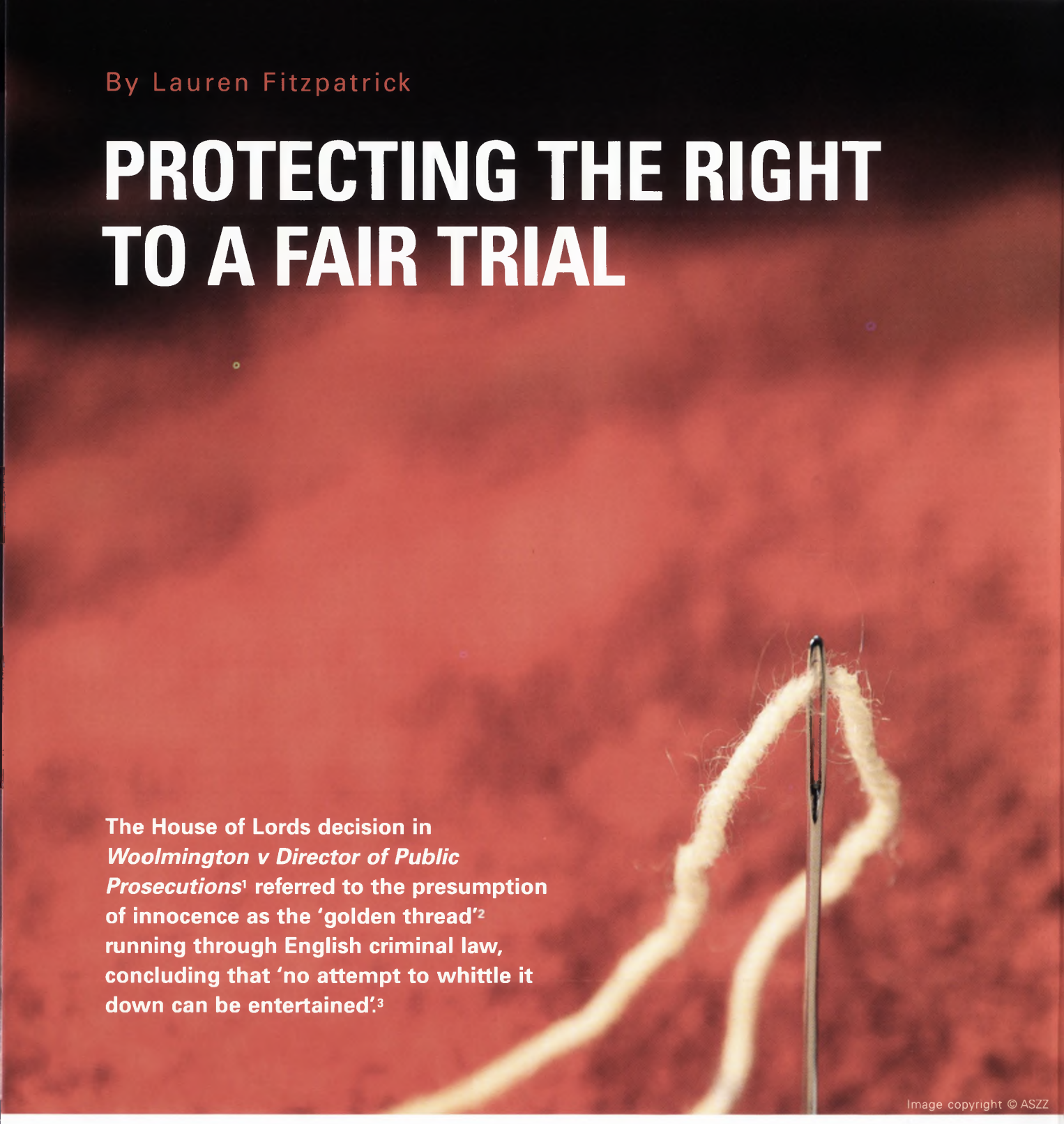
By Lauren Fitzpatrick

PROTECTING THE RIGHT TO A FAIR TRIAL



The House of Lords decision in *Woolmington v Director of Public Prosecutions*[1] referred to the presumption of innocence as the 'golden thread'[2] running through English criminal law, concluding that 'no attempt to whittle it down can be entertained'.[3]

This presumption – that all persons are equal before courts and tribunals – along with the right to a fair trial, is affected by 'the change to the very nature of how people engage in truth finding'.[4] Media, along with the rapid evolution of social media, 'the volume, speed, frequency, and ease with which people access information using various internet and communications technologies',[5] are posing serious challenges to a fundamental characteristic of the jury system – namely, the notion of what it means for a juror to be, and to remain, impartial.[6] We have inextricably linked fairness, and the adversary system, from the beginning of our history.[7] But if the judges are no longer the gatekeepers for the flow of information into a courtroom, and if jurors no longer accept the legitimacy of restrictions on what is relevant to fact finding, can the adversarial system continue to deliver fairness?[8]

ROLE OF JURORS

In the words of Waters and Hannaford-Agor, 'the strength of the jury in an adversary system of justice is the impartiality of the jurors. Impartial jurors are those who are willing and

able to consider the evidence presented at trial without preconceived opinions about the defendant's guilt or innocence, to apply the governing law as instructed by the trial judge, and to deliberate in good faith to render a legally and factually justifiable verdict.'[9] As was pointed out in *Karakaya:*[10]

> 'If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision-making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict; such an opportunity is essential to our concept of a fair trial...'[11]

While the 'jury of course bring their own experience and knowledge of the world with them into court',[12] the case is to be decided by the jury on the evidence produced in court, after they have heard counsels' arguments and the judge's directions. In *Dupas v The Queen,*[13] the High Court 'considered the effectiveness of judicial directions to aim to prevent contamination by prejudicial information, and concluded that there was nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases'.[14] The High Court held that the directions given by the trial judge were 'sufficient to relieve against the unfair consequences of the pre-trial publicity'.[15] This approach is consistent with the UK Court of Appeal decision in *R v Fuller-Love,*[16] that, 'where jurors are instructed to act only on evidence that they hear and see in court, they can be taken to be faithful to that responsibility in the absence of any evidence to the contrary'.[17] But what if there is evidence to the contrary?

Martin v R[18]

In December 2008, a jury in the County Court of Victoria found the applicant, Sarah Martin, guilty of one count of armed robbery, and one count of possession of a drug of dependence.[19] Martin was sentenced to four years' imprisonment, with a non-parole period of two years' imprisonment. Martin sought leave to appeal against the conviction, and the first ground of appeal was that 'the trial miscarried by reason of the jury's, in breach of their duty and the directions given them by the learned trial judge, unilateral search, and use of the internet for exposition of the burden and criminal standard of proof'.[20] The day after the jury delivered its verdict, seven pages of material downloaded from the internet was found in the jury room, addressing the topic, 'what is meant by beyond reasonable doubt'.[21] Under s78A(1) of the *Juries Act,*[22] it is provided that a person who is 'a juror must not make any enquiry for the purpose of obtaining information about...any matter relevant to the trial, except in the proper purpose of his or her functions as a juror'.[23] In *Skaf,*[24] the NSW Court of Criminal Appeal referred to the earlier authority of *R v K,*[25] and stated, 'there must be a new trial unless this court can be satisfied that the irregularity has not affected the verdict, and that the jury would have returned the same verdicts if the irregularity had not occurred'.[26] While adding that it is a 'fatal irregularity'[27] if a trial is conducted by an unlawfully constituted jury, it was held in *Martin*[28] that 'there is no significance to the assumed fact that the individual jurors adopted variant but permissible meanings of the critical phrase'[29] 'beyond reasonable doubt', as 'that is neither more nor less than may occur in any case where individual jurors give meaning to the critical phrase for the purposes of making their personal decision whether the Crown has established the case'.[30]

R v Skaf[31]

Yet, while the jury ignoring the judge's directions in *Martin*[32] did not impact on the outcome of the case, many commentators are not convinced by Australia's model of jury decision-making. This was further noted in the extra-curial investigation by the jury in the trial of Bilil and Mohammed Skaf for aggravated sexual intercourse without consent. In this case, the foreman of the jury went with another juror to ascertain the prevailing conditions under which the complainant was able to identify the accused. This misconduct by members of the jury led the NSW Court of >>

Criminal Appeal to quash the conviction, on the basis that the jury's verdict was tainted by conduct.[33] The foreman of the jury told the court, 'I only went to the park to clarify something for my own mind. I felt I had a duty to the court to be right,'[34] proving that jurors still seek to circumvent the judge's directions. It is clear that the current model of jury decision-making 'assumes that jurors pay attention to the proceedings, reserve judgment until all evidence is presented, give consideration to opposing arguments, and suppress the influence of irrelevant information when directed'.[35] Contrary to this, research into the human condition indicates that this model is flawed. To help them make sense of the complex and confusing situation that is a trial, jurors will almost certainly use any information they perceive to be relevant and useful,[36] severely threatening a defendant's constitutional right to a fair trial. This not only includes websites, but extends to the media, and social media.

TRIAL BY MEDIA

Over the last 75 years, in particular, media coverage of trials has steadily increased as a result of rapid advancements in technology, moving beyond the traditional types of mass media, including newspaper and television reports, to the internet. This increase in media coverage has led to the use of the term 'high-profile' to define cases and defendants subjected to heightened media scrutiny.[37] 'The media extensively broadcasts pre-trial coverage in high-profile cases, so much so that it becomes difficult for the public to avoid exposure to such information',[38] arguably preventing potential jurors from becoming fair and objective fact-finders. In *R v Wood,*[39] the Carolyn Byrne murder trial, some media went so far as to claim partial responsibility for securing a guilty verdict.[40] This aspect of trial by media had an obvious impact on the case of Robert Hughes.

Robert Hughes

Reports arose in the media that actor Robert Hughes had molested child co-stars on the set of the hit 1980s sitcom, *Hey Dad.* The number of alleged victims, including the identity of two, and details of some of the offences, were published. The allegations from child star, Sarah Monahan, were initially made through paid media spots, reportedly $15,000 for *Woman's Day*, and $40,000 for *A Current Affair,* before she had even made a formal statement to police. Monahan told *Woman's Day* that a man who worked on the show had fondled her and exposed himself. This was followed by Channel Nine's *A Current Affair* naming Hughes, who played the father in the popular comedy series, as the actor at the centre of the allegations. Another child star, Simone Buchanan, also featured on the show, and made similar allegations to Monahan. Several issues arise from such a trial by media. As the two victims, Monahan and Buchanan, are now known by name, a jury hearing any trial against Hughes relating to other complainants will be aware of, and affected by, these allegations. Additionally, Monahan continued to comment on the matter, tweeting, 'I am literally crying with happiness right now,' and 'Thanks to the team at Strike Force Ruskin. Lots of hard work. You guys rock #HeyDad.' Despite these comments being completely inadmissible at trial, they remain in the public for potential jurors to read, impacting on Hughes' presumption of innocence, and the right to a fair trial.

Hughes acknowledged the impact of the comments, and his lawyer, Robert Katz, added, 'Rather than continue to suffer a trial by media, my client is keen to defend the allegations which he vehemently denies.'[41] Yet it is arguable that Hughes' career and reputation have been irreparably harmed by the unproven allegations, as the media created a widespread perception of guilt regardless of any verdict in a court of law. Jain adds that the media, 'the supposed fourth pillar of our democracy, usurps the role of the executive and the judiciary',[42] impacting on a defendant's right to a fair trial.

Social media, however, is proving to be an even greater threat to the judicial process. 'The individual's influence is tenfold compared to that of the media, so in a world where we are constantly bombarded with opinions from our peers via Facebook and Twitter, is it truly possible to find a jury of people who haven't already made their minds up on a high-profile case?'[43]

TRIAL BY SOCIAL MEDIA

According to Matheson, 'Instead of an authoritative and informed media opinion tainting the public's point of view, the all powerful, self-informed individual of the information age is given the dominant voice on the issue.'[44] With more than two billion users, the internet has enabled global communication, connectedness, and access to information on a scale never before seen in human history.[45] The 'internet provides access to vast amounts of information in mere seconds, and most recently, has allowed users to broadcast their thoughts to millions while receiving near instantaneous responses through web-based "social networking" or "social media" services'.[46] Social media is 'a group of internet-based applications that build on the ideological and technological foundations of the [worldwide web], which allows the creation and exchange of user-generated content'.[47] The defining feature is that it enables users to communicate with almost anyone, at any time, from anywhere.[48] Additionally, 'there is very little limit on who can contribute to this sphere of ideas, and what can be published, stored, and later retrieved'.[49] In February 2013, 62 Australian judges, magistrates, court administrators, and other stakeholders, identified the potential for juries to misuse social media during trials as, by far, the single most significant challenge that social media poses to the courts.[50]

Jill Meagher

The alleged abduction, rape and murder of the 29-year-old ABC employee, Jill Meagher, sparked a massive response on social media. According to Lowe, Meagher was mentioned on social media, both Twitter and Facebook, every 11 seconds on the morning of 28 September 2012,[51] the day the accused, Adrian Ernest Bayley, appeared in court charged with Meagher's rape and murder. Additionally, the CCTV footage which showed her walking on Sydney Road in Melbourne on the morning she disappeared was shared on the same

platforms about 7,500 times within two hours.[52] A Facebook hate page against Bayley, calling for him to be executed, had attracted over 18,000 'likes', and there were over 120,000 people 'liking' one Facebook page dedicated to Meagher. Yet this social media attention was proving detrimental to the course of justice in the Meagher case, and Meagher's family and the Victoria Police began asking users of social media to refrain from commenting on the case in the social media world. On its Facebook page, Victoria Police warned, 'We ask you to refrain from posting anything on social media which could jeopardise or endanger the presumption of innocence, as this has the very high potential to interfere with the administration of justice.'[53] There was a fear that the prominent identification of Bayley as murder suspect, and the negative portrayal of him in media and on social networking platforms had the potential to endanger the presumption of innocence and right to receive a fair trial that Bayley, like all accused, is entitled to.

Posetti notes, 'We all are very familiar with the term "trial by media", and it's a real problem, but we also now need to be aware of the potential implications of trial by social media.'[54] Every second, 2,200 tweets are posted, 580 users update their Facebook status, 24 minutes of video is uploaded to YouTube, and $20 is spent on virtual goods in social gaming. Posetti added, 'Practically, [and speaking] generically, as soon as a person is arrested, we need to stop talking about what we think we know about this individual because there is a risk that his or her defence lawyers could argue that there's no possibility for a fair trial in this country for the person who's accused, because so much information has been published.'[55] As was stated in *Karakaya*,[56] the verdict would be reached 'not only on the evidence produced in court, but on the observations and comments of the individual to whom the juror has spoken. That will not be a true verdict according to the evidence. It will be a verdict according to the evidence, as supplemented by the views and comments of outsiders without responsibility for the verdict.'[57] Yet this spreading of public sentiment and information is impossible to control in the ever-powerful world of social media, as is apparent in the Meagher case, and guarantees that the potential jury members, consciously or not, would have been aware of this widely discussed attitude towards the accused. This could be considered 'the undoing potentially of a prosecution',[58] particularly if the community take it upon themselves to scrutinise the evidence and perform investigations, effectively building a case of the events from news sources and social media platforms.

WHERE TO FROM HERE?

Many commentators now agree that 'enforcing contempt laws in cyber space is nearly impossible, and that the courts need to accept that juries are increasingly capable of assessing the facts in complex cases, despite the influence of >>

negative commentary'.[59] Kenyon notes, 'There is a gradual recognition that if jurors hear some things outside the courtroom, they can put it aside. In the past it was like they could never hear anything. Courts would say, "We'll have to get a new jury." Now there is more recognition that with better instruction, jurors will try to do their job.'[60] Johnston and Keyzer agree, adding that the 'most "doable" option lies in dealing with jurors once in the court system',[61] so that jurors know exactly what they can and cannot do. A recent UK study undertaken for the British Ministry of Justice found jury directions worked best when jurors had these in writing. Others have suggested criteria for modernising jury instructions, including using plain language, giving specific examples of prohibited conduct, explaining the rationale for such restrictions, and describing the consequences of violating such restrictions.[62] Aaronson and Patterson insist that the 'why' is important, as jurors in the digital age are more receptive to learning information online, creating a challenge to get the jurors to give up their methods of learning and acquiring information, and adhere to the court's instructions.[63]

As well as being aware of their responsibility as jurors, members of the jury should also be informed of the laws that underpin this. A juror who disobeys judicial instructions would be guilty of contempt of court,[64] and NSW is the only state which has specifically legislated to prevent social media use by jurors, with the provision including 'any matters relevant to the trial'.[65] The Queensland provision is confined to enquiries 'about the accused',[66] while the Victorian provision prohibits the making of enquiries about any 'party' to the trial.[67] Although it has been suggested that the 'frequency of juror misconduct involving new media currently is less than one might imagine based on the number of recent news media accounts of jurors run amok',[68] it is essential that all jurisdictions in Australia attempt to address this issue.

CONCLUSION

The challenges posed by the media and social media in particular are great, but so is the resolve of the judiciary to protect the guarantee of a fair trial.[69] The jury is a fundamentally human institution, and while nothing can prevent jury members from conducting investigations, acknowledging news sources, and communicating through social media during a trial, courts must be proactive in discouraging such misconduct. 'Anticipatory judicial action is necessary not only to protect against actual prejudice at trial and avoid lengthy collateral proceedings, but also to preserve the public integrity of judicial proceedings.'[70] This is 'vital for the future of justice to be fairly and properly served'.[71] ■

Notes: **1** *Woolmington v Director of Public Prosecutions* [1935] UKHL 1. **2** *Ibid*, [7]. **3** *Ibid*. **4** Paula Hannaford-Agor, David B Rottman and Nicole L Waters, *Juror and Jury Use of New Media: A Baseline Exploration* (2012) National Center for State Courts, at 1, <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/249> at 3 May 2013. **5** Nicole L Waters and Paula Hannaford-Agor, *Jurors 24/7: The Impact of New Media on Jurors, Public Perceptions of the Jury System, and the American Criminal Justice System* (2012) National Center for State Courts at 1, <http://www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/What%20We%20Do/Jurors_%2024-7_REV011512.ashx> at 1 May 2013. **6** *Ibid*. **7** Paula Hannaford-Agor, David B Rottman and Nicole L Waters, see note 4 above. **8** *Ibid*. **9** Nicole L Waters and Paula Hannaford-Agor, see note 5 above. **10** *R v Karakaya* [2005] Cr App R 5. **11** *Ibid*, [24]. **12** *Ibid*, [25]. **13** *Dupas v The Queen* (2010) 241 CLR 237. **14** Patrick Keyzer et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (2012) Standing Council on Law and Justice, at 13, <http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/juries%20and%20social%20media%20-%20final.pdf> at 3 May 2013. **15** *Ibid*. **16** *R v Fuller-Love* [2007] EWCA Crim 3414. **17** *Ibid*, [16]. **18** *Martin v R* [2010] VSCA 153. **19** *Ibid*, [2] per Ashley JA. **20** *Ibid*, [3] per Ashley JA. **21** *Ibid*, [58] per Ashley JA. **22** *Juries Act* 2000 (Vic). **23** *Ibid*, s78A(1)(b). **24** *R v Skaf* [2004] NSWCCA 37; (2004) 60 NSWLR 86. **25** *R v K* (2003) 59 NSWLR 431. **26** *R v Skaf* [2004] NSWCCA 37; (2004) 60 NSWLR 86, [242]. **27** *Martin v R* [2010] VSCA 153, [86] per Ashley JA. **28** *Martin v R* [2010] VSCA 153. **29** *Ibid*, [88] per Ashley JA. **30** *Ibid*, [89] per Ashley JA. **31** *R v Skaf* [2004] NSWCCA 37; (2004) 60 NSWLR 86. **32** *Martin v R* [2010] VSCA 153. **33** Peter Lowe, 'Challenges for the Jury System and a Fair Trial in the Twenty-First Century' (2011) 2 *Journal of Commonwealth Criminal Law* 175. **34** *R v Skaf* [2004] NSWCCA 37; (2004) 60 NSWLR 86, [204]. **35** Patrick Keyzer et al, see note 14 above, 15. **36** *Ibid*. **37** John C Meringolo, 'The Media, The Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus' (2011) 55 *New York Law School Law Review* 981, 982. **38** *Ibid*. **39** *R v Wood* [2008] NSWSC 817. **40** Joe Murphy and Alana Paterson, 'Trial by Media', *Lawyers Weekly* (Sydney), 16 September 2011, 17. **41** AAP, 'TV Star to be Extradited to Australia', *The Sydney Morning Herald* (Sydney), 28 September 2012. **42** Praveen Kumar Jain, 'Sting Operations: An Invasion of Privacy' (2005) 3(9) *CNN*, 1, 1. **43** Jesse Matheson, *Trial by Social Media – Is It Time for Reform?* (2013) The Feed <http://thefeed.com.au/trial-by-social-media-is-it-time-for-reform/> at 2 May 2013. **44** *Ibid*. **45** Amy J St Eve and Michael A Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11 *Duke Law & Technology Review* 1, 3. **46** *Ibid*, 3-4. **47** Andreas M Kaplan and Michael Haenlein, 'Users of the world, unite! The challenges and opportunities of social media' (2012) 53(1) *Business Horizons* 61. **48** Amy J St Eve and Michael A Zuckerman, see note 45 above, 4. **49** *Strauss v Police* [2013] SASC 3, [31]. **50** Patrick Keyzer et al, see note 14 above, 9-10. **51** Adrian Lowe, 'Trial by Social Media Worry in Meagher Case', *The Age* (Melbourne), 28 September 2012. **52** *Ibid*. **53** Victoria Police, *Victoria Police Facebook page* (2013) Facebook <https://www.facebook.com/victoriapolice> at 7 May 2013. **54** Adrian Lowe, see note 51 above. **55** *Ibid*. **56** *R v Karakaya* [2005] Cr App R 5. **57** *Ibid*, [25]. **58** Adrian Lowe, see note 51 above. **59** Andrew Dodd, *Attorneys-General looking for Ideas to Thwart Social Media* (2012) Crikey <http://www.crikey.com.au/2012/10/02/attorneys-general-looking-for-ideas-to-thwart-social-media> at 1 May 2013. **60** *Ibid*. **61** Jane Johnston and Patrick Keyzer, *Trial by Social Media: Why we need to Properly Educate Juries* (2013) The Conversation <http://theconversation.com/trial-by-social-media-why-we-need-to-properly-educate-juries-13547> at 3 May 2013. **62** David Aaronson and Sydney Patterson, 'Modernizing Jury Instructions in the Age of Social Media' (2013) 27(4) *Criminal Justice* 1. **63** *Ibid*. **64** *Jury Act* 1977 (NSW) s68B; *Jury Act* 1995 (QLD) s70(4); *Juries Act* 2000 (Vic) s7; *Jury Act* 1967 (ACT) s42C; *Juries Act* 1962 (NT) s49A; *Juries Act* 2003 (Tas) s58. **65** *Jury Act* 1977 (NSW) s68C(1). **66** *Jury Act* 1995 (QLD) s69A(1). **67** *Juries Act* 2000 (Vic) s78A(5)(b). **68** Paula Hannaford-Agor, David B Rottman and Nicole L Waters, see note 4 above, 7. **69** Amy J St Eve and Michael A Zuckerman, see note 45 above, 29. **70** *Ibid*. **71** Jane Johnston and Patrick Keyzer, see note 61 above.

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