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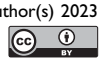

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Respect for juries: A rejoinder to Hemming on *Pell*

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Abstract
The High Court decision in *Pell v The Queen* continues to be the subject of extensive academic controversy. In a pair of important articles, evidence and criminal law scholar Andrew Hemming has defended the Court's decision. This rejoinder critiques Hemming's defence (and, by extension, the High Court's decision) on three grounds. First, because the decision conflates unchallenged testimony with honest and reliable testimony. Second, because it relies on ad hoc probabilistic determinations of discrete and unreplicable historical events. Third, because it fails to answer a key epistemological question: how could the High Court *know* more about what really did or did not happen in that sacristy than the jury?

Keywords
Reasonable doubt, jury verdicts, legal theory, jurisprudence, legal philosophy

In a pair of recent scholarly articles,[1] evidence and criminal law expert Andrew Hemming has defended the High Court's overturning of the jury verdict convicting the late Cardinal George Pell of historical sexual abuse.[2] According to Hemming, the High Court remedied a true miscarriage of justice[3] because any reasonable jury would have had a doubt based on the 'compounding improbabilities' that the alleged abuse actually took place, the 'unchallenged evidence' given by key defence witnesses, and the 'forensic disadvantage' that Pell suffered due to the lapse of time between the trial and the time when the crime was alleged to occur.[4] As Hemming portrays it, the case should never have been brought to trial in the first place and it is obvious why the High Court had no choice but to overturn it.

The High Court decision, and Hemming's defence of it, raise fascinating philosophical questions that have implications larger than whether a particular individual should be in prison or not. These questions include whether we must accept uncontradicted assertions as true, whether unreplicable discrete historical events can be assigned empirical probability values, and under which circumstances we should lend credence to the final, rather than the first, decision-maker on a contested question of fact. After the three brief arguments that follow, the conclusion of this rejoinder is that Hemming and the High Court have treated complex questions as simple ones, erred in their conclusions accordingly, and shown implicit disrespect for the institution of trial by jury in Australia.

Truth and contestation

In finding the jury's verdict unreasonable, Hemming and the High Court place enormous – one could fairly say conclusive – weight on the testimony of two defence witnesses. These witnesses, a Mr Portelli and a Mr Potter, were respectively the master of ceremonies for the Sunday solemn mass and the sacristan for the cathedral where Pell's criminal acts were said to take place. Each gave testimony that it was virtually impossible for Pell to have committed the crime because he was almost never alone during and

[1]See Fiona Hum and Andrew Hemming, 'Inconsistencies, Improbabilities, and Impossibilities in the Case of Cardinal Pell: A Reply to Memory Science' (2022) 46 *Criminal Law Journal* 151; Andrew Hemming, 'Why the Jury in *Pell v The Queen* Must Have Had a Doubt and the High Court Was Right to Quash the Guilty Verdicts' (2022) 1 *Australian Journal of Law and Religion* 57 ('*The Jury in Pell*'). The present rejoinder will leave the memory science debates to the experts and instead focus on Hemming's second article.
[2]*DPP (Vic) v Pell* [2019] VCC 260, affd *Pell v The Queen* [2019] VSCA 186 ('*Pell Appeal Vic*'), revd *Pell v the Queen* [2020] HCA 12 ('*Pell High Court Appeal*').
[3]Hemming, *The Jury in Pell* (n 1) 58.
[4]Ibid 75.

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after these ceremonies. If Pell was never alone, Hemming and the High Court ask, how could he have molested choirboys as the prosecution claimed?

A sceptical person might reply: well, how do we know Portelli and Potter were speaking truthfully and accurately? Here, Hemming and the High Court pounce! We *know*, they say, because the witnesses' testimony was *unchallenged*. The High Court uses the word 'unchallenged' several times to describe the witnesses' testimony (14 times, to be precise, according to Hemming).[5] According to the High Court, it is 'the evidence of witnesses, whose honesty was not in question',[6] that should be determinative of the issue of whether Pell had the opportunity to commit the crime.

The logical leap here is subtle, but crucial. The leap is to treat a statement that is not contested as having equivalent value for decision-making as a statement that is known to be true and accurate. If an assertion is not contested, does that mean we have to believe it? To use a facile example, if a defence witness testifies that the sky was green, and a prosecution witness does not rebut it, need a jury take it as fact that the sky was, indeed, green? In other words, was the jury in *Pell* mandated to believe *everything* that Portelli and Potter said simply because (according to Hemming and the High Court, at least) no witnesses were introduced to contradict them?[7] More specifically, for example, would it be open to the jury to have qualms about their testimony in the following ways:

a) Portelli and Potter were old men trying to remember precise details of otherwise mundane routines that took place approximately 25 years ago (a qualm about their recollection);
b) Portelli and Potter were both deeply invested in the Catholic Church generally and perhaps Cardinal Pell specifically (a qualm about their institutional and/or personal loyalties);
c) Portelli and Potter sometimes gave almost suspiciously precise details about specific events (a qualm about fabrication and/or coaching);
d) Portelli and Potter sometimes gave realistically vague and equivocal details while, at other times, they gave unrealistically precise details about specific events (a qualm about the consistency of their individual memories).

In fact, it is common for criminal court bench books (also known as charge books) to contain jury instructions to the effect that, when assessing a witness, the witness may be honest but have a poor memory or be mistaken. The jury should take this into account, whether or not the evidence is 'challenged', because it is up to jurors to decide whether they believe all, some, or none of a witness's evidence.[8] For the High Court to take everything that Portelli and Potter said as gospel, while discounting any plausible qualms the jury might have had about their testimony, substitutes a conclusion for reason. But even more problematically, it leads into the second major logical error committed by Hemming and the High Court.

Probability and discrete, unreplicable historical events

Allow me to begin with what will at first seem like both a tangent and an absurd statement: the *Titanic* did not sink. The reasons that the *Titanic* did not sink are numerous and incontestable:

- Oceans cover about 71 per cent of the Earth's surface; the probability of an iceberg being found in any given spot in the ocean is very small.
- Thousands of ships sail across the ocean every day; the probability of one hitting an iceberg is vanishingly small.
- Even if a ship did hit an iceberg, the chance of it sinking is small.
- The chances of a ship sinking on its very first ocean crossing are small.
- If the *Titanic* were to encounter an iceberg, the chances of its lookouts not noticing in time to avoid it is small.
- If the *Titanic* were to hit an iceberg, the chances of the iceberg being large enough to do significant damage are small.
- Even if the *Titanic* were significantly damaged by an iceberg, the chances that too many of its flood-tight compartments would fail, making it sink, are small.

Thus, by 'compounding these improbabilities', we reach the only 'logical' conclusion: the *Titanic* did not sink.

We know, of course, that the *Titanic* did sink, even if our ex post facto probabilistic reasoning makes it sound like it should not have. A particular ship sinking is a discrete, unreplicable historical event (a given ship can only sink once!). We might try to calculate the odds that a ship *like* the *Titanic* undertaking a voyage *like* the *Titanic* did could hit *an* iceberg and sink, but we do not need to do any hard

[5]Ibid 73.
[6]*Pell High Court Appeal* (n 2) [118].
[7]In fact, there was plenty of conflicting evidence from choirboys about exactly how ceremonies worked, not to mention the testimony of the alleged victim. See, eg, *Pell High Court Appeal* (n 2) [65]–[75].
[8]*Criminal Charge Book* (Vic) [1.6.1] ('It is for the jury, who have seen and heard the witnesses, to decide whether they accept their evidence. They are free to accept or reject the whole of a witness's evidence, or to accept some of the evidence and reject the rest.'). I am indebted to an anonymous peer reviewer for this point.

maths to figure out the 'probability' that the *Titanic* itself sank is 100 per cent.[9]

A particular offender committing a particular crime against a particular victim at a particular place in a particular timeframe in the past is also a discrete, unreplicable historical event. Whether it happened is simply not subject to empirical probabilistic calculation. But this is exactly the type of reasoning that both Hemming and the High Court engage in when they conclude the jury verdict in *Pell* was unreasonable. Both buy wholeheartedly into the clever argument that Pell's defence lawyer introduced (and lost with) at trial: that the chances of Pell being left alone were small, that the chances of him being unaccompanied in the sacristy were small, that the chances two altar boys could slip away unnoticed into the sacristy were small, and so forth, and that if each of these 'improbabilities' are 'compound[ed]', it becomes impossible to believe they could have occurred at the same time.[10]

On the surface, it seems persuasive. But when broken down, the argument fails. First, it depends entirely on the uncritical acceptance of the 'unchallenged' testimony of the 'opportunity witnesses' – testimony which the jury was free to reject in whole or in part if they had qualms of the nature discussed above. Second, treating the alleged crime as an isolated series of discrete events that all had to line up simultaneously and perfectly in order for the whole event to occur (like the *Titanic* hitting an iceberg on its maiden voyage in the North Sea on 15 April 1912 at exactly the worst angle for it to have a chance of surviving) mischaracterises the allegations at trial. We *might* accept that, after *most* ceremonies, Pell is not alone. We *might* accept that, after *most* ceremonies, altar boys do not sneak into the sacristy to steal wine. But the question is not what happens *most* of the time – the question that faced the jury was what happened, if it believed the compelling evidence of the victim, *the one time* both Pell was alone and that the altar boys snuck into the sacristry. Trying to attach probabilistic reasoning retrospectively to a discrete, unreplicable historical event (at least in the absence of a large sample size of comparator cases) is a fool's errand and an exercise in poor reasoning.

Epistemology and humility

It is important to note that the High Court overturned the jury verdict in *Pell* not because of any errors in law, but because of a perceived error in the jury's *conclusion*. The test is apparently a simple one: was the jury's verdict 'unreasonable'?[11] More specifically, after examining the record, is the court 'satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt'?[12] Hemming, all seven members of the High Court, and one member of the Victorian Court of Appeal think the jury's verdict was unreasonable. The majority of the Victorian Court of Appeal, the members of the jury, and some other legal scholars[13] think it was not. Nor is disagreement about the strength of the evidence against Cardinal Pell new: a previous jury deadlocked on the same charges.[14]

Epistemology is a fancy word for thinking about how we know what we know. We now 'know' that the jury in *Pell* was unreasonable and irrational; we know that because the High Court said so. But how did the High Court know? Apparently by doing the exact same thing that everyone else – jurors, intermediate appellate judges, and legal commentators – did: they were weighing the evidence and reaching a conclusion. Is there any reason to think that they were better at it than the jury?

If some of the people on the first jury, all the people on the second jury, and a majority of the people on the intermediate appellate court thought Cardinal Pell was guilty, what did the High Court *know* that they did not? We might plausibly assume that the members of the High Court have more extensive legal training but, if the presence of legal training makes for better decision-making in criminal trials, why are lawyers almost universally barred from jury pools?[15] If members of a jury spend days, weeks or months sitting in a courtroom listening to witnesses and assessing their demeanour, handling evidence (like the priest's robes at issue in *Pell*), touring the alleged crime scene, and more, would it not make more sense to say that they have access to a *special kind of experiential knowledge* that appellate judges simply cannot match by reading dry transcripts? From an epistemic point of view, who *knows* more about the evidence adduced at trial: is it the jurors or the High Court? And if the answer is not the jurors, then why do we even have juries to begin with? And finally, since the jury's verdict has been deemed unreasonable, does that mean the two judges on the Victorian Court of Appeal who thought it *was* reasonable must be deemed *un*reasonable too? (Or dare we ask, were they not 'acting rationally'?) By second-guessing the jury, the High Court raises questions it is simply not capable of answering.

Conclusion

Juries make mistakes, of course, and a process must exist to ensure the innocent are not wrongfully convicted.

[9]If one objects to the example because the sinking of the *Titanic* is not in dispute, a hypothetical drawn from politics rather than maritime disasters may better convey the point. Imagine, 100 years from now, two ill-informed high school students arguing about whether Donald Trump was ever President of the US. One comes across the final, 2016 election eve forecast by the reputable polling site FiveThirtyEight.com that states Donald Trump has only a 28.6% chance of winning, and then finds another conclusion by the Princeton Election Consortium (an Ivy League university-affiliated research center) that Trump has less than a 1% chance of winning. Would it be rational for the students to conclude that Trump must have lost the election?

[10]See Hemming, *The Jury in Pell* (n 1) 68; *Pell High Court Appeal* (n 2) [57]–[58].

[11]*Pell High Court Appeal* (n 2) [39].

[12]Ibid.

[13]See, eg, Greg Byrne, 'The High Court in *Pell v The Queen*: An "unreasonable" review of the jury's decision' (2020) 45(4) *Alternative Law Journal* 284.

[14]An excellent discussion of the hung jury in the first trial is contained in Melissa Davey, *The Case of George Pell: Reckoning with Child Sex Abuse by Clergy* (Scribe, 2020) ch 6.

[15]In other words, although a hypothetical all-lawyer jury might make 'better' decisions (in the sense of complying with applicable legal principles), the historical evolution of the lay jury is premised on values, like community representation and judgment by one's peers, that make such an innovation deeply problematic.

However, that process needs to take a jury's verdict seriously and not simply set it aside because the High Court disagrees with it. The High Court did not overturn the *Pell* jury because it heard stunning new exonerating evidence, had found an error in law by the trial judge on a crucial point, realised there was jury misconduct, or anything of that sort. Instead, it heard the exact same evidence and the exact same arguments that were made at trial, and simply reached a different conclusion than the jury on contested matters of fact and credibility. The High Court's decision in *Pell*, and Hemming's defence of it, suffer from similar defects. These are the unquestioning belief in the defendant's witnesses, an illogical 'probabilistic' analysis of a discrete, unreplicable historical event, and an eager willingness to substitute their own opinion for the jury's verdict because it reached the 'wrong' outcome.

Every criminal case is going to have a winner and a loser: either the alleged victim or the alleged perpetrator is going to be disappointed with the outcome. What should make the High Court's decision in *Pell* remarkable is that it adds jurors to the list of losers. We ask individuals to give their time, sometimes even months of their lives (and livelihoods) to perform a solemn civic duty, tell them they cannot talk to anyone about what they are doing, expose them to potentially traumatising material about sexual abuse, and then turn around and disregard everything they have done, labelling it 'unreasonable' and 'irrational.' The jury in *Pell* toiled away, working in good faith, only to discover they reached the 'wrong' decision according to the High Court. We should feel sorry for them, and for all future juries whose decisions will be so arrogantly second-guessed by appellate judges thinking that, somehow, they know better than a jury could about what 'really' did or did not happen.

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