BOOK REVIEWS

Evidence, Proof and Probability, by Sir Richard Eggleston, (Weidenfeld and Nicolson, London, 1978), pp. i-xiv, 1-226 (inclusive of Table of Contents, Table of Cases, Preface, Introduction, Notes and Index). ISBN 0 297 77404 2.

In recent years, practising and academic lawyers have come to recognize the value of inter-disciplinary analysis, with particular emphasis upon the social sciences. Those who specialize in Taxation and Company Law increasingly perceive the need for a solid background in Economics and Accounting. Those who concentrate upon Criminal Law or Family Law tend to pay more attention to the wealth of material of a psychological or sociological nature related to these specialities.

Sir Richard Eggleston Q.C. is Chancellor of Monash University. He was formerly a Judge of the Australian Industrial Court and the Supreme Court of the Australian Capital Territory, as well as having been the first President of the Trade Practices Tribunal. This book is written with a view to carrying the range of inter-disciplinary analysis a step further than most lawyers have ever gone before. The author's thesis is that one of the most fundamental of all lawyerly crafts, the art of fact-ascertainment, can be better understood through a recognition of the underlying role which mathematical probability theory plays in the process. He contends further, and perhaps more dubiously, that only minimal mathematical skills are necessary to appreciate the operation of probability theory in the context of the rules pertaining to the admissibility of evidence in our courts.

The author has divided his treatment of the subject broadly into three sections. The first few chapters set out in a straightforward, entirely comprehensible fashion some of the basic principles of probability theory — a kind of 'mathematics for the multitudes'. Through the use of a series of simple examples, the reader is introduced to the concept of probability. The odds against drawing a particular card from a pack, or tossing a consecutive number of heads with a coin are calculated and the operation of the multiplication rule is demonstrated. The reader learns the answers to such burning questions as what are the odds that two people in a room containing thirty people will share the same birthday? (The surprising figure being 70% probability.) The inveterate punter will also learn why he generally loses out to his bookmaker over any period of time — who knows, this chapter may even put him off gambling forever!

The bulk of the book (chapters 4-10) consists of a series of essays dealing with particular aspects of the law of evidence. Special attention is given to the concept of relevance, the operation of the 'similar facts' doctrine, the burden of proof, presumptions, standards of proof and opinion evidence.

The last part of the book ties together the material dealing with probability and the more expository conceptual analysis of the middle chapters. The author considers the extent to which probability theory could be utilized by our courts in order to enhance the accuracy of the fact-ascertainment process, and the limitations inherent in such quantitative analysis. The greatest such limitation stems from the deficiencies associated with assessing the credibility of testimonial evidence, not simply from the point of view of veracity, but also perception and memory. The fallibility of human observation is a factor which operates against the acquisition of the sort of hard data necessary to properly enable the utilization of statistical techniques as an aid to the determination of the facts.

A number of the themes canvassed in this book by the author have been dealt with by him on other occasions. For example, he has published lengthy treatments elsewhere regarding the concept of relevance,[1] proof beyond 'reasonable doubt',[2] testimonial credibility[3] and the adversary system.[4] Nonetheless it is of real value to have these essays in effect brought together in one more readily accessible volume.

The book is written with scholarly precision. At the same time it is eminently readable and is enlivened at a number of points by the injection of a number of delightful anecdotes, all perfectly chosen to illustrate the proposition under discussion. Two chapters in particular are outstanding from the point of view of the profound insights they contain. Chapter 10 is as good a treatment of the difficult problems associated with the admissibility of opinion evidence as any the reviewer has seen. Chapter 12, dealing with credibility, is one that should be read by any lawyer who complacently accepts the idea that cross-examination is a perfect aid to truth ascertainment. Chapter 11 is also worthy of particular note, especially insofar as it summarizes the nature of the continuing debate between writers such as Finkelstein and Fairley on the one hand and Tribe on the other, regarding the applicability of Bayes' theorem to cases involving identification evidence.[5]

Among the less satisfactory aspects of the book, perhaps the following points could be made. It is irritating in the extreme for footnotes to be appended at the back of the book, rather than at the bottom of each page, or incorporated into the text. Many of the footnotes are lengthy and require close attention and this style of footnoting affects the continuity of the development of the author's ideas.

A curious omission from the material dealing with relevance is the decision of the Victorian Full Court in *R. v. Stephenson*,[6] arguably one of the most important cases on this subject in recent years. The discussion of *Noor Mohamed's* case[7] at page 68 might have profited by the inclusion of the observations of Owen J. in *R. v. Fletcher*[8] regarding the paucity of evidence to support the proposition that Noor Mohamed had murdered his wife, Gooriah.

In a lighter vein, it is a matter of some regret that the author at page 79, in referring to the celebrated case of *Thompson v. R.*,[9] accepts the view that the powder puffs found in the possession of the accused might have been implements of a kind which could actually have been used in the crime. A generation of evidence lawyers has mused over precisely how the powder puffs were relevant in that case, and the author's views take us no closer to resolving this puzzle.

A Contract Bridge aficionado might also note that Sir Richard's observation, at page 165, that 13 spades is the perfect Bridge hand is simply wrong. It would only allow seven spades to be bid and made, whereas seven no trumps carries a higher score. The perfect Bridge hand would be any hand which allowed thirteen tricks to be taken at no trumps.

Notwithstanding the author's deficiencies as a Bridge theorist, this book is a fitting culmination of a life of great legal scholarship and practical achievement. It deserves to be widely read by all lawyers.

MARK WEINBERG*

[1] Eggleston, R., 'The Relationship between Relevance and Admissibility in the Law of Evidence', in Glass, H. H., (ed.), *Seminars on Evidence* (1969) 53.

[2] Eggleston, R., 'Probabilities and Proof' (1963) 4 *M.U.L.R.* 180; Eggleston, R., 'Beyond Reasonable Doubt' (1977) 4 *Monash Law Review* 1.

[3] Eggleston, R., 'Is Your Cross-Examination Really Necessary?' (1961) 10 *Proceedings of the Medico-Legal Society of Victoria* 84.

[4] Eggleston, R., 'What is Wrong with the Adversary System?' (1975) 49 *Australian Law Journal* 432.

[5] Finkelstein, M. O. and Fairley, W. B., 'A Bayesian Approach to Identification Evidence' (1970) 83 *Harvard Law Review* 489; Tribe, L.H., 'Trial by Mathematics: Precision and Ritual in Legal Process' (1971) 84 *Harvard Law Review* 1329.

[6] [1976] V.R. 376.

[7] *Noor Mohamed v. R.* [1949] A.C. 182.

[8] (1953) 53 S.R. (N.S.W.) 70, 79.

[9] [1918] A.C. 221.

* B.A., LL.B. (Hons.) (Monash); B.C.L. (Oxon.); Senior Lecturer in Law, University of Melbourne; Barrister at Law.

The Law of Wills, by I. J. Hardingham, M. A. Neave, and H. A. J. Ford, (Law Book Company, Australia, 1977), pp. i-xxxiii, 1-295. ISBN 0 455 19546 3.

The authors of *The Law of Wills* say in the preface that they 'set out to provide a treatment in depth of the law of wills rather than a study of the whole law of succession'. Once it is accepted that the aim of the authors has been restricted in that way, their work can be seen to be a useful addition to the literature of the subject. Certainly it is a work which will undoubtedly assist students who come to the subject of the law of wills for the first time. No doubt the first chapter of the work which is entitled 'The General Nature of a Will' is written with just such a reader in mind. One would hope that the more experienced reader would be aware of the differences between a testator and a testatrix! However, to say the work will be of assistance to the novice should not be taken to detract from its usefulness in the hands of more experienced and, one would hope, more critical readers.

The authors have attempted to notice all relevant reported decisions in England, the Australian States and Territories, and New Zealand, unless a doctrine is so settled as not to have been questioned in the case law or legal periodical literature of any of those countries. In the event that a doctrine is so settled the authors say that they have attempted only to select cases representative of the doctrine. In performing the task of collecting the authorities, the authors have performed a signal service for the busy practitioner. But it would be unfair to treat the book as amounting to little more than a digest. The authors have brought to bear upon a number of topics a critical appreciation of the problems which are posed by the authorities. In this regard, perhaps the chapter concerning delegation of will making power stands out. The problems posed by the decision of the High Court in *Tatham v. Huxtable*[1] have not in the reviewer's view yet been worked out. The text under review serves to indicate the nature of some of the problems that remain.

The authors have successfully steered a middle course between the Scylla of attempting to reduce complex and difficult questions of law in a way that although capable of comprehension by students is over-simplified and the Charybdis of writing for only the experienced practitioner. However, having attempted to cater for the different needs of a diverse audience, the text is not without its deficiencies as a practitioner's manual.

The authors devote some forty pages to discussion of the principles of the construction of wills. Given that the nature of the discussion is that it is limited to a discussion of principles, it may not be surprising that there is little or no discussion of cases relating to the meaning of particular words. Necessarily this limits the use to which the text may be put by a practitioner who is concerned with a particular problem of construction. In a way this limitation highlights the consequence of the decision by the authors that the text should not be a text including a discussion on the general law of succession. Because the ambit of the work is restricted in that way it cannot, of course, be seen as a substitute for the classic works such as *Theobald*[2] or *Jarman*.[3] Of course, the authors did not intend that it should be so. Accepting the imposition of such a self denying ordinance, the resulting work is one marked by diligent scholarship. It is unfortunate that such attributes have not been applied in a wider field.

K. M. HAYNE*

[1] (1950) 81 C.L.R. 639.
[2] Cretney, S. and Dworkin, G., *Theobald on Wills* (13th ed., 1971).
[3] Jennings, R. and Harper, J. C., *Jarman on Wills* (8th ed., 1951).
* Barrister-at-Law.