

UNIFORM EVIDENCE LAW: TEXT AND ESSENTIAL CASES[†]

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Peter Bayne's *Uniform Evidence Law — Text and Essential Cases* is an anomalous entry into the law textbook market, particularly in the area of evidence. Many law students regard evidence law as their greatest challenge, and recourse is often had to 'traditional' learning materials to aid in comprehension of the area. These include complex practitioners' texts, annotated acts, 'cases and materials' or abbreviated texts designed to impart a broad but all too brief understanding of evidence law. Bayne has written this text as a 'tool for teaching and learning...principles'¹ of the law of evidence. The book achieves more than this by combining the best features of traditional evidence texts as applied to the *Evidence Act 1995* (Cth) and its state counterparts. Whilst the author has not aimed to create another 'cases and materials' book or emulate *Cross on Evidence*,² the book promises to impinge on sales of these books with its broad yet detailed exposition of evidence law.

Across 15 chapters Bayne conveys the principles of evidence with the clarity of an abbreviated text and the depth of a practitioner's text, with more than adequate case extracts. Chapter 1 looks at types of evidence and admissibility principles. Chapter 2 contextualizes the study of evidence by explaining appeals, trials and the role of judges. Chapter 3 deals with judicial and public policy discretions. Chapter 4 canvases the allocation and operation of the burden and standard of proof. Chapter 5 focuses on the credibility of witnesses. Chapter 6 covers ss 97 and 98 of the *Evidence Act*, while Chapter 7 covers the matter of the defendant at a criminal trial. Chapter 8 pertains to opinion evidence and Chapter 9 to proof of document contents and real evidence problems. Chapters 10 and 11 deal with the rule against hearsay. Chapter 10 covers the scope of the rule in s 59 and its exceptions, while Chapter 11 covers admissions. Chapter 12 addresses identification evidence, and Chapter 13 addresses the estoppels that arise after judgment. Chapter 14 deals with witness competence, compellability and privilege. Chapter 15 concludes the text by effectively contextualising the previous chapters and giving general rules about examinations, corroboration and judicial warnings.

I have one small criticism of the chapter order. Chapter 2, dealing with appeals and trials, appears incongruously placed between Chapters 1 and 3, both of which deal with substantive law. It seems that Bayne himself recognised this. When describing the book's layout he discusses Chapter 3's content before discussing Chapter 2.³

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[†] Peter Bayne, *Uniform Evidence Law: Text and Essential Cases*, Federation Press (2003).

¹ *Ibid* 4.

² Dyson Heydon, *Cross on Evidence* (6th ed, 2000).

³ Bayne, above n [†], 4.

This is a minor issue, but one that could easily be resolved by simply placing Chapter 2 at the start of the text to maintain the continuity of the evidence discussion.

Each chapter is easy to follow. A broad introduction flags the relevant material. The introductions are large enough actually to canvass the topic; they are not simply trite comments on the 'complexity of the area' or its 'conceptual difficulty'. Perhaps the best aspects of the chapters and indeed the text as a tool for learning are Bayne's explanations, which are both logical and concise. Complex areas such as the operation of ss 135(a) ('unfair prejudice' discretion) and 137 (unfair prejudice in criminal proceedings) are broken down in an accessible way with numbers, bullet points and headings⁴. Challenging cases such as *Piddington v Bennett and Wood*⁵ and *Pfennig v R*⁶ are carefully examined.⁷

Inevitably, the author's take on these decisions emerges. Chapter 6 would be one of the best in the book yet it suffers from a detailed discussion of the correctness of McHugh J's dissenting judgment in *Pfennig v R*. The analysis becomes strained as Bayne seeks to prove his point, distracting the reader from the difficult task at hand — comprehending propensity evidence. This is unfortunate as many students find it difficult (or impossible) to reconcile their lecturers' views with those of their textbook authors. This criticism aside, the chapters are intelligibly structured. A clear, logical approach is taken to each, enabling Bayne to achieve his objective of teaching principles.

Bayne achieves his objective to clearest effect in Chapters 10 and 11. The hearsay sections of the *Evidence Act* are carefully analysed, with headings such as 'When evidence has a hearsay quality so that section 59 applies'⁸ leaving the reader certain of the content. Bayne makes good use of the initials of parties to a proceeding in his vivid explanations of the rules⁹. These chapters feature more case extracts than any others in the text. The extracts are invaluable tools for contextualising the content and cover the full spectrum of hearsay issues raised in the text.

Nonetheless, there is a notable absence of theoretical discussion of the rule against hearsay. This is possibly due to Bayne's intention to create a no-nonsense text for students. It is this reviewer's view that an area as complex as hearsay lends itself to theorising, meaning some theoretical discussion is apposite. It could be said that the hearsay rule has become redundant given the degree of statutory abrogation and the number of common law 'exceptions' and types of 'original' evidence that effectively become back-doors for the introduction of evidence based on artifice.¹⁰ It could be argued that the legislature and courts are currently faced with two

⁴ Note also the explanation on the use of s 60 in paragraph [10.500].

⁵ (1940) 63 CLR 533.

⁶ (1995) 182 CLR 461.

⁷ Bayne, above n †, 165-168, 188-199.

⁸ *Ibid* 332.

⁹ Note particularly the explanation at paragraph [10.300] of 'state of mind' evidence.

¹⁰ See the 'intention' exception promulgated in *Walton v R* (1989) 166 CLR 283.

options: either they do away with the rule entirely, or they start to abolish some of the exceptions and types of original evidence — both at common law and in statute — which have eroded the traditional operation of the rule. Perhaps this is expecting too much of a text that promises ‘principles’ only. The absence of critical appraisal is not fatal to the worth of these chapters, as they remain some of the clearest expositions of the rule against hearsay currently available to students.

One of the most notable features of the text is the heavy emphasis on recent High Court and New South Wales Court of Appeal decisions. Twenty-nine cases decided in or after 2000 are extracted. This is refreshing to see. A less welcome feature of the text is the preponderance of unreported judgments. Whilst it is admirable, if not imperative, that a text have recent judgments within its pages, the inconvenience of locating an unreported judgment may be enough to dissuade a less committed student from reading it. In a difficult subject like evidence, a disincentive to study is too often readily welcomed. To be fair, Bayne has discussed the unreported judgments in sufficient detail to get away without reading them most of the time — some are even extracted. The presence of unreported judgments could be demotivating for many students, despite the author’s best intentions.

While the text is not an annotated *Evidence Act* like that authored by Odgers,¹¹ it does feature the relevant sections in full, possibly removing the need to purchase the Act if open book examinations are set. Detailed references to the Australian Law Reform Commission’s Reports on the *Evidence Act* give substance to Bayne’s commentary on the sections. The discussion of cases is always linked to the relevant section of the *Evidence Act*. Common law background is given on matters when relevant; one cannot lose sight of the fact that the *Evidence Act* is not a codification of the law of evidence¹² but is construed in light of common law fundamentals.¹³

As a ‘tool for teaching and learning’¹⁴, this book is incredibly useful. Having read evidence in Queensland under the *Evidence Act 1977* (Qld), I had no difficulty in developing an understanding of the Commonwealth provisions. This is not to say that an appreciation of Bayne’s book is predicated upon previous study of evidence law — far from it. *Uniform Evidence Law: Text and Essential Cases* breaks down the rules and clarifies the content in a way that makes evidence accessible to all students. It promises to become a mandatory addition to the library of every student of the *Evidence Act*, and even for keen students studying evidence law under other states’ Evidence Acts.

¹¹ Stephen Odgers, *Uniform Evidence Law* (5th ed, 2002).

¹² *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640 at 650 (Einstein J).

¹³ *Dhanhoa v The Queen* [2003] HCA 40 at [19] (Gleeson CJ and Hayne J).

¹⁴ Bayne, above n †, 4.