Dealing with Prejudicial and Adverse Publicity

Contents

Introduction

Every accused has a right to a fair trial[1] that includes having their guilt decided only on the evidence before the jury in the trial. The danger of publicity is that it can bring before the jury extraneous information and opinions that can prejudice the hearing of a fair trial.[2] This material can be particularly prejudicial where it may give rise to impermissible tendency reasoning on the part of the jury.[3]

> It is fundamental that, for an accused to have a fair trial, the jury should reach its verdict by reference only to the evidence admitted at trial and not by reference to facts or alleged facts gathered from the media or some outside source. However, the might of media publicity in "sensational" cases makes such a pristine approach virtually impossible. Recognizing this, the courts have used various remedies such as adjournment, change of venue, severance of the trial of one co-accused from that of the others, express directions to the jury to exclude from their minds anything they may have heard outside the courtroom and the machinery of challenge for cause.[4]

The issue of publicity has become more extreme with the emergence of social media and the internet which allows more widespread access to news stories, information and opinions,

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[1] *John Fairfax Publications Pty Ltd and Anor v District Court of NSW and Ors* (2004) 61 NSWLR 344 at [17]-[23] per Spigelman CJ. See also *X7 v Australian Crime Commission* [2013] HCA 29 at [37]-[38] per French CJ and Crennan J.

[2] *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242 at 249 per Jordan CJ: 'It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of justice from having his case tried free from all matter of prejudice'

[3] *Mokbel* [2009] 26 VR 618; [2009] VSC 342 Kaye J at [102]; *McNeil (No.2)* [2015] NSWSC 757 at [6] per RA Hulme J

[4] *Murphy, Murdoch and Murphy* (1989) 167 CLR 94 at 98-99 per Mason CJ and Toohey J

providing instant access to material published months and years before, and which encourages the expression of prejudicial and unsubstantiated opinions.[5]

At the same time the principle of open justice is foundational to our criminal justice system and an important element of accountability.[6] In practice courts are reluctant to allow prejudicial publicity to prevent the holding of trials in open courts before a jury, the Court of Criminal Appeal expressing a concern in a recent case not to allow social media to become

> … a mechanism by which those of ill will could undermine the proper operation of our system of justice. Such a mechanism would also be readily available to be exploited by an accused and those who support him or her, who are intent on ensuring that charges brought cannot go to trial.[7]

An important element of the Courts' reluctance to alter or remove the openness of a trial is the strongly held view that jurors should be assumed to follow directions,[8] including those that direct them to ignore prejudicial material not in evidence before them. While this assumption is accepted and followed by the courts[9] some judges have pointed out the 'axiom can be taken only so far',[10] a concern that has received support from recent research and academic comment.[11]

There are several options available for defence counsel faced with the danger of prejudicial and adverse publicity. In considering each of these options courts will consider the interests of a fair trial, open justice, freedom of speech and the community interest (including the

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[5] *Hughes* [2015] NSWCCA 330 at [68] per the Court

[6] *Hogan v Hinch* (2011) 243 CLR 506 at [20] per French CJ; *State of South Australia v Totani* (2010) 242 CLR 1 per French CJ at [62]; *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [44]; *Lodhi v R* (2006) 163 A Crim R 508, NSWSC per Whealy J at [10]; *John Fairfax Publications Pty Ltd and Anor v District Court of NSW and Ors* (2004) 61 NSWLR 344 at [18]-[19], [39]-[40] per Spigelman CJ citing *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477 per McHugh JA. The leading common law case on the principle of open justice is *Scott v Scott* [1913] AC 417 (House of Lords). See also a summary of the history of open court in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 per Kirby P.

[7] *Hughes* [2015] NSWCCA 330 at [83] per the Court

[8] *Gilbert* (2000) 201 CLR 414 at 425 per McHugh J.

[9] See Simmons; Moore (No 4) [2015] NSWSC 259 at [88] per Hamill J

[10] Ibid. See also the comments of Adams J in dissent in *BC v R* [2015] NSWCCA 327 at [29]-[30]; RS Hulme J in *Debs* [2011] NSWSC 1248 at [30]-[35] and Hamill J in *Qaumi (No.14)* [2016] NSWSC 274 at [43]-[49] and *Qaumi (No.16)* [2016] NSWSC 319 at [44]-[54]

[11] See for example Jill Hunter, UNSW Jury Study, Jurors' Notions of Justice, February 2014 pp.3-6 and the editorial by Mirko Bagaric "The community interest in bringing suspects to trial trumps the right to an impartial decision maker — at least in Victoria" (2010) 34(1) Criminal Law Journal 5 at 8.

interests of witnesses, victims and their families) in having persons charged with criminal offences brought to trial expeditiously. Balancing these interests can be difficult.[12]

Contempt by Publication

A person (or organisation) who publishes material which has a real tendency to prejudice or interfere with particular pending criminal proceedings may be guilty of contempt.[13]

There must be a publishing of the material. This would generally require more than just communicating the material to a few people, unless this could be shown to have affected the administration of justice[14]. A private communication to a single person would not generally constitute contempt but comments made by someone in an interview that is subsequently published could[15].

The act of publishing must be intentional.[16] Although intent to interfere with the administration of justice is not necessary,[17] the existence or otherwise of such intent is relevant and important to deciding the critical question of whether the act had the tendency to interfere.[18]

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[12] *Murphy, Murdoch and Murphy* (1989) 167 CLR 94 at 124 per Brennan J: 'always difficult and often finely balanced'; *John Fairfax Publications Pty Ltd and Anor v District Court of NSW and Ors* (2004) 61 NSWLR 344 at [17] per Spigelman CJ; *Lodhi v R* (2006) 163 A Crim R 508, NSWSC per Whealy J at [6]: interests 'pull strongly in different directions'

[13] *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242 at 248 per Jordan CJ; *Baladjam (No.44)* [2008] NSWSC 1463 at [6]-[8] per Whealy J.

[14] *Attorney-General (NSW) v Mundey* [1972] 2 NSWLR 887 at 916 per Hope JA

[15] *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 378-9 per the Court

[16] *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 46 per Deane J, at 69-70 per Toohey J; *Director of Public Prosecutions (Cth) v Elisabeth Sexton* (2008) 181 A Crim R 507 per Howie J at [22]

[17] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371 per Dixon CJ, Fullagar, Kitto and Taylor JJ; *Lane v Registrar of Supreme Court of New South Wales (Equity Division)* (1981) 148 CLR 245 at 258 per Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ; *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 56 per Gibbs CJ, at 133 per Wilson J; *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 46 per Deane J, at 69-70 per Toohey J

[18] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371 per Dixon CJ, Fullagar, Kitto and Taylor JJ; *Lane v Registrar of Supreme Court of New South Wales (Equity Division)* (1981) 148 CLR 245 at 258 per Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ; *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 56 per Gibbs CJ, at 133 per Wilson J; *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 46 per Deane J, at 69-70 per Toohey J; *Director of Public Prosecutions (Cth) v Elisabeth*

Criminal proceedings must be pending at the time of the publication of the material – proceedings are considered to commence at the time of arrest.[19]

Publication will only constitute a contempt where there is a real and definite tendency to prejudice or embarrass particular proceedings.[20] This has been described as 'a real risk, as opposed to a remote possibility',[21] a matter of practical reality,[22] 'likely'[23] and a 'substantial risk of serious injustice'.[24] The actual effect of the publication is not relevant.[25] Contempt can include material that is favourable to accused.[26]

The tendency to prejudice or embarrass is to be assessed objectively at the time of the publication[27] based on its effect on the ordinary, reasonable member of community.[28] The

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Sexton (2008) 181 A Crim R 507 per Howie J at [22] (although where liability is based on being an accessory before the fact knowledge of a tendency to interfere with judicial proceedings must be proved).

[19] *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 374-8 per the Court

[20] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372 per Dixon CJ, Fullagar, Kitto and Taylor J quoted in *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 56 per Gibbs CJ; *Attorney General (NSW) v X* (2000) 49 NSWLR 653 at [170] per Mason P citing *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 34 per Wilson J

[21] *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 56 per Gibbs CJ; *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 733 at 735 per Glass JA, CA(NSW)

[22] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 370 per Dixon CJ, Fullagar, Kitto and Taylor JJ; *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626 per the Court, CA(NSW); *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 99 per Mason J, at 133 per Wilson J, at 166, 176-7 per Brennan J; *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 733 at 735 per Glass JA, CA(NSW); *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 27-8 per Mason CJ, 34 per Wilson J, at 70 per Toohey J

[23] *Bell v Stewart* (1920) 28 CLR 419 at 432 per Isaacs and Rich JJ (might result)

[24] *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 99 per Mason J; *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 28 per Mason CJ

[25] *Bell v Stewart* (1920) 28 CLR 419 at 432 per Isaacs and Rich JJ; *Attorney-General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 368 per the Court; *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626 per the Court; *Director of Public Prosecutions (Cth) v Elisabeth Sexton* (2008) 181 A Crim R 507 per Howie J at [25], [33] (fact that publication did interfere may be used as evidence of tendency to interfere but not decisive)

[26] *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626-7 per the court, CA(NSW)

[27] *Attorney-General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 368 per the Court; *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626 per the Court; *Director of Public Prosecutions (Cth) v Elisabeth Sexton* (2008) 181 A Crim R 507 per Howie J at [25], [33]

[28] *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626; *Attorney-General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 702 per McHugh JA

test takes into account the publication as a whole[29], the nature of the publication and all relevant surrounding circumstances.[30]

The risk of interference is higher when a jury is involved,[31] and generally a long delay between the date of publication and the date of the trial lessens the risk of interference.[32]

It is lawful to publish bare facts.[33] These are described in *Packer v Peacock* as extrinsic ascertained facts to which any eyewitness could bear testimony, such as the finding of a body and its condition, the place in which it is found, the persons by whom it was found, the arrest of a person, but does not include alleged facts.[34]

The publication of a matter that may cause prejudice to a person will not necessarily constitute contempt when it is incidental to or a by-product of an open discussion about a matter of public concern or interest.[35] This will, however, rarely include a discussion of the guilt or innocence of the accused, the very issue of a criminal trial.[36]

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[29] *Packer v Peacock* (1912) 13 CLR 577 at 587 per Griffiths CJ; *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372 per Dixon CJ, Fullagar, Kitto and Taylor JJ

[30] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371-2 per Dixon CJ, Fullagar, Kitto and Taylor JJ, at 375 per McTiernan J; *Attorney-General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 368 per the Court; *Attorney-General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 697 per Glass JA; *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 733 at 735-6 per Glass JA, CA(NSW); *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 28 per Mason CJ (nature and extent of publication, mode of trial, time between publication and trial), at 34 per Wilson J (content of publication, nature of proceedings, audience, durability of effect of publication); *Director of Public Prosecutions (Cth) v Elisabeth Sexton* (2008) 181 A Crim R 507 per Howie J at [25]

[31] *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 57-8 per Gibbs CJ at 76 per Stephen J; *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 733 at 734 per Glass JA, CA(NSW); *Baladjam (No.44)* [2008] NSWSC 1463 per Whealy J at [16]. See also *Director of Public Prosecutions (Cth) v Elisabeth Sexton* (2008) 181 A Crim R 507 per Howie J at [53] (should assume jurors will generally follow directions).

[32] *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 76 per Stephen J ('temporal factor'), at 118-19 per Aickin J (remote in time), at 136-7 per Wilson J; *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 28 per Mason CJ, at 34 per Wilson J

[33] *Packer v Peacock (*1912) 13 CLR 577 at 588 per Griffiths CJ; *Murphy, Murdoch and Murphy* (1989) 167 CLR 94 at 123 per Brennan J; *Glennon v The Queen* (1992) 173 CLR 592 at 611 per Brennan J

[34] (1912) 13 CLR 577 at 588 per Griffiths CJ

[35] *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242 at 249-50 per Jordan CJ; *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372 per Dixon CJ, Fullagar, Kitto and Taylor JJ*; Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 59-60 per Gibbs CJ, at 95 per Mason J, at 133-4 per Wilson J, at 175 per Brennan J; *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 41-2 per Wilson J, at 66 per Toohey J, at 82-86 per Gaudron J.

Examples of contempt in relation to criminal proceedings include:

> Publication of an incriminating statement by accused to police before the statement is referred to in court[37]
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> Statement from a witness yet to give evidence in a coronial inquest[38]
>
> Publication of prior convictions[39]
>
> Publication of a comment by the NSW Premier to a journalist that he believed former High Court judge granted a fresh trial was innocent and expected a different verdict – contempt by both Premier and media[40]
>
> Publication of a report that a person arrested had 'allegedly admitted' offence to police[41]

An injunction may be granted to restrain actual or threatened criminal contempt.[42] This can only be granted by the Supreme Court – the District Court as a court of inferior record cannot issue an injunction.[43] The Court must be satisfied that there is a serious question to be tried about whether the publication would indeed be likely to result in an interference with the course of justice.[44] The standard of proof is on the balance of probabilities.[45]

When considering the need for an injunction the Court should assume that juries can be generally relied upon to follow directions, which will include instructions to put out of their

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[36] *Director of Public Prosecutions v Wran (*1987) 7 NSWLR 616 at 629 per the Court; *Director of Public Prosecutions v Australian Broadcasting Corp* (1987) 7 NSWLR 588 at 598 per the Court

[37] *Attorney-General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362

[38] *Attorney-General (NSW) v Mirror Newspapers Ltd (Luna Park Case)* [1980] 1 NSWLR 374 NSWCA

[39] *Attorney-General (NSW) v Willesee* [1980] 2 NSWLR 143 at 150, 152 per Moffitt P, CA(NSW); *Hinch v A-G (Vic)* (1987) 164 CLR 15 at p.28 per Mason J

[40] *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616

[41] *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368

[42] *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 at 42 per Gibbs CJ; *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 716 at 725 per Young J; *Y and Z v W* (2007) 70 NSWLR 377 at [35] per Ipp JA, NSWCA; *Kamm v Channel Seven Sydney* [2005] NSWSC 699 per Campbell J at [8], [9] (jurisdiction accepted); *Baladjam (No.44)* [2008] NSWSC 1463 per Whealy J; *Baladjam (No.45)* [2008] NSWSC 1464 per Whealy J.

[43] *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 332-333 per Samuels AP, CA(NSW)

[44] *Kamm v Channel Seven Sydney* [2005] NSWSC 699 at [13] per Campbell J

[45] *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 716 at 726 per Young J; *Kamm v Channel Seven Sydney* [2005] NSWSC 699 per Campbell J at [13]

mind anything they may have read about a case in the media and to focus only on the evidence at trial.[46]

Suppression and Non Publication Orders

At common law the inherent jurisdiction or implied powers of a superior court[47] may be used to restrict the reporting of proceedings where necessary in the interests of the administration of justice.[48] Such orders must be clear and do no more than is required in the circumstances – there must be a minimal intrusion on the principle of open justice.[49] Such orders may bind parties, witnesses, counsel, solicitors and, if relevant, jurors and media representatives, or other persons present in court when an order is made, or to whom an order is specifically directed.[50] Such orders cannot bind persons at large, although conduct that deliberately breaches an order may constitute contempt not because it has breached an order but because it has the tendency to interfere with the due administration of justice.[51]

Under the (NSW) *Court Suppression and Non-Publication Orders Act* 2010 a court (which includes Local, District and Supreme Courts[52]) may make a suppression order or non-publication order to prohibit or restrict the publication or other disclosure of:

> (a) information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court, or
>
> (b) information that comprises evidence, or information about evidence, given in proceedings before the court.[53]

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[46] *Baladjam (No.44)* [2008] NSWSC 1463 at [14]-[15] per Whealy J (this was a 'rare' case where directions would not be sufficient to undo the prejudice)

[47] Such as the Supreme Court: *Qaumi and Ors* (No.9) [2016] NSWSC 171 at [23] per Hamill J. Statutory courts such as the District Court have no inherent powers.

[48] *Hogan v Hinch* (2011) 243 CLR 506 at [26] per French CJ; *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476-7 per McHugh JA; *Lodhi v R* (2006) 163 A Crim R 508, NSWSC per Whealy J at [10]; *Nagi v DPP* [2009] NSWCCA 197 at [31]-[32] per Basten JA.

[49] *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476-7 per McHugh JA; *Lodhi v R* (2006) 163 A Crim R 508, NSWSC per Whealy J at [10]

[50] *Hogan v Hinch* (2011) 243 CLR 506 at [26] per French CJ; *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476-7 per McHugh JA

[51] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [59]-[60] per Basten JA; *Hogan v Hinch* (2011) 243 CLR 506 at [24] per French CJ; *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477 and 479 per McHugh JA: (see contempt by publication above)

[52] *Court Suppression and Non-Publication Orders Act* 2010 s.3

A suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise) and a non-publication order means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).[54]

'Publish' means to disseminate or provide access to the public or a section of the public by any means, including by:

> (a) publication in a book, newspaper, magazine or other written publication, or
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> (b) broadcast by radio or television, or
>
> (c) public exhibition, or
>
> (d) broadcast or publication by means of the Internet.[55]

In relation to the internet information is published by uploading it to a particular site or webpage and continues to be published so long as the information is available to be downloaded.[56] The definition of publish extends to persons who provide access to material originally uploaded by someone else.[57]

An order cannot be made unless the court is satisfied of one or more of the grounds set out in s.8(1).[58] In relation to adverse publicity material the most relevant grounds are:

> s.8(1)(a) – the order is necessary to prevent prejudice to the proper administration of justice,[59] and
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> s.8(1)(e) - it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

The concept of 'administration of justice' is not easily defined and has been referred to as 'multifaceted'.[60] It has been described by the Federal Court as 'a reference to the public

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[53] *Court Suppression and Non-Publication Orders Act* 2010 s.7

[54] *Court Suppression and Non-Publication Orders Act* 2010 s.3.

[55] *Court Suppression and Non-Publication Orders Act* 2010 s.3

[56] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [43] per Basten JA

[57] *Debs* [2011] NSWSC 1248 at [24] per RS Hulme J

[58] *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [19].

[59] See *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [36] per Basten JA

[60] *Reinhardt v Welker [*2011] NSWCA 403 at [39] per Bathurst CJ and McColl JA

interest that the court should endeavour to achieve effectively the object for which it was appointed to do justice between the parties.'[61]

Aside from the requirement that a court must take into account that 'a primary objective of the administration of justice is to safeguard the public interest in open justice' the legislation does not identify or preclude from consideration any other objectives of 'the proper administration of justice', nor does it establish a hierarchy in considering these objectives.[62] One clearly relevant element of the proper administration of justice in a criminal matter is that of a fair trial.[63]

The term 'necessary' is not defined in the Act and Courts have taken the restrictive common law approach.[64]

The test for whether an order is *necessary* is dependent upon the context, the material sought to be suppressed and the nature of the order[65].

Where the material sought to be suppressed contains reporting of legal proceedings[66] the test for necessity is strict because it directly impacts the fundamental principle of open justice[67]. Under the legislation the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.[68] It is an exceptionally high test[69], described as requiring a 'high level of certainty that prejudice of the

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[61] *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129 at 133 per Bowen CJ quoted in *Reinhardt v Welker* [2011] NSWCA 403 at [39] per Bathurst CJ and McColl JA and *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [27].

[62] *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [19]

[63] *Ibid* at [28]-[29]; [62]-[65].

[64] *R v Perish; R v Lawton; R v Peris*h (2011) 220 A Crim R 463 NSWSC at [28] Price J; *Reinhardt v Welker* [2011] NSWCA 403 at [27]-[30] per Bathurst CJ and McColl JA; *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [22]-[26].

[65] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [45]-[46] per Basten JA; at [8] per Bathurst CJ; *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [37]-[39] (where Hamill J pointed out an order that closed the court is more extreme than one delaying publication of court proceedings)

[66] In *R v Perish; R v Lawton; R v Peris*h (2011) 220 A Crim R 463 NSWSC at [25] Price J extended this to include polemical debate of a court decision.

[67] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [51] per Basten JA; *R v Perish; R v Lawton; R v Peris*h (2011) 220 A Crim R 463 NSWSC, per Price J at [27].

[68] *Court Suppression and Non-Publication Orders Act* 2010 s.6, *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [34] per Basten JA; *R v Perish; R v Lawton; R v Perish* (2011) 220 A Crim R 463 NSWSC, per Price J at [28].

[69] *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [36]

trial will ensure'[70], and that the court is satisfied to a high degree of certainty the order is necessary for a fair trial.[71] The test is not a balancing exercise – the order must only be made if it is found to be necessary.[72] An order that is only convenient, reasonable or sensible is not an order that is necessary.[73] An order should only be made in exceptional circumstances.[74]

The following statement by McHugh JA in *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales*[75] has been applied as the 'clearest statement' for the test of necessity under the legislation:[76]

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule … an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it.

Where the request is to supress the reporting of earlier legal proceedings such as a reference to an earlier, unrelated, trial involving the accused, the court should take into account that the requested suppression will be for a short period only which reduces the impact on the principle of open justice.[77]

The request for suppression may relate to material that does not arise from legal proceedings. Such material is described by Basten JA as 'material having no connection with court proceedings except (in) its capacity to affect current or future proceedings'.[78] The distinction is important because the principle of open justice is less relevant[79] and the test of

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[70] *R v Perish; R v Lawton; R v Peris*h (2011) 220 A Crim R 463 NSWSC, per Price J at [27].

[71] *R v Perish; R v Lawton; R v Peris*h (2011) 220 A Crim R 463 NSWSC, per Price J at [30].

[72] *Reinhardt v Welker* [2011] NSWCA 403 at [31] per Bathurst CJ and McColl JA; *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [35]; *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [24].

[73] *Reinhardt v Welker* [2011] NSWCA 403 at [31] per Bathurst CJ and McColl JA cited in *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [34]-[36] and *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [24].

[74] *Reinhardt v Welker* [2011] NSWCA 403 at [27] per Bathurst CJ and McColl JA; *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [32]-[34].

[75] (1986) 5 NSWLR 465 at 476-7

[76] *Reinhardt v Welker* [2011] NSWCA 403 at [29] per Bathurst CJ and McColl JA

[77] *Debs* [2011] NSWSC 1248 at [28] per RS Hulme J. See also *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [37]-[39]

[78] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [51]

[79] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [49]-[51]; *R v Perish; R v Lawton; R v Peris*h (2011) 220 A Crim R 463 NSWSC, per Price J at [24]

necessity is less strict. In this case 'necessary' should not be given a narrow construction.[80] The appropriate test in these circumstances has been stated as whether it is 'reasonably appropriate and adapted to achieve its perceived purpose.'[81]

When considering whether the order is necessary to prevent prejudice to the proper administration of justice the court should consider questions such as[82]:

> Whether the prejudice is a certainty or a possibility
>
> Whether the effect of the publicity is minor or could cause the trial to miscarry
>
> Whether the making of an order will diminish the risk or remove it

When considering whether future media coverage is likely to be prejudicial the Court may use previous media coverage as a guide.[83] Anticipated publicity and its likely interference with the process of justice must be extreme or extraordinary.[84]

When considering whether to grant an order the Court should take into account the effect of directions to the jury[85]. While the courts have strongly endorsed the view that jurors should be assumed to follow directions[86], this should not be considered a foregone conclusion. Basten JA suggested that [87]

> 'a juror might be thought to be more likely to look for offending material, despite a direction, if such material is of recent origin and if he or she has some recollection of its existence, than in other circumstances. This is a matter for consideration by each judge asked to make such an order.'

In a case decided several months prior to the introduction of the Act Price J said[88]

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[80] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [8] per Bathurst CJ.

[81] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [51] per Basten JA

[82] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [46] per Basten JA.

[83] *Mr C* (1993) A Crim R 562 at 565 per Hunt CJ at CL cited and followed in *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [24]-[25], [41]-[43]. See also *Wran* [2016] NSWSC 1026 where Harrison J declined to grant a media organisation access to exhibits from a sentence hearing in view of concerns about the way the organisation had previously reported about the offender.

[84] *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [53]

[85] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [77], [100] per Basten JA

[86] *Gilbert* (2000) 201 CLR 414 at 425 per McHugh J; *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [63]-[67] (summary of cases)

[87] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [77]

[88] *Perish* [2011] NSWSC 1102 at [55] per Price J

> 'Although I accept that the jury will abide by my directions I consider that I should do all that I can to assist them in making their task easier. Notwithstanding the age of the articles, their immediate accessibility on the applicants' websites by keying in the names of the accused causes, in my opinion, a real risk of prejudice to the accuseds' right to a fair trial'

RS Hulme J suggests the following[89]:

> '… experience shows that the assumption (that juries follow directions) is not always justified … Given the circumstances in which it has come to light that jurors have disobeyed instructions given to them, it would be unrealistic to think that it has not happened in other cases and will not in the future.'

Hamill J suggested[90]

> '… while the robustness and the capacity of a jury to generally obey directions is not in doubt, the question here is whether the nature and extent of the anticipated publicity arising from the present trial will be such that it will be impossible to obtain an untainted jury panel for the (next) trial. In other words, will the members of the panel called for the (next) trial have been influenced to a degree that the accused's trial would have to be postponed or where there is a real risk of a miscarriage if the case proceeds shortly after the present trial.'

Where the stricter test is applied the possibility that a juror might defy orders does not meet the test for necessity – the court cannot order the removal of articles just to make it easier.[91]

The courts have rejected an argument that an order to remove material from the internet would be onerous[92].

An order will not meet the necessity test if it is futile, ineffective or impossible,[93] although the inability of an order to actually restrict the publication of all relevant material may not necessarily prevent the making of the order.[94]

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[89] *Debs* [2011] NSWSC 1248 at [31]-[32] per RS Hulme J

[90] *Qaumi and Ors (No.15)* [2016] NSWSC 318 at [68]

[91] *R v Perish; R v Lawton; R v Perish* (2011) 220 A Crim R 463 NSWSC, per Price J at [36]

[92] *Debs* [2011] NSWSC 1248 at [47]-[48] per RS Hulme J (gave the parties several days to comply)

[93] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [76], [78]-[80] per Basten JA

[94] *Debs* [2011] NSWSC 1248 at [43]-[44] per RS Hulme J (there is utility in substantially reducing prejudice); See also *Perish* [2011] NSWSC 1102 at [43]-[46] per Price J a case decided at common law just prior to the introduction of the Act. In *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [89] take-down orders made by Hamill J in *Qaumi (No.16)* [2016] NSWSC 319 at [36]-[41] were set aside on the basis that in the circumstances they would be infective and therefore futile. The decision of the appeal court appears to be based on the facts of the case: "Notwithstanding the very careful consideration His Honour gave to the making of the orders, and the views expressed by experienced trial judges in *Perish* and *Deb*, we have come to the conclusion that the take down orders would not result in the articles being sufficiently removed from the internet for the orders to be effective."

Before making an order the court should consider whether there is any other way to ensure a fair trial, such as delaying the commencement of the trial or directions to the jury,[95] although a proposal to delay proceedings must consider the impact on, and interests of, witnesses, the accused and the family and friends of alleged victims.[96]

The business interests of media organisation will generally have little impact on the decision of whether to make an order.[97]

Any party to proceedings may apply for an order.[98] A request for an order must be supported by material – mere belief as to the necessity of the order is insufficient.[99]

An order may be made subject to such exceptions and conditions as the court thinks fit and specifies in the order,[100] it may be an interim order[101] and must specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made.[102] The order must be plain in its terms, not requiring a reading of the accompanying judgment to understand its scope.[103] The order must be the least intrusive of the public interest in open justice as can be made in the circumstances.[104]

An order operates for the period specified by the order which may be a fixed period or referenced to a specified event, and must be no longer than is reasonably necessary to achieve the purpose for which it is made.[105]

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[95] *R v Perish; R v Lawton; R v Perish* (2011) 220 A Crim R 463 NSWSC, per Price J at [32], [37]

[96] *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [55], [74]-[77] affirmed in *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [68], [77].

[97] *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [93]; *Qaumi (No.16)* [2016] NSWSC 319 per Hamill J at [56]-[57]

[98] *Court Suppression and Non-Publication Orders Act* 2010 s.9(1)

[99] *Perish* [2011] NSWSC 1102 at [42] per Price J (a case decided at common law just prior to the introduction of the Act)

[100] *Court Suppression and Non-Publication Orders Act* 2010 s.9(4); *R v Simmons (No 5)* [2015] NSWSC 333 at [40] per Hamill J (nature of such orders are flexible)

[101] *Court Suppression and Non-Publication Orders Act* 2010 s.10

[102] *Court Suppression and Non-Publication Orders Act* 2010 s.9(5)

[103] Qaumi and Ors (No.12) [2016] NSWSC 294 per Hamill J at [12]

[104] *Qaumi and Ors (No.15)* [2016] NSWSC 318 per Hamill J at [72]

[105] *Court Suppression and Non-Publication Orders Act* 2010 s.12

An order may apply to anywhere in the Commonwealth, but can only apply outside NSW if necessary, and must specify the place to which it applies.[106] This makes the application of an order potentially broader than that at common law.[107]

At common law an order can apply only to parties present in the court room. The provisions of this Act were intended to extend this application to parties outside the courtroom: the Second Reading Speech suggests orders can bind all persons[108].

Where specific organisations are ordered to remove specified articles the enforcement of the order is relatively simple.[109] Orders that supress the publication of material arising from current legal proceedings would also seem relatively simple to enforce. In *Rogerson (No.13)* [110] the Court Media Manager forwarded an email to one hundred media outlets advising them as to the existence and terms of the suppression orders, including the fact that at the end of the trial the orders would be lifted.

A practical approach has also been taken to the publishing of judgments on the NSW Caselaw site where they relate to a matter still awaiting trial. In *Matthews (No.2)*[111] the Court explained:

> Administratively at least it is not unusual for judgments of this Court to be handed down and in that sense "published", but not "published" in the sense of being uploaded immediately onto Caselaw. The most common circumstance in which that occurs is when the judgment has the potential to affect outstanding criminal proceedings. By not placing the judgment immediately on the website the potential contamination of a jury pool by the wide dissemination of material adverse to an accused is minimised. However this type of (in)action does not constitute any form of non-publication order or the making of such an order under the Act. Thus in such cases there is no immediate impediment to the parties and others reproducing the judgment, including on a website, although they do so subject to the law of contempt.

In *Obeid (No.8)*[112] Beech-Jones J ordered the lifting of a non-publication order but, in view of the future trial date of 6 June, stated:

> I consider that this judgment and the judgments in *Obeid No 2*, *Obeid No 3* and *Obeid No 5* should be “published” on Caselaw but only until 17 May 2016. Consistent with the approach stated in *Matthews No 2* they will then be removed, especially as *Obeid No 2* canvasses

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[106] *Court Suppression and Non-Publication Orders Act* 2010 s 11

[107] *Debs* [2011] NSWSC 1248 at [20], [22]-[25] per RS Hulme J

[108] *Debs* [2011] NSWSC 1248 at [20] per RS Hulme J

[109] See for example *Perish* [2011] NSWSC 1110 per Price J

[110] [2015] NSWSC 1120 at [4]

[111] [2013] NSWCCA 194 at [3]

[112] [2016] NSWSC 388 at [9]

> factual details of the Crown case. Whether the Court of Criminal Appeal's judgment will be "published" on Caselaw will be a matter for the members of that Court to determine.

Cases that are subject to non-publication orders may be available on the JIRS website under Restricted Judgments making them available to legal practitioners for the purpose of legal proceedings but making clear they are not for general publication.

The difficulty emerges where a court is asked to order a generalised restriction on the publication of material in relation to the accused, particularly where the material is already in the public domain. A number of internet content hosts or search engine operators may have such material archived or available for downloading without being aware its existence. Many of these hosts may be in another country, although the material itself is available in NSW, raising the practical question of enforcement. [113]

The Court of Criminal Appeal has rejected generalised orders on the basis they are too broad, ineffective, impractical and therefore not do not meet the test for nessecity[114]. The Court has further concluded that any order that required an internet content host to remove, restrict or even monitor material the existence of which they were not aware, would be unconstitutional.[115]

The Court of Criminal Appeal has suggested that the DPP should first conduct an internet search prior to the trial and ask internet content hosts to remove material prior to making an application for an order,[116] even suggesting that the test for necessity would not be satisfied if this was not done first.[117] Justice Bell of the High Court has suggested a similar approach by both the DPP and defence counsel in an article on preserving the integrity of jury trial.[118]

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[113] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [70] per Basten JA. See also X v Twitter [2017] NSWSC 1300 where Pembroke J considered similar issues in the context of an application for an order restraining the international corporations responsible for the worldwide operations of the micro-blogging service Twitter from continued publication of unauthorised information by a third person using the service.

[114] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [78]-[80], [101] per Basten JA

[115] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [96], [102] per Basten JA

[116] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [94] per Basten JA

[117] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [98] per Basten JA

[118] Bell, V. 'How to Preserve the Integrity of Jury Trials in a Mass Media Age' (2005) 7 *Judicial Review* 311 at 319 cited in Buckley, 'In Defence of 'Take Down' Orders' (2014) 23 *JJA* 203 at 218.

In *Obeid*[119] the DPP reported to the court the following action:

(a) the Office of the Director of Public Prosecutions ("ODPP") has requested, on 2 July 2015, that references to the Applicant in connection to findings of corruption by the ICAC be removed from the online websites of Fairfax Media and News Limited;

(b) the ODPP has requested the co-operation of the ABC, SBS, Channel 9, Channel 7, Channel 10, Foxtel, Sky News, 2GB and 2UE to refrain from publishing references to findings of corruption by the ICAC concerning the Applicant prior to trial;

(c) the ICAC has informed the ODPP that, on 1 September 2015, it will remove from its public website publications (including reports, transcripts, exhibits, witness lists and public notices) concerning the ICAC investigations and findings entitled Cyrus, Meeka and Cabot (each of which involved the Applicant) until such time as the trial has concluded.

In another case the application for 'take down orders' was withdrawn until the applicant had first spoken to the DPP and various media organisations about removing certain articles.[120]

Finally the issuing of orders under this legislation does not affect the inherent jurisdiction or any powers of court to regulate its proceedings or to deal with a contempt of the court.[121] It also does not extend the power of a court at common law to prevent contempt.[122] The form of an order should be the form that would be appropriate in the exercise of the inherent jurisdiction of the Supreme Court to prevent the apprehended breach of a contempt by publication.[123]

Recent cases show the varied circumstances and content of suppressions orders.

In *Longworth (No.3)*[124] Cogswell SC DCJ made a non-publication order in relation to CCTV footage of the alleged offence although it had already been tendered as evidence at the trial. His Honour accepted the argument of counsel for the accused that in the circumstances of the case display of the footage by media could possibly render the mother of the accused so psychologically traumatised that she became incapable of giving evidence on behalf of the accused thus causing significant prejudice to his trial. His Honour was also of the opinion that it was highly undesirable that the jury be exposed to the widespread public and private argument and discussion on a central issue in the trial that would undoubtedly result from the playing of the footage. The suppression order was to extend until the verdict was given.

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[119] [2015] NSWSC 897 at [101]

[120] *Qaumi (No.16)* [2016] NSWSC 319 per Hamill J at [3]

[121] *Court Suppression and Non-Publication Orders Act* 2010 s.4

[122] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [63] per Basten JA

[123] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [98] per Basten JA

[124] [2015] NSWDC 401

In *Obeid*[125] non-publication orders were made after pre-trial hearings on the basis that although there had been a "falling off" of adverse publicity concerning the accused (referred to by the judge as the "fade factor") the orders were necessary to guard against a “reversal of the fade factor”. These orders had been made in relation to the publication of the listing of pre-trial applications and interlocutory appeals as well as the judgments themselves.[126] These order remained until circumstances made them largely redundant.[127]

In *Rogerson (No.13)*[128] Bellew J commented that ‘prohibiting publication of applications made in the absence of the jury in a case such as this is unremarkable’. Similar to the matter of *Obeid*, the suppression extended to the fact of the making of the applications, all evidence and submissions and the judgements themselves.

Similar orders restricting the publication of the names of the accused in the court lists were made in *Qaumi (No.10),*[129] the rational being to prevent potential jurors who have received a summons for jury duty but will not yet have received appropriate directions, making a search in relation to the names of possible persons standing trial. In this case the order was to expire on the first day of the trial.

In *Quami and Ors (No.12)* [130] an order was made suppressing publication of the name and nickname of the victim of the alleged offence, as well as anything tending to reveal the identity of the victim. It was anticipated that a great deal of adverse evidence touching on the character, reputation and criminal activity of the victim in the context of a turf war between rival chapters of a criminal gang would be adduced in the trial, and could prejudice a subsequent trial where the victim himself was charged with murder and attempted murder.

In *Quami and Ors (No.15)*[131] two of the accused in a murder trial were to stand trial for a second charge of murder at the conclusion of the first trial (back to back trials). Hamill J granted a suppression order in relation to the first trial until the completion of the second trial. Both trials related to alleged criminal gang warfare and the order was made to prevent reporting on details from the first trial adversely affecting the second trial. The order was

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[125] *Obeid* [2015] NSWSC 897 at [53]-[76] per Johnson J; Obeid [No.2] [2016] HCA 10 at [17]-[18] per Gageler J.

[126] See for example *Obeid* [2015] NSWSC 897 at [51], [99] per Johnson J.

[127] *Obeid (No.8)* [2016] NSWSC 388 per Beech-Jones (although the published cases were to be removed from the NSW Caselaw site at a specified date prior to the commencement of the trial)

[128] [2015] NSWSC 1120 at [15]

[129] [2016] NSWSC 184 per Hamill J. See Also *Qaumi* [2016] NSWSC 1473 per Hamill J at [33] and *McNeil* [2015] NSWSC 357 at [110]-[111] per Johnson J

[130] [2016] NSWSC 294 per Hamill J

[131] [2016] NSWSC 318 per Hamill J

made after Hamill J concluded the use of pseudonyms would not offer sufficient protection[132]. He was also concerned with the possible infection of the pool of potential jurors.[133] Both these conclusions were affirmed by the Appeal Court in the exceptional circumstances of the case.[134]

(CTH) Judiciary Act 1903 ss.77RA-77KA

In 2012 Part XAA--Suppression And Non-Publication Orders was added to the *Judiciary Act*. The sections are worded almost identically to the NSW legislation and give specific power to the High Court to make a non-publication or suppression order.[135]

The application of these provisions has been considered in *Obeid [No.2]*.[136] Gageler J stated that ordinarily an application for a non-publication order should be made to the court from whose judgment special leave to appeal was being sought as that court would generally be in a better position to decide the application.[137] Where an application is made to the High Court it should be done by summons and affidavit and as promptly as possible.[138]

In this case Gageler J granted the requested non-publication order on the basis that a failure to do so could undermine the effect of existing non-publication orders made by the Supreme Court in relation to a pending trial.[139] He also accepted that whilst the use of a pseudonym in the court documents would have achieved the same practical effect it was too late to make use of this option and '(a)n order which in terms prohibited publication was necessary'.[140]

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[132] Ibid per Hamill J at [82]-[89]

[133] Ibid at [68] per Hamill J

[134] *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [72]-[75].

[135] The Part does not limit or otherwise effect any other power of the High Court to regulate its proceedings or to deal with a contempt of the Court nor does it limit or otherwise affect the operation of a provision of any other Act that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings: (CTH) *Judiciary Act* 1903 ss.77RB and 77RC.

[136] [2016] HCA 10 Gageler J

[137] Ibid at [8]

[138] Ibid at [9]

[139] Ibid at [22]. The matter was listed to go to trial several weeks after the hearing of the application in the High Court.

[140] Ibid at [23]

Sentence

In the sentencing case of *Wran*[141] Harrison J declined to give a media organisation access to the both the names of persons providing references in support of a high profile offender being sentenced and the references themselves. Access to pleadings, transcripts and exhibits for appropriate non-interested parties is normally granted under the Supreme Court Practice Note SC Gen 2 Par 7 unless the judge considers the material should be kept confidential. In this case the judge declined the application for access in view of concerns about the way the organisation had previously reported in newspaper articles about the offender. The denial was based upon the newspaper's history of reporting which evidenced an 'insidious inclination' to print material that is harmful, unpleasant and misleading in relation to both the offender, and in relation to referees that supported another, unrelated high profile offender in the past.[142] It had been submitted by defence counsel that it was 'overwhelmingly in the public interest and the administration of justice that prospective referees not be discouraged or dissuaded from assisting the Court'.[143]

Stay Application

In hearing an application for a stay of proceedings the court must balance the interest of the accused and the community in a fair trial with the interest of community that person charged with criminal offences be brought to trial expeditiously.[144] The court must consider what is required in the circumstances of case.[145] It is sufficient that an applicant demonstrates a risk that he or she will not have a fair trial.[146]

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[141] [2016] NSWSC 1026

[142] Ibid at [13]-[14] per Harrison J

[143] Ibid at [9]

[144] *Murphy, Murdoch and Murphy* (1989) 167 CLR 94 at 99 per Mason CJ and Toohey J; *Skaf* [2008] NSWCCA 303 at [29] per the Court; *R (Cth) v Petroulias (No 19)* [2007] NSWSC 536 per Johnson J at [39] applying *Yuill* (1993) 69 A Crim R 450 at 453; *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303 at [198] per the Court

[145] *R (Cth) v Petroulias (No 19)* [2007] NSWSC 536 per Johnson J at [39] applying *Yuill* (1993) 69 A Crim R 450 at 454

[146] *Re K* [2002] NSWCCA 374 at [9]-[10] per the Court; *R (Cth) v Petroulias (No 19)* [2007] NSWSC 536 at [41] per Johnson J. See also *TS* (2004) 144 A Crim R 124 (NSWCCA) at [39] per Mason P and Wood CJ at CL (it is an error to state that the trial must continue unless impossible to do so)

Just because a juror may have heard something does not necessarily mean they will not be impartial.[147] The Court must consider the effect of directions to the jury[148] and is entitled to rely upon the assumption that the jury will listen to directions and make decisions based on the evidence.[149] Despite this in some cases the publicity is so overwhelming as to compromise impartiality.[150]

A permanent stay will only be granted in an extreme case.[151] Temporary stays or adjournments have been more readily granted.[152] If a temporary stay or adjournment is granted it should be for the minimum time required.[153]

The following cases are examples of where an application for a temporary stay based on publicity was rejected:

Murphy, Murdoch and Murphy (1989) 167 CLR 94 (temporary stay)

Adler [2005] NSWSC 44, Dunford J (temporary stay)

Darwiche [2006] NSWSC 927, Bell J (temporary stay)

Skaf [2008] NSWCCA 303 (permanent stay)

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[147] *Murphy, Murdoch and Murphy* (1989) 167 CLR 94 at 99 per Mason CJ and Toohey J; *Glennon v The Queen* (1992) 173 CLR 592 at 603 per Mason CJ and Toohey J

[148] *Skaf* [2008] NSWCCA 303 at [33] per the Court; *Dupas* (2010) 241 CLR 237 at [22] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ

[149] *Glennon v The Queen* (1992) 173 CLR 592 at 603 per Mason CJ and Toohey J; at 614 per Brennan J; *TS* (2004) 144 A Crim R 124 (NSWCCA) at [21] per Mason P and Wood CJ at CL; *Kanaan* [2006] NSWCCA 109 at [24]-[30] per the Court; *Skaf* [2008] NSWCCA 303 at [28] per the Court; *Jamal* (2008) 191 A Crim R 1 at [17]-[21] (NSWCCA) per Spigelman CJ; *Dupas* (2010) 241 CLR 237 at [28]-[29] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ

[150] *TS* (2004) 144 A Crim R 124 (NSWCCA) at [22] per Mason P and Wood CJ at CL

[151] *Glennon v The Queen* (1992) 173 CLR 592 at 605 per Mason CJ and Toohey J; *Skaf* [2008] NSWCCA 303 at [34]-[35] (referring to *Tuckiar* (1934) 52 CLR 335 as the only case where an application for a permanent stay has been granted and *R v Ferguson; Ex parte A-G (Qld)* [2008] QCA 227 at [58]: permanent stay justified only on concluding a fair trial will not be possible within any reasonable time frame or in any venue within court's jurisdiction); *Jamal* (2008) 191 A Crim R 1 (NSWCCA) per Spigelman CJ at [16] (applications for permanent stay failed in most sensational of cases); *Dupas* (2010) 241 CLR 237 at [18], [35] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ (question is not whether case can be characterised as extreme but whether problem cannot be alleviated by trial judge)

[152] *Glennon v The Queen* (1992) 173 CLR 592 at 614 per Brennan J; at 623 per Deane, Gaudron and McHugh JJ; *TS* (2004) 144 A Crim R 124 (NSWCCA) at [23] per Mason P and Wood CJ at CL; *Skaf* [2008] NSWCCA 303 at [27] per the Court (on the assumption that the memory of publicity will fade with time and jurors will have no difficulty in confining their deliberations to the evidence)

[153] *Glennon v The Queen* (1992) 173 CLR 592 at 623 per Deane, Gaudron and McHugh JJ

Dupas (2010) 241 CLR 237 (permanent stay)

Agius (No.2) [2011] NSWSC 482 (temporary stay)

In the following cases a temporary stay was granted or should have been considered

Re K [2002] NSWCCA 374 (temporary stay granted)

TS (2004) 144 A Crim R 124 (NSWCCA) (publicity rendered appellant's trial unfair – retrial ordered)

Jamal (2008) 191 A Crim R 1 (NSWCCA) (should have considered temporary stay)

Judge Alone Trial

Another option to avoiding the prejudicial impact of adverse publicity on jurors is to conduct the trial before a judge alone.

Under (NSW) *Criminal Procedure Act* 1986 s.132 an accused may apply for an order that he or she be tried by a Judge alone. If the Crown agrees the Court must make the order. If the Crown does not agree the Court must consider whether it is in the interests of justice to order a judge alone trial.

On an application for a trial by judge alone there is no presumption in favour of a jury trial[154] and although there is an evidentiary burden on an accused there is no onus of proof.[155] At the same time the Courts recognise importance of the jury trial.[156]

The test under s.132(4) of interests of justice involves a wide discretion and the balancing of interests.[157] The balancing of various interests is required, including the interests of the parties, larger questions of legal principle, the public interest and policy considerations.[158] Interests of justice include the important collateral benefits to the community from involving

[154] *Obeid (No.4)* [2015] NSWSC 1442 per Beech Jones J at [97]; *McNeil* [2015] NSWSC 357 at [27] per Johnson J; *McKnight* [2014] NSWSC 398 at [8] per Campbell J; *Simmons (No.4)* [2015] NSWSC 259 at [55]-[57] per Hamill

[155] *McNeil* [2015] NSWSC 357 at [33] per Johnson J; *McKnight* [2014] NSWSC 398 at [9] per Campbell J; *Simmons (No.4)* [2015] NSWSC 259 at [55]-[57] per Hamill; *Dean* [2013] NSWSC 661, Latham J at [52]

[156] *McNeil* [2015] NSWSC 357 at [28]-[32] per Johnson J; *McKnight* [2014] NSWSC 398 at [9] per Campbell J; *Simmons (No.4)* [2015] NSWSC 259 at [59] per Hamill (no right to demand trial by judge alone)

[157] *McNeil* [2015] NSWSC 357 at [34]-[38] per Johnson J; *King* (2013) 228 A Crim R 406, NSWSC, at [47] per Bellew J; *Dean* [2013] NSWSC 661, Latham J at [52]

[158] *McNeil* [2015] NSWSC 357 at [38] per Johnson J

the public in the administration of justice by way of jury trials.[159] The court may refuse to make an order if it considers the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.[160]

The desire of the accused to be tried by judge alone and a concern about the fairness of the trial are relevant but not determinative factors. [161]

Bellew J recognised that the entitlement of the accused to a fair trial forms part of the broader interests of justice.[162] The Courts have also recognised the possible prejudicial effect of adverse publicity, especially in light of the easy accessibility and usage of the Internet.[163] In *Abrahams*[164] Harrison J explained

> The uncontested evidence in this case shows that the events giving rise to the charges against the accused and Robert Smith have attracted considerable publicity. That has not been limited to the traditional news media outlets but has also extended to electronic publicity in the form of Internet posts and on-line exchanges. These questionable sources of (so-called) information thrive in circumstances and at a time in our development in which everybody must be taken to have unlimited access to them. They survive beyond the range of any appropriate regulation or monitoring capable of ensuring either their accuracy or their reliability. Their authors remain anonymous and unaccountable: their motives are unknown and often manifestly mischievous or malevolent. Regrettably in very many instances the ability of the authors of these questionable publications to express rational views about anything at all cannot be known or assessed and certainly cannot ever be assumed. The material referred to already in this case only serves to confirm and reinforce these concerns.

At the same time the Courts have accepted the inevitability of publicity, [165] and assume that juries will follow appropriately worded directions.[166] The fact that a juror has knowledge of

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[159] *Obeid* [2015] NSWSC 897 per Johnson J at [57], [73]; *Stanley* [2013] NSWCCA 124 at [43] per Barr AJ

[160] *Criminal Procedure Act* s.132(5)

[161] *Abrahams* [2013] NSWSC 729 at [32] per Harrison J; *Simmons (No.4)* [2015] NSWSC 259 at [60] per Hamill; *Stanley* [2013] NSWCCA 124 at [42] per Barr AJ

[162] *King* (2013) 228 A Crim R 406, NSWSC per Bellew J at [54]

[163] *King* (2013) 228 A Crim R 406, NSWSC per Bellew J at [56]; *McNeil* [2015] NSWSC 357 at [67] per Johnson J quoting *Skaf* [2008] NSWCCA 303 at [27]-[28]

[164] [2013] NSWSC 729 at [52]

[165] *McKnight* [2014] NSWSC 398 per Campbell J at [29]; *King* (2013) 228 A Crim R 406, NSWSC, Bellew J at [55]; *McNeil* [2015] NSWSC 357 at [64] per Johnson J. See also *McKnight* [2014] NSWSC 398 per Campbell J at [31]; (it is unrealistic to think jurors will not have heard anything but this does not make a juror impartial - quoting from Mason CJ and Toohey J in *Glennon v The Queen* (1992) 173 CLR 592 at 603).

[166] *Obeid (No.4)* [2015] NSWSC 1442 at [74]-[75] per Beech-Jones J; *Obeid* [2015] NSWSC 897 per Johnson J at [56] (citing *McNeil* as an example of jurors ignoring intense adverse publicity in choosing to convict of manslaughter instead of murder) and [60], [68]; *McNeil* [2015] NSWSC 357 at [65] per Johnson J; *Abrahams*

prior convictions of an accused has been accepted as not necessarily sufficient to establish bias.[167] Regard is also had to the effect of repeated strong directions and warning to juries as to the importance of ignoring extraneous information, including references to s.68C *Jury Act* 1977 which makes it an offence for a juror to make extraneous inquiries,[168] and any other means that can be used to allay the effect of publicity on a fair trial.[169]

The lapse of time between the publicity and the trial may be relevant.[170]

The following are recent examples where an application for a judge alone trial based on adverse publicity was refused:

> *McKnight* [2014] NSWSC 398 per Campbell J (single punch manslaughter)
>
> *Abrahams* [2013] NSWSC 729 per Harrison J (killing of young daughter and reporting her missing)
>
> *McNeil* [2015] NSWSC 357 per Johnson J (single punch manslaughter)
>
> *Obeid* [2015] NSWSC 897 per Johnson J, *Obeid (No.4)* [2015] NSWSC 1442 per Beech-Jones J (wilful misconduct in a public office by a politician)
>
> *Qaumi (No.14)* [2016] NSWSC 274 per Hamill J (murder / attempted murder in the context of very public gang warfare)
>
> *Qaumi* [2016] NSWSC 1473 per Hamill J at [31]-[40] (although a trial by judge alone was ultimately ordered Hamill J had ruled that the pre-publicity factor did not justify a trial by judge alone and was not a decisive factor in making the decision)

[2013] NSWSC 729 at [55]-[61] per Harrison J quoting *Gilbert* (2000) 201 CLR 414 at 425 and *Glennon v The Queen* (1992) 173 CLR 592 at 603; *Simmons (No.4)* [2015] NSWSC 259 at [86]-[88] per Hamill (although the axiom can be taken only so far - it is a question of degree and turns on a thorough analysis of both the nature and extent of the prejudicial material and the method by which it will be introduced into the trial); *King* (2013) 228 A Crim R 406, NSWSC per Bellew J at [57]-[62]; *Qaumi (No.14)* [2016] NSWSC 274 at [43]-[49] per Hamill J.

[167] *McNeil* [2015] NSWSC 357 at [74] per Johnson J citing *K* (2003) 59 NSWLR 431 at 446 [67] and *King* (2013) 228 A Crim R 406 at 417 [60]; *McKnight* [2014] NSWSC 398 per Campbell J at [31] quoting from Mason CJ and Toohey J in *Glennon v The Queen* (1992) 173 CLR 592 at 603

[168] *Obeid (No.4)* [2015] NSWSC 1442 at [72] per Beech-Jones J; *Obeid* [2015] NSWSC 897 per Johnson J at [74]; *King* (2013) 228 A Crim R 406, NSWSC per Bellew J at [61]; *McNeil* [2015] NSWSC 357 at [68]-[69]; [79]-[80] per Johnson J quoting *Skaf* [2008] NSWCCA 303 at [46]; *Qaumi (No.14)* [2016] NSWSC 274 at [81] per Hamill J. See further below under *The Jury*.

[169] *Obeid (No.4)* [2015] NSWSC 1442 at [71] per Beech-Jones J. This may include advising the jury panel to excuse themselves if they feel they cannot be impartial in view of the effect of the adverse publicity: at [72]. See further below under *The Jury*.

[170] *Obeid* [2015] NSWSC 897 per Johnson J at [61], [66]; *McNeil* [2015] NSWSC 357 at [66], [75] per Johnson J

The case of *GSR (3)*[171] is an example where a judge alone trial was granted because of poisonous pre-trial publicity. *Keir* [172] was a trial for murder held before a judge alone. Although there is no judgment indicating why the trial was held without a jury this was the third trial held in the matter, convictions in the previous two trials having been quashed on appeal. The second conviction appeal was successful on the basis that the jury had discovered via the internet that the accused had also been charged with the death of his second wife.[173] A judge alone trial was granted on the basis of prejudicial publicity in the Western Australian case of *Arthurs,*[174] a case involving the detention, sexual assault and murder of an 8 year girl in the toilet of a shopping centre. A judge alone trial was granted by consent in a murder trial where contemporaneous proceedings of the highly publicised inquest into the Lindt Café siege would inevitably involve reference to persons in the trial, including the accused. [175]

The Jury

In cases where there is a significant amount of adverse publicity a number of procedures are available to ensure juries are unbiased and refrain from extraneous enquiries.

Empanelment of the Jury

Challenge to the Array

Under s.41 (NSW) *Jury Act* 1977 the common law right to challenge the whole panel of persons summoned to jury service is preserved. Such challenge must be based on some

[171] [2011] NSWDC 17

[172] [2004] NSWSC 1194

[173] *K* (2003) 144 A Crim R 468 per Wood CJ at CL

[174] [2007] WASC 182

[175] *Droudis (No. 14)* [2016] NSWSC 1550 per Johnson J

default or irregularity by the Sheriff in the selection or summoning of the jury panel.[176] This would not include the potential prejudicial effect of adverse publicity.[177]

Challenge for Cause

Under (NSW) *Jury Act* 1977 s 46 the accused may challenge a member of the jury 'for cause'. Use of this challenge in relation to prejudicial publicity would be on the basis that a person selected for a jury is not impartial because of exposure to such publicity[178]. This right to challenge for cause has been described as more apparent than real.[179] Where a judge allows a challenge for cause the accused is permitted to question a potential juror, but such questioning is not permitted unless the accused has first establish a prima facie foundation for belief that a juror may be biased.[180] Although this was allowed in *The Queen v. Kray*[181] on the basis of adverse publicity, Australian courts have regarded this as an exceptional case. A right to question a juror on the basis of potential bias resulting from adverse publicity was refused in both the Anita Coby murder trial,[182] and the Whiskey Au Go Go murder trial.[183]

In another well publicised case, the Snowtown killings in South Australia[184], Martin J suggested that in exceptional circumstances a judge could use the inherent power of the court to question jurors with a view to 'ensuring that an accused receives a fair trial and that the verdict is based upon the evidence properly considered by an impartial jury'. He declined to exercise such powers concerned that jurors may consider it an infringement upon their

[176] *Greer* (1996) 84 A Crim R 482 at 485 per Pigeon J quoting *O'Connell* [1844] 5 State Trials NS 1 at 789. See also *Grant and Lovett* [1972] VR 423 at 424-5 per McInerney J, *Diak* (1983) 19 NTR 13 per Nader J.

[177] *Greer* (1996) 84 A Crim R 482

[178] *Murphy* (1989) 167 CLR 94 per Mason CJ and Toohey J at 102

[179] *Patel* [2013] QSC 62 per Fryberg J at [7]. In Queensland the *Jury Act* has been amended to include s 47 a statutory right to question jurors where the trial judge is satisfied there are special reasons, prejudicial pre-trial publicity being specifically referred to as a possible special reason.

[180] *Murphy* (1989) 167 CLR 94 per Mason CJ and Toohey J at 102-104; *Greer* (1996) 84 A Crim R 482 at 486; *Queen v. Stuart and Finch* [1974] Qd R 297 per Douglas J at 300-304; per WB Campbell J at 324-330, per Matthews J at 366-371

[181] (1969) 53 Cr App R 412 at 415

[182] *Murphy* (1989) 167 CLR 94 per Mason CJ and Toohey J at 102-104; per Brennan J at 123-4

[183] *Queen v. Stuart and Finch* [1974] Qd R 297 per Douglas J at 300-304; per WB Campbell J at 324-330, per Matthews J at 366-371

[184] *Bunting (No.9)* [2003] SASC 257

right to privacy.[185] Instead Martin J used directions prior to empanelment inviting potential jurors to 'carefully consider a number of matters capable of impacting upon their capacity both to sit as impartial jurors and to give proper consideration to the evidence and their verdicts'.[186]

Another reason Courts have been reluctant to use this method is its doubtful effectiveness.

> "It seems unlikely that a prejudiced juror would recognize his own personal prejudice - or, knowing it, would admit it. However, since there are no empirical data to contradict his declaration of detachment, his word is ordinarily the determining factor. What is more, the more prejudiced or bigoted the jurors, the less can they be expected to confess forthrightly and candidly their state of mind in open court."[187]

Directions Prior to Empanelling

The practice of addressing jurors on the potential effect of adverse publicity prior to empanelment has been used in other cases. The case of ***Skaf***[188] involved an extreme level of adverse publicity resulting from the nature and number of the criminal charges. Prior to selection the trial judge addressed the entire panel, telling them in no uncertain terms it was 'absolutely essential' the jurors who tried the matter be 'utterly impartial' and after informing them of the considerable pre-trial publicity told them that if they had 'the slightest doubt as to [their] capacity to give entirely open and impartial consideration to this case' they could tell the Sheriff's office and they would be automatically removed from the panel without question. The entire panel was then given a half hour adjournment to consider their position. Providing this time to consider their position was deemed important by the CCA

> '… The impact of this change of procedure in encouraging any concerned juror to come forward cannot be underestimated. The initial experience of a jury of the courtroom is likely to be stressful, inhibiting a person from expressing their concerns about becoming a member of the jury. With time for reflection, if the juror has concerns, they are more likely to express them once they have become reasonably familiar with their surroundings.'[189]

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[185] In *Murphy* (1989) 167 CLR 94 at 123 Brennan J suggested that questioning under a challenge for cause could lead a jury to think community confidence in their impartiality and sense of responsibility was heavily qualified.

[186] ***Bunting (No.9)*** [2003] SASC 257 at [21]

[187] *Murphy* (1989) 167 CLR 94 per Mason CJ and Toohey J at 103 quoting (*Friendly and Goldfarb, Crime and Publicity*, (1967), pp 103-104, quoted in LaFave and Israel, *Criminal Procedure*, (1984), vol 2, pp 766-767)

[188] [2008] NSWCCA 303

[189] ***Skaf*** [2008] NSWCCA 303 at [54]-[55] per the Court

A similar approach was taken by RA Hulme J in *McNeil (No.2)*[190] where the jury panel was given lengthy directions and then taken elsewhere in the complex in order for panel members to have time to reflect on what was said. 8 out of 56 members of the panel took the opportunity to be excused, no questions asked, by simply indicating to the Sheriff's officers they did not think they should be a potential jury member.[191]

In another case a similar invitation resulted in 30 or more applications to be excused.[192]

Increasing the Panel and Challenges

In *Skaf* the trial judge took several further steps prior to empanelling the jury to ensure the impartiality of the jury. The panel from which the jury was selected was increased in number, and the number of challenges for each appellant increased from three to five.[193]

Directions to Jury

Some cases will always have publicity and the internet means jurors can access old reports.[194] In response the Courts have developed model directions that instruct juries not to conduct internet research or enquiries.[195]

In *Skaf*[196] the trial judge directed the jury as follows prior to the commencement of the trial:

> The evidence, as I have already told you, consists of the oral evidence of the various witnesses, the documentary exhibits. In other words the material that is put before you here in this courtroom. And it is absolutely essential that your deliberations be based only – only on that material.
>
> Now as we went through before the actual empanelment of you, the jury, the fact that there has been considerable amount of media publicity relating to these accused and the history of this trial, it is very likely that a number of you have seen it. But as I said to you earlier, you are here to be impartial and objective. To the extent that you have read anything whatsoever

[190] [2015] NSWSC 757 at [8]

[191] *Ibid* at [8]-[9]

[192] *Qaumi* [2016] NSWSC 1473 per Hamill J at [34]

[193] *Skaf* [2008] NSWCCA 303 at [48] per the Court

[194] *Skaf* [2008] NSWCCA 303 at [27] per the Court; *Jamal* (2008) 191 A Crim R 1 at [30] (NSWCCA) per Spigelman CJ; *Agius (No.2)* [2011] NSWSC 482 at [31] per Simpson J

[195] *Skaf* [2008] NSWCCA 303 at [46] per the Court and *Jamal* (2008) 191 A Crim R 1 at [30] (NSWCCA) per Spigelman CJ citing *K* (2003) 144 A Crim R 468 at [89]-[90] per Wood CJ at CL

[196] *Skaf* [2008] NSWCCA 303 at [49] per the Court

> outside this Court, it is absolutely essential that you put it out of your minds completely when you are looking at the issues raised during the course of this trial, and that you determine the issues in this trial on the material put before you in this Court, and only on that material.
>
> There are very good reasons of fairness for this. In a trial setting the evidence that it put forward by one party or the other is available for scrutiny, contradiction, and explanation by the other party. Fairness dictates that this be so. But if you were to somehow base your determination on material that was not part of the evidence in this trial, then you would be depriving the opposing party of explaining, contradicting, giving another version of whatever you had in your head. You would be doing a serious injustice to one party or the other, and you would be untrue to your oath which was to try this case according to the evidence.
>
> Now for these reasons it is absolutely essential that none of you take any steps whatsoever, or ask anyone else to take any steps whatsoever to make inquiries about this case outside the courtroom, either by the Internet, by any other electronic means, or indeed by any means whatsoever. You must not consider making any private visit to any scene, or making any outside court attempt to investigate the background of this matter.

This was repeated by further directions during the summing up[197]

> Now I emphasised to you right at the beginning of this trial even before you were empanelled, the necessity to put completely to one side anything that you might have read or heard about this trial or about these accused outside this courtroom. Even during the course of the trial there has been a bit of publicity, over the last week or so, about sexual assaults generally, and how victims are treated within the justice system, victims of sexual assault. I do not know whether any of you have seen this, but if you have, yet again, you must put it completely out of your minds. You must determine this case solely on the evidence that is given in this courtroom, plus of course the evidence of the view that we all went upon last Wednesday evening.

Directions have now been included in the Bench Book.[198]

Where publicity is extensive and likely to continue throughout the trial it may be appropriate to direct the jury on a daily basis not to discuss the facts outside the courtroom, not to undertake independent research, and to decide the case only on the evidence elicited in the trial.[199]

<u>Concerns As to Publicity Arising During the Trial – Jury Directions</u>

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[197] ***Skaf*** [2008] NSWCCA 303 at [50]

[198] Judicial Commission, Criminal Trial Courts Bench Book at [1-480]-[1-490]. See also a summary of directions given to the jury in *McNeil (No.2)* [2015] NSWSC 757 at [14]-[16] per RA Hulme J

[199] ***Qaumi*** (No.25) [2016] NSWSC 514 at [16] per Hamill J

Directions in response to publicity that emerges during the course of a trial may be appropriate and can be tailored according to the circumstances. In a recent case counsel sought a discharge of the jury as a result of a television news report and newspaper article that touched upon some persons and criminal activities that were unrelated to the offences facing the accused but had been referred to in the trial and could be interpreted as relevant and prejudicial. After refusing the discharge the trial judge directed the jury in some detail as to the content of the reports in order to explain why and how the subject of the reports did not relate to the trial and should be ignored.[200]

The (NSW) Jury Act 1977

Under s.55D *Jury Act* a judge may examine an individual juror on oath to determine whether the juror has read, seen or heard alleged prejudicial material published or broadcast during the trial and whether the juror has been influenced by the material.

In *Darwiche*[201], Bell J questioned each juror individually and on oath as to whether they had read and been influenced by a particular article in a newspaper. The trial judge concluded the exercise by saying to the jury

> Thank you for that, members of the jury. I can appreciate it might have seemed like a somewhat unusual exercise to be taken through, but you do appreciate how serious these charges are, and how important it is in fairness to all the parties, to the accused and the Crown, that we have your verdicts based on the evidence and not on views that may be formed by something you read in the media or the like. I do invite you to be very careful throughout this trial to put out of your minds publicity, including generic publicity. There seems to be a deal of publicity at the moment about shooting offences and the like. None of that publicity will help you for a moment in determining the issues raised in this case, as I am sure all of you will understand. Thank you for your patience

When a further adverse and potentially prejudicial broadcast emerged the trial judge declined to re-question each juror individually instead raising the matter with the jury as a whole then questioning more closely and on oath (and in the absence of the rest of the jury) the one juror who had seen the broadcast as to what he remembered. Accepting the response of that juror that he could not recall the material identified as potentially prejudicial to the accused the trial judge declined to pursue the matter any further, declining to ask the juror if he had discussed the matter with other members or even tell him not to do so.

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[200] *Qaumi* (No.25) [2016] NSWSC 514 at [18] per Hamill J

[201] [2006] NSWSC 927 at [12]

Such an approach reflects a warning made by Hunt J in *Savaas*[202] where he suggested s.55D may be a worthwhile procedure but not one to be adopted in every case: "In many cases its adoption would be likely to cause more harm than good by the emphasis which it must give to any prejudice which may have been caused. Jurors are very likely to resent the necessary intrusion it would have into their private thought processes … before exercising his powers pursuant to s.55D a trial judge must in my view balance the risk of causing greater prejudice … where no prejudice in fact may have been caused already'. In many cases the best approach may be to either give appropriate directions, or say nothing at all 'so as to avoid drawing further attention to what has happened'.

Section 68C *Jury Act* 1977 makes it an offence for a juror to make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror. Making an inquiry includes 'conducting any research, for example, by searching an electronic database for information (such as by using the Internet)': s.68C(5)(b).

A warning as to s.68C should be included in the directions to jurors prior to the commencement of the trial,[203] and, where appropriate, repeated throughout the trial.[204]

Under s.53A a juror must be discharged if the juror has engaged in misconduct such as making private inquiries under s.68C. Where a concern has been raised a judge can question a juror under s.55DA(1) and does not have to be satisfied of misconduct beyond reasonable doubt before discharging the juror.[205] Simply reading a newspaper article or even bringing clippings into a jury room is not irregular unless the circumstances give rise to an inference that a member of the jury had taken it a step further and searched internet.[206]

Discharge of Jury

[202] NSWSC, Hunt J, 19.9.1989

[203] *K* (2003) 144 A Crim R 468 at [90] per Wood CJ at CL.

[204] *Qaumi* [2016] NSWSC 1473 per Hamill J at [35]

[205] *Smith* [2010] NSWCCA 325 at [28] per RA Hulme J, *Sio* [2013] NSWSC 1414 at [5] per Adamson J

[206] *Carr* [2015] NSWCCA 186

Concerns as to the prejudicial effect of publicity emerging during the trial may provide grounds for discharging the jury. The principles applicable for this situation have been recently summarised in by Whealy J[207].

The Court should be slow to discharge a jury but should not refrain from taking the step in an appropriate case.[208]

It is not necessary for the accused to demonstrate he or she will not have a fair trial – a real risk of prejudice is sufficient.[209]

Courts must assume that juries will follow instructions to decide the case only on the evidence presented at trial.[210] In another case the application for a discharge was refused as the judge was satisfied that appropriate directions to the jury would significantly and sufficiently ameliorate the risk of impermissible prejudice.[211]

The test is one of necessity - a "high degree of need" in order to avoid a miscarriage of justice, before a discharge will be ordered.[212]

In *McNeil* RA Hulme J stated the likely consequence of the discharge of the jury was not a significant factor in the consideration.[213] In *Razzak and Ors* the Court of Criminal Appeal upheld the decision of the trial judge to discharge the jury five weeks after the trial commenced and as it was entering addresses.[214]

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[207] *Elomar & Ors (No.27)* [2009] NSWSC 985 at [18]-[26]. See also *Elomar & Ors (No.29)* [2009] NSWSC 1102 at [15]-[24]

[208] *Elomar & Ors (No.27)* [2009] NSWSC 985 at [18] citing *Glennon v The Queen* (1992) 173 CLR 592, 623 per Deane, Gaudron and McHugh JJ and *General Television Corporation Pty Limited v DPP* [2008] VSCA 103

[209] *Elomar & Ors (No.27)* [2009] NSWSC 985 at [19] citing *Re K* [2002] NSWCCA 374 at [9], [10] per Beazley JA, Sully and Simpson JJ

[210] *Elomar & Ors (No.27)* [2009] NSWSC 985 at [20]-[23] citing *R (Cth) v Petroulias (No 19)* [2007] NSWSC 536 at [40] (a stay application), *Glennon v The Queen* (1992) 173 CLR 592 at 603 per Mason CJ and Toohey J at 603 and *John Fairfax Publications Pty Limited v District Court of New South Wales* (2004) 61 NSWLR 344, Spigelman CJ (Handley JA and M Campbell AJA agreeing) said at [102]-[103]

[211] *McNeil (No.2)* [2015] NSWSC 757 at [53] per RA Hulme J

[212] *Elomar & Ors (No.27)* [2009] NSWSC 985 at [24]-[25]. This test was set out in *Crofts v The Queen* (1996) 186 CLR 427 at 432 and adopted in *Crowther-Wilkinson* [2004] NSWCCA 249 at [203]-[208] per Wood CJ at CL. See also *Mikael* [2015] NSWCCA 294 at [43] per Hall J

[213] *McNeil (No.2)* [2015] NSWSC 757 at [36] per RA Hulme J

[214] [2006] NSWCCA 195 at [2], [13]

Craig Smith SC
Deputy Senior Public Defender

Jennifer Wheeler
Legal Researcher

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