

Do Members of the Public Have a 'Right to Know' about Similar Fact Evidence? The Emily Perry Story and the 'Right to Know' in the Context of a Fair Re-Trial

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Spencer, R., 2014. Do Members of the Public Have a 'Right to Know' about Similar Fact Evidence? The Emily Perry Story and the 'Right to Know' in the Context of a Fair Re-Trial. *Oñati Socio-legal Series* [online], 4 (4), 750-770. Available from: <http://ssrn.com/abstract=2507139>



Abstract

In South Australia in 1981, an intriguing criminal trial took shape around Emily Perry who was charged with two counts of attempting to murder her husband with arsenic. Similar fact evidence about the deaths of a former husband, a de facto partner and a brother led to a jury finding her guilty of the attempted murder of her husband who denied any claim that she had tried to harm him. An appeal to the South Australian Court of Criminal Appeal on the basis that the previous deaths should not have been brought to the attention of the jury was unsuccessful but Emily Perry's case went all the way to the High Court of Australia. Her conviction was quashed and she was never re-tried.

This article examines the dichotomy of an accused's right to a fair trial (and the rules of evidence that flow from that right) and the public's so-called 'right to know' about a person charged with a serious offence. It posits the *Perry* case as an example of the opposing perspectives of lawyers and journalists, and explores the different narratives to which the case gave rise. The paper questions whether a fair re-trial for Emily Perry would ever have been possible after the vast media attention that it received.

Key words

Similar fact evidence; right to a fair trial; open justice; Emily Perry case; narrative; media

Article resulting from the paper presented at the workshop *Law in the Age of Media Logic* held in the International Institute for the Sociology of Law, Oñati, Spain, 27-28 June 2013, and coordinated by Bryna Bogoch (Bar Ilan University), Keith J. Bybee (Syracuse University), Yifat Holzman-Gazit (College of Management, Rishon Lezion) and Anat Peleg (Bar Ilan University).

This article contains extracts of the writer's article 'Legal Ethics and the Media: Are the Ethics of Lawyers and Journalists Irretrievably at Odds?' 15 (1) *Legal Ethics* 83-110 with the kind permission of the editors of *Legal Ethics*. The writer is indebted to the participation of attendees at the *Law in the Age of Media Logic* Workshop held at the International Institute for the Sociology of Law in Oñati, Spain on 27-28 June 2013 for their encouragement, enthusiasm and suggestions which assisted with the development of this article. The author would also like to acknowledge and thank the two anonymous reviewers of this article prior to publication. I am indebted to them for providing two fresh perspectives; my work has been enlivened and enriched by their helpful and insightful advice

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Resumen

En 1981 en Australia Meridional se desarrolló un fascinante juicio criminal alrededor de Emily Perry, a quien se acusó de dos intentos de asesinar a su marido con arsénico. Pruebas similares sobre las muertes de un esposo anterior, su pareja de hecho y su hermano llevaron al jurado a declararla culpable de intento de asesinato de su marido, quien rechazó en sus declaraciones que ella hubiera tratado de hacerle daño. No prosperó una apelación a la Corte de Apelación Penal de Australia Meridional alegando que las muertes previas no deberían haberse mencionado al jurado, pero el caso de Emily Perry siguió su curso hasta el Tribunal Superior de Justicia de Australia. Se anuló su condena y nunca se le volvió a juzgar.

Este artículo analiza la dicotomía entre el derecho del acusado a un juicio justo (y las reglas de evidencia que surgen de ese derecho) y el denominado "derecho a la información" del público sobre una persona acusada de un delito serio. Plantea el caso *Perry* como un ejemplo de los intereses opuestos entre abogados y periodistas, y analiza las diferentes narrativas a que dio lugar el caso. El artículo cuestiona si hubiera sido posible realizar un nuevo juicio justo después de la amplia atención mediática que recibió.

Palabras clave

Hechos probados similares; derecho a un juicio justo; justicia abierta; caso Emily Perry; narrative; medios de comunicación

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1. Introduction

Murder has long been a subject of fascination. The intentional killing of another person has been the subject of literature for as long as we have told stories. If the size of the "Crime Fiction" section of my local bookshops is an indication of the popularity of this genre, it would appear that crime fiction has never been so popular. And when murder is fact rather than fiction, all forms of media can't get enough. Journalists provide 'coverage' of the event, the accused, the street where it happened, the neighbours, the relatives, anyone with a connection to the tragedy. And now, traditional purveyors of news (newspapers, television and radio) no longer have a monopoly over what is made public and have been forced to intersect with new media, especially on-line 'social' media.

Stories from the courts, especially the criminal courts, are considered to be newsworthy (Patel 2007, p. 213, Resta 2008, p. 33). Open any newspaper, watch any nightly television news programme, and there will be at least one story from the courts. Crime news is good for business: it is good for journalists and others in the business of disseminating news as a product for sale, and it is good for the business of the criminal lawyer. But let's not also forget that crime – especially murder – is a tragedy. It is a natural human instinct to be interested in tragedy that befalls others. Stories about murder, however tragic or horrific, are like magnets to the part of our humanity that seeks out a good story. Analysis of an alleged murderer provides intrigue. What is known about the person charged? What does the accused look like? Where does the accused live? Did he do it? Why did he or she do it? How did he do it?

When a crime is committed, two opposing forces come into play: the right of the accused to a fair trial, and the right of the public to know what is going on. Police investigators might also argue that the public's right to know is also linked with the possibility that members of the public may be able to assist with solving the crime – identifying the offender, for example, or providing information that may help to piece together the truth of what happened. However, in many instances, police investigators might deliberately withhold information from journalists, so that its publication does not in any way jeopardise the investigation, or perhaps even more critically, so that publication of information does not jeopardise the obtaining of a conviction. Media comment prior to a trial by jury has the potential to corrupt potential jurors against the accused; '[i]t is possible very effectually to poison the fountain of justice before it begins to flow' (*R v Parke* [1903] 2 KB 432, per Wills, J, p. 438). This may also dissuade the accused from exercising the right to trial by jury for that very reason (*Director of Public Prosecutions v Francis* [2006] SASC 211). If prejudicial comment has been made, counsel for the accused may argue that the jury should be discharged. The trial judge has a vast discretion in relation to how the matter will proceed. For example, the jurors may be examined to determine whether they have indeed been tainted or influenced by the published material, or the jurors may be ordered to disregard any publicity. In Australia, in the *Hinch* case, a radio journalist broadcast the prior convictions of the accused Michael Glennon shortly before Glennon's trial. Deane J, from the High Court of Australia said that jurors are expected to be true to their oaths, even after sensationalised and prejudicial media reporting. It is then a matter for the trial judge to decide whether the publication has had a 'real and definite tendency' 'as a matter of practical reality' to 'preclude or prejudice the fair and effective administration of justice' (*Hinch* cited in Chesterman 1999, p. 71). This is particularly important in the context of current information dissemination practice, whereby anyone with access to a keyboard and the internet can notify the world at large about absolutely anything.

In any Western democracy there are two fundamental but competing principles of justice: the principle of open justice and the right to a fair trial. The struggle to reconcile these two principles creates tensions between those who are officers of

the court and facilitators of a fair system of justice (lawyers) and those who provide members of the public with a link to what is happening in the courts (journalists). The ethical frameworks within which lawyers and journalists work have been explored by this author, especially in the context of court reporting (Spencer 2012). The contest between lawyers and journalists is rooted in the struggle for dominance between the right of access to information and the right to a fair trial' (Sellars 2008, p. 199). This struggle is at the heart of the view that '[o]ne of the shibboleths of journalism is that journalists and lawyers are natural enemies' (Littlemore 1996, p. 145).

I have elsewhere expressed my view that the ethical framework within which journalists work is at odds with the ethics of lawyers, predominantly because of the journalist's lack of a client (Spencer 2012). In lacking a fiduciary duty to a client, the lens through which a journalist views court reporting is never going to match in focus with the view of the lawyer, whose duties to both an individual client and the court itself will inevitably clash with a journalist whose aim is to disseminate information, as quickly as possible, to a faceless public.

The English word 'profession' comes from the Latin *professionum*, which means making a public declaration. It came to mean making a public vow or oath upon entering a learned occupation (Ross 2010, p. 57). Before being admitted to the legal profession, a lawyer must swear (or affirm) an oath to the Court, for example in South Australia: 'that [I] will diligently and honestly perform the duties of a practitioner of this Court and will faithfully serve and uphold the administration of justice'. The public promise to fulfil those duties—to act in the best interests of the client, to facilitate the interests of justice, to avoid conflicts of interest, to perform duties without fear or favour to any person or group, is what binds the lawyer to the client, and it is the source of the fundamental difference between lawyers and journalists. It is the very source of the conflict between the court and the cover story, because journalists and media proprietors make no such oath to anyone.

The relationship with clients is fundamental to the notion of a profession. Unlike lawyers, journalists have no clients. There is no relationship with a specific person like the relationship between a doctor and a patient or lawyer and a client. Any 'greater good' performed by a journalist is performed on behalf of 'the public', an 'ill-defined audience' (Campbell 1999, p. 127). As a consequence of this lack of a client, the journalist has no particular person to whom any duty is owed when reporting a story. When reporting from the court, the journalist's primary function is to gather information, process it, and present a timely story that is pleasing to the editor, and likely to be of interest to the target audience. This is in stark contrast to the role of the lawyer, who must act in the best interests of the client and facilitate the administration of justice. Of course, there are many very good journalists who regard their role as a vocation. Those journalists will always seek to do more than provide 'info-tainment'. But they are reliant upon publishers and producers who also have the same ideals.

2. The Principle of open justice v the Right to a fair trial

The principle of open justice is said to be 'a fundamental tenet of the common law' (*Scott v Scott* [1913] AC 417; endorsed by the Australian High Court in *Dickason v Dickason* (1913) 17 CLR 50, 51). Justice is expected to be administered in 'open court'. One of the most commonly quoted legal aphorisms is from the judgment of Lord Hewart in *R v Sussex Justices, ex parte McCarthy*: 'It is not merely of some importance but it is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' (*R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, p. 259). Essentially, the principle of open justice enables the workings of the judiciary to be transparent. Members of the public are entitled to know what happens in the courts in order to 'maintain confidence in the integrity of the administration of justice' (Rolph *et al.* 2010, p.

401). Very few members of the public have the time or the inclination to observe court proceedings, and so rely on media reports for information. However, media reports now extend beyond newspaper columns and nightly news programs. Court reporting is much more immediate these days with online reports jostling for recognition beside social media commentary.

The principle of open justice includes a general entitlement to publish a report of open court proceedings. It does not include an entitlement to publish any information about the accused that the public might find 'interesting'. The concept of "public interest" is vastly different to the concept of "of interest to the public". The details of a particular case might indeed be "of interest" to a public keen for salacious gossip, but whether releasing those details is "in the public interest" is a question of degree, and often a question of ethics. "Open court" proceedings have long been recognised as those courts to which members of the public have a right of access (*McPherson v McPherson* [1936] AC 177). Most courts are 'open', although some proceedings are held privately, or 'in camera'. In such cases, members of the public, including the media, are not permitted to attend, and publication of what occurs in such a hearing could constitute contempt of court. From time to time, a court may order that no reports may be made. These orders, called 'suppression orders' in Australia and 'protective orders' in the US are usually made in relation to criminal proceedings. Indeed, members of the public are only alerted to the incidence of criminal activity through the lens of the media. This can create a 'disentangled reality' (Grabosky and Wilson 1989) which has the power to shape public attitudes (Chibnall 1977, p. 226). A court will only make a suppression order when it is considered necessary for the administration of justice. Nevertheless, the expression 'gag orders', given to them by the media (Hengstler 2008, p. 176), makes clear the view of many journalists that they are contradictory to the principle of open justice.

A similarity between journalists and lawyers (particularly trial advocates) is that both rely on the ancient art of story-telling as the basis of their work. A journalist aims to create and publish a story that will appeal to a specific audience. The lawyer's role (especially the criminal lawyer) is also to tell a story: to a judicial officer or to a jury (or both). In a criminal trial, the prosecution story will be based around the accused as the protagonist who has committed a crime against the victim. The defence story will be an attempt to either cast the accused in a lesser role, or to cast doubt upon the narrative that is proposed by the prosecution. For all types of story-telling, what is required is a thorough investigation, an abiding sense of scepticism and an overarching understanding that the 'whole truth' is not always the story that will be told.

The role of the story –or narrative– is at the heart of an accused's right to not only a fair trial, but also a fair re-trial.

How much of the 'whole story' will get told to the court? The rules of evidence restrict what any witness might say. The prohibition against hearsay, the fact that certain evidence may be more prejudicial than probative, or inadmissibility for a range of other reasons may result in narrative detail being excluded from the evidence that is presented to the court. The story ultimately consumed by members of the public is diluted, refined or homogenised according to the journalist's filter through which the words of the story are processed. In addition, journalists may print or otherwise publish additional chapters of the narrative that may not be part of the narrative unfolding in court. This may happen before the matter even reaches the court. For example, when a person is arrested for a crime, a journalist's post-arrest narrative of the crime might contain detail that will ultimately be forbidden to be told in court. How much of that extra, perhaps sensational, perhaps untested detail will get told to the public outside of the court room? And what if the people in the court room – especially the jurors – have access to the story that is being told on the outside? 'Freedom of the press' as it used to be called is a

somewhat outdated phrase now, given the rise of social media and other forms of reporting of information. Although newspapers are no longer the major source of 'news', in the United States, the right to 'freedom of the press' was the First Amendment made to the Constitution of the United States of America on 15 December 1791: 'Congress shall make no law ... abridging the freedom of speech, or of the press'. In contrast, the Australian Constitution makes no reference to freedom of speech or freedom of the press, and Australia has no Bill of Rights. In 1997, the High Court of Australia in *Lange v Australian Broadcasting Corporation* specifically contrasted the Australian position with the US position, stating that '[u]nlike the First Amendment ... which has been interpreted to confer private rights, [the Australian] Constitution contains no express right of freedom of communication or expression' (*Lange v Australian Broadcasting Corporation* 1997, p. 567).

Narrative freedom in Australia derives from the United Nations Universal Declaration of Human Rights, in whose drafting and adoption Australia played a major role in 1948. Article 19 of that Declaration states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

Any discussion about the right to free speech must be balanced with an accused's right to a fair trial. In the United States, the right to a fair trial is guaranteed by the Sixth Amendment to the Constitution. Once again, the Australian Constitution makes no reference to the right to a fair trial and absent any Bill of Rights, Australians must rely on the international position. The right to a fair trial is expressed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (Chen 1997). The United States Constitution does not express any preference for which right might veto the other (Phillipson 2008, p. 16) but Anglo-Australian courts have expressed a clear view that the right to a fair trial should take priority (*Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, p. 27).

Ethics in journalism are based upon the utilitarian notions explored by John Stuart Mill in his 1859 publication of *On Liberty*. During the twentieth century, the rise of social responsibility theory led to a focus on journalistic responsibility rather than libertarianism which essentially encompassed service to society and 'the greater good'. It became generally accepted that the press should be subject to moral and ethical restrictions. However, social responsibility theory in fact releases individual journalists from responsibility. Journalists are equally responsible to the public, their sources, their editors, their proprietors and perhaps also themselves. There are no safeguards against conflicts of interest under social responsibility theory. Unlike the lawyer who has specific responsibilities and fiduciary duties to each individual client, and who must not be in a position of conflict of interest, the journalist is free to open the door to conflicts of interest with no one to close it (Spencer 2012). Reputable journalists would argue that they take great care to either avoid or declare personal conflicts of interest but they actually operate within an environment of such conflict. This is because most journalists are employed by large corporations (Richards 2005, p. 67) and they know that shareholders are regarded by senior management and Board members as a higher priority than either the readers (or viewers or listeners) or the sources and certainly higher than the subjects of the stories that they publish. This inevitably clashes with the journalist's first loyalty which has long been recognised as to 'the citizens' (Kovach and Rosensteil 2007). Indeed, Kovach and Rosensteil argue that journalists 'have a social obligation that can actually override their employers' immediate interests at times, and yet this obligation is the source of their employers' financial success' (Kovach and Rosensteil 2007). The question of whether or not the principle of open justice might clash with the imperative of a fair trial is an example of what Tim Dare describes as the 'decision-making procedures that are the focus of the actual

accommodations between competing conceptions of the good in our community' that are 'enormously complex' (Dare 2004, p. 27).

Journalists argue that the public *needs* to know about matters of societal interest. Whether or not a matter is indeed of 'interest' and therefore 'newsworthy' has until very recently, been determined by newspaper editors and news directors. 'The ethical dimension of the journalistic process commences at the point of deciding what to report and then extends into decisions about how the information will be presented, and to whom' (Richards 2005, p. x). This results in narrative emphasis being altered according to its newsworthiness. When a crime has been committed, the journalist will want to publish as much information as possible about the crime and any person who may be suspected of committing the crime, arguing that this is necessary in order for the whole truth to eventually emerge, and so that the public will be accurately informed. The cynic might argue the old adage that journalists will "not let the truth get in the way of a good story". The lawyer, on the other hand, acting in the best interests of the client (the accused), will argue that the client has the right to silence, the right to a fair hearing (including the benefits of the rules of evidence), and the right to hear all allegations before commenting or pleading.

Truth telling is said to be fundamental to journalism. But what is 'truth'? Truth is such a nebulous concept that journalism texts have developed the idea of 'journalistic truth'. Journalistic truth is acknowledged to encompass four specific criteria: accuracy, completeness, fairness and objectivity. Together, these criteria are said to comprise 'rational acceptability' (Richards 2005, p. x). A narrative based on rational acceptability has the potential to be quite different from one that is based on the rules of evidence, excludes hearsay, and aimed towards a finding of a narrative that is beyond reasonable doubt.

The Australian Journalists' Association Code of Ethics requires Australian journalists to '[r]eport and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts'. Australian journalists are specifically prohibited from 'suppress[ing] relevant available facts, or giv[ing] distorting emphasis' and they must '[d]o [their] utmost to give a fair opportunity for reply'. This creates a clash: the journalist is ethically obliged *not* to suppress relevant available facts. In an attempt to be as accurate as possible, a journalist may consider it necessary to publish everything possible about an accused person, perhaps what could be described as 'the whole truth'. However, the law stands in the way of the journalist telling the whole truth because there are certain categories of information which, if published, give rise to a charge of contempt of court. Narrative detail that might influence a jury could prejudice the accused's right to a fair trial, so is not allowed; publication of such information would constitute a contempt of court. For example, disclosure of an accused person's prior criminal convictions would be complying with the journalists' ethical obligation regarding 'completeness' but would be contrary to 'one of the most deeply rooted and jealously guarded principles of our criminal law' (*Maxwell v Director of Public Prosecutions* [1935] AC 309 (HL), p. 317). The courts have said that 'the public interest in free discussion and in alerting the community to risk does not warrant a desertion of the public interest in securing a fair trial' (*Hinch* cited in Chesterman 1999, p. 71).

3. An example: the Perry Case

In South Australia in 1981, 55 year old Emily Phyllis Gertrude Perry was tried for the attempted murder of her (third) husband, Kenneth Warwick Henry Perry, aged 50. It was alleged that Mrs Perry had administered small quantities of poison in Mr Perry's food and drink, over a long period of time, intending to kill him. The Crown produced detailed medical evidence throughout the trial of high lead and arsenic levels in samples taken from Mr Perry. The Crown also led evidence that Mr Perry was fit and healthy prior to his marriage in 1973. By the end of 1975, several

insurance policies had been taken out on Mr Perry's life. The local evening tabloid newspaper reported the Crown argument that Mrs Perry would have been in "a remarkably good position if Mr Perry had died" (De Luca 1981, p. 6). In fact, if Mr Perry had died his wife would have received a total of AUD\$118,920 in insurance payouts for death from illness. This would have been worth approximately AUD\$417,000 in 2013 (Reserve Bank of Australia 2013). Evidence was given that Mr Perry "started to slow up" in his health in 1976. A forensic pathologist was reported to have told the jury how the symptoms of lead and arsenic poisoning could develop slowly, almost unnoticed at first. Another specialist witness was reported to have described it as a "sneaky onset". Journalists also reported the evidence that in early 1977, Mr Perry wrote a letter to his employers, saying he had not been well during the previous 12 months. The Crown argued that it was not a coincidence that Mr Perry's health became progressively poorer after the insurance was taken out (De Luca 1981, p. 7).

This in itself is an interesting story. But the prosecution case involved a deeper, wider plot. An important component of the Prosecution case was a narrative about the deaths of three other men from poisoning. These three other men had also been closely associated with the accused Mrs Perry. The Crown presented evidence that one man was a previous husband named Albert Haag. Albert, Emily's second husband (her first marriage to Kenneth Hulse ended in divorce in the early 1950s) died from arsenic poisoning in 1961. An inquest was held. No charges were laid. Another was her brother, Francis Montgomery, who died from arsenic poisoning in 1962. Perry was the last to see him alive and the first to find him dead. Evidence was given at the trial that he was a violent alcoholic. The Crown case was that the motive for his murder was to rid the family of a tiresome burden. The third was a man named Jim Duncan (also known as John Alfred Jamieson) with whom Mrs Perry had lived in a de facto relationship in the late 1960s. He died from an overdose of barbiturates in March 1970, but it was alleged that he had suffered from arsenic poisoning for a significant period before his death.

Evidence was led at the trial, and reported by journalists, that during 1978 and 1979, Ken Perry, Emily's third husband, suffered from arsenic and lead poisoning. While he was in hospital, Emily was arrested and charged with attempted murder. In 1981, although Mrs Perry was on trial only for the attempted murder of Ken Perry, the Crown argued that Mrs Perry had had an opportunity to kill all three of the other men as well as Mr Perry. In two of the three other cases, Mrs Perry had instigated or arranged life insurance on the man's life in her favour. Following the insurance, each man suffered an illness for which there was no certain diagnosis, but in each case, there were symptoms consistent with arsenic and / or lead poisoning. And in each case there was death or very serious illness.

"Is this just a tragic coincidence?" the Prosecutor is reported to have asked the jury.

So, we have a compelling narrative. But the most fascinating and intriguing aspect of this case was the fact that Ken Perry, the husband who suffered from arsenic poisoning and who was the alleged victim in this trial, denied that his wife had ever attempted to harm him or kill him. Mr Perry refused to give evidence against his wife and gave evidence in her favour. In and out of court, Ken Perry staunchly defended his wife. This was unique in South Australian legal history. The Prosecution was unable to give the "victim" the expected role in the attempted murder narrative because he refused to accept it.

Mrs Perry categorically denied having anything to do with the three deaths. The defence claimed that Mr Perry received his lead and arsenic poisoning from an orchestrelle (a musical organ designed to imitate the effect of an orchestra – a bit like an early version of a modern electronic keyboard) which had contained lead arsenate. He told the court that for years he had followed a hobby of restoring player pianos, especially or Pianolas. At any one time he would have had up to 30

Pianolas on his premises. About half to three-quarters of those contained lead piping. Mr Perry told the court that while working on the pianos there would have been lead tubing and lead powder on a bench and on the floor. He said while working he also continually wiped his moustache with his hands. The defence suggested that Mr Perry could have inhaled the lead arsenate from his dirty working environment. He rarely washed his hands while working because the nearest hand basin was many yards away from his workshop. The defence also argued that arsenic was used in the Pianolas to deter rats and mice.

164 witnesses gave evidence in a trial that lasted for sixty days; over 4000 pages of recorded transcript are now archived in the Supreme Court of South Australia Registry. The writer has had the opportunity to read the transcript and the excerpts quoted in this article are from the file held at the Supreme Court of South Australia.

At the beginning of the trial, counsel for the Defence was aware that the Prosecution intended to lead evidence relating to the three earlier deaths and in the absence of the jury, applied to have all of the 'similar fact evidence' declared inadmissible. The application was unsuccessful. Subsequently, again in the absence of the jury, counsel for the accused applied for an order suppressing the publication of any evidence relating to the deaths of Haag, Montgomerie and Duncan or any reference to those topics made either by the Prosecutor in his opening (at that stage not yet commenced) or by the Judge already in dealing with evidentiary matters. The Trial Judge, Cox, J., reserved his decision on the application but initially made a holding suppression order pursuant to the *Evidence Act (SA)*. Counsel for the accused also asked the judge to give a short direction to the jury as to how they could use the similar fact evidence. In the absence of the jury, His Honour said:

'I am sympathetic to the application and my present intention would be to do something about it but it may not be straight after the opening. I will be anticipating what I will say at the end of the day and I don't want to go wrong so I will take an opportunity at an early stage of the trial to re-enforce anything which the Prosecutor may say, or to say something if he doesn't touch on the topic at all, to the jury about the proper use or the improper use that may be made of the similar fact evidence.'

The Crown opened the case for the Prosecution soon after that. In the very early part of the Crown's opening address to the jury, the Crown Prosecutor said:

'I would like, at this stage, to make very, very clear indeed the way in which this evidence can properly be used because it is important in the interests of the administration of justice that evidence such as this be used properly...I am mentioning matters of law so what I say is completely subject to His Honour's directions to you.'

The Crown Prosecutor was extremely careful to point out that the accused was 'not on trial for the three [earlier] deaths' but only on trial 'for the attempted murder of her present husband.' He explained that '[t]he evidence of the other three deaths is led in order to assist you in determining whether or not it was the accused who administered the poison to Mr Perry and if so, what her intention was.'

He pointed out that it would be 'improper' and 'obviously unfair' to say, 'Well, look, we've heard all this evidence and this woman's the type who goes around poisoning people therefore she must have poisoned Mr Perry.'

'But what is proper,' he continued, 'and what you will be asked to do is firstly to examine the facts that you find to be proved with regard to each of those three previous deaths and with regard to the circumstances surrounding the poisoning of Mr Perry, for example...what sort of poison was used on each of these four occasions, three previous deaths and now Mr Perry? What sort of poison? What sort of opportunity did the accused have on each of these occasions? Was there any benefit to come to her from the deaths of these people, any insurance? Are there

any similarities between them? What sort of explanations have been put forward with regard to each?'

The Crown Prosecutor told the jury that it 'would be proper, once you have gone through that exercise, to look at the total picture that is presented.'

'[I]f you then conclude,' he told the members of the jury, 'that...there are reasonable explanations, it's just a series of unfortunate tragedies that have happened to this woman, they are all coincidences...then the evidence of the three previous deaths would be of no assistance to you whatsoever...But if, on the other hand, you concluded that there were some basic similarities, that the accused was the only person – and this is the Crown case – ... who had the opportunity of administering poison to all four of these people, and if you judge when you look at the total picture according to your common sense and knowledge of human experience, that repetition of poisonings does not happen to people closely associated with one person in the ordinary experience of a lifetime, these repetitions do not happen by accident, you would then be entitled to infer well, it was not an accident and the evidence points to the fact that accused administered the poison to Mr Perry.'

These carefully chosen remarks were reported by the local press in a truncated version that diluted the emphasis that the Prosecutor had placed on the way that the jury could use the similar fact evidence:

Crown Prosecutor, Mr Brian Martin, has told the jury that Mrs Perry is not on trial over the deaths of the three men. It would be improper to suggest that she was the sort of woman who went around poisoning people. The evidence relating to the deaths of the three men would be given simply to help the jury to determine if it was in fact Mrs Perry who administered poison to her husband.

(Kernahan 1981a)

Later that morning, after a break during the Prosecution's opening, the trial judge said this:

'I'm influenced in my decision by the large part which ... similar fact evidence will play in the trial, so that to suppress any publication of it would be to suppress a great deal of the evidence in a hearing which in this jurisdiction, I suppose, above all others, ought in principle to be public unless there is a sound reason to rule otherwise... That, of course, is not just an idiosyncratic view of mine; it's the principle which is enshrined in the Evidence Act itself. I have decided that it would not be appropriate to make a wholesale suppression order of the kind sought.'

(Transcript, p. 108)

The judge revoked the earlier holding order with respect to the similar fact evidence and the prosecution's opening about it, but he made a fresh order suppressing publication of the fact that an application had been made to suppress the publication of similar fact evidence. So journalists were able to publish the similar fact evidence, but could not tell the public that the defence had tried to stop it from being published. This order was made in the absence of the jury. The writer has obtained permission from the Supreme Court of South Australia to publish this fact in this article.

An examination of the local newspapers from the time of the trial has revealed that journalists reported regularly on the case. Notwithstanding the journalism ideal of getting the facts right and getting the right facts, the headlines published during the course of the trial make the journalists' narrative very clear: **Doctor tells of man's high lead level** (O'Reilly 1981), **Husband defends his wife** (Kernahan 1981b), **POISON CASE Husband not a victim: Defence** (Kernahan 1981c), **Wife 'well off if he died'** (*The News* 1981a), **'Ex-husband was insured for \$22,000'** (Kernahan 1981d), **Poison case wife guilty** (Kernahan 1981e), and finally: **15 YEARS FOR POISON CASE WIFE** (Kernahan 1981f).

There were no headlines about a mother who worked tirelessly to provide for her children, no headlines about orchestrelles with lead pipes and no headlines about the intense cross-examination in relation to the forensic pathology evidence. There was a pattern to the way the matter was reported in the local daily tabloid newspaper, *The News*. For example, the following, or a variation of it, was repeated in almost every *News* report as either the first or second paragraph:

Emily Phillis Gertrude Perry, 55, of Grenfell Road, Fairview Park has denied two charges of attempting to murder her husband Kenneth Warwick Henry Perry, 51, at Fairview Park and elsewhere between July 1978 and December 1979.

During the trial, when actual evidence was about to be led about the three prior deaths, the trial judge gave detailed directions to the jury about how to use the similar fact evidence. He said:

'I understand that the Crown is now about to embark upon a body of evidence that goes beyond the events of 1978 and 1979 and is designed to prove that the accused...murdered three people by poisoning in 1961, 1962 and 1970. The Crown says that this evidence will be relevant to the questions which are before you – that is, whether the accused attempted to murder Mr Perry by poisoning in 1978 and 1979. This makes it advisable for me to give you some guidance at this stage as to the way the evidence we are about to hear with respect to the deaths of men named Haag, Montgomerie and Duncan may properly be used in your consideration of the two charges upon which the accused is being tried – that is provided that the Crown's allegations with respect to those deaths are proved to your satisfaction and provided that you are willing to draw from it the inferences which the Crown invites you to draw...It is also necessary that I warn you against using the evidence in the wrong way.

As a general rule, the only evidence that the Crown may lead in proof of a charge that it brings against an accused person is evidence that is directly concerned with the allegations made in the charge...I am not making any comment about the weight of the evidence ... [a]t this stage... However, there are exceptions to most general rules, and the Crown's allegations in this case raise one of them. Sometimes there may be such a striking similarity between two different events or sets of circumstances, with both of which an accused person is in some important way connected, that it will be proper to have regard to what happened on the first occasion when assessing that person's degree of involvement in the second. It will not be so, of course, if both events are quite commonplace and could readily be explained by coincidence or in some other exculpatory way. There needs to be such a close similarity between the two events, or such a clear underlying unity between them, as to make coincidence a very unlikely explanation for what happened. Bear in mind that it is not enough if it simply raises or deepens a suspicion of guilt. It must make any other conclusion than guilt – mere coincidence for instance – an affront to one's common sense.'

The judge then provided examples of how this principle might work in practice.

'Suppose the case of a man who is charged with setting fire to his shop with the intention of defrauding the insurance company. The police can prove that the shop was over-insured, and that the man had the opportunity of setting fire to it, but that would hardly be enough to arouse more than a suspicion. After all, it might well have been an accident. However, if there were also evidence to show that the shop proprietor had on two previous occasions been the owner of a house that had been over-insured and had caught fire, with the result that on each occasion he got a windfall from the insurance company then that might very well turn a suspicion that the fire in the shop was lit deliberately into a certainty. A man is most unlikely to have three beneficial fires like that by accident...Lawyers call this kind of evidence "similar fact" evidence – evidence of facts or circumstances so remarkably similar to those directly in issue at the trial, or indicating such a clear pattern of behaviour, that they have a strong probative force in the determination of one or more of the issues before the jury.

The Crown ... seeks to rely on this similar facts principle ... The witnesses whom the Crown is now about to call will give evidence relating to the deaths of the three men I have mentioned – Haag, Montgomerie and Duncan. The case for the Crown,

as I understand it, is that the accused poisoned those three men, and that the facts and circumstances are so remarkably similar in their essential features to those in Mr Perry's case ... that you may properly take them into account in determining whether Mr Perry's poisoning was intentional or accidental and, if it was intentional, whether the accused was the poisoner. The Crown says that by reasoning from the similar fact evidence...you will be entitled to conclude that the accused deliberately poisoned Mr. Perry with the intention of killing him.

In putting it in that fashion, I have explained the only way in which you properly may have regard to any evidence of alleged similar actions on the part of the accused in the past. Any other use of the evidence – for instance, that the accused is a person likely from her criminal conduct or character, as possibly disclosed by that similar fact evidence, to have committed the offences for which she is now being tried – would be quite wrong. You will see then, that the similar fact evidence must be regarded with the greatest care. If you are satisfied at the end of the trial that the Crown has made good its allegations with respect to it – that is has demonstrated the kind of similarity or pattern of behaviour to which I have referred – then you would be entitled to use that evidence, should you see fit, in your consideration of the questions whether the accused administered poison to Mr. Perry and did so with the necessary criminal intent. In other words you could find, if you were so disposed, that pure coincidence could not be a reasonable explanation of the four incidents and that a consideration of them together points inevitably to the guilt of the accused with respect to the charges laid against her in this Court. But that is the only way in which that evidence might properly be used.

(Transcript, undated, p. 1)

Cox J addressed the similar fact issue again at length later in summing up. Fourteen pages of transcript record his painstaking explanations, including:

'The Crown says that you have here a striking course or pattern of events and relationships, with the accused as the connecting link, from which only the most sinister conclusion can be drawn. First, a husband of the accused dies from arsenical poisoning, then a brother, and then a man who for practical purposes was her next husband dies of poisoning (not arsenic this time, but barbiturates), and finally another husband is gravely ill from, it would appear, chronic lead and arsenic poisoning. Nor, says the Crown, is it just a matter of the deaths. There is also, in three of the four cases, a history of medical symptoms extending over a lengthy period for which, it is said, no satisfactory natural cause was found, and in addition clear evidence that the accused stood to gain financially from any death that might result in those three cases. In those respects the death of Montgomerie, as you know, stands differently.

Can you discern in these occurrences such a striking pattern of circumstances, such an underlying unity, as to assist you to a decision in Mr. Perry's case as to whether the accused administered poison to him, and did so with an intention of murdering him? The question will not arise of course unless you are first satisfied that Mr. Perry was in fact poisoned but you are not sure whether his poisoning was a matter of accident or design. It is then that you may look at the whole body of evidence to see whether it discloses such a remarkable pattern or series of common features as to satisfy you that Mr. Perry's poisoning was not caused by accident but was brought about deliberately by the accused. I remind you again, that you are not trying the accused with respect to the poisoning of Haag or Montgomerie or Duncan. Their deaths are relevant only in so far as they may throw light upon the poisoning of Mr. Perry. Again, you could find the kind of objective pattern for which the Crown contends, and still decline to draw the adverse inferences from it which would be essential if you were to find the accused guilty. In that event the explanation in Mr. Perry's case, as for that matter you may think in the case of all the men, is simply coincidence.'

His Honour also said:

'Ladies and gentlemen, I am sure that you have already given this aspect of the case much consideration. Obviously you will have to weigh the issues here very carefully. It certainly is a most remarkable thing that one woman should have three successive husbands, legal or *de facto*, struck down by poison, two of them fatally

and the third to a very grave degree, even if the events did cover a good few years. And on top of that a brother dies of poisoning as well. If the accused is not guilty of these charges, then the explanation must lie, at least so far as her common relationship is concerned, in the long arm of coincidence. It is a matter, perhaps, of how long you think the arm of coincidence is.'

The jury found Mrs Perry guilty of attempted murder and she was sent to prison for fifteen years. After Perry was sent to prison, and before the High Court appeal, a large double page spread was published in *The News* under the headline **TRAGIC TRUST SHOWN BY A HUSBAND** (De Luca 1981). The article reported on a large amount of the evidence that was presented at the trial, including how the couple met, and the history of the three earlier deaths. It is well established that journalists are allowed to report court proceedings as long as the report is fair and accurate (*R v The Evening News, ex parte Hobbs* [1925] 2 KB 158, 167–8). The newspaper articles published after the verdict and sentence were reports of the evidence given at trial. The newspaper did not report anything that was not told in open court. But it did report facts that were subsequently held by the High Court to be inadmissible. Another double page spread appeared in the same newspaper on the same date under the headline: **The Perry poison case: The trial where the accused was defended by the victim** (*The News* 1981b).

Perry appealed to the South Australian Court of Criminal Appeal. The appellant's argument (and the first ground of appeal) was primarily that evidence relating to the deaths of Mr Haag, Mr Montgomerie and Mr Duncan should not have been admitted because that evidence was inadmissible at law.

Alternatively, Mrs Perry's counsel argued that the trial judge should have exercised his discretion and excluded the evidence because its prejudicial nature outweighed its probative value. In the further alternative, the appellant argued that the jury should have been discharged after the whole of the evidence in relation to Montgomerie's death was given, upon the ground that a mis-trial had occurred, or that the trial Judge should have directed the jury to ignore the evidence in relation to the death of Montgomerie and also the evidence in relation to the death of Duncan (*The Queen v Perry* [No. 5] (1981) 28 SASR 417, p. 418-419) Mrs Perry's counsel also argued that the trial judge 'should have directed the jury that they had to be satisfied that the appellant was responsible for the three prior deaths before the deaths could be used as an aid to determine whether [Mrs Perry] was guilty of the charges in the indictment' (*The Queen v Perry* [No. 5] (1981) 28 SASR 417, p. 432)

The Court of Criminal Appeal had to 'look at the Crown case in relation to all the deaths and the illness suffered by Mr. Perry in order to decide whether the evidence of the deaths was legally admissible and, if it was, whether there was any error in the exercise of the discretion' (*The Queen v Perry* [No. 5] (1981) 28 SASR 422).

The hearing of the appeal commenced on 21 September 1981 and lasted for five days.

Judgment was delivered on 20 October 1981 by King CJ, White J and Mitchell J. All three Appeal Court judges gave separate judgments concerning the admissibility in a criminal trial of evidence of other criminal conduct by an accused person. The then South Australian Chief Justice, King CJ, referred to the principles laid down in the 1894 judgment of the Privy Council in *Makin v. Attorney-General for New South Wales* (1894 AC 57, p. 65):

'It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant

if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.'

King CJ expressed the clear opinion that:

'the evidence as to the earlier incidents is genuinely and indeed strongly probative of the allegation that the appellant deliberately administered poison to her husband with the intention of killing him and that its probative force is quite independent of any tendency which it possesses to show that the appellant is a person disposed to murder and to murder by poisoning. The evidence was therefore rightly admitted.'

(*The Queen v Perry* [No.5] (1981) 28 SASR 417, p. 412)

Mitchell J's view (with which White J agreed) was that

'... the evidence tendered by the Crown relating to the deaths of Haag, Montgomerie and Duncan was legally admissible ... to show the high degree of improbability attending the hypothesis that the arsenic poisoning from which Mr. Perry suffered was occasioned by accident, in the light of the facts that the appellant had a close connection with three other men who died of poison, two of them from arsenic poison, and that she had benefited from insurance policies negotiated by her on the lives of two of them and stood to benefit from insurance policies on Mr. Perry's life. Certainly the death of Duncan was not from arsenic but it was from poisoning, and there was evidence from the Crown from which the jury could infer, if it chose, that he had suffered from chronic arsenic poisoning before his death. The appellant benefited from insurances taken out on his life, which insurances she arranged. She did not benefit financially from Montgomerie's death but his death certainly removed someone who may have been regarded as a burden on the appellant's family. His death was from arsenic poisoning and she had the opportunity to cause him to take arsenic...

I do not find that the learned trial Judge made any error in the exercise of his discretion. Of course the evidence was prejudicial, as most relevant evidence tendered by the Crown is. It was, however, of sufficient relevance in my view to make that relevance outweigh the questions of prejudice to which the learned Judge had to give consideration.'

(*The Queen v Perry* [No.5] (1981) 28 SASR 417, p. 433)

The Court of Criminal appeal upheld the decision of the Supreme Court and dismissed the appeal. Mrs Perry subsequently appealed to the High Court of Australia whose Chief Justice described it as a 'difficult case' *Perry v R* ((1982) 150 CLR 580). Gibbs CJ enunciated what has been described as the orthodox view: evidence about the 'propensity' of an accused to commit a certain type of crime is prohibited (Odgers 1983, p. 622). The Prosecution in Emily Perry's trial should have been prohibited from leading evidence in order to show the jury that the accused had a propensity to commit crimes of the type with which she was charged. The scope of this article is not to examine the common law relating to similar fact evidence and propensity evidence but it is important to note that the four judgments all explain and critique the history of the case law relating to similar fact evidence, the leading cases at the time being *Makin v Attorney General for New South Wales* and *Director of Public Prosecutions v Boardman*. Even post-*Perry*, and since the advent of the *Evidence Act 1995* (Cth), the similar fact evidence rule has changed very little. It remains a combination of the requirement that evidence be relevant, the court's discretion to exclude evidence that is unduly prejudicial, and 'a peculiar twist on the application of the general rule relating to circumstantial evidence, being an assessment by the judge of the probabilities of the similar fact evidence being inconsistent with guilt rather than leaving such an assessment to the jury, as usually occurs with circumstantial evidence' (Downes 2004, p. 288).

In the *Perry* High Court appeal, one of the five judges (Aickin, J) died (from injuries sustained in a car accident) before providing reasons for judgment. The remaining four judges agreed that the evidence relating to the death of the *de facto* husband Jim Duncan from barbiturate poisoning was inadmissible. However, three judges

(Gibbs CJ, Wilson and Brennan JJ) held that the evidence relating to the death of Albert Haag, the second husband, was admissible. Gibbs CJ and Murphy J held that the evidence concerning the death of the accused's brother Francis Montgomerie was not admissible; Wilson J and Brennan J decided that this evidence was admissible.

One judge (Murphy, J) said that all of the evidence relating to all three prior deaths was inadmissible. A table summarising the judges' decisions in relation to evidence concerning the prior deaths is set out below.

Table 1: High Court Judges' Decisions regarding similar fact evidence in *Perry v R* (1982) 150 CLR 580.

Judge	Evidence relating to Albert Otto Haag (2 nd husband). Died of arsenic poisoning in 1961.	Evidence relating to Francis Montgomerie (brother). Died of arsenic poisoning in 1962.	Evidence relating to John Alfred Jameison / Jim Duncan (de facto). Died of overdose of barbiturates in 1970.
	Suggested motive: life insurance	Suggested motive: rid family of burden	Suggested motive: life insurance
	Defence: accident / corn sprayed with weed killer / suicide.	Defence: suicide	Defence: bad health, suicide; some symptoms contra-indicative of poisoning.
	Perry had knowledge of poisons, had bought weed killer, opportunity to administer poison, domestic trouble, false statements re knowledge of insurance policies and state of relationship.	No bottle found, Perry cleaned up and threw away bottles.	Arsenic poisoning for considerable period before death. Symptoms consistent with ingestion of lead arsenate.
Gibbs CJ	Admissible	Inadmissible	Inadmissible
Murphy J	Inadmissible	Inadmissible	Inadmissible
Wilson J	Admissible	Admissible	Inadmissible
Brennan	Admissible	Admissible	Inadmissible
Aickin	Died before reasons for judgment	Died before reasons for judgment.	Died before reasons for judgment

Emily's conviction was quashed by the High Court. She was released from prison and a re-trial was ordered. But the prosecution never re-tried her. She died in 2012.

One of the High Court judges, Murphy, J, noted that '[i]n Mrs Perry's case there is a very great temptation in weighing the evidence and more particularly in deciding admissibility, to ignore the presumption of innocence and to replace it with a presumption of guilt. The allegation that a number of the accused's relatives died or suffered from arsenic poisoning immediately conjures up a highly suspicious prejudicial atmosphere in which the presumption of innocence tends to be replaced with a presumption of guilt' (*Perry v R* (1982) 150 CLR 580, p. 594). Murphy J found that the evidence in relation to Duncan's death 'was not fit to be taken into consideration' (*Perry v R*, p. 595), that '[t]here was ample evidence providing a rational explanation of [Haag's death] consistent with Mrs Perry's innocence' (*Perry v R*, p. 598) and 'not a scrap of evidence to sustain a conclusion that the accused poisoned [Montgomerie]' (*Perry v R*, p. 598). His judgment provides a very different narrative to the one put forward by the prosecution and subsequently by the media.

This case provides a particularly interesting example of the dichotomy of the public's alleged 'right to know' about the history of a person charged with a serious offence and an accused's right not only to a fair trial but also to a fair re-trial. The case highlights the rules of evidence that flow from the rights of the accused. The Emily Perry story is an example of the opposing perspectives of lawyers and journalists. The reasoning is somewhat circular – the story was fascinating because of the accused's past history. Journalists published the story to widespread public acclaim. The past history is also likely to be why a jury found her to be guilty of the crimes with which she was charged: the attempted murder on two occasions of her current husband. But the telling of the fascinating story which created newspaper-selling headlines is also the basis upon which the conviction was overturned. The evidence was ruled admissible by the trial judge and was therefore reported in accordance with the principle of open justice. But after the High Court's decision, the publication of Emily Perry's complex past created the probable reason behind why she was never re-tried.

Could it have been possible for Emily Perry to obtain a fair re-trial after the narrative about the three earlier deaths had been given such vast media attention? Probably not. It is certainly likely that Mrs Perry's counsel would have argued strongly that any jury would have been tainted by the extensive coverage of the similar fact evidence that was published both during and after the trial. Given that this case occurred before the advent of digital media and the instant national and international publication that is now possible through the Internet, it might have been argued by the Prosecution that a jury composed of citizens from other states might not have been affected by publication of the similar fact evidence. But could the Crown have obtained a conviction for attempted murder against Mrs Perry without the evidence of the earlier deaths? It would certainly have been much more difficult to obtain a verdict of guilty if the only evidence led by the Crown was in relation to the illness of Mr Perry. Without the cumulative effect of the similar fact evidence, the Prosecution case would have been substantially weakened (Cossins 2013, p. 754). On the other hand, following the High Court's decision, evidence in relation to Haag's death would arguably have been admissible, given that three judges decided that it was admissible. Only Murphy, J found the evidence in relation to Haag to be inadmissible (*Perry v R*, p. 600). Cost would no doubt also have been a significant factor, although without the evidence relating to deaths of Montgomerie (the brother) and Duncan (the *de facto* partner) a re-trial would have been much shorter than the original sixty day trial where 164 witnesses gave evidence.

Today, courts are forced to consider very seriously the possibility of jury members finding out information from the Internet and through social media. This is a vast area of research which will not be addressed in this article other than to note that the Perry case took place within an entirely different social and judicial context. The trial would most likely have been conducted quite differently if it had happened today. On-line journalism and tweets from court rooms were not even in the realms of science fiction in 1981 but they are now very much a part of the modern interpretation of open justice, even though South Australia has yet to embrace cameras in court rooms. However, some things have not changed.

A jury is required to make a decision based on information provided within the framework of the adversarial system. This includes the rules of evidence. Journalists, on the other hand, create stories out of what happens in court. Journalists 'look at the human story rather than get bogged down in the legal minutiae.' (Fife-Yeomans 1995, p. 40). In addition, the 'boundaries between journalism and literature [have become] increasingly blurred' (Richards 2005, p. 25) as 'many of the techniques of fiction writing have become standard techniques in journalism ... [especially] in the 1960s and 1970s with the rise of New Journalism (note the upper case): "The idea was to give the full objective description, plus something that readers had always had to go to novels and short stories for:

namely, the subjective or emotional life of characters''' (Wolfe and Johnson 1975, p. 25).

The appreciation of story-telling is an important part of what it means to be human. It follows that the right to a fair trial will always struggle for supremacy before a voyeuristic public with an insatiable appetite for a good story. The interesting twist in the *Perry* case is that the jury members were allowed to hear stories of previous deaths but were given specific directions as to how they might use those 'stories' when deciding on the guilt of the accused. The stories were repeated on television, on radio and in newspapers. Details of all of the earlier deaths provided a thrilling 'whodunnit' at a time of global conservatism: Malcolm Fraser was Prime Minister of Australia, Ronald Reagan had just survived an assassination attempt and Thatcherism was taking hold in the UK where Lady Diana Spencer was about to be married to Prince Charles. A local murder scandal – especially where the victim had not only survived but refused to hear a bad word said about his wife who was blamed for trying to kill him – provided the classic hallmarks of entertainment. Who would not be interested in such a story? But the *Perry* case provides an example of a story that members of the public do not in fact have a right to know about because of its prejudicial nature. If Emily Perry had been re-tried, jury members in the new trial who became aware of the stories of the deaths of Haag, Duncan and Montgomerie would have highly likely been influenced by this information because it would certainly have 'raised a suspicion that the accused may have been guilty of the similar misconduct alleged or the crime charged' as pointed out by Gibbs, CJ in his High Court judgment. Four High Court judges differed in their views as to whether the evidence relating to the death of Albert Haag was admissible. This fact in itself provides a warning to journalists about whether similar facts or propensity evidence can or should be published, even *after* a trial, in case of a successful appeal where a re-trial is ordered. If a suppression order had been in place in the trial of Emily Perry in relation to this evidence, none of the similar fact evidence would have been published, because to do so would have been in contempt of court (even if individual journalists believed that the public had a 'right to know'). But once the whole story about the three earlier deaths had been published, the chances of finding jury members for a re-trial were next to impossible. Telling a new jury to disregard anything they had seen or heard about the case would have been naively optimistic. Of this, the Prosecution was no doubt all too aware.

The question that now remains is whether there is a way to avoid or to mitigate the potential damage that could flow from publication of similar fact evidence. Suppression orders provide one avenue. Perhaps the courts should consider disallowing the publication of similar fact evidence until any appeal period has expired, although this would be contrary to the principle of open justice and the right to report matters which are litigated in open court. This is an important issue that extends beyond the scope of this article but is ripe for exploration. It certainly highlights the complexity of the rules applicable to similar fact evidence and the pressure on trial judges to apply the rules correctly.

Once the media had published its own narrative of the Emily Perry story, could the justice system really ever deal with it? Would it have been possible to find an untainted, unbiased jury for a re-trial? Which narrative would the prosecution have presented at a re-trial? Now we will never know. Only Emily Perry knew the real truth, and she has taken her own narrative to the grave.

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