

CRIMINAL LAW JOURNAL

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The High Court on crime in 2012: Outcomes and jurisprudence – *Mirko Bagaric*

This article examines the High Court decisions from 2012 which relate to criminal matters. This systematic analysis of all High Court judgments commenced in this Journal in 2010 and is now undertaken annually. The article explains the principles that derive from these cases and identifies jurisprudential themes from the decisions. It also sets out the significance of the cases and the possible wider consequences of the decisions. 6

Provocation: The good, the bad and the ugly – *Thomas Crofts and Arlie Loughnan*

This article makes a case for the retention of the partial defence of provocation as provided in s 23 of the Crimes Act 1900 (NSW), based on the importance of labelling in criminal law, the role of the jury in assessing questions of culpability, as well as consideration of the diversity of cases in which provocation may be raised, and the dynamism of the defence. However, reflecting serious problems with the defence as it is currently formulated, the article recommends amendments to the current law, oriented around the notion of “gross provocation” and expressly excluding (a) words alone; (b) things done or said to end or change a domestic relationship; and (c) non-violent sexual advances as potential triggers for the “loss of control” required by the defence. 23

Judicial valuation of the social costs of crime – *Andrew Torre and Scott Sherwen*

The true economic functions of the criminal courts are, first, to deter potential prospective offenders from committing offences, and in so doing reduce the total social costs of crime in the future; and secondly, to force the convicted offender to bear some of the costs, which the crime has externalised onto the victim(s) and wider society through retributive justice. These objectives are achieved through the sentencing function. Critics have lamented that too many extraneous factors are taken into account when setting penalties but the authors argue in this article that nevertheless these sentences are optimal because of the judges’ comparative advantage. What is of great interest, and the focus of this article, are the implicit valuations of the social costs of crime that these sentences imply. Using the South Australia higher criminal courts as a case study, the authors estimate and utilise these judicial valuations to suggest a methodology for measuring the true economic value of the criminal courts. The analysis helps put into perspective the courts’ very valuable contribution to social welfare. 38

Intellectual disabilities and the determination of fitness to plead in the magistrates' courts – Betheli O'Carroll

Fitness to plead in the magistrates' courts is a neglected issue in many Australian jurisdictions, with inconsistent laws throughout Australia. In some States, there is no legislation that provides for determining fitness to plead to summary offences. This article examines the legislation and the recent Queensland Court of Appeal case of *R v AAM; Ex parte Attorney-General (Qld)*. In that case, the court set aside the convictions of a person with a significant intellectual disability and criticised Queensland's lack of legislation dealing with fitness to plead to summary offences. The judgment is indicative of the confusion surrounding the procedural and substantive law that should apply when an issue of fitness to plead arises in the magistrates' courts, and demonstrates that law reform in this area of criminal procedure is long overdue throughout Australia. 51

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