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ARTICLES

INVESTIGATORS, COGNITIVE BIAS AND DOUBLE-DIPPING: MISUNDERSTANDING OPINION EVIDENCE IN TRIALS AND APPEALS

Gary Edmond

This article examines the misuse of evidence in trials and appeals. Specifically, the systematic mis-representation and over-valuing of opinion evidence. It explains how inattention to the independence (and value) of different strands of (circumstantial) evidence, along with dangers posed by context effects and cognitive biases, results in contamination, such that the same evidence might be unwittingly “dipped into”, and so counted, more than

once. These problems are sometimes compounded when jurors are enabled to undertake comparisons (eg of voice recordings or persons in images) in the extremely suggestive conditions of the accusatorial trial. Such practices not only dilute criminal proof, they encourage unfairness and irrationality. Traditional trial safeguards (and personnel) have failed to recognise, let alone address, these problems and the substantial risks entailed. 543

DEAD MEN TELL NO TALES – PERMANENT STAYS IN HISTORICAL CHILD SEXUAL ABUSE LITIGATION AND “DEAD MAN STATUTES” – AN UNFORESEEN OUTCOME?

James Masur

Following a five-year inquiry, the Royal Commission into Institutional Responses to Child Sexual Abuse produced its final report in 2017. Its recommended legislative reforms permitting survivors of historical child sexual abuse to obtain civil law redress brought a sense of optimism that their claims would be finally determined on their merits at court. While an increase of these previously barred claims was explicitly expected, it is unclear whether this included the corresponding rise in applications seeking a permanent stay? Either way, the development of authority, which has the practical consequence of preventing plaintiffs from maintaining such claims where the putative abuser cannot be confronted with the allegations due to death or infirmity, presents a direct challenge to the efficacy of the Royal Commission’s objectives and recommendations. In doing so, it has produced similar outcomes to the so-called “Dead Man Statutes”, the derided statutory vestiges of the common law’s long-abolished qualification against interest rules. 575

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