

Tuesday 8 July 3.30pm to 5.00pm

On Being the Forensic, Expert Witness: an Analysis of the Medico-legal Interface Experience in the Rape Trial

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Abstract

At first blush this paper might be regarded as having only the most tenuous connection with the theme of the ALTA CONFERENCE 2008.

Upon a little reflection, however, a very real link to the Conference theme would appear to emerge. After all the part that is, and increasingly will be, played by the forensic expert witness – not only in criminal law proceedings – but also in proceedings concerning the environment and indigenous peoples will be readily enough acknowledged.

However even the most cursory survey of the relevant literature reveals that there are problems at the interface between the law and science and, more particularly, at the interface between the law and medicine. Some would have it that the forensic scientist and, more particularly, the forensic, medical scientist should withdraw from the legal arena altogether. Others would maintain that what science and, more particularly, medical science have to offer the law, lawyers and our system of justice is, as yet, largely unrealized.

This paper does not aim to resolve any one of the many problems which the relevant literature has already identified at the medico- legal interface. Rather it intends to address just one of them – the problematic nature of the role of the forensic, medical, expert witness in the rape trial - and to set the problem or problems associated with that role well - just where they are confronted existentially by the forensic, medical expert witness on a daily basis – in the court and in the witness box.

In an attempt to set such problems well, to expose exactly what is problematic in that particular, personal experience of the interface between the law and medicine, the authors have chosen to present a phenomenological description of that experience based in Heidegger's analysis of "Being-There" presented in his famous treatise "Being and Time".

If that description does provide teachers of the law with some fresh, new insights into the problematic nature of this one small aspect of the interface between the law and medicine, then perhaps this paper might contribute, in some small way, to realizing that potential for justice, which its authors do believe, does lie in the nexus between medicine and the law.

"Identification Evidence – Proof and Doubt": An Experiential Teaching Strategy to Promote Deep Analytical Understanding Combined with Development of Practical Legal Skills

Dr John Anderson

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Abstract

Identification is a complex and fascinating issue that frequently arises in criminal trials. As evidence, it has the feature of apparent reliability when given by an independent eyewitness but this feature must be evaluated in light of the inherent dangers related to the subjective experience of human perceptions. A number of rules as to admissibility and warnings have developed and form an important part of student learning in this area of evidence law.

In order to enhance student understanding and evaluation of these rules I have developed a teaching strategy combining legal problem solving with a student experience in legal process involving a witness cross-examination through role-play. The case of *R v Ben Lewis* has been designed to engage students in deep thought and analysis about the identification evidence of an eyewitness. This process involves a number of stages. Firstly, students must consider the circumstances of the formal