

CIVIL EVIDENCE HANDBOOK. By Gordon D. Cudmore. Carswell, 1987. Loose-leaf Service. (\$85.00)

## I. INTRODUCTION

A book should be reviewed with its purpose and its audience in mind. The author reveals in the Preface that, with the CIVIL EVIDENCE HANDBOOK, he "seeks to provide a tool to assist the practicing lawyer when responding to immediate evidentiary problems".<sup>1</sup> I must confess at the outset that I cannot claim to be one of the author's intended audience. I am first and foremost a legal academic and, as is the case with many academics, I have concern about lawyers' handbooks in general. In order to provide quick answers they must remain simple and uncluttered. Unfortunately, the law of evidence, like so many other areas of the law, is neither simple nor uncluttered. The risk exists that pithy propositions, presented without analysis, criticism or illustration can mislead. In their simplicity they can be misconstrued or they can suggest that a matter is settled when it is not.

None of this is to say that handbooks in general, or those dealing with the law of evidence in particular, are without value. Indeed, it seems trite to say that the practical exigencies of trial demand that even complex evidentiary issues be settled promptly and any tool that assists in accomplishing this should be encouraged. It is no surprise then to find Mr. Justice Reid, in the Foreword to the book, writing:

This is a trial lawyer's manual of evidence that I believe all wise counsel will wish to have by them in court. I hope to see it on the counsel tables of trials in which I preside.<sup>2</sup>

Given its function then, the quality of this work must be measured by the accessibility of its contents, its coverage and, most importantly, by the author's success in stating the law in simple, accurate and helpful terms.

## II. ACCESSABILITY

The general organization of the book is rational and functional. It is divided into three parts. Part I deals with general preliminary matters such as the concept of admissibility, relevance, burdens of proof, presumptions, and competence and compellability. Part II contains rules re-

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<sup>1</sup> P. vii.

<sup>2</sup> P. v.

lated to the course of the trial, divided according to the chronology of testimony: examination in chief, impeaching your own witness, cross-examination, re-examination and reply evidence. Part III includes general categories of evidence such as opinion evidence, hearsay and exceptions to the hearsay rule, and demonstrative evidence. The contents of each part are generally what one would expect to find. Conspicuous by its absence, however, is the usual category of character evidence.<sup>3</sup> There is also a separate section entitled "Pleadings" which, in my view, adds little to the discussion of "Relevancy" and could easily have been incorporated under that heading.

Like all loose-leaf services, this one has titled tabs separating each of these sections, which will provide quick access to the general topic of inquiry.<sup>4</sup> Within these general headings the organization of the material is strong, although I did not find this to be so with the hearsay material. In discussing "hearsay" there are three consecutive sub-headings, "Purpose of Evidence", "Hearsay Versus Non-Hearsay" and "Purpose of Statement". Each section deals with the same notion, namely, that one can identify whether evidence of previous statements is being tendered as hearsay by examining whether those statements are offered to prove the truth of their contents, or merely to prove that the statements have been made. The presentation of this section could be improved. It is also worth mentioning that the author lists as exceptions to the "collateral facts rule" methods of impeaching the testimony of opposing witnesses which are not, strictly speaking, exceptions to that rule.<sup>5</sup> Yet, I doubt that this does major damage to the accessibility of the material.

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<sup>3</sup> Character evidence is not dealt with comprehensively in this book although most of the character evidence rules are included throughout the work. Under the heading "relevance", there is a brief section on similar fact evidence. Under the heading "cross-examination", there is summary reference to the use of previous convictions. Despite that character evidence plays a smaller role in civil cases than in criminal matters, a more detailed treatment of the complex rules relating to proof that reflects upon the character of parties and of witnesses would, in my opinion, improve this book.

<sup>4</sup> The only specific point I would make is that the tab for opinion evidence has the main heading of "Experts", despite that the section deals extensively with the opinion evidence of lay witnesses. The tab does use the bracketed sub-heading of "Opinion Evidence", reducing the prospect of confusion.

<sup>5</sup> The collateral facts rule provides that the answers of a witness which are not relevant to the substantive issues in the case cannot be contradicted by opposing counsel. See Sir R. Cross and C. Tapper, *CROSS ON EVIDENCE*, 6th ed. (London: Butterworths, 1985) at 282-83. The author of the *CIVIL EVIDENCE HANDBOOK* lists as an exception to this rule, the rule that opposing counsel may prove the mental condition of a witness where that condition reflects on the ability of the witness to testify accurately. This is not an exception to the collateral facts rule because the witness is not being contradicted on a specific collateral answer which he has provided. He will not have been asked about his mental state prior to the evidence of that condition being adduced. The same is true of the "reputation for untrustworthiness" rule, which is also listed as an exception. The witness being discredited will not first be asked about his own reputation. He is not, therefore, being contradicted on one of his answers when the reputation evidence is being adduced. Finally, the rule allowing for proof of previous inconsistent statements

The index to the book is sparse but, to the author's credit, I found it to be quite serviceable.

In sum, this work scores well in terms of the accessibility of its contents.

### III. COVERAGE

The author is candid in admitting that "the text does not contain a complete summary of the law of evidence".<sup>6</sup> He concedes that this was, in part, due to frustration born of the fact that the task seemed endless. "Each topic invariably led to the need to include another. . . ."<sup>7</sup> I found the choice to omit some material to be unfortunate and to reduce the value of the handbook. I have already referred to the sparse treatment of character evidence. More troubling was the failure by the author to discuss the admissibility of informal admissions by opposing party litigants as an exception to the hearsay rule. This, to me, is significant because of the inevitable confusion of those rules with the much less important "statements against interest" exception, which is generously discussed.<sup>8</sup> Moreover, the work fails to provide information about the admissibility of the results of, and testimony from, previous judicial proceedings. There is no discussion of the admissibility of examinations for discovery or of taking evidence before trial, matters that one would have thought important in civil cases. Nor does the book seek to explain the relative coverage of the federal and provincial evidence acts. Finally, although there would be less agreement on the importance of this material, there is no discussion on the effects of the *Canadian Charter of Rights and Freedoms*<sup>9</sup> on the admissibility of evidence in civil cases.

Within those topics that are included the quality of the coverage varies between the extremes. Examples of noteworthy omissions include the following. The author provides no serviceable definition for the concept of hostility. Moreover, there is no helpful reference to the differences of opinion from province to province on whether the term "adverse" has the same meaning as the term "hostile".<sup>10</sup> Mr. Cudmore stops at telling us that "[d]ecisions as to the the definition of 'adverse' are not easily

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is not an exception to the collateral facts rule since a witness can be confronted only with previous statements made by him relative to the substantive issues in the case, and not respecting answers about collateral matters.

<sup>6</sup> Preface, vii.

<sup>7</sup> *Ibid.*

<sup>8</sup> Para. 17-2.

<sup>9</sup> Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11.

<sup>10</sup> See S.A. Schiff, *EVIDENCE IN THE LITIGATION PROCESS*, 2nd ed., (Toronto: Carswell, 1982) vol. 1 at 581-82.

reconcilable".<sup>11</sup> The failure to explore the controversy seriously diminishes the utility of this discussion. A definition formulated by the author for both of the concepts of hostility and adversity, taking account of the continuing controversies, would have made this material more useful.

In discussing the admission of previous convictions, there is no information given as to what amounts to a conviction for the purpose of the rule.<sup>12</sup> Nor does the author warn the reader of the limited use that can be made of convictions once proved. While it is implicit in the handbook, there is no clear statement in the context of the discussion of "present recollection revived" that the restriction on the kinds of documents that can be used under the "past recollection recorded" rule are inapplicable where an independent recollection has been revived. In my view, a clear statement is required because of the continuing confusion between these rules. The author also fails to extract and include the appropriate test for the admissibility of hospital and business records from the decision in *Ares v. Venner*.<sup>13</sup> In the context of subsection 9(2) of the *Canada Evidence Act*,<sup>14</sup> the description of the procedure to be used is potentially misleading in that it does not state squarely that the subsection 9(2) cross-examination should take place in front of the trier of fact. These are all, in my experience, areas of complication and they represent the kinds of controversies that this work will be turned to in order to settle.

In sum, while the coverage is often good, there are a number of areas, and some aspects of particular areas, that have been ignored. If the handbook is to provide a dependable reference source, these matters should be included in future supplements.

#### IV. SIMPLICITY, ACCURACY AND HELPFULNESS

Gordon Cudmore has the ability to write clearly and simply. He is able to identify and capture the essence of a rule in a few, well chosen words. At this he achieves a high level of success. Sometimes the prop-

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<sup>11</sup> Para. 11.6(c). One of the passages selected by the author to define the term "adverse" is unclear. The excerpt from the case of *Boland v. Globe and Mail*, [1961] O.R. 712 at 734, 29 D.L.R. (2d) 401 at 423 (Ont. C.A.), appearing in paragraph 10.3, is ambiguous when standing alone for, considered outside of the context of the judgment as a whole it is problematic whether the term, "his proof", is referring to the evidence of the witness who is adverse, or to the party calling the witness.

<sup>12</sup> Para. 9.10(c).

<sup>13</sup> [1970] S.C.R. 608, 14 D.L.R. (3d) 4. At para. 17.6(b) he states that "[t]he doctrine of necessity has been replaced by one of administrative convenience". That is a fair summary of the effect of the judgment but fails to elaborate on those conditions expressed in the judgment as to when such evidence would be received. These conditions relate to why the documentary evidence had sufficient indicia of trustworthiness to admit in place of the testimony of the nurses whose observations had been recorded. Those conditions are listed at [1970] S.C.R. 608 at 626, 14 D.L.R. (3d) at 16.

<sup>14</sup> R.S.C. 1970, c. E-10.

ositions become trite, but had they not he would have been criticized for omitting material.

Occasionally, but only rarely, I take issue with the accuracy, or more often the articulation of rules of law. For example, it is unlikely that it is still required under the statements against interest exception that the declarant be dead at the time of trial.<sup>15</sup> In my opinion, the author has either poorly organized his *res gestae* material, or he has conflated the variety of formulations relating to the admission of statements made during or close to the transaction in question.<sup>16</sup>

The omission of some of the material mentioned above also has the potential to mislead. For example, the over-simplification of the *Ares v. Venner* case could be used to support submissions related to an *ad hoc* discretion to include hearsay evidence. In a book purporting to synthesize a vast area of the law like this, there are bound to be cases where the articulation selected by the author causes disagreement. On balance, however, the law, as stated, is accurate and dependable.

The method of presentation occasionally diminishes the helpfulness of the work. Most notably, the author places great reliance on the table of concordance which he has prepared for the various evidence acts. For example, under the heading "Self-incrimination", the author lists as authority for his proposition: "See: Canadian Charter of Rights and Freedoms, Evidence Acts".<sup>17</sup> Or, under the topic "Public or Official Documents", the author states that "[a]uthentic copies will generally suffice" and supports the statement as follows: "See: Provincial Rules of Practice, Provincial Evidence Acts".<sup>18</sup> I found this disconcerting given that the

<sup>15</sup> See *R. v. Demeter* (1975), 10 O.R. (3d) 321 at 344, 25 C.C.C. (2d) 417 at 440 (Ont. C.A.), approved as defining appropriate guidelines, [1978] 1 S.C.R. 538, 35 C.C.C. (2d) 209; and see *R. v. Pelletier* (1978), 38 C.C.C. (2d) 515 (Ont. C.A.).

<sup>16</sup> The Federal/Provincial Task Force on Uniform Rules of Evidence, REPORT ON EVIDENCE (Toronto: Carswell, 1982) at 204-11, distinguishes between several types of *res gestae* rules. These categories include:

- Statements as to Physical Condition;
- Statements as to State of Mind or Emotion;
- Excited Utterances; and
- Contemporaneous Statements and Verbal Acts.

Mr. Cudmore, outside of his heading of "*Res Gestae*", discusses "Declarations of Physical and Mental Conditions" and "Statements Accompanying Acts". Under the heading of "*Res Gestae*" he merges authority related to the "Excited Utterance" and "Contemporaneous Statements" categories, which I do not think is correct. He recognizes the confusion in the area and that sometimes statements made during the transaction are admitted as background information, or circumstantial evidence, and not as proof of the truth of the contents of the statement, but he makes no effort to enlighten the reader as to the way to distinguish between these cases. In fairness, for someone wishing to write a simple, uncluttered account of the basic rules of evidence, the morass of *res gestae* authority must have been discouraging. Yet, without clearer presentation, more analysis and concrete illustrations, this section of the book is more likely to confuse than to enlighten the practitioner.

<sup>17</sup> Para. 6.14.

<sup>18</sup> Para. 18.5(c).

objective of the book was to provide immediate solution to problems presented during the course of a trial.

Where statutory provisions are involved, the author generally provides no interpretive guidance. Under the heading "Statutory Provisions Re: Business Records", the section numbers from the evidence acts are listed, and section 35 of the Ontario *Evidence Act*<sup>19</sup> is reproduced in the text, without annotation, as illustrative of the basic format.<sup>20</sup> Under the heading "Statutory Provisions Re: Medical Records", there is reference by section number to the relevant provisions and reference to two decisions, without annotation.<sup>21</sup> Again, such oblique references are of little use to the practitioner during the heat of battle. Concise, pithy statements as to the import of those cases coupled with further cross-referencing would dramatically improve the book.

## V. CONCLUSION

That which appears in the CIVIL EVIDENCE HANDBOOK is characteristically accurate and presented in a well organized, clear and concise fashion. It is hard to expect more from a handbook than accuracy, clarity and ease of reference. Yet, this handbook is incomplete, a fact the author well recognizes. It will not be enough, in my opinion, for the author to add general topics which have been omitted from the initial edition. In order for the book to be comprehensive and dependable, more attention must be given to the coverage of material within general sections to ensure that likely controversies are anticipated and appropriate and clear answers provided. More reliance should be placed, in my opinion, on the author's facility for summarizing the law than upon extracted quotations. The reader should be provided with both fingertip reference to pertinent section numbers under the relevant headings and to annotations helpful in the interpretation of those provisions.

In my opinion, it is too soon to endorse this loose-leaf service with enthusiasm. However, because of its format and the strong organizational structure that the author has imposed, it could be brought to that point through the use of supplements, thereby adding a useful and important reference book to the arsenal of Canadian trial lawyers.

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<sup>19</sup> R.S.O. 1980, c. 145.

<sup>20</sup> Para. 17.6(c).

<sup>21</sup> Para. 17.6(d).

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