TELECONFERENCING:
A NORTHERN TERRITORY PERSPECTIVE

by Margo Nelson

INTRODUCTION

It has been said that technology is the science of arranging life so that one need not experience it. Technology is such now, that evidence for Court proceedings may be taken from interstate or overseas witnesses effectively without them even leaving 'home'. They can now arrange their life for the day around attending a videoconferencing centre in their city; they never have to experience the awe and austerity of the court building and its looming silence, the inevitable waiting around outside the courtroom to give evidence, or the courtroom tension, for the witness is comfortably seated thousands of kilometres away from the Court itself.

The rearrangement of life may also have an effect in the Court of Appeal, where video-conferencing evidence was taken at trial. The video-tape itself is inevitably an Exhibit and constitutes evidence reviewable by the Court of Appeal. Whereas normally a Court of Appeal cannot itself consider the demeanour of the trial witness it is now examinable by the viewing of the video tape. Is the Court of Appeal in such a case subject to the usual restraints on an appellate court which flow from the advantage of the trial judge in seeing and hearing the witness? Is there any such advantage? Is the nature of the appeal on questions of fact, as summmarized in *Flannery v Cohuna Sewerage Authority* (1976) 51 ALJR 135 at 136, altered?

Apart from any legal prowess, there are the considerable benefits that such technology bestows on a litigant by way of significantly reduced legal costs and a more expeditious trial. This paper is intended to address some of the legal and non-legal issues arising from video-conferencing.

POTENTIAL NON-LEGAL PROBLEMS

i) Time Factors

At present there are no video-conferencing facilities available in the Northern Territory courts. Any such conferencing must therefore be conducted at one of the commercial facilities available in both Darwin and Alice Springs. A time factor is therefore involved in relocating the Court to the facility.

In Darwin that may range from some 5-10 minutes one-way if travelling to the Picturel network located at Territory Perspective on the Esplanade, or 20-25 minutes one-way if travelling to the Telecom facility at the Casuarina Campus of the Northern Territory University. In Alice Springs, the Tanami Network facility is at Batchelor College in Bloomfield Street and some 10 minutes one-way from the Courthouse.

Such a relocation would be more time efficient if the witness examination commenced at the start of the court's normal sitting time, taking account of the time zone differences within Australia and any Summer Standard time. It seems clear that witnesses in Western Australia could have to be examined in the afternoon session and those from other States in the morning session. Such considerations informed an order of Young J in the unreported decision in the Equity Division of the Supreme Court of New South Wales of *Laporte Group Australia Ltd v Vatselias and Others*, 25 November 1991:"Reasonable notice to the Court and to the opponent of the time and date of the proposed satellite video session, which time must be between 10am and 4pm Australian Eastern Summer Standard Time."

Besides convenience to the Court, inherent in such an order, is the associated minimisation of cost afforded to the litigant, since out-of-hours conferencing bears an additional cost.

ii) Physically Exhibiting Evidence

Certainly a facsimile machine at each location is necessary for the transfer of documents between locations. Problems could arise however where other material is required to be shown to the witness, such as Xrays. Technology presently exists to overcome some foreseeable difficulties, such as close-up inspection of objects but the suitability of the technology for court room purposes has not yet been fully tested.

POTENTIAL LEGAL AND PROCEDURAL PROBLEMS

At present in the Northern Territory no legislation, Court Rules or Practice Directions exist to deal specifically with issues arising from the use of video-conferencing for the pur-

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pose of obtaining the evidence of witnesses. Uniform statutory provisions are presently being drafted by a working committee of the Standing Committee of the Attorneys-General (SCAG); the Northern Territory is represented. The aim of SCAG is to co-ordinate the use of video technology in Australian Courts; the Commonwealth has a co-ordinating role in the working committee.

A. *Procedural and Legal Problems*

i) *Parties Consent to Video-Conferencing*

In the absence of any authority by way of legislation, Rules of Court etc., any such conferencing requires the consent of the parties. As Young J. in *Laporte Group Australia Ltd v Vatselis and Ors (supra)* said, 'Reasonable notice to the court and to the opponent of the time and date of the proposed satellite video session...' is necessary.

What is 'reasonable notice'? I suggest it would be confirmation at the Readiness Hearing or by way of Mention some 4-6 weeks prior to the trial. To make arrangements closer to trial leaves both the solicitor and the witness on 'Stand-By', with subpoenas, flights, accommodation etc having to be arranged in the event that the necessary consent is not forthcoming. Presumably Rules would provide possible sanction if a party either unduly delays in providing consent, thereby necessitating travel arrangements for the witness, or by unreasonably withholding such consent, by way of a costs order against it.

Examples of how the need for parties' consent has been dealt with in other jurisdictions may be seen in the following cases. In probably the first report of video-conferencing in a civil trial in Australia, *Bayer AG v Minister for Health of the Commonwealth of Australia and Others*, (1988) 13 IPR 225, the parties before Young J consented to the taking of evidence by way of video-conferencing.

Contrast *Laporte Group Australia Ltd v Vatselis and Others, (supra)*, where the defendant would not consent to the witnesses in the United Kingdom giving evidence by way of video-conferencing. The defendant's counsel assured Young J that this was not for tactical reasons. It was not conceded that no comment would be made as to their credit. Young J dealt with the issue as follows:

"The ordinary procedure in this Court is that witnesses give oral evidence or are orally cross examined before the Judge in an open court room. However, provisions in the Supreme Court Act and Rules, see example s76A, make it clear that the Court may vary its usual proceedings to achieve speedy resolution of the real questions between the parties as economically as possible.

This is a case where the witnesses' evidence and their cross-examination is material. Although the witnesses are overseas, they are, in a commercial sense, part of the plaintiff's organisation and they would be in Sydney at the trial if the plaintiff insisted. These factors are relevant to my decision, though the ultimate question is whether the interests of justice in a fair, cheap and speedy trial will be served."

His Honour, on considering this aspect and the then recent decision in *Garcin v Amerindo Investment Advisers Ltd* [1991] 1 WLR 1140 where Morritt J., in a contested application, made an order to take evidence by live television from New York because it was a cheaper and more expeditious procedure than the available alternatives, decided to grant the application to hear the evidence of the witnesses in the United Kingdom by way of video-conferencing.

In December Balance this article continues and deals with the topics of the Admissibility of Evidence, Swearing in of Witnesses, perjury and the use of video-conferencing in other jurisdictions.