BOOK REVIEW

CROSS ON EVIDENCE 3rd Aust edn *by David Byrne and J D Heydon* (Butterworths 1986) pp 1088

Cross on Evidence has long been regarded as the dominant text on the law of evidence in Australia. Some revere it as the standard work on the subject. In recent years it has experienced competition for this traditional position, particularly as an Australian student text. Now that the 3rd Australian edition has arrived, the position of *Cross on Evidence* as a text and the character of its intended audience can be re-examined.

The 3rd Australian edition is superior to its Australian predecessors in both format and content. It takes account of recent developments in the law and theory of proof. The most recent High Court decisions, such as those in *Chamberlain* v *R* (1984) 51 ALR 225 (burden and standard of proof), *Perry* v *R* (1982) 44 ALR 449 (inadmissibility of evidence of crimes other than that being tried) and *Baker* v *Campbell* (1983) 49 ALR 385 (legal professional privilege), are discussed in the text. It also draws extensively upon theoretical discussion contained in the 6th English edition of *Cross* by Colin Tapper. The Australian work also contains a section on the debate surrounding mathematics and the standard of proof (p262).[1] The debate centres on the place of probabilities as part of the law of evidence and inductive and mathematical formulas to which judicial proof can be reduced.

One of the most useful parts of the revision is in the section dealing with so-called 'similar-fact evidence' (p508ff). It deals comprehensively with the developments of the common law doctrines relating to this type of evidence from *Makin* v *A-G (NSW)* [1894] AC 57 to *Perry* v *R* (supra). The up-to-date treatment of this area is useful and is drawn principally from the Tapper edition.[2] The editors suggest that the Gordian knot of

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1 See also *TNT Management Pty Ltd v Brooks* (1979) 53 ALJR 267; *People v Collins* 438 P 2d 33 (1968); Cohen, *The Probable and the Provable* (1977); Eggleston, *Evidence, Proof and Probability* (2nd edn 1983). For the debate between Williams and Cohen, see Williams, 'The Mathematics of Proof'[1979] Crim LR 297 (a review of Cohen's work); Cohen, 'The logic of proof'[1980] Crim LR 91 (Cohen's reply); Williams [1980] Crim LR 103 (Williams' rejoinder). See also Ligertwood, 'The uncertainty of proof'(1976) 10 MULR 367.

2 For other recent discussions of Australian authorities see Australian Law Reform Commission, *Evidence - Interim Report* (1982) and *Character and Conduct* Research Paper no 11; McNamara 'Dissimilar Judgements on Similar Facts' (1984) 58 ALJ 74, 143; Weinberg, 'Multiple counts and similar fact evidence' in Campbell & Waller (eds) *Well and Truly Tried* (1982).

probative value and prejudicial effect in similar-fact cases may be severed by the use of judicial discretion to exclude evidence at trial when its probative value is slight compared with its prejudicial effect in the minds of jury members. However, the question remains as to precisely upon what formula this discretion should be exercised by the trial judge. The editors recite two suggested solutions. The first is that of the English Criminal Law Revision Committee in its 11th report (cmnd 499). The committee suggests breaking the connection with the confusion of precedent in the area and making a fresh start. The basis of the new approach would be that similar-fact evidence only be admissible in cases where the accused admits the conduct associated with the crime charged but denies the allegations of guilty intent in performing the act. The similar-fact evidence would thereby provide evidence from which it could be inferred that there was guilty intent on the occasion for which the accused stands trial. The second solution suggested is the recommendation of the Australian Law Reform Commission that guidelines be developed for the assistance of trial judges based on existing authority. The editors provide no analysis of the relative merits of these two proposals.

This underlines a feature of *Cross on Evidence*, considered by some to be a defect, that has been preserved in the latest edition. Although the book provides in its footnotes reference to decided cases for most of the propositions found in the text, the plethora of authority is not matched by analysis in the body of the text. For the most part, *Cross on Evidence* is a discursive rather than a critical statement of the law of evidence. This style of writing, for the practitioner, makes the book invaluable as a digest on the law of evidence. It does not, however, always provide the student of the law of evidence with the material required to understand the propositions found in the text.

The study of the law of evidence has changed since the first English edition was published. A number of Australian law schools now teach the subject by a case-study technique, which places more emphasis upon the principles of proof than upon rules and their authority. Casebooks published to suit the teaching of these courses do not contain the extensive footnotes that one finds in *Cross on Evidence*. They concentrate instead on providing relevant extracts from selected authorities and commentaries. They are suited more to comprehension of concepts than to argument on authority. The 3rd Australian edition does not bridge this suitability gap for the student, but it does not purport to. This edition succeeds in its editors' objectives by 'providing a discussion of theoretical questions, [and setting] out in an accessible way, statements of principles and practice which [the editors] hope the practitioner will find useful'. Although Cross is no longer a principal student text in a number of law schools, it no longer tries to be. For the practitioner, however, the work is indispensible.

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