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Book Review: Mahoney on Evidence: Act & Analysis 4th ed
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BOOK REVIEW

Mahoney on Evidence: Act & Analysis

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"There are worse crimes than burning books. One of them is not reading them." (Joseph Brodsky)

Mahoney on Evidence: Act & Analysis continues to build on its reputation as an essential tool in a lawyer's briefcase or computer. Since *The Evidence Act 2006: Act & Analysis* exploded into print in 2007, that authoritative book has matured into this new version. It would be a crime not to read it and assimilate it into the daily practice of law.

The change in the title pays tribute to Professor Richard Mahoney, who has recently retired. In his Preface to the book, Scott Optican acknowledges that Professor Mahoney was the primary academic consultant for the Law Commission's review of the law of evidence and criminal procedure which has spanned a decade.

Each of the seven contributors is a recognised expert in the law of evidence. The contents of the book provide an updated examination and commentary on the provisions of the *Evidence Act*. It is richly studded with case law from the High Court, the Court of Appeal and the Supreme Court. The authors also discuss the 2016 amendments to the Act, along with the Law Commission's 2018 Issues Paper, which was released in preparation for the second review of the *Evidence Act*.

This book does not hesitate to raise issues in the *Evidence Act* which concern criminal and civil lawyers. *Mahoney* recognises that, like a healthy organism, the *Evidence Act* has the potential and the ability to adapt intelligently to its environment. This recognition in the commentaries make this book exciting and relevant. Here are three examples:

The right to silence

The right to silence is slowly being whittled down. Section 32 of the Act says the fact-finder is not to be invited to infer guilt from the defendant's silence before trial. A jury is often unlikely to understand the distinction between permissible adverse inferences about credibility and inferences of guilt, even after a properly worded judicial direction. *Mahoney* supports concerns by the Law Commission in its 2018 Issues Paper, when it described the right to silence as a "network of loosely linked rules or principles of immunity differing in scope and rationale". *Mahoney* carefully and systematically goes through all the subsections in section 32. The book explains in detail the meaning of each subsection, while supporting the commentary with recent case law. This helps offset the concerns by the Law Commission that the Act provides no guidance on the circumstances when an adverse challenge to a defendant's credibility on the basis of pre-trial silence will be permitted.

This is a developing area in the law where the right to silence is slowly being chipped away. Echoing the Law Commission's 2018 Issues Paper, *Mahoney*, while setting out the legal position, reminds us to recognise the rights affirmed by section 23(4) of the *New Zealand Bill of Rights Act*.

Significant delay

Section 122(2)(a) refers to judicial directions where the conduct is alleged to have occurred more than 10 years previously. Such delay in respect of sexual complainants is a growing concern for defence lawyers, and *Mahoney* gives an excellent overview of the present law. Reference is made to the Supreme Court decision of *CT v R* [2014] NZSC 155, where the majority said that, if a case falls within section 122(2)(a), a judge may conclude that the ability or otherwise of a defendant to check and challenge the evidence of a complainant is material to the judge's assessment whether that evidence may be unreliable.

Mahoney also notes the minority in *CT* considered that section 122(2)(a) is directed to the reliability of the evidence itself, rather than any difficulties in testing that evidence, whether such difficulties arise through the lapse of time or otherwise. *Mahoney* then refers again to the 2018 Issues Paper which drew a distinction between unreliability arising from the effect of the effluxion of time or memory, and the forensic difficulties the delay may cause to a defendant's ability to present an effective defence (due, for example, to the unavailability of potential witnesses). Once again, because this area of the law is developing, *Mahoney* has set out concerns raised in case law, and has cited *D* (CA 95/2014), where the Court of Appeal spoke boldly about memory. What jurors may be taken to know about memory and, where aspects of memory are not common knowledge, directions founded on expert opinion or research not in evidence may be given.

Expert evidence on memory has its difficulties and experts themselves disagree – quite strongly – with each other. In 2019, the Court of Appeal will hear two separate appeals presently before it which will consider the vexed questions of memory and experts.

Identification evidence

Section 46 of the *Evidence Act* says voice identification evidence advanced by the prosecution in a criminal proceeding is inadmissible unless the prosecution proves, on the balance of probabilities, that the circumstances in which the identification was made have produced a reliable identification. Voice identification has always been a concern to defence lawyers, especially in intercepted drug cases. *Mahoney* notes that voice identification is even more fragile than visual identification and that the Court of Appeal has referred to the special dangers of relying on voice identification evidence.

This section of the book carefully explains the distinction between the definitions of voice identification evidence and visual identification evidence.

Because identification evidence is a species of opinion evidence, *Mahoney* compares its admissibility with other admissibility rules, along with the balance of probabilities standard for its admission. Unlike section 45, section 46 does not provide guidance as to proper procedures for obtaining voice identification evidence. *Mahoney* says because the standard of proof imposed under section 46 is on the balance of probabilities, the prosecution has only to prove that the voice identification is "probably reliable". The author points out the dangers of this standard and says if the inherent unreliability of visual identification in the absence of prescribed procedures justifies a "beyond reasonable doubt" standard, the same must be the case for the admissibility of voice identification evidence.

However, *Mahoney* raises a concern that it is questionable whether judges are well equipped to make assessments regarding probable reliability. Judges may find that expert evidence based on psychological research relating to the circumstantial factors is substantially helpful and admissible under section 25 (admissibility of expert opinion evidence).

This is an excellent book. Buy it.

Scott Optican and Jack Oliver-Hood will present an *Evidence Law Update for Civil and Criminal Lawyers* at the end of February. For details, visit adls.org.nz/cpd.

See opposite page for details of this book available from the ADLS Bookstore.