REVIEW ARTICLE*

Evidence, Advocacy and Ethical Practice - A Criminal Trial Commentary by JILL HUNTER and KATHRYN CRONIN (Australia: Butterworths, 1995), xxvii + 534. Softcover recommended retail price $69.00 (ISBN 0 409 30673 8).

Barristers can sometimes be heard to say that evidence is something you only really come to understand once you are 'on your feet' in court. *Evidence, Advocacy and Ethical Practice* challenges that contention and marks a welcome development in evidence scholarship and teaching.

The book looks at evidence differently to conventional treatments: the participants of the trial are put in the foreground; the impact of evidentiary rules and principles are assessed - not merely in legal terms, but also from sociological, psychological (including linguistic analysis) and other perspectives; process and substance are merged. All this is accomplished within a framework that encourages critical analysis of the rules of evidence and the trial process more generally.

Although it is specifically a teaching text, the book contains much that will assist practitioners. The considerable material on evidence law is succinct and up to date. The authors took a gamble by including relevant provisions of the *Evidence Act* (Cth) when in the stage of a Bill. This paid off when the Bill was enacted in 1995, and NSW has subsequently adopted legislation in substantially identical terms.[1] Practitioners will also benefit from the material on advocacy which ranges from how to interview a client to techniques for effective cross-examination.

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1 Furthermore, all State and Territory Attorneys-General have given in-principle support for introducing substantially uniform evidence laws: *The Justice Statement*, Attorney-General's Department, May 1995, Office of Legal Information and Publishing, Attorney-General's Department, ACT, pp 127-8.

It is interesting to consider the book in the context of developments in evidence curricula in Australian universities over the years. It was not so long ago that evidence was typically an elective subject at many law schools. Over time it shifted to generally being a mandatory component of a law degree however it was still purely doctrinal with no link to procedure. Courses in civil and criminal procedure, if offered, were usually not compulsory and neither the evidence nor procedure courses acknowledged the inherent links between each other. An important change was marked by the publication in 1976 of *Litigation: Evidence and Procedure* by Aronson, Reaburn and Weinberg.[2] This book marked a recognition of the desirability of teaching rules concerning pre-trial and trial in one course. Evidence is as much about getting the facts as it is proving them. Procedure is as much about getting the evidence ready as it is managing it.

Evidence, Advocacy and Ethical Practice goes a step further. It is neither purely doctrinal, nor is it a book purely devoted to procedure. It is not simply an amalgam of the two although it contains both. It is a book where the content and meaning of the rules and practices applying to criminal trials are worked through from the perspective of each major player: the judge; jury; lawyers; accused; and witnesses.[3] Other books in this area take the traditional, lawyer's perspective. The approach taken in *Evidence, Advocacy and Ethical Practice* has both educational and practical advantages. If you learn about the same thing through different points of view you can come to understand the pressures operating upon the rules and players and the meaning of the rules. Thus an objective of the book is not so much to teach doctrine but rather to revisit doctrine through various perspectives.

Another innovation in the book is the combination of evidence theory and material relating to advocacy skills, which includes preparing a case for trial, interviewing witnesses as well as techniques for the examination and cross-examination of witnesses and the like. There have been a number of books published recently concerning advocacy skills[4] but none have sought to combine this with a doctrinal study. Successful advocacy is often knowing how to manipulate the rules to best advantage. Given this, it makes sense to consider advocacy techniques together with the rules themselves. The other advantage of the simultaneous treatment of evidence and advocacy is the clinical component it gives to teaching.

The authors have taken a critical approach to the study of the criminal trial and evidence. A fascination with criminal trials is a feature of modern times. Consider the OJ Simpson trial, "Janus" and other television series, all of which focus upon the dramatic qualities of the criminal trial. Clearly trials do have a dynamic quality and often involve issues of personal and public importance. Rarely are questions asked, however, as to whether the trial is a particularly appropriate or effective form of adjudication. *Evidence, Advocacy and Ethical*

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2 MI Aronson, NS Reaburn, MS Weinberg, *Litigation, Evidence and Procedure*, Butterworths (1976), see now MI Aronson, JB Hunter, *Litigation: Evidence and Advocacy*, Butterworths (5th ed, 1995).

3 J Hunter, K Cronin, *Evidence, Advocacy and Ethical Practice- A Criminal Trial Commentary*, Butterworths (1995) Chapters 2 to 6.

4 See for example: K Tronc, I Dearden, *Advocacy Basics for Solicitors*, Law Book Company (1993); L Stuesser, *An Introduction to Advocacy*, Law Book Company (1993).

Practice deals with this, and provides a wealth of material prompting readers to do so too. The book's structure and approach is a way of coming at the "why" question in relation to rules of evidence and procedure: why do we have these rules; do we want them? No other advocacy book stops to consider this.

Chapter One, "The criminal trial in history" lays the groundwork for a critical approach to the criminal trial. After considering the goals of adjudication it provides a history of the criminal trial, from the ecclesiastical justice provided in medieval Europe to the common law and civil law justice systems found today.[5] Without the clutter of detail, the strengths and weaknesses of the system are revealed. Further, the reader is drawn into making critical comparisons between then and now. Comparisons are also made between the common law and civil trial models, although the authors note that nowhere are the adversarial and inquisitorial models practised in a pure sense: over time, each has acquired shades of the other. Law reform by way of grafting adversarial techniques onto essentially inquisitorial systems - and visa versa - has its problems. This is illustrated by an extremely interesting discussion of the Italian experience with their new Code of Criminal Procedure.[6]

Some evidence books appear to operate on the assumption that trials do not involve people, but only rules of admissibility. Chapters Two to Six dispel this notion with detailed consideration of the various aspects of the law, practice and ethics that touch upon the major players in the trial.

Consider the accused, for example. Chapter Five contains a range of material relating to the accused including how to interview an accused, the privilege against self-incrimination and the admissibility of evidence of the accused's bad and/or good character. It also considers the position of the accused in the trial. The authors note that while the accused's presence at trial for an indictable offence is essential except in rare circumstances, their presence appears largely symbolic given the minimal role the accused plays in the trial.[7] They refer to *R v Iliev*[8] where, during the Crown address, the accused had said some incriminating words and made a gesture with his arm. A new trial was ordered by the New South Wales Court of Criminal Appeal. This discussion connects nicely with the extract, in Chapter One, of an article by WH Simon.[9] Simon paints a bleak picture of the adversarial trial process which intimidates and alienates the litigant. Simon's view, as summarised by the authors, is that the trial is, "orchestrated not to celebrate the client's rights but the lawyer's status".[10]

There is great diversity in the material covered in the book. Chapter Six "Witnesses", for example, considers, amongst other things: studies concerning trial

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5 The history of the jury and witnesses' involvement in the criminal trial, including competence, is discussed later in the book, note 3 *supra*, particularly see pp 98-104, 297-8.

6 Note 3 *supra*, p 37-8, drawing on the work of WT Pizzi and L Marrafioti, "The New Italian Code of Criminal Procedure: The Difficulties of Building and Adversarial Trial System on a Civil Law Foundation" (1992) 17 *Yale Journal of International Law* 1.

7 Note 3 *supra*, p 254.

8 (1989) 41 *A Crim R* 383.

9 "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) *29 Wisconsin Law Review* 30 at 96-9 in Hunter and Cronin, note 3 *supra*, pp 33-4.

10 Note 3 *supra*, p 33.

questioning of child witnesses; psychologists' views as to witnesses' reliability and concerning the importance of demeanour; the practice in the United States of carrying out mock trials or focus groups to prepare witnesses for trial; cases concerning rules of evidence related to questioning witnesses and relevant statutory provisions; and examples of effective cross-examination. In Chapter Six we learn about the German system of calling psychological experts to give evidence about a specific witness's credibility where there is doubt about the veracity of the witness. This testimony is based upon the expert's extensive pre-trial assessment of the witness.[11] We also learn that judges, lawyers and police are no better at detecting when someone is lying than anyone else in the community - and the community standard is low. US Secret Service Agents, on the other hand, have been found to be good lie detectors![12]

Chapters Seven., Eight and Nine deal with identification evidence, confessions and hearsay evidence, in the context of the trial. The separate treatment of these areas makes good sense given that at least one - and probably two or even all - of these will arise in almost all criminal trials. These chapters also include more 'advocacy' material, such as the use of case theory, the use of exhibits and opening and closing addresses.

The book is designed primarily as a teaching text. It is based upon the authors' experience in teaching the popular elective subject, 'Evidence and Advocacy' in the LLB program at the University of New South Wales. Each chapter includes specific questions and lists of further reading. Practise exercises appear at various points in the book and each of the final three chapters contains the necessary material for a mock trial, including fact sheets, witness' notes and statements and records of interview. These trials are typical of ordinary criminal cases and would no doubt be stimulating both for the students and teachers. Such practical exercises are particularly useful, enabling students to go beyond their knowledge of theory, and learn how to recognise and apply the various rules.

Evidence, Advocacy and Ethical Practice is an important contribution to the theory and practice of litigation. Hunter and Cronin have brought together the academic and practice oriented streams of evidence and procedure. Both the study of evidence and the practical application of trial rules are the better for it.

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11 *Ibid*, pp 363-4.

12 *Ibid*, p 329 referring to results of workshop exercises carried out by Paul Ekman in the United States: *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage*, Norton (1991) pp 287-92.