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ARTICLES

THE USE AND MISUSE OF METAPHORS

The Hon William Gummow AC and Aryan Mohseni

The use of metaphors in legal reasoning has received renewed attention in recent decisions of the High Court of Australia and the UK Supreme Court. Reliance upon metaphor has a history of criticism as apt to confuse and mislead, but also has been described as a means of persuasion which assists in understanding legal doctrine. There are various species of legal metaphor. In this article, these are discussed under eight headings. 738

PURPOSE, PROCEDURE AND PERFORMANCE: OATHS AND AFFIRMATIONS RECONSIDERED

Fiona Hum and Darshan Datar

Oaths and affirmations exist as ceremonial expressions of the witness vowing to give truthful evidence. This ritual is said to secure the legitimacy of the trial. These choices of vows have received little scholarly attention and are usually treated as part of a harmless tradition. The authors contend oaths and affirmations have both theoretical and pragmatic harms that impact the objectivity and neutrality of the trial process. First, we demonstrate that oaths and affirmations are justified due to their perceived role in legitimising the trial. We theoretically demonstrate that oaths only serve as a ritual to legitimise the trial process and accordingly do not serve as a barometer to demonstrate the truthfulness of a witness. Second, drawing on empirical data from case law, we argue lawyers can have an adverse impact upon certain religions by undermining the credibility of religious witnesses who do not take oaths. 750

THIRD-PARTY LIABILITY FOR BREACH OF CONFIDENCE – ACCESSORIAL OR PRIMARY? THE PROBLEMS WITH UNIVERSAL CHARACTERISATIONS

By Henry Higgins and Pranay Jha

The nature of third-party liability for breach of confidence has frequently been described as “unsettled”. One aspect of uncertainty within the case law is whether such liability should be considered “accessorial” or “primary”. This article suggests that a priori categorisations of third-party liability as universally accessorial or primary should be avoided. Instead, the article advocates for a “circumstance-dependent” approach to be taken. It argues that

distinctions should be drawn between recipient and participant liability. For participant liability, liability will necessarily be accessorial. However, for recipient liability, it will depend on the circumstance said to put a third party on notice of the information's confidentiality. The article observes that the treatment of liability as accessorial or primary may have significant remedial consequences, including whether: split elections between compensation and an account of profits can be made against multiple wrongdoers; liability can be treated as joint and several; and third parties can be bound to arbitration agreements. 763

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