Davey, 'Surf Club' (n 325); Milligan (n 323) 200–2.

[353] Many of the allegations involved Pell touching boys and exposing himself to boys: *Pell (Evidential Ruling No 1)* (n 351) [1]–[7] (Kidd CJ). However, the touching in the second alleged Cathedral incident appears to have been more forceful than the others: see *Pell (HCA)* (n 1)

occurred decades earlier than the charged offences. Having said that, a significant number of accusations had accrued across the decades.

In 2017, while Victoria Police was investigating the allegations against Pell and the High Court was deciding *Hughes*, the Royal Commission finalised its *Criminal Justice Report*.[354] It noted that the 'criminal justice system is often seen as not being effective in responding to crimes of sexual violence',[355] and identified the admissibility of other allegation evidence as 'one of the most significant issues'.[356] The Royal Commission's research led it to conclude that the law traditionally '*understated* the probative value of tendency and coincidence evidence and *overstated* the risk that such evidence will unfairly prejudice the accused'.[357] It recommended reforms 'to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence'.[358]

At the end of November 2019, a couple of weeks after the *Pell* special leave application was referred to a full bench of the High Court, the Council of Attorneys-General ('CAG') indicated that the *UEL* jurisdictions would adopt reforms to implement the Royal Commission's recommendation.[359] Shortly after the High Court upheld the appeal in 2020, New South Wales ('NSW') and the Australian Capital Territory ('ACT') passed the reforms, as did the Northern

140 [20] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). And some of the other acts were of a different nature again. The swimming allegations included passive behaviour, such as Pell allegedly 'perv[ing]' in the change rooms while he and the boys were naked: Milligan
(n 323) 201; while some of Pell's actions in the first alleged Cathedral incident involved Pell's penetration of the boys' mouths: *Pell (HCA)* (n 1) 139–40 [16]–[17] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

354 See *Royal Commission into Institutional Responses to Child Sexual Abuse: Executive Summary and Parts I–II* (Criminal Justice Report, 2017) ('*Royal Commission Criminal Justice Report (Executive Summary and Parts I–II)*'); *Royal Commission Criminal Justice Report (Parts III–VI)* (n 88).

355 *Royal Commission Criminal Justice Report (Executive Summary and Parts I–II)* (n 354) 9.

356 *Royal Commission Criminal Justice Report (Parts III–VI)* (n 88) 411.

357 Ibid 603 (emphasis in original).

358 Ibid 634 (recommendation 44).

359 Council of Attorneys-General, 'Communiqué' (Media Release, 29 November 2019) <https://www.ag.gov.au/about-us/publications/council-attorneys-general-communique-november-2019>, archived at <https://perma.cc/8UNE-3D97>. The Royal Commission's draft legislation was rejected: Hamer, 'Propensity Evidence Reform' (n 330) 235. Unfortunately, the version arrived at by the CAG working party is terribly complex and messy: David Hamer, 'Myths, Misconceptions and Mixed Messages: An Early Look at the New Tendency and Coincidence Evidence Provisions' (2021) 45(4) *Criminal Law Journal* 232, 232–3 ('Mixed Messages').

Territory a year later.[360] Victoria and other jurisdictions are still to follow. The new provisions have not yet received detailed judicial consideration, but they appear likely to achieve their goal of facilitating child sex offence prosecutions by greatly increasing the admissibility of other allegations.[361]

Under the new s 97A, it is presumed that evidence of other incidents showing the defendant's sexual interest in children has significant probative value.[362] The presumption is rebuttable,[363] but in determining whether it has been rebutted certain matters are '*not* to be taken into account … unless the court considers there are exceptional circumstances'.[364] The listed matters include ones that the High Court had insisted upon in cases like *McPhillamy*, and which may have presented a problem in *Pell*: differences in the alleged acts,[365] the circumstances of the acts,[366] the relationship between the defendant and alleged victim,[367] the absence of 'distinctive or unusual features',[368] 'the level of generality' of the claimed tendency,[369] and the 'period of time' between the other incidents and the charged offence.[370] The credibility of other alleged victims may be open to challenge.[371] However, weak credibility is generally not a ground for exclusion; it is a matter of weight for the jury or appellate fact finder.[372]

This powerful presumption operates both for the purposes of the s 97 requirement of significant probative value, and the s 101 test balancing probative value against the danger of unfair prejudice. A related reform relaxes the

[360] See *Royal Commission Criminal Justice Legislation Amendment Act 2020* (ACT) pt 3; *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) sch 1; *Evidence (National Uniform Legislation) Amendment Act 2021* (NT) items 3–7. Those reforms are also currently before the Tasmanian Parliament: Justice Miscellaneous (Royal Commission Amendments) Bill 2022 (Tas) pt 5.

[361] Hamer, 'Mixed Messages' (n 359) 243.

[362] *Evidence Act 1995* (NSW) s 97A(2).

[363] Ibid s 97A(4).

[364] Ibid s 97A(5) (emphasis added).

[365] Ibid s 97A(5)(a).

[366] Ibid s 97A(5)(b).

[367] Ibid s 97A(5)(d).

[368] Ibid s 97A(5)(f).

[369] Ibid s 97A(5)(g).

[370] Ibid s 97A(5)(e). A final factor which was neither in issue in *McPhillamy* (n 347) nor in relation to the various allegations against Pell, but appearing in the list, is differences in 'the personal characteristics of the subject … (for example, the subject's age, sex or gender)': ibid s 97A(5)(c).

[371] Southwell (n 322) 11–12, 15; Milligan (n 323) ch 24.

[372] See, eg, *Evidence Act 1995* (NSW) s 94(5); Hamer, 'Mixed Messages' (n 359) 240–1, 248–9.

balancing test.[373] The probative value of the evidence no longer needs to 'substantially' outweigh prejudicial risk; it need only 'outweigh' it.[374]

In the handful of NSW and ACT child sexual assault cases that have so far considered the tendency reforms, trial judges have recognised and given effect to the legislative intent that other child sex allegations should generally be admitted.[375] Had the reforms been in place at the Cathedral trial it appears likely that some of the other allegations would have been admissible. The prosecution may well have been able to argue that Pell had previously committed similar child sex offences, that he had a tendency to commit child sexual abuse, and that this increased the probability that he committed child sexual abuse at the Cathedral. This additional evidence would have corroborated the plaintiff's allegations, bolstering the prosecution case in its contest with the opportunity evidence, and may have been enough to protect the jury convictions from being overturned by the High Court.[376]

IV Conclusion

In this article, I have explored the construction of the criminal verdict using the *Pell* case as an example. The actual facts of a criminal case — for example, whether or not Pell sexually abused the choirboys in the Cathedral — are objective and fixed. Evidence of these facts, however, is often limited and of uncertain reliability. To a degree, the focus shifts from the accuracy of the outcome to the legitimacy of the process by which the outcome is determined. The adversarial jury trial aims to secure verdict acceptability by giving both the parties and the community key roles in the proceedings.

The system has not totally lost sight of the importance of outcome accuracy. Indeed, the epistemic benefits of party control and the jury are proclaimed as often as their procedural legitimacy. But there is a tension between outcome and process concerns and elaborate principles and procedures have been developed to manage them. The conduct of the well-resourced prosecution in particular is subjected to considerable regulation in an effort to level the playing ground and ensure a fairer contest. The jury is the tribunal of fact, but concerns

[373] See, eg, *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) sch 1 item 4, amending *Evidence Act 1995* (NSW) s 101(2).

[374] *Evidence Act 1995* (NSW) s 101(2).

[375] See, eg, *R v Brookman* [2021] NSWDC 110, [71] (Abadee DCJ); *R v Young* [2021] NSWDC 622, [21]–[23] (Haesler DCJ); *R v IW* [2021] NSWDC 789, [37]–[38] (Grant DCJ); *R v QX [No 5]* (2021) 292 A Crim R 193, 225–31 [71]–[106] (Loukas-Karlsson J).

[376] As discussed above, if Victoria were to adopt these reforms making the other allegations admissible in the *Pell* case, that would not provide a basis for the prosecution to appeal against acquittals given double jeopardy exceptions: see above n 106 and accompanying text.

about the jury's fact finding abilities have given rise to many admissibility and use rules of evidence law. The trial judge and appellate court are primarily focused on process, but they may invade the jury's fact finding province and direct an acquittal or overturn a conviction. The original facts of a case may be objective; however, the ultimate outcome is indeterminate. It depends not only upon the availability and interpretation of evidence, but also on an elaborate complex of principles and procedure, much of which is also open to interpretation.

The *Pell* case well illustrates the constructed and contingent nature of the criminal verdict. A series of outcomes were generated across two trials and two appeals. Paradoxically perhaps, while the High Court expressed greater respect for the jury's role than the VSCA majority, it was the High Court that overturned the jury convictions as unreasonable and lacking evidential support. The difficulties with the prosecution case, according to the High Court, were procedural, based on the interpretation and application of technical principles regarding the prosecution's supposed failure to challenge opportunity witnesses and the defence's supposed forensic disadvantage from delay. Another key principle is the tendency exclusionary rule which appears to have kept from the jury other child sex abuse allegations against Pell. Under current reforms, following the Royal Commission, these other allegations could well have gained admission.

The *Pell* High Court acquittals are the constructed outcomes of a complex procedure in which process values had at least as great an impact as the evidence. Key elements of the High Court's reasoning are contestable and contingent. The High Court acquittals will, of course, stand, but it is difficult to view them as any more necessary than the convictions of the second jury, upheld by a majority of the VSCA.