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EXAMINATION IN CHIEF USING WITNESS OUTLINES IN CIVIL ACTIONS IN THE SUPREME COURT OF WESTERN AUSTRALIA

By

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(Supreme Court of Western Australia)

Introduction

I received a request to present a session in September 2020 concerning the use of witness outlines at a Continuing Professional Development session. I am of course very happy to address the Piddington Society about the topic. But I have to say at the outset that the invitation was extended on the basis that I was the 'Judge overseeing this project'.

Much as I would like to claim credit for the initiative, that is, in fact, not the case. A change from a default position of using witness statements in civil trials, over to witness outlines was one of the initiatives introduced by Chief Justice Quinlan in early February 2019 - with the unanimous support of the CMC Judges of the Supreme Court. And whilst the focus of discussion is upon the use of a witness outline, the proper context of any discussion is the subject matter of 'evidence-in-chief' in civil trials and the question of how that evidence is to be received.

Change arrived under cover of new Supreme Court Consolidated Practice Directions (CPD), the subject of Practice Direction (PD) 4.5, PD 4.1.2, PD 4.1.2.2. The index to the CPD under the heading 'Reason For The Amendment' says, as regards these incoming amendments under new PD 4.5:

> Substantial amendments to provide that, **ordinarily, evidence in chief at trial will be given orally, without the use of witness statements**. Ordinarily, the case manager will order that the parties exchange witness outlines **which identify the topics** in respect of which evidence will be given **and the substance of that evidence**. The purpose of the witness outline is to provide notice of a witness' evidence in chief to the Court and other parties. **Witness outlines are not, and do not become, evidence**. (my evidence in bold).

Some background

Before turning to the precise changes introduced under these revised practice directions, I will briefly address the 'vice' the 2019 practice adjustment was intended to address. I attempt that by providing an extract from an observation made by a CMC trial judge and more recently, by Nettle and Gordon JJ in the High Court of Australia. The observations reflect a recurrent problem with witness statements - a problem evident to trial judges of the Supreme Court over many years. That situation has essentially prevailed since the early 1990s, when directions were then introduced for a general use of witness statements as the ordinary position for civil trials in the Supreme Court. Prior to that I am old enough to recall that it had been a case of, in effect, turn up and see what the evidence was in civil at the trial.

Witness statements were introduced as an efficiency measure towards truncating the evidence in chief - on a basis that the time taken to verbally 'lead' the witness's evidence at a trial, which could be lengthy, could be saved. An introductory hope had been that a witness statement could be produced, verified and tendered through the witness, so that the trial then could immediately proceed to cross-examination of that witness. If there was to be no cross-examination, then the statement could simply be tendered as an exhibit, with the witness excused from attending court completely.

Of course, that position for adducing evidence in chief has never applied in criminal trials in Supreme and District Courts of Western Australia - where the position has been, and remains, that the DPP will provide a brief to the accused's lawyers which essentially contains statements of relevant witnesses taken by the State, including the witnesses whose evidence the prosecution proposes to call at the trial. For the accused at a criminal trial, save say in respect of the notification of an alibi, as I understand the position there is little

other obligation for the defence in a criminal trial to notify the prosecution of proposed defence evidence - even by a witness outline, let alone a more detailed witness statement. So called rights to silence of course intrude as a policy consideration in the sphere of criminal trials. I am also not addressing the position as regards expert evidence, of course.

The District Court of Western Australia has never, to my knowledge, adopted a practice of directing an exchange of detailed witness statements for a civil trial as a matter of course. Sometimes for a particular cases, particularly where the parties agree, that position may be adopted by the parties with the concurrence of the trial judge or case manager. But it is not the norm for evidence in chief in the District Court in civil.

At this early stage, I need to point out that for the Supreme Court any perception that the use of witness statements in civil trials has been 'abolished', is inaccurate. As will be seen in the usual orders in civil relating to trial directions in CMC List cases (see PD 4.1.2.2) Usual Orders 39A - F address the use of witness outlines. However, as stated by PD 4.1.2 par 26 and PD 4.5 par 3, orders for witness statements can still be made in cases for good reason, if that is the parties' preference and the case manager agrees (see the Usual Orders 40 - 49).

This court's witness outline practice directions of February 2019, therefore, reflect a policy shift as regards the ordinary starting predisposition back to the more traditional examination in chief in a Supreme Court trial by verbal evidence in the traditional way - but then, accompanied by a witness outline. The witness's evidence in chief is taken viva voce (ie, verbal), whilst being 'led' by counsel.

The verbal mode of adducing evidence is by some contrast to simply adducing all or most of the witness's evidence in chief through the tendering as an exhibit of a very detailed witness statement.

As a precursor to the leading of evidence in chief viva voce, the usual case management orders now require the earlier exchange of a witness outline - by way of the giving of notice as to the forthcoming verbal evidence to be given in chief, but which, as the term 'witness outlines' suggests, provides only a framework of the topics, or the areas of the evidence proposed to be adduced verbally through the witness's evidence in chief. If things are done properly at trial under this process, the judge would never get to see that outline - being solely concerned to hear the witnesses' verbal evidence in chief.

Civil actions other than those begun by writ in the Supreme Court

There is a further qualification to be made for civil trials in the Supreme Court I should point out. The observations that I am currently rendering about witness outlines apply to civil actions in the Supreme Court that are commenced by writ. Contrast, for example, an action that is otherwise commenced by an originating summons. There, the expectation is, ordinarily, the parties at trial will adduce the evidence in chief by an exchange of sworn affidavits which are 'read'. Such affidavits are to contain all the parties' submitted evidence. They usually annex or attach any documentation relied upon.

Many trials in the Supreme Court proceed that way upon affidavit evidence, with cross examination on the affidavits if required (and of course re-examination, sometimes). See to that end, *Rules of the Supreme Court 1971* (WA) (RSC) O 58 r 21:

21 Evidence at hearing to be by affidavit

Unless the Court otherwise orders, evidence at the hearing of an originating summons shall be adduced by affidavit.

The same observation as to using affidavit evidence applies to actions brought in the court's Corporations List, commenced by originating (COR) process. There again the evidence in chief is generally taken by affidavit. See *Supreme Court (Corporations) (WA) Rules 2004* r 2.4:

2.4 Supporting affidavits

(1) Unless the Court otherwise directs, an originating process, or interlocutory process, must be supported by an affidavit stating the facts in support of the process.

(2) Subject to rule 2.4A, an affidavit in support of an originating process must annex a record of a search of the records maintained by ASIC, in relation to the company that is the subject of the application to which the originating process relates, carried out no earlier than 7 days before the originating process is filed.

Moreover, the flexibility of bespoke potential case management orders open to be sought in the Supreme Court is such that, particularly for actions where there has been a considerable number of prior interlocutory applications, a case manager might well be persuaded to make an order for the trial to proceed on the basis of the already exchanged affidavits (say, where hearsay is not a real issue).

Likewise for a process begun by an originating motion (see RSC O 54). Although that Order does not specify as to the method of evidence, the use of affidavits is common in such actions.

Likewise for a judicial review application brought under RSC O 56 r 5 or seeking the traditional prerogative writs (ie, certiorari) under O 56 r 14. Again, affidavit evidence is generally the chosen mode for adducing evidence in such matters.

The Supreme Court does not approach civil case management from a rigid and immovable position. It is always very much a case of what procedures will work best for any particular looming trial. Particularly within the CMC List, each case will be bespokenly evaluated from the point of view of conducting of a trial by the most effective and cost efficient way possible. See RSC O 1 r 4(B)(1) and O 4A r 2(1).

To that end, the Court is always much assisted by the creativity and insights of counsel. For some civil trials, there may be very little disagreement over underlying facts. For that situation, a case manager would usually be more than amenable to orders for a trial to proceed on the basis of a statement of agreed facts, if the parties are capable of putting a coherent and agreed factual position before the Court. Each trial will be different.

The problem

A typically experienced 'vice' associated with the use of witness statements as the evidence in chief, was exemplified in the remarks of Tottle J and provided in ***Belgravia Nominees Pty Ltd v Lowe [No 6]*** [2019] WASC 5. Within that saga of civil litigation, his Honour observed as to the witness statement evidence in chief for a witness, 'Bill', at [39]:

> Further, Bill's evidence about the preparation of his witness statement did not encourage reliance on it. Bill accepted the statement included terms which he did not understand or only understood vaguely and contained expressions he did not use. Bill said that most of the information in his statement was 'put together talking to Colin Heath'. Bill agreed that the

> witness statement did not contain a reference to the Joondalup project in respect of which project management fees and selling fees totalling 7%, rather than 10%, had been charged because the statement had been prepared by someone else. Bill did not seem to understand how statements in the witness statement conflicted with answers given by him in cross-examination. Bill said he had no recollection of being involved in the preparation of his witness statement. Bill was unable to explain how other matters came to be included in his statement other than on the basis that others had included the information. As noted in the preceding paragraph Bill was unable to answer a number of questions put to him in cross-examination about matters contained in his statement which, in the context of the contents of the statement and the detail contained in it, were relatively straightforward. (footnotes omitted)

That is but one example. But it strongly resonates with many of my own experiences both as junior counsel, senior counsel and now, after almost 12 years as a civil trial Judge in the CMC List of the Supreme Court.

I do not think I am speaking out of turn in relaying that the observations of Tottle J reflect similarly adverse witness statement experiences for many of my colleagues who regularly sit as primary judges to hear civil trials in the Supreme Court.

To the same issue and seen more recently in the appeal ***Queensland v Masson*** [2020] HCA 28; (2020) 94 ALJR 785, Nettle and Gordon JJ said there at [112]:

> The oft unspoken reality that lay witness statements are liable to be workshopped, amended and settled by lawyers, the risk that lay and, therefore, understandably deferential witnesses do not quibble with many of the changes made by lawyers in the process - because the changes do not appear to many lay witnesses necessarily to alter the meaning of what they intended to convey - and the danger that, when such changes are later subjected to a curial analysis of the kind undertaken in this matter, they are found to be productive of a different meaning from that which the witness intended, means that the approach of basing decisions on the ipsissima verba of civil litigation lay witness statements is highly problematic. It is the oral evidence of the witness, and usually, therefore, the trial judge's assessment of it, that is of paramount importance.

The February 2019 changes to the CPD

I have already referred to the commentary in the index to the CPD about the reason for the changes.

Specifically, the new witness outline practice direction is found as PD 4.5. It appears under a heading 'Evidence in Chief - Witness Outlines and Witness Statements'. These directions relevantly provide, as follows:

> 1. Evidence in chief at trial may be led orally or in writing, at the direction of the case manager (and subject to any further order at trial). Those directions will be made before a matter is entered for trial.
>
> 2. Ordinarily, evidence in chief will be given orally, without the use of witness statements. In those circumstances, ordinarily, the case manager will order that the parties exchange witness outlines (witness outline orders).
>
> 3. Orders for the exchange of witness statements and for witness statements to stand as evidence in chief (witness statement orders) will only be made where a party satisfies the case manager that this course will better achieve the objects of efficiency, just determination of litigation and proportionality than if evidence were to be given orally in the usual way.
>
> 4. Ordinarily the use of a witness statement will not be appropriate where contentious evidence is to be given of facts dependent on the recollection of the witness or where the credit of the witness is likely to be challenged on the topic.
>
> 5. The case manager may order that witness statements be provided by only some witnesses, or that only part of the evidence in chief of a witness be provided by way of witness statement.
>
> **Witness outlines**
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> 6. Where witness statement orders have not been made, the case manager will ordinarily order the provision of a witness outline (witness outline orders).
>
> 7. A witness outline must be directed **only to matters in issue**.
>
> 8. A witness outline must clearly identify all the topics in respect of which evidence will be given and **the substance of that evidence,** including the substance of each important conversation.

9. Where a witness refers to a document in a witness outline, they must identify the document by its description and its discovery number or, if an order has been made for a trial bundle to be filed, by a description of the document and by the page number in the trial bundle. If an order has been made for an electronic trial bundle to be filed, the document must be referred to by the document number assigned to it and the page number within that document.

10. Where a witness outline is ordered, the case manager will ordinarily order that no party may use any part of the contents of that document for the purpose of cross-examination of the witness without leave of the trial Judge.

Witness statements

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Practice at trial

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18. Where witness outline orders have been made, the practice at the trial will ordinarily be that the witnesses' evidence in chief is given orally, in the usual way. Objections will be dealt with in in the course of the witnesses' evidence.

19. Where a witness statement order or a witness outline order is made, a party may not, without leave, adduce from the witness evidence in chief other than evidence included in the witness statement, or in relation to a topic referred to in the witness outline, as the case may be.

Apart from a major change by PD 4.5 concerning evidence in chief, there were also some correlative consequential changes introduced at the same time concerning witness outlines. I will, for completeness on the topic, reference them briefly below.

First, in relation to case management, in particular for CMC List cases, under PD 4.1.2 addressing issues to be dealt with at a strategic conference, par 18(g) says that a strategic conference will address:

> (g) whether there is any reason why evidence in chief should not be given orally, with or without the provision and exchange of a witness outline ...

Second, in relation to the documents to be included within the book of documents for trial (referred to as a trial bundle) PD 4.1.2 at par 24(a) provides, as regards preparation of a trial bundle to be tendered at the trial, that:

> (a) The usual order of pre-trial directions will require witness outlines or witness statements to be prepared referring to documents by their discovery number (without copying the documents referred to in the witness outline or witness statement). After the trial bundle has been prepared, the parties will be directed to provide the court with another copy of each witness outline or witness statement, annotated so as to show the trial bundle reference in respect of each document referred to in the statement.

As I have already briefly alluded to, the CMC List Usual Orders are dealt with by PD 4.1.2. As regards witness outlines, PD 4.1.2, pars 26 and 27 say:

> 26. The Usual Orders include orders in relation to witness statements as an alternative to orders in relation to witness outlines. However, a party seeking to utilise witness statements for the purpose of leading evidence-in-chief will be required to satisfy the CMC List Judge that this course will better achieve the objects referred to in paragraph 3 of PD 4.5, than if evidence were to be given orally in the usual way.
>
> 27. Ordinarily, the use of a witness statement will not be appropriate where contentious evidence is to be given of facts dependent on the recollection of the witness or where the credit of the witness is likely to be challenged on the topic.

Third, further directions apply in a context of the Usual Orders for civil actions in the CMC List, under the heading 'Non-expert Evidence: Witness Outlines Ordered' by Usual Orders 39A through 39F. I refer to Usual Orders 39A, 39D, 39E and 39F. They provide, relevantly:

> 39A. Subject to any order of the judge, evidence in the trial [shall] be given orally with the parties providing a witness outline for each witness they intend to call.
>
> ...
>
> 39D. Each witness outline must satisfy the following requirements.
>
> (a) it should be set out in numbered paragraphs; and
>
> (b) it must clearly identify the topics in respect of which evidence will be given and the substance of that evidence, including the substance of each important conversation.
>
> 39E. The content of a witness outline served pursuant to an order of the Court is subject to the **same implied undertaking** as to confidentiality as applies to a document produced upon discovery.
>
> 39F. No person may use any part of the contents of a witness outline for the purposes of cross-examination of the person providing the witness outline or any other person without leave of the judge. (my emphasis in bold)

As regards the implied undertaking as mentioned by 39E to confidentiality over documents, see ***Hearne v Street*** [2008] HCA 36; (2008) 235 CLR 125.

In relation to entry for trial and pre-trial directions prior to entry, the issue of witness outlines or witness statements is dealt with under PD 4.4.1, under pars 10(a) and 15. Paragraph 15 is important. It conveys a key underlying sentiment that the ordering of an exchange of witness outlines is not fixed in stone. Paragraph 15 says:

> 15. The procedure set out above may be varied in appropriate cases. For example, it may be desirable in a particular case for witness outlines, witness statements or expert evidence to be exchanged

> earlier in the proceedings. Such matters should be raised with the Registrar [at] the appropriate time. It will only be in exceptional cases, however, that matters which are not ready for trial or which have not been mediated may be entered for trial.

More adverse experiences from witness statements

Problems routinely encountered with witness statements might be non-exclusively summarised, as follows:

(a) As was manifest from the remarks of Tottle J taken from ***Belgravia [No 6]***, too frequently the exchanged witness statement did not provide an accurate rendering of the evidence in chief of the witness. Rather, it more typically would present as a sterile and constructed effort of a lawyer or lawyers who drew it up - effectively in the long term hope of its content being the evidence of a witness. The disconformity problem between the content of the statement and the true facts was recurrent, notwithstanding noble efforts of organisations such as the WA Bar Association to lay down by Best Practice guidelines the pre-requisites for an admissible witness statement properly prepared. On the whole, I would have to say that across 17 years at the bar and nearly 12 more now as a civil trial judge, that with notable exceptions, more often than not the exchanged witness statements I saw for use as the proposed evidence in chief in a civil trial, usually had a defect of some kind.

(b) Witness statements were notoriously time consuming to prepare and so, client-wise, expensive. The rules governing admissibility of evidence on a final basis needed to be observed. More often than not, they were not.

(c) Widespread incorporation of too much inadmissible material within witness statements, such as arguments, conclusionary observations,

inadmissible hearsay and downright submission, was often only exposed at the last minute, or worse, at the trial itself. Where objection to the inclusion of such material emerged, last ditch attempts at correction made at the trial could chew up inordinate amounts of time - before the trial proper could get under way. Once there had been a concession or ruling against inadmissible material in a statement, then frequently leave to supplement verbally was sought and usually allowed, to adduce the evidence from the witness in that defective area verbally anyway. Witnesses in that position were often lost and bewildered by what was going on, especially by late attempts to lead in defective areas - followed by the invariable objection then from the other side to 'leading the witness', rendering the rehabilitation exercise almost farcical.

(d) Somewhat ironically, the time saving and efficiency theories underlying the introduction of witness statements, were exposed by time and practice to have too many flaws as an anticipated efficiency measure. First, the witness statement often conveyed the distorted picture about the witness's evidence as to facts - as the witness did not get to articulate himself or herself to the Court out of their own mouth. Second, the witness statement process required a trial judge be given a fair opportunity to familiarise with the statement before the witness gave their evidence. Trial judges would do their best here. But, not infrequently, the attempted prior assimilation at pace beforehand was less than perfect. In the beginning some judges asked a witness to read out their statement, albeit sometimes across hundreds of pages. That practice soon fell into disuse. There emerged the underlying assumption that the trial judge had had time to read and fully absorb the content of all the witness statements as the evidence in chief, before the trial. The assumption was invariably wrong. The allowed time to read the witness

statements was generally only on weekends or evenings. Where the statements were lengthy, out of court attempts at familiarisations with a closely typed 200 page statement cross referenced to lengthy and complex documents, not accessible, was pointless.

(e) A related common problem also emerged for the observers of the civil trial and its evidence. In order for the interested observer to reliably comprehend what was going on in the courtroom trial, they needed to have access to the content of the witness statement - before the force of an ensuing cross-examination of the witness could be fully appreciated. This particularly rang true for independent representatives of the media observing a civil trial unfold and seeking to report about it. They, as a matter of fairness, would need to have the witness statement to gain a reliable true picture about what was going on, rather than just see a one sided perspective of the witness from their cross-examination. Trial judges again did their best to accommodate a legitimate need for statement access. ***Marsh v Baxter*** [2014] WASC 187; (2014) 46 WAR 377, was a civil trial that I presided over and in which there was an unusual amount of widespread public interest in a commercial civil trial. With the concurrence of counsel, I issued directions providing for the witness statements of parties to be posted and made accessible generally to the community by a link accessible on the Supreme Court's website. Other Judges, in my knowledge, asked parties to bring more hard copies of witness statements to court so they could be provided to the media on request.

(f) However, for all the heroic efforts to normalise the position, the great theatre of a civil trial, in my experience, was damaged, if not lost completely, by this parsing out of an important component of a witness's

evidence (the examination in chief) before cross-examination was undertaken. Perhaps the most important evidentiary component of the whole process had become remote, sterilised and devalued, all in the name of efficiency.

(g) Not infrequently, my experience as well in civil was that using a witness statement in chief was unfair to a witness, in terms of them being immediately exposed to vigorous cross-examination before they had any opportunity to settle in, 'loosen up' and develop some level of familiarity with a hostile process of answering questions in the confronting environment of a court room. Witnesses tend to settle and adjust to their surroundings after a few loosening questions. However, a key witness who was a little tense and was thrust into an immediately confronting cross-examination upon a 200 page witness statement by a skilled cross-examiner was immediately, and perhaps irretrievably, put on the back foot.

Documents and evidence in chief

An issue that goes hand in hand with a witness's evidence in chief is the tendering of relevant documentary materials that the witness can legitimately speak to.

The rules of evidence are such, particularly in a heavy document case, that a witness may need to refer to multiple documents to explain their repercussions. Usually the witness needs to explain their involvement with those documents. But the clinically drawn witness statement, which simply refers to hundreds of documents, quite properly not exposing their content (as the document speaks for itself) but cross-referencing their discovery number and location within a trial bundle, can effectively be wholly indecipherable - before

trial - until the relevant documents are put alongside the statement. A process that simply tenders an incomprehensible witness statement referring therein to hundreds of documents, without explanation, is again approaching farce.

In the interests of doing justice, sometimes time simply has to be taken during a witness's examination in chief to carefully take the witness to a particular document and then, question by question, carefully ascertain where they stand by reference to statements found within the document. A careful elicitation of evidence by reference to or around a document will pick up and correct errors or erroneous assumptions in the document that are not otherwise appreciated until clarified. This is a process conducive to the adducing of reliable evidence and ultimately to deriving/divining of true facts.

By contrast, a rushed global dumping of hundreds of documents all referred to simply by an index or tab number buried in a trial book, as encountered, say, in a large construction dispute case, is thoroughly unhelpful. It is a particularly unhelpful process for situations where the party's counsel, neither during opening, nor in closing, takes the Court to most of the trial book documents to explain their contents or significance in a context of the issues presented for resolution at the trial. That exercise is left for the appeal and happens too frequently.

These days, most documents relied upon in a commercial civil case will probably be independently admissible as business records, without the need to tender them through a witness. There is usually little justification for not tendering the important key documents early during the opening of the trial, and at that time taking the judge to their suggested significant key passages, as a part of a careful trial opening. That could, within bounds, also be done within the parties' written opening submissions. But, please, not by a footnote.

Helpfulness to truth finding?

I seek extra forgiveness for mentioning one of my own decisions. This was a defamation trial where I ordered all the witnesses give their trial evidence in chief the traditional way (viva voce). That was notwithstanding some witness statements which had actually been prepared and earlier exchanged as between the parties.

For defamation actions it had generally been my position and some others that evidence in chief was to be given the traditional way. That followed from the highly personal nature of a defamation action and so, a general unsuitability of a clinical witness statement as a mechanism for doing justice to redress an allegedly damaged personal reputation.

I mention the case below as I rendered some observations there in the reasons concerning the comparative efficiency of leading evidence in chief in the traditional way, by contrast to evidence in chief clinically adduced under the medium of a tendered witness statement to become a trial exhibit.

In ***Kingsfield Holdings Pty Ltd v Rutherford*** [2016] WASC 117, delivered 11 April 2016, I said this:

> [177] For this case, I had the considerable forensic advantage of having the witnesses' evidence led in traditional fashion, viva voce, rather than by the tendering of written witness statements for the evidence in chief of each witness. The basis for the trials proceeding on viva voce evidence in chief stemmed from the fact that, at an earlier interlocutory stage in the litigation, the trials for three actions (as they stood at that time) were to be jury trial, at the behest of the plaintiffs - see my reasons in ***Kingsfield Holdings Pty Ltd v Sullivan Commercial Pty Ltd [No 2]*** [2014] WASC 408. The plaintiffs in the residual two actions subsequently did not seek trials before a civil jury.

[178] On that basis, by programming directions as case manager, I had earlier ordered that only summaries of the evidence in chief be exchanged between the parties, prior to trial. The exchange of summaries meant that parties would still broadly be put on notice of the evidential territory proposed to be covered by each trial witness in chief.

[179] My oversight of this process as case manager has demonstrated for me the superiority of this process, as an instrument for more reliably ascertaining true facts, where there is dispute. Here, very considerable clarifications and adjustments emerged at the trials towards the earlier exchanged witness evidence summaries, prior to witnesses' evidence being led at the trial. This was in circumstances where, had a formal witness statement been prepared, and exchanged for proposed tender, I tend to doubt whether the corrected inaccuracies in the earlier exchanged evidence would have been picked up and corrected before the evidence was tendered at trial. The leading of the evidence cured that.

[180] Furthermore, a more traditional leading of the witnesses through their evidence in this trial enabled me to better assess and assimilate that evidence and also to evaluate the overall credibility of a witness's testimony. This allowed a more balanced perspective, rather than simply observing key witnesses from the beginning under their cross-examination, or later, in a generally brief re-examination (if any).

[181] Another large forensic advantage I assessed was that precious trial hours were not lost here by needlessly debating evidentiary objections to multiple paragraphs of the exchanged witness statements, as routinely occurs in commercial cases. At trial, there were only a handful of easily resolved objections to evidence in chief of witnesses, as that evidence was being elicited viva voce.

[182] Here, the trial time saved in not needing to deal with hosts of sterile, multi-faceted evidentiary objections to endless rambling paragraphs of lawyer influenced witness statements, more than balanced time consumed in the leading of the witnesses' evidence in chief in traditional fashion. In this trial, both counsel sensibly led their witnesses through their evidence in chief at times. They did not object where the evidence in chief was uncontroversial, and it was led helpfully and quickly under his process.

[183] All in all, for a civil trial, I felt I was able to obtain a better insight than usual here, in terms of gauging the reliability of the evidence of each witness, through it being led in the traditional way.

Witness outlines: content

The next observations address what might be expected in a witness outline. Here, I regret, there is no fixed criteria. Each case must necessarily be different. But the elements of the cause of action and the pleadings are a good place to start.

By illustration, consider the elements of a breach of contract case, as opposed to a defamation action, as opposed to a misleading and deceptive conduct action.

The fundamental guiding principle is for the exchanged outline to avoid unfair forensic trial prejudice to the other side by undue surprise from out of the verbal evidence as adduced.

For most civil cases in the Supreme Court there will have been comprehensive pleadings exchanged beforehand. The pleadings ought to have crystallised the issues in dispute. (That is the theory!) Then usually follow further and better particulars of those pleadings, provided, almost invariably, in response to written requests for better elaboration concerning the ingredients of the cause of action - such as, say, the components of an oral contract, or the extent of a party's alleged economic damages.

It is also commonplace now in civil trials for expert reports to be exchanged before the trial (especially as to damages issues). They will also provide considerable insights to a party's evidentiary position to avoid surprise. These days there will invariably be detailed written opening submissions exchanged before a Supreme Court civil trial.

A recent example of a late surprise issue, albeit with a deficient witness statement, not an outline, was a defamation action, where there was a late attempt to lead further oral evidence from the witness - but going well beyond what had been foreshadowed in their earlier exchanged witness statement. That was in ***Jensen v Nationwide News Pty Ltd [No 11]*** [2019] WASC 179 per Quinlan CJ, published 23 May 2019. (For a wider explanation of the ***Jensen*** defamation trial itself, namely, ***Jensen v Nationwide News Pty Ltd [No 13]*** [2019] WASC 451, see my summary of the trial in the Australian Law Journal (2020) 94 ALJ 494).

For what were problematic circumstances where the proposed augmentation of the proposed extra evidence only emerged one working day before the trial was to commence, Quinlan CJ observed at [17]:

> The late service of the new witness statement does cause, in my view, general prejudice to the plaintiff, as the plaintiff has, and would continue to be, diverted from the other issues relevant to the trial. That is not to say that the plaintiff was not on notice that there would potentially be some evidence from Mr Burrell in relation to the matters going to extrinsic facts, as reflected in the statement of 18 October 2018.

A touchstone for a fair witness outline then is one that gives fair notice of the forthcoming verbal evidence from the witness, and avoiding surprise and undue prejudice to the other side, from the evidence of non-expert witnesses, when adduced at trial in the traditional way.

There ought not to be any undue preciousness in the approach towards preventing surprise. But if there is genuine forensic trial prejudice, because the outline is inadequate to properly and fairly appraise the opposing party, to enable it to be in a position to deal with such evidence adduced from the

witness, then there will be a problem. The desired extra evidence may simply not be allowed. Or there may be a delay carrying adverse cost order repercussions, especially if the trial is delayed or cannot proceed.

There is a time trodden wisdom in following an approach that providing too scant detail of the evidence, under a witness outline, may carry a long-term potential for trouble to arise. The reverse is invariably a safer option. Hence, the more detailed the information given under the outline then, correlatively, so less will be the prospect of a prejudice objection emerging by an opposing party at the trial by contending unfairness and surprise - on the basis of a lack of detail and so to their suggested inability to respond and fairly deal with evidence at the trial, as a matter of their contended prejudice.

Concluding observations upon the new CPDs and witness outlines

In terms of constructing a workable witness outline, there are important messages to be extracted from the CPD. In particular, from use of the word '**clearly**' in Usual Order 39D(b), there emerges the sentiment that a witness outline must, albeit concise, be clear in its identification of the '**topics**' in respect of which evidence is to be given by the witness.

The word 'topics' is also important. Consequently, if a witness wishes to speak as to a different topic, such as evidence or an incident that had not been otherwise fairly identified before, then the omission is likely to be problematic at the trial.

Moreover, it is important to note that the requirement is for a clear identification of the topics not only in respect of the topics which evidence will be given but also, significantly, for '**the substance of that evidence**'.

Reference is given of the required substance in a witness outline towards an '**important**' conversation. Hence, for instance, if a party is seeking to establish at the trial from the witness, say, the terms of an oral contract or, say, the content of a verbal representation overheard and then relied upon for the purposes of establishing, say, a component of an estoppel plea - alternatively, a verbal statement made and said to constitute some conduct said to be likely, or conduct likely to mislead or deceive - then the expectation would surely be that the allegedly uttered oral words as relied upon (to constitute either the term of the contract, or the representation for the purposes of the estoppel or the statement for the purposes of the alleged misleading and deceptive conduct action), be substantively provided within the outline.

A litmus test for providing sufficient substance may generally be to ask whether the opposing party upon receipt of that witness outline of evidence is sufficiently appraised then of the case that they need to meet at trial - so as to properly prepare and to be in a position to fairly respond, having had adequate notice of the case of the opponent party. Again, I venture to suggest that if there is any grey as a component in a fairness assessment pre-trial, over what is being provided, that the drafter of a witness outline ought to proceed upon a cautious basis, namely, that giving too much detail will be a safer option than providing too little information.

I would also observe in somewhat direct contrast to the position for a signed witness statement (see, for instance, PD 4.5, pars 11 through 16) there is no requirement that a witness outline be signed by a particular witness. Having said that, I have made a case management direction requiring signatures on a witness outline - on the basis that the step would be of potential utility at the ensuing trial.

Each case will be different, but for that occasion I was persuaded a signature would be appropriate. A signature might also carry a pragmatic benefit of engaging the attention of the particular witness with the process and obtaining a degree of comfort that the witness himself or herself is content with the topics canvassed and the substance of the evidence. I also note recently under a decision of Registrar Whitby (see ***Lee v Australian Executor Trustees Ltd*** [2020] WASC 309), where there was a failed attempt by a third party to get access to some witness outlines that had been filed for the purposes of a forthcoming trial.

Closing remarks

I have spoken informally to a number of my colleagues (who tend to sit in civil) prior to completing this paper to elicit any particular insights as regards the use of witness outlines.

The broad position emerging is that to date we have not experienced them for long enough yet to form any final or reliable conclusions, at this time. Some civil trial cases are still being dealt with upon the basis of case management orders made some time ago prior to the introduction of the February 2019 regime. The year 2020 has, of course, been unusual in many respects! Some issues, however, which have emerged to date in discussion with my colleagues are:

(a) Competently leading the evidence of an important witness at a trial is a valuable and much underrated forensic skill of counsel. It takes work to competently acquire and the difficulty of the task should not be underestimated. A reinstituted need for counsel to lead the evidence in chief in civil of their witness by orthodox fashion, has posed challenges

for some counsel. In certain quarters there is a need for some level of upskilling, as regards the leading of evidence in chief.

(b) To that same issue, an observation has been made of the need for upskilling in terms of how some counsel lead a witness, so as not to ask leading questions - by suggesting the answer - which is objectionable, when eliciting evidence in controversial areas. On the other hand, the need to control a witness in chief, so as to confine the evidence to relevant areas and not allow the witness to 'ramble on', is a skill that also takes some mastering.

(c) For non-English speakers, where interpreters are needed, the process can be even more complicated, not to mention take longer.

(d) Some of my colleagues have commented that the eliciting of the evidence in traditional fashion in chief is taking longer than where a witness statement is used. On the other hand, some have observed the balancing out of the time saved by not dealing with wasteful multiple witness statement objections has resulted in the overall time used position being, generally speaking, much the same in terms of the overall time consumed.

KJM

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