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Jurors who sat in the Zachary Rolfe murder trial might now feel cheated – that's understandable

In criminal trials, the information that is excluded from a jury can be just as important as the information they get to see and hear

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Richard Ackland
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Jurors who sat on the Zachary Rolfe murder trial in the supreme court of the Northern Territory might be feeling cheated.

A week after the not-guilty verdict came down, the court lifted more than two dozen suppression orders that had kept from the jury information about the alleged previous conduct of the accused.

This was "tendency evidence" that Justice John Burns ruled would prejudice the jury if made available during the trial of Rolfe on charges relating to the death of Kumanjayi Walker. His defence team successfully argued that his alleged history within the NT police was not admissible as evidence, in part because no findings of wrongdoing had been made against Rolfe in relation to four allegedly violent arrests, and because a judge agreed they were not directly relevant to the shooting death of Walker.

The suppressed information included statements by a NT magistrate in another case that Rolfe had lied about what happened during an arrest of Alice Springs man Malcolm Ryder.

Judge Greg Borchers found that Rolfe lacked credibility and had injured Ryder by punching him in the face and deliberately banging his head on the floor – injuries that required 16 stitches.

Unfortunately, Rolfe hadn't turned on his body camera, claiming that the device was relatively new in Alice Springs and his "muscle memory hadn't developed". Fortunately, another's officer's body camera was on and showed, contrary to Rolfe's evidence, that Ryder had not tried to hit anyone at the time of his arrest.

In April 2019, it is alleged that after a chase he banged another young man's head into a rock, again requiring stitches, and again his body camera was not activated.

In October that year, there was an allegation that the police officer pushed a man into a wall, resulting in nine stitches to a bleeding head.

An encounter the previous month saw Wayne Spencer hospitalised after being chased by Rolfe and allegedly pushed with full force into a barricade.

The prosecution at the trial for the murder of Kumanjayi Walker wanted evidence of these events involving violence included in the proceedings so they could argue that Rolfe had a tendency to use excessive force and to lie in justifying his conduct.

There were also text messages from the police officer to his army pals, sent in February and July 2019, that the prosecution sought to have admitted, arguing they gave insights into his attitude towards policing.

Alice Springs he described as a "shit hole" ... like the "wild west" ... with "fuck all ... rules in the job". When he was deployed with a tactical squad it was possible to do "cowboy stuff with no rules".

Rolfe's barrister, David Edwardson QC, argued that the tendency evidence was "misconceived and unsubstantiated". He maintained there were significant differences because the Walker case involved the use of a gun, whereas the other incidents didn't.

In January, three weeks before the trial commenced, Justice Burns rejected the crown submission saying that the evidence sought to be admitted did "not have significant probative value".

Further, it would effectively mean five separate trials within a trial for the crown to prove the facts in each of those cases where violence was alleged. He also found the previous cases were not relevant to the shooting.

As to the text messages, the trial judge originally accepted the argument that they should be before the jury because "the evidence reveals the expression of an attitude ... that the rules do not apply to him in his activities as a police officer".

Later, the defence persuaded him that the texts were isolated chats among friends and could not necessarily reflect Rolfe's state of mind in November 2019 at the time he shot Walker.

The tests for admissibility of tendency evidence are not always easy to navigate. The Australian Law Reform Commission refers to situations where the "probative value is such that there is no rational view of the evidence that is consistent with the innocence of the accused".

The Judicial Commission of New South Wales points to situations where "the probative value of the evidence substantially outweigh any prejudicial effect the evidence may have on the accused".

Submissions and judgments about what goes in and what stays out of a trial are heard well out of earshot of jurors

Criminal trials are carefully constructed affairs where the information that is excluded from a jury can be just as important as the information they get to see and hear.

Jurors are only to consider what is served up in the courtroom itself, except on occasions when they are taken on a "view" of the crime scene. To that extent, a jury exists in an artificial environment where selected facts are presented for determination.

This was much easier to enforce in times where there might be one newspaper in a town with a court reporter who abided by the "rules", or in cities where the mainstream media generally was compliant with instructions from the bench.

In an age drenched in blogs and social media and where everyone can be a reporter, this is well-nigh out the window. People have their own ideas about what should be published and, in any event, information posted on news sites overseas can still be read by Australians in cases where evidence or verdicts are supposedly suppressed.

So it was in the case of Cardinal George Pell, where the original guilty verdict in his child sexual abuse case was subject to a court-ordered suppression in Australia, but could be freely read on international news sites.

The suppression in that case rested on a belief that a jury in a subsequent trial would be prejudiced if they knew that he had been found guilty of the sexual abuse and assault of choirboys in Melbourne.

Ultimately, the high court decided that the prosecution had not met the required standard for a safe verdict of guilty in the choirboy case, upheld Pell's appeal against his conviction and acquitted him of all charges.

Eighteen months after the Pell verdict, the NSW parliament amended the Evidence Act to allow more background details about an accused to be considered by juries.

This was in response to recommendations from the child sexual abuse royal commission. In NSW, the figures from 2018 showed 91% of defendants in criminal proceedings were found guilty of an offence, yet for child sexual assault cases the conviction rate was 60%.

The legislation opened up to juries in child sexual abuse cases more information that in other sorts of criminal trials might be regarded as prejudicial.

The submissions and judgments about what goes in and what stays out of a trial are heard well out of earshot of jurors. It's understandable if they feel disappointed to discover later they made a decision based on incomplete information.

- Richard Ackland publishes 500Words.com.au