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ARTICLES

The High Court on Crime in 2022: Outcomes and Jurisprudence – *Mirko Bagaric*

This article examines the High Court of Australia decisions in 2022 which relate to criminal matters. This systematic analysis of all High Court judgments commenced in this journal in 2010 and is undertaken annually. This article explains the principles that arise from these cases and identifies jurisprudential themes from the decisions. 83

Identity Crisis in Eyewitness Testimony: Exploring Visual Similarity Judgments as an Alternative to Identification Decisions – *Micaiah Zwartz, Donald M Thomson and Adrian J Scott*

Eyewitness identification evidence is notoriously problematic, and the leading cause of wrongful convictions. The Australian Law Reform Commission has suggested that evidence of resemblance, rather than identity, is the most accurate evidence a witness can give. However, current practices in Australia continue to rely upon evidence of identity. This article explores identification evidence from legal and psychological perspectives. The relevant legislation and psychological research are reviewed and the problems with current identification procedures are highlighted. A new method for conceptualising and capturing identification evidence is proposed involving similarity (or resemblance) as an alternative mechanism for gauging "sameness". The advantages of similarity are discussed and the results from a study comparing traditional binary identifications with continuum-based similarity judgments are reported. 93

Thirty Years of Stalking – And Further Amendments to Queensland's Stalking Offence – *Andreas Schloenhardt*

In 2023, 30 years after the offence was first introduced, the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023 (Qld)* renamed and amended Queensland's stalking offence. This article reviews the purpose, evolution, and elements of Queensland's stalking offence, contextualises and critically examines the 2023 amendments, and reflects on the scope, application, and impact the offence, also in light of longstanding criticism. 109

Assault and the Mental Element of Intention in the Queensland Criminal Code – *James Duffy*

This article critically analyses whether in Queensland, the prosecution is required to prove that a person intentionally applied force to another when prosecuting an assault through application of force (type 1 assault). The latest Queensland decision (single judge District Court) on the issue held that intention is an element of type 1 assault. The latest Western Australian decision (Court of Appeal) held that intention is not an element of type 1 assault. A Magistrate or District Court judge considering this issue will need to grapple with issues of statutory interpretation as they pertain to criminal codes, as well as doctrine of precedent issues relating to decisions of courts in different hierarchies at different levels. In this article, it is argued that the definition of assault in the Queensland Criminal Code needs to

be redrafted to explicitly mention intention and recklessness as elements of type 1 assault in Queensland. 124

Sentencing Developments in the United States in 2023: Continued Reform Stagnation in a Climate of High Crime Rates – *Mirko Bagaric*

Sentencing law and practice is one of the most politically sensitive and controversial subject areas in the United States. Over the past decade it has been subject to considerable change, with a general softening of criminal sanctions. The rate of sentencing developments slowed in 2022 – perhaps as a result of a large spike in violent crime in recent years. This trend continued in 2023. There were, however, some important developments during this year. These are discussed in this article. 136

Parties' Liability at Common Law in Australia: How to Clean Up a Mess – *Andrew Dyer*

In *Mitchell v The King*, the High Court of Australia ruled that the Crown may not combine the extended joint criminal enterprise doctrine with the constructive murder rule created by s 12A of the *Criminal Law Consolidation Act 1935* (SA). Their Honours' reasoning on this point was dubious; indeed, this is the second time the Court has used questionable reasoning to avoid difficulties created by its criminal complicity jurisprudence. Such reasoning shows that the common law relating to parties' liability is seriously flawed and that law reform is necessary. Australian Parliaments should place *Jogee v The Queen* on a statutory footing. And they should deal more thoroughly than any Australian Parliament yet has with a problem that has often arisen in the case law – the extent to which the liability of an assister, encourager or procurer hinges on the guilt of those whom she has assisted, encouraged or procured. 144

Why Australia Should Adopt the English Model for Propensity and Bad Character Evidence: Rebalancing the Criminal Justice System in Favour of the Victims of Crime – *Andrew Hemming and Emma Hudson*

In recent years, Australian jurisdictions have reformed the admissibility of propensity evidence, most particularly for sexual offences against children, but have left the admissibility of bad character evidence untouched. This article argues that Australia should follow the English example and comprehensively reform both propensity and bad character evidence by adopting the seven gateways model found in s 101 of the *Criminal Justice Act 2003* (England and Wales), which makes it easier for the Crown to adduce propensity and bad character evidence into court. Australian law reform bodies and legal academics have virtually ignored this revolutionary development in England, which the authors argue is a major oversight that needs to be addressed in the context of rebalancing the criminal justice system in favour of the victims of crime. 180

Sentencing with Mandatory Minima and Element Analysis – *Matthew Goode*

The decision of the ACT Court of Appeal in Hurt v The Queen primarily concerned the method by which to calculate a sentence where the Parliament has legislated a mandatory minimum penalty. That turns out to be more complicated than it seems. It also led to an even more complicated question involving the correct method of analysing offences in the Commonwealth Criminal Code. This was far more difficult than it seemed. 199

"Constructive, Constructive Murder" – Extended Joint Criminal Enterprise and the Limits of Constructive Liability: Mitchell v The King – *WM Scobie*

This article considers the decision of the High Court in *Mitchell v The King*, in particular the issues of extended joint criminal enterprise and constructive murder. The relevant aspects of the law of complicity are discussed, and then the three separate judgments

are analysed. Despite disparate holdings as to the construction of the relevant provision, the decision unanimously held the doctrine of extended joint criminal enterprise was not capable of applying to the South Australian provision establishing constructive murder. The article also makes some observations about the doctrinal foundations of the doctrine of extended joint criminal enterprise, and considers the ramifications of the decision in criminal practice. 210

Dunn and Dusted: Applying the Rule in Browne v Dunn When Cross-examining Children – *Dr Robyn Blewer, Dr Natalie Martschuk, Prof Jane Goodman-Delahunty and Prof Martine Powell*

Cross-examination is central to all common law adversarial trials. The rule in *Browne v Dunn* is, in turn, central to cross-examination. This article considers the rule in the context of cross-examining child witnesses. Both the literature and case law indicate the rule is often misunderstood by practitioners which, in turn, may lead to appeals, mistrials and even miscarriages of justice. For child witnesses, application of the rule may also lead to confusion and the need to respond to direct allegations that they are lying. The article includes details of a study of practitioner perspectives on the application of the rule, complementing the doctrinal analysis and identifies precise areas for future research and reform. 218

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