

# CRIMINAL LAW JOURNAL

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**Is There Any Prospect of a Model Provision for Similar Fact/Propensity Evidence or the Coincidence/Tendency Rules in Australia?** – *Andrew Hemming*

Australia has five tests for the admission of similar fact or propensity evidence as it is known at common law, or alternatively coincidence or tendency evidence as it is known under the Uniform Evidence Legislation. Each test differs according to the difficulty or “bar” the Crown faces in obtaining the court’s permission to adduce such potentially damaging evidence. This article will weigh the merits of each of the five tests in an endeavour to establish whether there is any prospect of a model provision, such that a uniform test across Australian criminal law jurisdictions for the admission of similar fact or tendency evidence could be adopted, aside from child sexual offences and domestic violence offences. It is acknowledged that where to set the bar of admission is both a moral and political one, weighing the moral harm of wrongful conviction against the public interest in convicting offenders (leaving aside local factors such as whether jury trials are mandatory or whether joint trials are common). The criteria for determining the test for a model provision will be considered in Part III, which if adopted will require a shift in the weight ascribed to these competing considerations in some jurisdictions. .... 207

**Memory Science in the Pell Appeals: Impossibility, Timing, Inconsistencies** – *Jane Goodman-Delahunty, Natalie Martschuk and Mark Nolan*

We examine the appeals from the conviction of Cardinal Pell in light of the common sense versus scientific belief system about human memory and robust principles of memory. We outline how assumptions about memory operations appeared to influence the legal decisions. At the heart of the High Court’s reasoning seemed to be an assumption that memory about routine practice was to be believed when it contradicted the complainant’s memory of the alleged abuse. We question whether the complainant’s episodic memory was undervalued compared to potential over-reliance on sometimes questionable schematic recall of repeated events by the opportunity witnesses. This analysis does not suggest that the rule about appellate review of jury trials re-emphasised by the High Court was in error. In many types of legal cases, memory of institutional figures about routine practices, absent clear memory of specific adherence to the practice on a particular occasion, is accorded undue weight. .... 232

**Bail in the Time of COVID-19** – *Dr Brendon Murphy and Tahlia Ferrari*

One of the numerous and unexpected ways that the COVID-19 pandemic has affected Australian law and judicial practice, has been the impact on bail applications. In a very short space of time, a new body of jurisprudence has emerged in which the COVID virus has become a relevant factor in the determination of bail. This article considers the extent to which COVID has influenced bail decisions in New South Wales and Victoria,

by analysing how COVID-19 has changed bail applications, and the impact this has on bail jurisprudence. In conclusion, we suggest that while COVID has been integrated into Australian law rapidly, it has done so with respect to existing categories including concerns centred around trial delay, potential exposure to the virus while incarcerated, increased health risks due to a compromised immune system, hardship on remand, and limits on access to legal representatives. While COVID has affected decision-making, it is one of many factors considered. .... 247

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